International Crimes Tribunal-2 (ICT-2)

[Tribunal constituted under section 6 (1) of the Act No. XIX of 1973]

Old High Court Building, Dhaka, Bangladesh

ICT-BD Case No. 03 of 2012

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

The Chief Prosecutor

Vs

Muhammad Kamaruzzaman

Before

Justice Obaidul Hassan, Chairman

Justice Md. Mozibur Rahman Miah, Member

Judge Md. Shahinur Islam, Member

For the Prosecution:

Mr. Ghulam Arieff Tipoo, Chief Prosecutor

Mr. Syed Haidar Ali, Prosecutor

Mr. Mohammad Ali, Prosecutor

Mr. A.K.M Saiful Islam, Prosecutor

Ms. Nurjahan Mukta, Prosecutor

Ms. Tureen Afroz, Prosecutor

For the Accused:

Mr. Abdur Razzak, Senior Advocate, Bangladesh Supreme Court

Mr. Kafil Uddin Chowdhury, Advocate, Bangladesh Supreme Court

Mr. Ehsan Siddique, Advocate, Bangladesh Supreme Court

Date of delivery of Judgment: 09 May 2013

JUDGEMENT

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

I. Opening words

Following wrapping up of trial that took place in presence of Muhammad Kamaruzzaman who has been arraigned of internationally recognized crimes i.e. crimes against humanity perpetrated in 1971 in the territory of Bangladesh,

during the War of Liberation, this Tribunal (ICT-2) [a domestic judicial forum constituted on 22 March 2012 under the International Crimes (Tribunals) Act, 1973] is sitting today to render its unanimous Judgement. This is the third case in which we are going to deliver our verdict.

It would not be out of place to mention, with full appreciation, that at all segments of proceedings the prosecution and the defence have made scholarly performance in presenting their valued arguments especially on legal aspects by referring citations on the evolved jurisprudence. Predictably their commendable effort has stirred us to address and resolve the legal issues involved in the case, together with the factual aspects as well. We take the occasion to appreciate and value their worthy venture.

In delivering the verdict we deem it indispensable in highlighting some issues, in addition to legal and factual aspects, relating to historical and contextual background, characterization of crimes, commencement of proceedings, procedural history reflecting the entire proceedings, charges framed, in brief, and the laws applicable to the case for the purpose of determining culpability of the accused. Next, together with the factual aspects we have made effort to address the legal issues involved, mostly by reiterating the views this Tribunal [ICT-2] has rendered in the case of Chief prosecutor v. Abdul Quader Molla [ICT-BD Case No. 02 of 2012 Judgment: 05 February 2013, paragraph nos.80-136] with necessary addition and then discussed and appraised evidence adduced in relation to charges separately and in conclusion have penned our finding on alleged culpability of the accused.

Now, having regard to section 10(1) (j), section 20(1) and section 20(2) of the International Crimes (Tribunals) Act, 1973[Act No. XIX of 1973] this 'Tribunal' known as International Crimes Tribunal-2 (ICT-2) hereby renders and pronounces the following unanimous judgment.

II. Commencement of proceedings

1. On 18 December 2011, the Prosecution filed the 'formal charge' in the form of petition as required under section 9(1) and Rule 18(1) of the Rules of Procedure 2012 [ICT-2] against accused Muhammad Kamaruzzaman. After providing due opportunity of perpetration to accused, the Tribunal [ICT-1] ,

under Rule 29(1) of the Rules of Procedure [hereinafter referred to as 'ROP'], took cognizance of offences as mentioned in section 3(2) (a)(b)(g)(h) of the Act of 1973. The Tribunal [ICT-2], after hearing both sides and on perusal of the formal charge, documents and statement of witnesses framed seven charges relating to the commission of 'crimes against humanity' as specified in section 3(2)(a) of the Act of 1973 or in the alternative for 'complicity in committing such crimes' as specified in section 3(2)(a)(g)(h) of the said Act . The charges so framed were read out and explained to the accused Muhammad Kamaruzzaman in open court when he pleaded not guilty and claimed to be tried and thus the trial started.

III. Introductory Words

2. International Crimes (Tribunals) Act, 1973 (the Act XIX of 1973)[hereinafter referred to as 'the Act of 1973] is an ex-post facto domestic legislation enacted in 1973 by our sovereign parliament and after significant updating the ICTA 1973 through amendment in 2009, the government has constituted the Tribunal (1st Tribunal) on 25 March 2010 . The 2nd Tribunal has been set up on 22 March 2012. The degree of fairness and due process as has been contemplated in the Act and the Rules of Procedure (ROP) formulated by the Tribunal [ICT-2] under the powers conferred in section 22 of the principal Act are to be assessed with reference to the national wishes such as, the long denial of justice to the victims of the atrocities committed during war of liberation 1971 and the nation as a whole.

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

4. Bangladesh Government is a signatory to and has ratified the International Covenant for Civil and Political Rights (ICCPR), along with its Optional Protocol. It is crucial to state that the provisions of the ICTA 1973

[(International Crimes (Tribunals) Act, 1973] and the Rules framed there under offer adequate compatibility with the rights of the accused enshrined under Article 14 of the ICCPR. The 1973 Act of Bangladesh has the merit and means of ensuring the standard of safeguards recognised universally to be provided to the person accused of crimes against humanity.

IV. Jurisdiction of the Tribunal

5. The Act of 1973 is meant to prosecute, try and punish not only the armed forces but also the perpetrators who belonged to 'auxiliary forces', or who committed the offence as an 'individual' or a 'group of individuals' or 'organisation'[as amended with effect from 14.7.2009] and nowhere the Act says that without prosecuting the 'armed forces' (Pakistani) the person or persons having any other capacity specified in section 3(1) of the Act of 1973 cannot be prosecuted. Rather, it is manifested from section 3(1) of the Act of 1973 that even any person (individual), if he is prima facie found accountable either under section 4(1) or 4(2) of the Act of 1973 for the perpetration of offence(s), can be brought to justice under the Act.. Thus, the Tribunal set up under the Act of 1973 is absolutely domestic Tribunal but meant to try internationally recognised crimes committed in violation of customary international law during the war of liberation in 1971 in the territory of Bangladesh. Merely for the reason that the Tribunal is preceded by the word "international" and possessed jurisdiction over crimes such as Crimes against Humanity, Crimes against Peace, Genocide, and War Crimes, it will be mistaken to assume that the Tribunal must be treated as an ''International Tribunal''.

V. Brief Historical Background

6. Atrocious and dreadful crimes were committed during the nine-month-long war of liberation in 1971, which resulted in the birth of Bangladesh, an independent state and the motherland of the Bengali nation. Some three million people were killed, nearly quarter million women were raped and over 10 million people were forced to take refuge in India to escape brutal persecution at home, during the nine-month battle and struggle of Bangalee nation. The perpetrators of the crimes could not be brought to book, and this left a deep scratch on the country's political awareness and the whole nation.

The impunity they enjoyed held back political stability, saw the rise of militancy, and destroyed the nation's Constitution.

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

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

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

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

> **"In East Pakistan [General Agha Mohammed Yahya Khan and his top generals] also planned to murder its Bengali intellectual, cultural, and political elite. They also planned to indiscriminately murder hundreds of thousands of its Hindus and drive the rest into India. And they planned to destroy its economic base to**

insure that it would be subordinate to West Pakistan for at least a generation to come."

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

12. The massacres started with planned and organized atrocity called "Operation Searchlight," which was designed to disarm and liquidate Bengali policemen, soldiers and military officers, to arrest and kill nationalist Bengali politicians, soldiers and military officers, to arrest and kill and round up professionals, intellectuals, and students (**Siddiq 1997 and Safiullah 1989**). Afterwards, actions in concert with its local collaborator militias, Razakar, Al-Badar and the key pro-Pakistan political organisation Jamat E Islami (JEI) were intended to stamp out the Bengali national liberation movement and to mash the national feelings and aspirations of the Bangalee nation.

13. In the War of Liberation that ensued, all people of East Pakistan unreservedly supported and participated in the call to free Bangladesh but a small number of Bangalees, Biharis, other pro-Pakistanis, as well as members of a number of different religion-based political parties, particularly Jamat E Islami (JEI) and its student wing Islami Chatra Sangha (ICS) joined and/or collaborated with the Pakistan occupation army to aggressively resist the conception of independent Bangladesh and most of them committed and facilitated the commission of appalling atrocities in violation of customary international law in the territory of Bangladesh. It also experienced unprecedented devastation of properties all over Bangladesh.

14. The Pakistan government and the military formed number of auxiliary forces such as the Razakars, the Al-Badar, the Al-Shams, the Peace Committee etc, essentially to act as a team with the Pakistani occupation army in identifying and eliminating all those who were perceived to be pro-liberation, individuals belonging to minority religious groups especially the

Hindus, political groups belonging to Awami League and Bangalee intellectuals and unarmed civilian population of Bangladesh.

15. A report titled 'A Country Full of Corpses' published in SUMMA Magazine, Caracas, October 1971[Source: Bangladesh Documents- Volume II, page 76] speaks that

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

16. Jamat E Islami (JEI), as an organization, substantially contributed in creating the para-militia forces (auxiliary force) for combating the unarmed Bangalee civilians, in the name of protecting Pakistan. Al- Badar is believed to have been the 'action section' of Jamat-e-Islami, carefully organised after the Pakistani crackdown last March [**Fox Butterfield** in the **New York Times**- January 3, 1972: Source: Bangladesh Documents Vol. II Ministry of External Affairs New Delhi]. Incontrovertibly the way to self-determination for the Bangalee nation was strenuous, swabbed with enormous blood, strive and sacrifices. In the present-day world history, conceivably no nation paid as extremely as the Bangalee nation did for its self-determination.

VI. Brief account of the Accused

17. Accused Muhammad Kamaruzzaman son of late Insan Ali Sarker of village-Mudipara Police Station- Sherpur Sadar District- Sherpur at present House No. 105, Road No. 4, Block No. F, Section-11, Journalists residential Area, Police Station Pallabi, Dhaka Metropolitan Police,[DMP], Dhaka was born on 04.07.1952. According to prosecution, in 1967 while he was a student of class X of Sherpur GKM Institution he started student politics as a supporter of Islami Chatra Sangha [ICS]. He was the secretary of ICS, Jamalpur Ashek Mahmud Degree College hall unit, while he was student of degree class. He contested in college student sangsad against the post of Assistant Cultural Secretary but could not succeed. At the end of 1970 he was assigned with the charge of president, Islami Chatra Sangha [ICS] of greater Mymensingh. Accused Kamaruzzaman was holding the post of office secretary, of Islami Chatra Sangha of the then East Pakistan. It is alleged that the accused Muhammad Kamaruzzaman, in 1971, as the president of Islami Chatra Sangha, greater Mymensingh played the role of a key organizer in formation of Al-Badar Bahini with the selected students of Ashek Mahmud College belonging to Islami Chatra Sangha. It is also alleged that within a month, under the leadership of Kamaruzzaman, all the students belonging to Islami Chatra Sangha of greater Mymensingh, were absorbed to Al-Badar bahini and they received summary training. He allegedly being in close association with the Pakistani army, actively aided, abetted, facilitated and substantially contributed in committing dreadful atrocities during the War of Liberation in 1971 in the territory of greater Mymensingh.

VII. Procedural History.

a. Pre-trial Phase

(i) Detention & Interrogation of the Accused

18. Since pre-trial stage, on an application under Rule 9(1) of the Rules of Procedure initiated by the Chief Prosecutor seeking arrest, accused Muhammad Kamaruzzaman has been in detention in connection with this case, for the purpose of effective and proper investigation. In course of hearing the matter, it was learnt that the accused was already in custody in connection with some other case. As a result, pursuant to the production

warrant (PW) issued by the Tribunal (Tribunal-1) the accused was produced before the Tribunal (Tribunal-1) by the prison authority and then he was shown arrested /detained as an accused before the Tribunal. Accordingly, since 02.10.2010 the accused Muhammad Kamaruzzaman has been in custody in connection with the case before us.

19. The Tribunal (Tribunal-1), since his detention, has entertained a number of applications seeking his release on bail and the same were disposed of in accordance with law and on hearing both sides. The Tribunal[ICT-1] also allowed the learned defence counsels to have privileged communication with the accused detained in prison. To prohibit coercion and torture of any kind, the Tribunal[ICT-1] also ordered the presence of engaged counsel and a doctor at a room adjacent to the room of the 'safe home' where the Investigation Agency was allowed to interrogate the accused.

b. Trial Phase: Tribunal-1

(ii) Submission of Formal Charge

20. Finally, the Chief Prosecutor submitted the Formal Charge under section 9(1) of the Act on 11.12.2011. But on considering it the Tribunal directed the prosecution, in exercise of its inherent power given under Rule 46A of the ROP, by its order dated 28.12.2011 to submit it afresh in an arranged and systematic form.

(iii) Re-submission of Formal Charge

21. Accordingly, the prosecution re-submitted the 'formal charge' on 15.01.2012 alleging that the accused as a potential member and a key organizer of the Al-Badar Bahini (i.e. auxiliary force) as well as a leading official of the Islami Chatra Sangha or member of a group of individuals had committed the offences of crimes against humanity, conspired and planned to commit such crimes in different places of greater Mymensingh and also had conscious complicity to commit such crimes as specified in section 3(2)(a)(g)(h) of the Act, during the period of War of Liberation in 1971.

(iv) Taking Cognizance of Offences

22. The Tribunal, considering the Formal Charge and documents submitted therewith, having found prima facie case, took cognizance of offences against

the accused Muhammad Kamaruzzaman on 31.1.2012. Prosecution was, as required by law, then directed to furnish copies of the Formal Charge and documents submitted there with which it intended to rely upon for supplying the same to the accused for preparation of defence. Privileged communication with engaged counsels, as prayed by the defence was allowed by an order dated 23.2.2012.

(v) Transferring the case record

23. The Tribunal-1, on application filed by the Chief Prosecutor ordered for transmission of the case record to this Tribunal-2 under section 11A (1) of the Act, for expeditious trial and disposal of the case by an order dated 16.4.2012.

c. Trial Phase: Tribunal-2

(vi) Receiving the Case Record

24. This Tribunal, thereafter, received the case record on 29.4.2012. Earlier, the case was at stage of hearing the charge framing matter. Thus, this Tribunal had to hear the matter afresh as required under section 11A (2) of the Act. The hearing took place on 08 May, 13 May, 15 May 16 May and 20 May 2012.

(vii) Charge Framing

25. The Tribunal-2, on consideration of deliberations made by both sides and the formal charge together with the materials and statement of witnesses submitted by the prosecution, finally framed as many as 07 charges against the accused Muhammad Kamaruzzaman on 04th June 2012 which were read over and explained to the accused, in open court, to which he pleaded not guilty and claimed to contest the charges so framed.

(viii) Review application against Charge Framing

26. The defence preferred review [application filed on 11.6.2012] of the order framing charges under Rule 26(3) of the ROP on hearing which the Tribunal by its order dated 19.6.2012 considered it just to bring minor alterations in the second paragraph of each charge by inserting the words ‘or in the alternative’ in place of the words ‘and also for’ and before the words ' complicity to commit such offence' occurred therein including alteration in Charge No.07 as well.

(ix) Privileged communication

27. Privileged communication with engaged counsels, for second occasion, as prayed by the defence was allowed by an order dated 28.6.2012, for the sake of ensuring due opportunity of preparing defence.

(x) List of witnesses and documents submitted by the defence

28. Defence however submitted a list consisting of 1354 witnesses together with documents and materials upon which it intended to rely upon as required under section 9(5) of the Act on 15.7.2012.

(xi) Opening Statement and Prosecution Witnesses

29. Thereafter, the prosecution after placing its opening statement on 02.7.2012 as required under section 10(1)(d) of the Act of 1973 started adducing witnesses from 15.7.2012. However, prosecution adduced and examined in all 18 witnesses including Investigating Officer and two seizure witnesses of whom three were women witnesses are from the list submitted along with an application under section 9(4) of the Act seeking permission for tendering them as additional witnesses. Three women witnesses have been permitted to depose in camera under section 10(4) of the Act of 1973, as prayed by the prosecution by an order dated 09.110.2012. P.W.16, P.W.17 and P.W.18 have proved some documents and books which have been duly marked as exhibits.

(xii) Application submitted by the defence for drawing contempt

30. In course of proceedings, defence initiated an application on 06.9.2012 for drawing contempt against Begum Matia Chowdhury [a Cabinet Minister] on allegation of making derogatory remark in public on *subjudice* matter in response to which the Tribunal asked the respondent to explain the alleged remarks through counsel.

31. On hearing both sides and on perusal of the written explanation submitted by the respondent the Tribunal rendered its decision on the matter of contempt. Eventually, by giving some observations and cautions, the Tribunal disposed of the application brought to initiate contempt proceedings.

32. The Tribunal, in disposing of the application by its order dated 13.11.2012, observed that

> **"However, such comment, even if accepted to be based on public perception and opinion, made in public by the respondent should not be guarded by the right to freedom of speech as it relates to sensitive subjudice criminal proceedings to which the mass people of the country and the international community as well have been eying very closely. This prohibition should be kept in mind not only in the best interest of the accused who has a right to fair trial but also the prosecution and the public who have right to secure a verdict from a court of law that is free from prejudice. It should not be forgotten too that in the name of exercising one's right to freedom of speech one can conceivably affect another person's right to defend according to law. …….. we however expect that a responsible person holding significant office of the government should be restraint and careful in making any such comment on a *subjudice* matter to get rid of general public baffle. Everybody should bear in mind that it is the law which must be respected by all citizens."**

(xiii) Application filed by the prosecution under section 19(2) of the Act of 1973

33. Prosecution submitted an application under section 19(2) of the Act of 1973 with prayer to receive statement of witness Syed Abdul Hannan [victim of the event narrated in charge no.2] made to the Investigation Officer, on the grounds stated therein. It was found that the reasons stated in the application did not attract the grounds contained in section 19(2) of the Act for

consideration and as such the Tribunal rejected the same by its order dated 20.1.2013. Prosecution evidence has been thus closed on 24.2.2013.

(xiv) Application seeking Re-call of order closing cross-examination of the IO

34. Abdur Razzak Khan, the Investigation Officer has been examined on 11 February 2013 and after completion of his 03 hours long testimony defence started to cross-examine him and continued for four days and took about 10 hours time. For further cross-examination 13 February 2013 was fixed. But the learned defence counsel defaulted and prayed adjournment. Next, 18 February 2013 was fixed for further cross-examination. But the learned defence counsel did not show up on the date fixed and prayed adjournment. However, the Tribunal, for ends of justice, adjourning the case, fixed 24 February 29013 for conclusion of cross-examination of the IO. But the learned defence counsel instead securing attendance prayed further adjournment through a junior counsel of the defence team. Tribunal rejected the prayer seeking adjournment and thus cross-examination of the IO ended. Defence , afterwards, filed an application seeking re-call of order closing cross-examination of the IO. However, the Tribunal eventually did not consider the application seeking re-call of order dated 24 February 2013 closing cross-examination of the IO (P.W.18) as it did not demonstrate any material and satisfactory ground to re-call the order closing cross-examination of the IO and rejecting the application fixed date for examination of defence witnesses.

(xv) Limiting Defence Witness

35. Earlier, the Tribunal on hearing both sides on an application submitted by the prosecution seeking limitation of defence witnesses rendered an order dated 20.2.2013 limiting defence witnesses to 04 mainly by stating the reason that the phrase ‘if any’ occurred in section 9(5) provides clear indicia that the defence is not obligated to furnish list of witnesses. The Tribunal in its order limiting defence witness rendered reasons that

> **“However, the accused can do so only when it seems to him indispensable for establishing any specific defence case. Provision as contained in section 9(5), on any count, does not provide the defence an unfettered right to provide list of more than thousand of witnesses. In a criminal**

> **trial, either in our domestic court or in any international adhoc tribunal established for prosecuting and trying crimes against humanity, such kind of action on part of the accused, in the name of complying with the provision of the statute, never happens, and or is allowed as well. Furnishing list of more than thousand defence witnesses itself demonstrates an ulterior intention to somehow haul the trial and disposal of the case which the Tribunal by passing necessary order shall have right to prevent."**

(xvi) Application seeking review of order limiting defence witnesses

36. However, afterwards, filing a review application defence prayed leave to produce and examine in all 07 witnesses. The Tribunal by its order dated 3.3.2013 allowed the prayer in part and permitted one more defence witness to be adduced and examined by stating reasons that

> **"The trend of cross-examination of the prosecution witnesses does not show distinct plea of alibi for each charge and as such it is not at all acceptable that the defence is needed to produce and examine in all 07 witnesses, i.e 03 more witnesses. Next, defence is not obliged to disprove prosecution case by adducing evidence. Despite this universally recognized legal position, in our earlier order, by stating reasons, we have permitted the defence to call and examine in all 04 witnesses."**

37. The Tribunal rendered its further view that

> **"Equality of arms does not mean that the defence is to be permitted to examine such number of witnesses as have been examined by the prosecution. It is to be noted that in the case of Alfred Musema (ICTR Trial Chamber]**

> **prosecutor called 22 witnesses, one investigator and one expert witness, while the defence called the accused, four witnesses and one investigator. The trial of Musema was lasted for a total 39 trial days. This Tribunal(ICT-2) , in exercise of power given under section 22 we have regulated the number of defence witnesses, even in absence of any explicit provision either in the Act or in the ROP."**

(xvii) Defence Witness

38. Defence, however, adduced and examined in all 05 witnesses form the list submitted under section 9(5) of the Act of 1973. They have been examined on 06.3.2013, 10.3.2013, 11.3.2013, 13.3.2013 and 21.3.2013. Of five witnesses D.W.3 has proved some documents and books which have been duly marked as exhibits.

(xviii) Application by the defence for directing to produce documents and to re-examine D.W.3

39. Defence filed two applications. One was for order directing office or organisation as mentioned in the application for providing document/ copies thereof as listed therein to the defence. The other application relates to prayer allowing the defence to examine D.W.3 on re-call, on the grounds stated therein. The Tribunal, on hearing the applications, rendered its decision by an order dated 18.3.2013 stating reasons that the Tribunal may order production of any document or thing only in order to discover or obtain proof of 'relevant facts' [Section 10(1)(h) of the Act of 1973]. The Tribunal shall exercise such power not on application of either party but on its own motion. The Act of 1973 does provide provision empowering the Tribunal to direct any office or organisation for providing any document to either party, on its application. Additionally, defence shall have to furnish documents or copies thereof which it intends to rely upon only at the time of commencement of the trial as required under section 9(5) of the Act, not at this stage. Rejecting this application, the Tribunal also observed that the application seeking permission to examine the D.W.3 on re-call, for proving the documents which were sought to be obtained on production, on order of the Tribunal became redundant and as such the same was also rejected.

(xix) Stage of Summing up of case by the prosecution

40. The learned Chief Prosecutor Mr. Golam Areif Tipoo started summing up of its case on 24.3.2013 and concluded it on 31.3.2013, being assisted by the Prosecutors Mr. Syed Haider Ali, Mr. A.K.M Saiful Islam, Ms. Nurjahan Mukta and Ms. Tureen Afroz. Prosecution took about 08.5 hours to conclude summing up of its case with prayer to advance its reply on legal issues after summing up of defence case. Prosecutor Mr. A.K.M Saiful Islam advanced argument of factual aspects while Mr. Syed Haider Ali and Ms. Tureen Afroz made effort to lay some significant legal issues involved by citing decisions.

(xx) Stage of Summing up of case by the Defence

41. Mr. Abdur Razzak, the learned senior counsel for the defence started summing up of defence case on 03.4.2013 and continued for two more days. In the midst of advancing summing up, the accused by filing an application prayed permission to have privileged communication with two of his engaged counsels. The tribunal allowed it by its order dated 04.4.2013. Defence took in all 11.5 hours to conclude summing up of case. The learned defence counsel first reiterated his submission that he advanced in the earlier case [Chief Prosecutor v. Abdul Quader Molla: ICT-BD Case No. 02 of 2012, Judgment 5 February 2013] in relation to some legal issues adding submission on 'hearsay evidence', 'complicity' and 'inconsistencies' occurred in testimony, by citing decisions from adhoc tribunals and ICC.

(xxi) Reply to Defence argument on legal points by the Prosecution

42. On 16.4.2013, before moving to listen the reply from the end of prosecution, on legal points, the Tribunal heard an application filed on 15.4.2013 under section 17(1) of the Act on behalf of the accused allowing him to explain the charges made against him. Tribunal rejected the prayer by observing that

> **" the rights of accused as provided in subsequent two sub-sections i.e. sub-section (2) and sub-section (3) have been duly afforded. Naturally it is assumed that the right as provided in sub-section (1) of section 17 could have been asserted earlier, before availing the**

> **rights as given in subsequent two sub-sections. Therefore, the right as envisaged in section 17(1) ought to have been asserted at the stage of confirming the framing charges which were duly read out and explained to the accused in open court. It was the stage when the accused could have explained the charges made against him."**

43. Afterwards, prosecution, on 16.4.2013, responded to what has been argued by the defence on some legal issues and in doing so it took 01.5 hrs hours and thereby summing up of cases of both sides concluded on 16.4.2013 and with this the Tribunal kept the matter of rendering its verdict under section 20(1) of the Act of 1973 CAV.

(xxii) Application by the accused under section 17(1) of the Act of 1973

44. On the same day, after conclusion of summing up of cases by both sides, an application was brought by the accused under section 17(1) of the Act of 1973 for allowing the accused to give explanations to the charges made against him. On hearing both sides, the Tribunal rejected the prayer by giving observations as below:

> **"The three sub-sections of section 17 of the Act of 1973 conjointly it would reveal clearly that an accused can avail the opportunity or right of giving explanation to the charges made at the time of framing the same as subsequent sub-sections (2) and (3) of section 17 of the Act of 1973 deal with conducting the defence case by engaging counsel as well as presenting defence witness at its own volition-- which is invariably stages subsequent to framing charges. Thus, the rights of accused as provided in subsequent two sub-sections i.e. sub-section (2) and sub-section (3) have been duly afforded. Naturally it is assumed that the right as provided in sub-section (1) of section 17 could have been asserted earlier, before availing the rights as given in subsequent two sub-sections. Therefore, the right as envisaged in section 17(1) ought to have been asserted at the stage of confirming the framing**

> **charges which were duly read out and explained to the accused in open court. It was the stage when the accused could have explained the charges made against him."**

VIII. Applicable laws

45. The proceedings before the Tribunal shall be guided by the International Crimes (Tribunals) Act 1973, the Rules of Procedure 2012 formulated by the Tribunal under the powers given in section 22 of the Act. Section 23 of the Act of 1973 prohibits the applicability of the Code of Criminal Procedure, 1898 and the Evidence Act 1872. Tribunal is authorized to take judicial notice of fact of common knowledge which is not needed to be proved by adducing evidence [Section 19(4) of the Act]. The Tribunal may admit any evidence [Section 19(1) of the Act]. The Tribunal shall have discretion to consider hearsay evidence by weighing its probative value [Rule 56(2)]. The defence shall have liberty to cross-examine prosecution witness on his credibility and to take contradiction of the evidence given by him [Rule 53(ii)]. Cross-examination is significant in confronting evidence.

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

47. Both the Act of 1973 and the Rules (ROP) have adequately ensured the universally recognised rights of the defence. Additionally, the Tribunal, in exercise of its discretion and inherent powers as contained in Rule 46A of the ROP, has adopted numerous practices for ensuring fair trial by providing all possible rights of the accused. Since the Act of 1973 is meant to prosecute and try the persons responsible for the offence of crimes against humanity, committed in violation of customary international law, the Tribunal however is not precluded from seeking guidance from international reference and

relevant jurisprudence, if needed to resolve legal issues related to charges and culpability of the accused.

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

48. The Tribunal [ICT-2] has been established to protect universally recognized human rights of victims by bringing the 'untouchables'—individuals who are alleged to have committed crimes 1971 in grave breach of customary international law, in 1971 but had been shielded from prosecution---to justice. However, the Tribunal is quite conscious in fulfilling fair trial requirements. Ensuring rights of accused is a pertinent issue involved in any criminal trial. Fair trial concept stems from the recognized rights of accused.

49. The Tribunal [ICT-2], a domestic judicial forum composed of two Judges of Supreme Court of Bangladesh and a judge who is qualified to be a judge of Supreme Court of Bangladesh, has been constituted under a valid legislation enacted in sovereign Parliament, is obliged to guarantee the rights of the accused. The fundamental and key elements of fair trial are (i)Right to disclosure (ii) public hearing (iii) presumption of innocence (iv) adequate time to prepare defence (v) expeditious trial (vi) right to examine witness (vii) right to defend by engaging counsel. All the rights including these ones have been provided to the accused so that the fair trial requirements are satisfied.

(i) Right to Disclosure

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

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

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

(ii) Right to Public hearing

53. The right to a public hearing has two purposes: it guarantees the protection of the defendant from secret trials, and it protects the right of the public to scrutinize the integrity of proceedings. Section 10(4) of the Act of 1973 provides provision of holding trial in public. Rule 43(4) of the ROP also ensures the concept of fair and public trial by engaging counsel [authorized to appear before the Tribunal] at accused's choice. In the case in hand only three women victims have been permitted to be examined in camera [proviso of section 10(4) of the Act of 1973].Observers and experts from home and abroad are permitted to witness the proceedings as and when they intend, with intimation to the registry of the ICT. Media persons also remain present inside the court room to see the proceedings.

(iii) To be presumed innocent till found guilty

54. The right to be presumed innocent until proven guilty is one of the cornerstones of fair trial proceedings and is related to the protection of human dignity. It is universally accepted settled jurisprudence. In common law system, defence is to prove nothing and he or she shall be presumed innocent till found guilty. No one can be convicted unless the charge brought against him is proved 'beyond reasonable doubt'. This is the standard and universally settled criminal jurisprudence that all the courts constituted under valid legislation will follow. In ICT-BD the provision that the burden of proving the charge shall lie upon the prosecution (Rule 50) amply implicates the theory of innocence of an accused until and unless he is held guilty through trial. Besides, a person charged with crimes as described under section 3(2) of the Act shall be presumed innocent until found guilty [Rule 43(2) of the ROP].

(iv) Adequate time to prepare defence

55. The key element of fair trial notion is the right of an accused to have adequate time and facilities for the preparation of his defense during all stages of the trial. What time is considered adequate depends on the circumstances of the case. The Tribunal-2 is quite conscious ensuring this key right of defense. The Tribunal-2, through judicial practices, has already developed the notion that each party must have a reasonable opportunity to defend its interests. Fairness is the idea of doing what's best. It may not be perfect, but it's the good and decent thing to do. It requires being level-headed, uniform and customary. Adequate time to get preparation of defense is one of key rights that signifies the fairness of the proceedings. Article 14(3)(b) of the ICCPR states,

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

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

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

57. The 'three weeks' time is given to the defense to prepare. Section 9(3) of the Act of 1973 explicitly provides that 'at least three weeks' before the commencement of the trial, the Chief prosecutor shall have to furnish a list of witnesses along with the copies of recorded statement and documents upon which it intends to rely upon. Additionally, what time is considered adequate depends on the circumstances of the case. The ICT-BD is quite conscious ensuring this key right of defense. It is to be mentioned that there has been not a single instance that any of accused person before the Tribunal[ICT-2] has

been denied any of his right to have time necessary for preparation of his defense or interest.

(v) To be assisted by counsel and 'privileged communication'

58. The right to be assisted by counsel is paramount to the concept of 'due process'. Another key element is the right of an accused to communicate with counsel of his own choosing, which is particularly relevant to the preparation for trial. In the case in hand the accused has been permitted to engage a team of counsels. As and when prayed by the defence the accused has been permitted to have 'privileged communication' with his counsels, for thrice---- first at pre-trial stage, next at trial stage and finally at the stage of summing up of case. Additionally, often on the date fixed for proceedings, engaged counsel and relative[s] have been allowed to meet and discuss the accused at Tribunal's custody, as prayed orally.

(vi) Expeditiousness of the proceedings

59. The expeditiousness and fairness of the proceedings are intertwined It must be kept in mind too that another very important element of the right to a fair trial, namely the right to be tried without undue delay, is inevitable. Regulating the examination of witnesses by an accused party is justified in order to protect the rights to 'an expeditious and fair trial'. Provisions contained in section 11(3) and section 13 of the Act of 1973 require the Tribunal for ensuring expeditious proceedings, without giving adjournment, if such adjournment is not deemed necessary for interest of justice. Tribunal is also cautious to note that finality is a key component of any criminal trial. Parties cannot cause setback the proceedings at will. In this regard we may recall the observation made in the case of ***Kayishema and Obed Ruzindana*** by The ICTR Appeals Chamber which is as below:

> **"Procedural time-limits are to be respected, and . . . they are indispensable to the proper functioning of the Tribunal and to the fulfillment of its mission to do justice. Violations of these time-limits, unaccompanied by any showing of good cause, will not be tolerated." [*Prosecutor v. Clément Kayishema***

and Obed Ruzindana, Case No. ICTR-95-1-A, Judgment (Reasons), 46 (June 1, 2001).]

60. In the case in hand, often the defence has shown a tendency in seeking frequent adjournments at all stages of proceedings, mostly on frivolous and unjust grounds. The trial could have been concluded within lesser period of time if both sides would avoided seeking adjournments in compliance with the Act of 1973 and ROP. Thus, it can be said that both parties were afforded adequate time in conducting their respective case. The principle of equality of arms means that the Prosecution and the Defence must be equal before the Tribunal. Keeping the notion in mind the Tribunal was mindful in providing every practicable facility it was capable of granting under the Rules and the Act of 1973 when faced with a request by either party for assistance in presenting its case.

(vii) Right to examine witnesses

61. Under section 10(1) (f) of the Act of 1973 defence shall have right to examine witness, if any, and the provision contained in section 17(3) of the Act of 1973 provides that the accused shall have right to cross-examine the prosecution witnesses. In the case in hand, defence submitted a list of 1354 witnesses under section 9(5) of the Act of 1973 at the commencement of trial. Submitting such a long list is indeed unheard of. However, eventually considering the defence case extracted from the trend of cross-examination of prosecution witnesses the Tribunal [ICT-2] permitted the defence to produce and examine only 04 witnesses from their list, in exercise of power given in section 22 of the Act and Rule 46A of the ROP. Afterwards, defence prayed for allowing it to produce and examine in all 07 witnesses. Considering the prayer the Tribunal allowed one more defence witness to be examined.

X. Compatibility of provisions in ICT Act with the ICCPR

62. In light of above deliberations on fundamental rights of defence it is necessary to state that the provisions of the Act of 1973 [(International Crimes (Tribunals) Act,1973] and the Rules(ROP) framed there under offer adequate compatibility with the rights of the accused enshrined under Article 14 of the **ICCPR**. In trying the offences under the general law, the court of law in our country does not rely on our own standards only; it considers settled and recognised jurisprudence from around the world. So, even in absence of any

explicit provision on this aspect the Tribunal , ethically, must see what happened in similar situations in other courts and what they have done, and take those decisions into account.

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

> **(i) Fair and impartial Tribunal**: [section 6 (2A) which is compatible with Article 14(1) of ICCPR] ;
>
> **(ii) Public trial** [section 10(4)] ;
>
> **(iii) Accused to know of the charges against him and the evidence against him :** [Rule 9(3) and Rule 18(4) of the ROP and section 9(3) and section 16(2) which are compatible with Article 14(3)(a) ICCPR];
>
> **(iv) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law:** [Rule 43(2) of ROP which is compatible with Article 14(2) ICCPR];
>
> **(v) Adequate time of getting preparation of defense:** [section 9(3) and Rule 38(2) of the ROP which are compatible with Article 14(3)(b) ICCPR];
>
> **(vi) Services of a defense counsel and interpreter:** [section 10(3) and section 17(2) which are compatible with Article 14(3)(d) and 14(3)(f) ICCPR];
>
> **(vii) Full opportunity to present his defense, including the right to call witnesses and produce evidence before the Tribunal:** [section 10(1)(f) and section 17(3) which are compatible with Article 14(3)(e) ICCPR];
>
> **(viii) Right to cross-examine witnesses:** [section 10(1)(e)];

> **(ix) To be tried without undue delay:** [Section 11(3) which is compatible with Article 14(3)(c) ICCPR];
>
> **(x) Not to be compelled to testify against himself or to confess guilt:** [Rule 43(7) ROP which is compatible with Article 14(3)(g) ICCPR];
>
> **(xi) Right of appeal against final verdict:** [section 21(1) which is compatible with Article 14(5) ICCPR].

64. The above rights of defense and procedure given in the Act of 1973 and the Rules of Procedure are the manifestations of the "due process of law" and "fair trial" which make the legislation of 1973 more compassionate, jurisprudentially significant and legally sound. In addition to ensuring the above recognised rights to accused the Tribunal-2 (ICT-2) has adopted the practice by ensuring that at the time of interrogation defense counsel and a doctor shall be present in a room adjacent to that where the accused is interrogated and during break time they are allowed to consult the accused, despite the fact that statement made to investigation officer shall not be admissible in evidence.

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

XI. Universally Recognised Rights of Victims

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

Article 2

> **(3).** Each State Party to the present Covenant undertakes: **(a)** To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by

> persons acting in an official capacity; **(b)** To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; **(c)** To ensure that the competent authorities shall enforce such remedies when granted.

67. The victims of systematic and organised diabolical atrocities committed in 1971 within the territory of Bangladesh in violation of customary international law need justice to heal. Bangladesh considers that the right to remedy should also belong to victims of crimes against humanity. It is also to be kept in mind together with the rights of accused, for rendering justice effectively. Besides, the State has an obligation to remedy serious human rights violations. Bangladesh recognizes Article 8 of the Universal Declaration of Human Rights **[UDHR]** and Article 2(3) of the International Covenant of Civil and Political Rights **[ICCPR]** which ensure the right to an effective remedy for the violation of human rights.

XII. Summing up of cases

a. Summing up of the Prosecution

68. Mr. Golam Areif Tipoo, the learned Chief Prosecutor, started summing up of its own case on 24 March 2013. At the outset, in his introductory presentation, the Chief Prosecutor submitted that prosecution and trial of persons accountable for the horrific atrocities committed during the War of Liberation 1971 within the territory of Bangladesh is the demand of the nation to come out from the culture of impunity and also to provide redress the sufferings caused to the millions of victims and their relatives. The learned Chief Prosecutor went on to place a brief portrayal of historical background that had enthused the Bengali nation to the movement of self-determination which eventually got shape of War of Liberation. The then Pakistani government and the occupation troops' policy was to resist the war of liberation in its embryo and as such **'operation search light'** was executed in Dhaka causing thousands of killing and mass destruction, with the aid and organizational support mainly from Jamat-E-Islam (JEI), its student wing

Islami Chatra Sangha (ICS) and pro-Pakistan political bodies and individuals. Respecting the preamble of the International Crimes (Tribunals) Act 1973 (The Act XIX of 1073) the government has constituted this Tribunal for prosecution and punishment of persons responsible for genocide, crimes against humanity committed in the territory of Bangladesh in 1971.

69. Next, Mr. A.K.M Saiful Islam, the learned Prosecutor, in continuation of the presentation made by the learned Chief Prosecutor, submitted that in furtherance of 'operation search light' atrocities had been committed in greater Mymensingh and also through out Bangladesh. The accused has been indicted for committing criminal acts forming part of systematic attack that resulted in the commission of the offences of crimes against humanity, as listed in 07 charges framed. As the chief organiser of Al-Badar in greater Mymensingh and also as a commander of Al-Badar camps set up at Sherpur town and Mymensingh town accused Muhammad Kamaruzzaman had acted in the capacity of 'superior' of the Al-Badar force and was actively concerned with many other atrocities which are beyond charges but have been revealed from narrative made by the witnesses, particularly P.W.1, P.W.2.

70. It has been further submitted that the accused Muhammad Kamaruzzaman had acted as the commander of two camps----one in Mymensingh town and another in Sherpur town and thereby he actively assisted the members of Al-Badar in carrying out criminal activities directed against civilian population. Being the 'superior' of the perpetrator Al-Badars, the accused also incurred 'civilian superior responsibility'. Context prevailing during the war of liberation, it was not realistic to witness the horrific atrocious acts committed by Pakistani occupation army and their principal aider Al-Badar, by surrounding people, excepting the victims and captives. Therefore, it was mostly natural to learn the incidents and involvement of perpetrators thereof. The witnesses [P.W.1, P.W.2 and P.W.15] were kept unlawfully confined at the Al-Badar camps and during their unlawful confinement they had occasion to see and experience the activities of the accused that sufficiently adds to other proof as to his complicity with the commission of the crimes alleged.

71. It has been further submitted by the prosecutor that the hearsay statement made by witnesses as to material facts cannot be excluded as it is relevant and

the witnesses made such statement are credible. Defence could not impeach what the witnesses have stated on relevant material facts, in any manner. Mere inconsistency occurred in their statement made before the Tribunal does not render the entire part of their testimony unreliable. The learned prosecutor further added that the Tribunal is not bound by the technical rules of evidence and it shall accord in its discretion due consideration to 'hearsay evidence' on weighing its probative value**.[Rule 56(2) of the ROP].** Next, it has been argued that even evidence of a 'single witness' is enough to prove a charge if it inspires credence and testimony of a single witness is not needed to be corroborated by other evidence.

72. It has been submitted that P.W.4 and P.W.6 who are hearsay witnesses have proved how the victim Badiuzzaman [victim of the event narrated in charge no.1] was abducted and brought to the army camp at Ahammadnagar. Admittedly Badiuzzaman was killed after he was brought to the camp. Thus the accused's act of leading the gang of perpetrators is clear indicia of his participation and complicity to the actual commission of the murder as narrated in charge no.1. In relation to the criminal act of causing 'other inhuman acts' as narrated in charge no.2 has been proved by the evidence of P.W.2 and P.W.14 the eye witnesses.

73. As regards charge no.4 it has been argued that the acts and conducts of the accused as testified by the P.W.2, P.W.5 and P.W.14 clearly indicates that the accused was 'concerned' with the act of abduction of victim Golam Mostafa followed by his brutal killing. Defence could not shake the statement of P.W.2 that the victim was brought to the Al-Badar camp at Suren Saha's house in Sherpur town and afterwards he was brought out of the camp by accused's accomplice Nasir.

74. In relation to charge no.5, the learned prosecutor has submitted that the event of crime narrated in this charge P.W.1 has testified that he heard of it. The contradiction revealed in testimony of P.W.14 relating to the month of his confinement at the Al-Badar camp might have occurred due to his memory failure and as such without giving importance to it the remaining part of his testimony can be relied upon together with the evidence of P.W.7 for the purpose of adjudicating this charge.

75. As regards the event of Tunu murder, narrated in charge no.6 it has been submitted that in support of this charge P.W.1 made hearsay statement and the event remains unimpeached. Drawing attention to evidence of P.W.1, P.W.9 and P.W.15 the learned prosecutor has submitted that 'complicity' of the accused with the event of killing Dara as narrated in charge no.7 has been proved from the material facts the witnesses have testified.

b. Summing up of case by the defence

76. Apart from legal argument on *'hearsay evidence'*, *inconsistencies in witnesses' testimony'*, *'complicity'* and some other pertinent legal aspects Mr. Abdur Razzak, the learned senior defence counsel has made a thorough effort in making argument on factual aspects, by drawing attention to the evidence adduced by the prosecution and the argument may be succinctly categorized as below.

77. As regards charge no.1, Mr. Abdur Razzak, the learned senior counsel for the defence has mainly contended that the charge no.1 is based on hearsay evidence of P.W.4 and P.W.6. But their statement made before the Tribunal suffer from major inconsistencies. The charge framed alleges that the accused Muhammad Kamaruzzaman led the armed group in taking Badiuzzaman away to the Ahammadnagar army camp. But the witnesses made inconsistent statement relating to 'mode of abduction' of the victim Badiuzzaman and also to the alleged fact of seeing Muhammad Kamaruzzaman with the armed men at the house of Syedur Rahman.

78. However, on query, the learned senior defence counsel conceded that the fact of abducting Badiuzzaman from the place narrated in the charge to the army camp and later on he was killed is not disputed.

79. Citing decisions from the different adhoc tribunals and ICC, the learned counsel argued that 'corroboration', either by direct, or circumstantial evidence is a must for hearsay evidence. But on March 31, prosecutor Tureen Afroz, citing instances from different war crimes cases, made an incorrect

submission that the "settled jurisprudence" of international law is that hearsay evidence is admissible, without corroboration.

80. The learned defence counsel next argued on charge no.2. He has submitted that P.W.3 cannot be relied upon as he stated inconsistent date of the event. Statement made by P.W.2 and P.W.14 on some particulars is inconsistent. Due to such inconsistencies it is immaterial to see whether the statement made by them could be impeached by the defence through cross-examination. Inconsistencies between statements of two witnesses by itself renders them unreliable and tutored.

81. In respect of charge no.3, the learned defence counsel has submitted that the event of Sohagpur massacre is not disputed. But the witnesses who have deposed in support of the charge implicating the accused are not credible. P.W.1 and P.W.2 are hearsay witnesses and P.W.11, P.W.12 and P.W.13 are the victims [widows]. Their statement relating to alleged presence of the accused at the crime site is contradictory. Besides, the accused has been indicted for providing 'advices' to his accomplices in launching the attack and it does not describe that the accused accompanied the principal perpetrators. Thus, the evidence of these witnesses does not offer any reasonable indication as to presence of the accused at the crime site at the relevant time.

82. As regards charge no.4, the learned defence counsel has argued mainly attacking credibility of witnesses. It has been submitted that P.W.14 who is hearsay witness cannot be relied upon as the date of his learning the event does not correspond to the month or date of the event alleged. P.W.2 is a tutored and untrustworthy witness who has made inconsistent statement on many facts, and hearsay statement of P.W.5 does not appear to have been corroborated by other evidence.

83. As regards charge no.5 it has been argued by Mr. Ehsan Siddique, the learned defence counsel that P.W.7 and P.W.14 have made contradictory statement on material fact that tends to make the fact of their confinement at the Al-Badar camp at Zilla Parishad Duk Bungalow, Mymensingh. The accused has been indicted for complicity as he had ordered the alleged killing

of Dara. But 'ordering' is a mode of liability which may be charged under section 4(2) of the Act and in that case prosecution was obliged to prove accused's superior position. Prosecution failed to discharge this onus. In relation to charge no. 6 the learned defence counsel argued that the prosecution failed to adduce any evidence in support of this charge, excepting the unattributed hearsay evidence of P.W.1. Such hearsay evidence which suffers from specificity cannot be relied upon.

84. In respect of charge no.6, the learned defence counsel has argued that there has been no lawful evidence, direct, hearsay or circumstantial to substantiate this charge. P.W.1's anonymous hearsay testimony does not offer any valid indication that the accused was concerned with the murder of Tunu, in any manner.As regards charge no.7 it has been argued by the learned defence counsel that mere saying [as stated by P.W.1] that Dara was killed and his father Tepa Mia somehow escaped cannot be considered as evidence to tie the accused with the event of alleged criminal acts. P.W.9 does not state as to from whom he had heard that Dara and his father Tepa Mia were kept detained at the camp and how Dara was murdered.

85. Mr. Abdur Razzak, the learned defence counsel, during the last session of summing up, drawing inconsistencies occurred in P.W.2's testimony has submitted that this witness is untrustworthy and he cannot be relied upon. P.W.2 made inconsistent statement as to some facts which are : when he [P.W.2] started receiving training at Al-Badar camp, the date of burning the brothel by the Pakistani army, bringing and keeping one Shushil at the camp, taking fire arms from the upstairs' office of the camp by Nasir who allegedly brought Golam Mostafa [victim of charge no.4] to Sheri bridge. Thus P.W.2 is a tutored and untruthful witness.

XIII. The way of adjudicating the charges

86. The evidence produced by both parties in support of their respective case was mainly testimonial. Some of prosecution witnesses allegedly directly experienced the dreadful events they have narrated in court and that such trauma could have an impact on their testimonies. Some of witnesses were allegedly kept detained at the Al-Badar camps which provided them alleged occasion to experience the criminal activities carried out by the camps and the

accused. However, their testimony seems to be invaluable to the Tribunal in its search for the truth on the alleged atrocious events that happened in 1971 war of liberation directing the Bangalee civilian population, after duly weighing value, relevance and credibility of such testimonies.

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

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

88. It should be kept in mind that the alleged incidents took place 42 years back, in 1971 and as such memory of live witness may have been faded. Therefore, in a case like one in our hand involving adjudication of charges for the offence of crimes against humanity we are to depend upon **(i)** facts of common knowledge **(ii)** documentary evidence **(iii)** old reporting of news paper, books etc. having probative value **(iv)** relevant facts **(v)** circumstantial evidence **(vi)** careful evaluation of witnesses' version **(vii)** Political status of the accused at the relevant time and **(viii)** the jurisprudence evolved on these

issues in the *adhoc* tribunals, if deemed necessary to adjudicate any point of law.

89. In the prosecution of crimes against humanity, principally accused's status, position, association, authority, conduct, activities, link with the state organization, political party are pertinent issues even prior to the alleged events. In determining alleged culpability of the accused, all these factors have to be addressed and resolved as well.

90. It is to be noted that in particular when the Tribunal acts on hearsay evidence, it is not bound to apply the technical rules of evidence. Rather the Tribunal is to determine the probative value of all relevant evidence admitted. Hearsay evidence, in a trial under the Act of 1973, is not inadmissible *per se*, but that such evidence should be considered with caution and if it carries reasonable probative value.

91. Therefore, we have to resolve whether the crimes alleged were committed and if so, who were the perpetrators and how the accused had acted to participate in the commission thereof. The prosecution, in the light of the charges framed, is burdened to prove-**(i)** commission of the crimes alleged **(ii)** mode of participation of the accused in committing any of crimes alleged **(iii)** how he acted in aiding or providing encouragement or moral support or approval to the commission of any of alleged crimes **(iv)** what was his complicity to commission of any of crimes alleged **(v)** context of committing the alleged crimes **(vi)** the elements necessary to constitute the offence of crimes against humanity (**vii)** liability of the accused.

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

XIV. Backdrop and Context

93. The backdrop and context of commission of untold barbaric atrocities in 1971 war of liberation is the conflict between the Bangalee nation and the

Pakistani government that pushed the Bangalee nation for self determination and eventually for freedom and emancipation. War of Liberation started following the 'operation search light' in the night of 25 March 1971 and lasted till 16 December 1971 when the Pakistani occupation force surrendered. Ten millions (one crore) of total population took refuge in India under compelling situation and many of them were compelled to deport.

94. What was the role of the accused during the period of nine months in 1971? What were his activities? What he did and for whom? Had he link, in any manner, with the Pakistani occupation force or pro-Pakistan political party Jamat E Islami (JEI) and the militia forces formed for implementing organizational policy or plan and if so, why and how?

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

XV. Addressing legal issues agitated

96. Before we enter into the segment of our discussion on adjudication of charges we deem it convenient to address and resolve the legal issues agitated during summing up of cases of both parties. It appears that the learned senior counsel for the defence, at the beginning of summing up of case, has submitted that he did not intend to reiterate argument that he made on the legal issues which have been resolved in the case of ***The Chief Prosecutor v. Abdul Quader Molla*** [ICT-BD Case No. 02 of 2012: ICT-2: 05 February 2013] and

thus he submitted to adopt his earlier argument on those legal issues. Therefore, we prefer to reiterate our findings on the issues in brief, by adopting the argument made by the defence on those legal issues in the above mentioned case.

Summary of Argument by the defence Counsel on legal aspects [as adopted]

97. Mr. Abdur Razzak the senior defence counsel, in course of summing up case, raising the legal issues, has submitted to consider and adopt the argument he made in the case of ***The Chief prosecutor v. Abdul Quader Molla*** [ICT-BD case No. 02 of 2012, Judgment 05 February 2013] in relation to legal aspects. However, the argument on legal issues may be reiterated in brief as below, for the convenience of rendering our findings:

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

Summary of Reply of Prosecutor to argument by the Defence on Legal Points [as adopted]

98. In reply to these legal contentions, Mr. Sayed Haider Ali the learned Prosecutor also submitted that already this Tribunal[ICT-2] has resolved these issues by giving its findings and as such he urged to adopt the submission made by the prosecution in the case of ***Chief Prosecutor v. Abdul Quader Molla*** [ICT-BD case No. 02 of 2012, Judgment 5 February 2013]. However, his submission may be summarized as

> **(i)** there is no limitation in bringing criminal prosecution, particularly when it relates to 'international crimes' committed in violation of customary international law; **(ii)** that the 'tripartite agreement' which was a mere 'executive act' cannot bung up in bringing prosecution under the Act of 1973 against 'auxiliary force, an 'individual' or 'group of individuals'; **(iii)** the context of committing crimes proves that those were committed as part of systematic attack committed against civilian population; **(iv)** that even without prosecuting the 195 POWs the person responsible can be brought to book under section 3(2) of the Act of 1973; **(v)** that there is no legal bar in prosecuting a person who acted to facilitate the commission of the crimes even without bringing the principal perpetrators or accomplices .

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

XVI. Determination of Legal Aspects

(i) Does Unexplained Delay frustrate prosecution case

100. Conceding the settled legal proposition that there has been no limitation in bringing criminal prosecution Mr. Abdur Razak , the learned senior counsel for the defence has mainly argued on unexplained inordinate delay of long 40 years occurred in prosecuting the accused. Such inordinate delay of long 40 years should have been explained in the formal charge submitted under section 9(1) of the Act which is the foundation of the case. The learned defence counsel made addition to his submission as adopted that such unexplained delay not only casts doubt on the allegations brought but leads to acquittal of the accused as well.

101. In light of our reasoned view on the issue of delayed prosecution, in the case of **Chief Prosecutor v. Abdul Quader Molla** [ICT-BD Case No. 02 of 2013, Judgment, 05 February 2013] we consider it expedient to reiterate our earlier deliberations and finding, on the issue, in brief. Admittedly, from the point of morality and sound legal dogma, time bar should not apply to the prosecution of human rights crimes. Neither the Genocide Convention of 1948, nor the Geneva Conventions of 1949 contain any provisions on statutory limitations to war crimes and crimes against humanity. Article I of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968 provides protection against even any statutory limitation in prosecuting crimes against humanity, genocide etc. Thus, criminal prosecutions are always open and not barred by time limitation.

102. We have already given our observation in the case of ***The Chief Prosecutor v. Abdul Quader Molla*** [ICT-BD Case No. 02 of 2012: ICT-2: 05 February 2013] that indubitably, a prompt and indisputable justice process cannot be motorized solely by the painful memories and aspirations of the victims. Indeed it requires strong public and political will together with favourable and stable political situation. Mere state inaction, for whatever reasons, does not render the delayed prosecution readily frustrated and barred by any law.

103. Crimes against humanity and genocide, the gravest crime never get old and that the perpetrators who are treated as the enemies of mankind will face justice. We should not forget it that the millions of victims who deserve that their tormenters are held accountable; the passage of time does not lessen the culpability. Considerations of material justice for the victims should prevail when prosecuting crimes of the severe enormity is on the process. Justice delayed is no longer justice denied, particularly when the perpetrators of core international crimes are brought to the process of justice. We disagree with the submission extended by the learned defence counsel that unexplained inordinate delay in bringing prosecution, leads accused's acquittal. However, there can be no recognised hypothesis to insist that such a 'system crime' can only be pursued within a given number of years. Therefore, delayed prosecution does not rest as a clog in prosecuting and trying the accused and creates no mystification about the atrocities committed in 1971.

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

104. By drawing attention to the Parliamentary debate dated 13 July 1973 on the issue of passing the Bill for promulgating the International Crimes (Tribunals) Act 1973, the learned senior counsel for the defence advanced his argument in the case of *Abdul Quader Molla* that pursuant to the above debate eventually the Act of 1973 was enacted on 20 July 1973 after bringing first amendment of the Constitution on 15 July 1973.

105. Defense's stand on this legal issue, as already argued in the case of *Abdul Quader Molla*[ICT-BD Case No. 02 of 2012, Judgement 05 February 2013] was that the Act of 1973 and first amendment of the constitution will go to show that intention of the framers of the legislation was to prosecute and try the 195 listed war criminals of Pakistan armed force and not the civilians as the phrase 'including any person' was replaced by the phrase 'any person' belonging to armed force or auxiliary force. The first amendment of the constitution was brought so that no 'civilian person' could be prosecuted and tried under the Act of 1973.

106. The Prosecution countered this argument by making submission that the Act of 1973 is meant to prosecute, try and punish any 'individual' or 'group of individuals' , or any member of armed, defence or auxiliary force for the offences specified in section 3(2) of the Act of 1973. If it is not proved that the accused belonged to 'auxiliary force' even then he may be brought to jurisdiction of the Tribunal if he is found to have perpetrated offences enumerated in the Act of 1973 in the capacity of an 'individual'.

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

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

109. We are to perceive the intent of enacting the main Statute together with fortitude of section 3(1) of the Act. At the same time we cannot deviate from extending attention to the protection provided by the Article 47(3) of the Constitution to the Act of 1973 which was enacted to prosecute, try and punish the perpetrators of atrocities committed in 1971 War of Liberation.

110. The legislative modification that has been adopted by bringing amendment in 2009 has merely extended jurisdiction of the Tribunal for bringing the perpetrator to book if he is found involved with the commission

of the criminal acts even in the capacity of an 'individual' or member of 'group of individuals'.

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

112. Thus, we hold that the contention raised by the defence is of no consequence to the accused in consideration of his legal status and accordingly the defence objection is not sustainable in law, particularly in the light of Article 47(3) and Article 47A(2) of the Constitution.

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

113. We may recall the argument advanced by the learned senior defence counsel, on this legal issue, advanced in the case of *Abdul Quader Molla* [ICT-BD case No. 02 of 2012, Judgment 05 February 2013] that pursuant to the 'tripartite agreement' dated 09.4.1974, 195 listed war criminals belonging to Pakistani armed force have been given clemency. Thus the matter of prosecuting and trying them under the Act of 1973 ended with this agreement. The local perpetrators who allegedly aided and abetted the Pakistani occupation armed force in committing atrocities including murder, rape, arson the government enacted the Collaborators Order 1972.

114. It is to be noted that the Tribunal has already resolved this issue by giving its reasoned finding, in the case of Chief Prosecutor v. Abdul Quader Molla[ICT-BD Case No. 02 of 2012 Judgement, 05 February 2013]. Therefore instead of making discussion in detail we prefer to reiterate our earlier deliberations with some addition, on this issue. First we reiterate that it is not good enough to say that no 'individual' or member of 'auxiliary force' as stated in section 3(1) of the Act of 1973 can be brought to justice under the

Act for the offence(s) enumerated therein for the reason that 195 Pakistani war criminals belonging to Pak armed force were allowed to evade justice on the strength of 'tripartite agreement' of 1974.

115. The backdrop of entering into the 'tripartite agreement' needs to be considered. Bangladesh's decision was to prosecute and try 195 Pakistani POWs who were detained in India. Finally they were repatriated to Pakistan followed by the 'tripartite agreement'. **N. Jayapalan**, in his book titled **'India and Her Neighbours'** has attempted to give a light on it, by narrating

> **"……India left no stone unturned for helping Bangladesh to get recognition from other countries and its due place in the United Nations. India gave full support to the August 9, 1972 application made by Bangladesh for getting the membership of the United Nations. However, the Chinese veto against Bangladesh prevented success in this direction. In February 1974, Pakistan gave recognition to Bangladesh and it was followed by the accord of recognition by China. This development cleared the way of Bangladesh's entry into United Nations. In the context of Indo-Pak-Bangladesh relations, the April 1974 tripartite talks between India, Pakistan and Bangladesh produced an important agreement leading to the repatriation of 195 Pakistani POWs who were still being detained in India because of Bangladesh's earlier decision to try them on charges of genocide and war crimes."**
>
> [**Source: India and Her Neighbours**: N. Jayapalan: Atlantic Publishers & Distributors, Jan 1, 2000: B-2, Vishal Encalve, Opp. Rajouri Garden, New Delhi-27]: ISBN 81-7156-921-9]

116. Besides, a closer look at the repatriation process of 195 Pakistani War Criminals [tripartite agreement] suggests that the political direction of the day

had to put on hold the trial process at that time, but intended not to terminate the option of any future trial. The Tripartite Agreement visibly mentioned Bangladesh's position on the 195 Pakistani War Criminals in the **Article 13** of the agreement which is as below:

> **"There was universal consensus that persons charged with such crimes as 195 Pakistani prisoners of war should be held to account and subjected to the due process of law".**

117. However, the **Article 15** of the tripartite agreement says:

> **"Having regard to the appeal of the Prime Minister of Pakistan to the people of Bangladesh to forgive and forget the mistakes of the past" Government of Bangladesh had decided not to proceed with the trials as an act of clemency.**

118. Thus the scope of clemency is evidently limited to Bangladesh's decision on not to try them here. Rather, it keeps the option open for trial of those Pakistani war criminals. Additionally, such agreement was an 'executive act' and it cannot create any clog to prosecute member of 'auxiliary force' or an 'individual' or member of 'group of individuals' as the agreement showing forgiveness or immunity to the persons committing offences in breach of customary international law was disparaging to the existing law i.e the Act of 1973 enacted to prosecute those offences.

119. One of the main justifications for prosecuting crimes against humanity, or genocide is that they violate the jus cogens norms. As state party of Universal Declaration of Human Rights (UDHR) and Geneva Convention Bangladesh cannot evade obligation to ensure and provide justice to victims and sufferers of those offences and their relatives who still suffer the pains sustained by the victims and as such an 'executive act' (tripartite agreement) can no way derogate this internationally recognized obligation. Thus, any agreement or treaty if seems to be conflicting and derogatory to jus cogens (compelling laws) norms does not create any hurdle to internationally recognized state obligation.

120. *Jus cogens* norms – literally the laws or norms that are known and binding throughout humanity – form the clearest basis for identifying distinctly international crimes as violations of international law. These norms are often said to involve "principles which are recognized by civilized nations as binding on states, even without any" express obligation based on convention or treaty. [**Aristotle, Nicomachean Ethics, W. D. Ross, trans., NY: Oxford University Press, 1925, 1137b5–6**.]

121. Amnesty shown to 195 listed war criminals are opposed to peremptory norms of international law. It is to be noted that any agreement and treaty amongst states in derogation of this principle stands void as per the provisions of international treaty law convention [**Article 53** of the **Vienna Convention on the Law of the Treaties, 1969**] *Jus cogens* norms were first identified in the international law of treaties. The Vienna Convention on the Law of Treaties said that certain treaties should not be respected since these treaties violated "peremptory norms of general international law." The Vienna Convention then said that "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." Here is what is said in Article 53 of the Vienna Convention:

> **"A treaty is void if at the time of its conclusion it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."**

122. Therefore, we emphatically reiterate our finding [***in the case of Abdul Quader Molla***] that despite the immunity given to 195 listed war criminals belonging to Pakistani armed force on the strength of 'tripartite agreement' the Act of 1973 still provides jurisdiction to bring them to the process of justice.

Provisions as contained in section 3(1) of the Act of 1973 has kept the entrance unbolt to prosecute, try and punish them for shocking and barbaric atrocities committed in 1971 in the territory of Bangladesh. Of course in order to prosecute and try those 195 war criminals belonging to Pakistani army a unified, bold and national effort would be required. It is to be noted that the perpetrators of crimes against humanity and genocide are the enemies of mankind. We are of the view that the 'tripartite agreement' is not at all a barrier to prosecute even a local civilian perpetrator under the Act of 1973.

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

123. Defence claims [as presented in the case of ***Abdul Quader Molla***] that the cumulative effect of intention of enacting the Act of 1973, unexplained delay in bringing instant prosecution and bringing amendment of the Act of 1973 in 2009 by incorporating the phrase 'individual' or 'group of individuals' inevitably shows that bringing prosecution against the accused under the Act of 1973 is malafide and for political purpose. The accused could have been prosecuted and tried under Collaborators Order 1972, if actually he had committed the offence of collaborating the Pakistani army.

124. First, we reiterate that the Collaborators Order 1972 was a different legislation aiming to prosecute the persons responsible for the offences enumerated in the schedule thereof. It will appear that the offences punishable under the Penal Code were scheduled in the Collaborators Order 1972. While the 1973 Act was enacted to prosecute and try the 'crimes against humanity', 'genocide' and other system crimes committed in violation of customary international law. There is no scope to characterize the offences underlying in the Collaborators Order 1972 to be the same offences as specified in the Act of 1973.

125. In the case in hand, the accused is alleged to have committed or aided and abetted or had complicity to the perpetration of the offences enumerated in the 1973 Act, in the capacity of leader/commander of Al-Badar force of greater Mymensingh. The elementary truth and message that we have got from

the example of delayed prosecution of a Nazi war criminal **Maurice Papon** that a person whoever may be or whatever position he occupied he cannot be relieved from being prosecuted for the crimes committed in violation of customary international law even after long lapse of time and thus merely for the reason of delayed prosecution it cannot be readily branded as political and malafide prosecution. The accused has been facing trial for his alleged criminal activities committed in 1971. His present political status and affiliation is of no consequence in adjudicating the charges and his alleged culpability. A person accused of an offence cannot be relieved by his subsequent act, and position or status.

126. Therefore, we are disinclined to agree with the argument that merely for the reason that since the accused was not brought to justice under the Collaborators Order 1972 now he is immune from being prosecuted under the Act of 1973 and he has been prosecuted for malafide and for political purpose.

(v) Definition and Elements of Crime

127. The learned defence counsel has submitted for adopting his argument that he made in the case of *Abdul Quader Molla* wherein he had argued that the offences specified in section 3(2) are not well defined and the same lack of elements. Section 3(2) of the ICTA 1973 does not explicitly contain the 'widespread or systematic' element for constituting the crimes against humanity. In this regard this Tribunal may borrow the elements and definition of crimes as contained in the Rome Statute. It has been further argued that an 'attack' may be termed as 'systematic' or 'widespread' if it was in furtherance of policy and plan. But there has been no evidence to show that the alleged offences were perpetrated in furtherance of any plan or policy and the accused acted with intent to implement such policy and plan. Thus the offence, if actually happened, in absence of context, and policy or plan, cannot be characterized as crimes against humanity.

128. First the Tribunal reiterates its finding given in the case of *Abdul Quader Molla* that 'policy' and 'plan' are not the elements to constitute the offence of crimes against humanity. It is true that the common denominator of a 'systematic attack' is that it is carried out pursuant to a preconceived policy or

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

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

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

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

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

131. It is now settled that the expression *'committed against any civilian population'* is an expression which specifies that in the context of a crime against humanity the civilian population is the primary object of the attack.

The definition of 'Crimes against humanity' as contemplated in Article 5 of the ICTY Statute 1993 neither requires the presence of 'Widespread or Systematic Attack' nor the presence of 'knowledge' thereto as conditions for establishing the liability for 'Crimes against Humanity'. It is the jurisprudence developed in ICTY that identified the 'widespread' or 'systematic' requirement.

132. True, the Rome Statute (a prospective statute) definition differs from that of both ICTY and ICTR Statutes. But, the Rome Statute says, the definition etc. contained in the Statute is ***'for the purpose of the Statute'***. So, use of the phrase ***"for the purpose of the Statute"*** in **Article 10 of the Rome Statute** means that the drafters were not only aware of, but recognized that these definitions were not the final and definitive interpretations, and that there are others. Thus, our Tribunal (ICT-2) which is a domestic judicial body constituted under a legislation enacted by our Parliament is not obliged by the provisions contained in the Rome Statute. The Rome Statute is not binding upon this Tribunal for resolving the issue of elements requirement to characterize the offence of crimes against humanity.

133. If the specific offences of 'Crimes against Humanity' which were committed during 1971 are tried under 1973 Act, it is obvious that they were committed in the **'context'** of the 1971 war. This context itself is sufficient to prove the existence of a *'systematic attack'* on Bangladeshi self-determined population in 1971. It is the *'context'* that transforms an individual's act into a crime against humanity and the accused must be aware of this context in order to be culpable of crime alleged.

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

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

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

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

137. Section 22 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 rule 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. Reason of such provisions is to be perceived from the preamble of the Act of 1973 which speaks that the Act has been enacted to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law. Thus the crimes enumerated in section 3(2) of the Act of 1973 are the crimes committed in violation of customary international law and these are not isolated crimes punishable under the normal Penal law of the land.

138. Context, however, is significantly important. The term 'context' refers to the events, organizational structure of the group of para militia forces, policies that surround the alleged crimes perpetrated in 1971 during the war of liberation. Context prevailing in 1971 within the territory of Bangladesh will adequately illuminate as to whether it was probable to witness the atrocities as spectator.

139. The Tribunal notes that context of committing such crimes which are internationally recognised crimes and totality of its horrific profile naturally leaves little room for the people or civilians to witness the events of the criminal acts. Due to the nature of international crimes, their chaotic circumstances, and post-conflict instability, these crimes are usually not well-documented by post-conflict authorities.

140. It is to be noted that the testimony even of a single witness on a material fact does not, as a matter of law, require corroboration. The established jurisprudence is clear that corroboration is not a legal requirement for a finding to be made. "*Corroboration of evidence is not necessarily required and a Chamber may rely on a single witness' testimony as proof of a material fact. As such, a sole witness' testimony could suffice to justify a conviction if the Chamber is convinced beyond all reasonable doubt."* [**Nchamihigo,** (ICTR Trial Chamber), November 12, 2008, para. 14]. This view finds support also from the decision in the case of **Kordic and Cerkez**, wherein it has been observed that, "*The Appeals Chamber has consistently held that the corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to evidence"*. [**Kordic and Cerkez** ICTY Appeal Chamber December 17, 2004, para. 274]

141. Where a significant period of time has elapsed between the acts for which the accused has been charged, it may not always be reasonable to expect the witness to recall every detail with precision. In the case in hand, Prosecution depends mainly on testimony made by the witnesses before the Tribunal.

142. Apart from this reality, long-term memory can store a very large quantity of information and can maintain that information for very long periods of time. It holds many different kinds of information including: facts, events, motor and perceptual skills, knowledge of physical laws, spatial models of familiar environments, attitudes and beliefs about ourselves and others, etc. Research shows that human memory only records fragments of events as observed.

143. However. Onus squarely lies upon the prosecution to establish accused's presence, acts and conducts forming part of attack resulted in commission of the offences of crimes against humanity as enumerated in section 3(2) of the Act of 1973 for which he has been arraigned. Most of the prosecution witnesses have testified the acts, conducts of the accused claiming him as a potential leader of Al-Badar having significant influence and effective control over the camps set up at Suren Saha's house in Sherpur town and another one set up at Zilla Parishad Dak Bungalow, Mymensingh. Naturally considerable lapse of time may affect the ability of witnesses to recall facts they heard and experienced with sufficient 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.

144. It is to be noted too that an insignificant discrepancy does not tarnish witness's testimony in its entirety. Any such discrepancy 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**]**

145. The hearsay evidence is to be considered together with the circumstances and relevant material facts depicted. 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] . This view finds support 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]

146. Further, inconsequential inconsistency by itself does not taint the entire evidence made by witness before the Tribunal. This principle adopted in trial of crimes against humanity is compatible with the evolved jurisprudence as well as with the Act of 1973. It has been observed by the ICTY trial Chamber in the case of **Prosecutor v.Mico Staisic & Stojan Jupljan** that

> **"In its evaluation of the evidence, in assessing potential inconsistencies, the Trial Chamber took into account: the passage of time, the differences in questions put to the witnesses at different stages of investigations and in-court, and the traumatic situations in which many of the witnesses found themselves, not only during the events about which they testified, but also in many instances during their testimony before the Trial Chamber. Inconsequential inconsistencies did not lead the Trial Chamber**

to automatically reject evidence as unreliable."
[***Prosecutor v.Mico Staisic & Stojan Jupljan*** Case No. IT-08-91-T 27 March 2013]

147. It would be appropriate and jurisprudentially logical if, in the process of appraisal of evidence, we separate the grains of acceptable truth from the chaff of exaggerations and improbabilities which cannot be safely or prudently accepted and acted upon. It is sound commonsense to refuse to apply mechanically, in assessing the worth of necessarily imperfect human testimony, the maxim : ***"falsus in uno falsus in omnibus***.

148. Both sides concede that hearsay evidence is admissible in determining the material facts related to the principal event of crimes. But mere admission of hearsay evidence does not render it carrying probative value. Such hearsay evidence is to be weighed in context of its credibility, relevance and circumstances. Keeping this legal position the Tribunal will take advantage to weigh the probative value of hearsay evidence of witnesses made before the Tribunal in relation to charges framed against the accused.

XVIII. Relevant and Decisive Factual Aspect: Who was Accused Muhammad Kamaruzzaman in 1971

149. Who was Muhammad Kamaruzzaman? What he used to do and what was his political ideology, if any in 1971. Did he allegedly belong to Al-Badar force? Had he allegedly coordinated the activities of the Al-Badar camps at Sherpur and Mymensingh? Findings on these matters will be of significant relevance in adjudicating alleged culpability of the accused for the charges framed against him. Therefore, at the outset, let us arrive at decision on these aspects, on having discussion based on evidence and materials presented before us and on relevant sourced documents.

150. The accused Muhammad Kamaruzzaman has been indicted for his culpable conducts and acts forming part of attack committed against unarmed civilian population that resulted to the commission of principal offences of crimes against humanity in 1971. Prosecution alleges that the accused so acted as a leader of Al-Badar of greater Mymensingh and he was actively involved

with the politics of Islami Chatra Sangha [ICS], the student wing of Jamat E Islami [JEI] and had played active role in forming Al-Badar force in greater Mymensingh, as the chief organiser.

151. Defence, contesting the above allegation, avers that the accused had been at their native village during the entire period of war of liberation in 1971 and he had no affiliation with politics. Defence, in support of the plea of *alibi* and defence case has examined in all 05 witnesses. Reasonableness of the plea of *alibi* and the defence case may be well resolved later on, on evaluating evidence adduced by the defence.

152. It is to be noted, at the out set, that it is quite insignificant to consider what now the accused is or to what political party he belongs and what his present position in any political party is. The accused has been prosecuted and tried for the alleged atrocities committed during the war of liberation in 1971. At that time he was 20 years old. Since the prosecution is squarely obliged to prove what it contends on material facts indispensable for adjudication of alleged culpability of the accused, the Tribunal deems it expedient to resolve the contention as to accused's alleged affiliation with Al-Badar and Islami Chatra Sangha first, in this segment of judgment. Before we discuss evidence adduced in relation to charges and pen our finding it is thus obvious to resolve first who was Muhammad Kamaruzzaman in 1971 and whether he acted forming part of attack in the capacity of an 'individual' or a member of Al-Badar force or a leader or chief organiser of Al-Badar force in greater Mymensingh, as alleged by the prosecution.

153. It appears from evidence of P.W.s that some of them stated that accused Muhammad Kamaruzzaman was a 'leader' or 'big leader' of Al-Badar, some stated that he was 'commander' of Al-Badar and some stated that he was organiser of Al-Badar in greater Mymensingh. The witnesses also stated that the accused was a leader of Islami Chatra Sangha [ICS]. Unimpeached testimony of P.W.2 who had worked as a guard being appointed by the accused at the Al-Badar camp at Suren Saha's house in Sherpur town demonstrates that Kamaruzzaman [accused] was a 'high flyer' who used to accompany Majors [of the Pakistani army]and if he wanted to, he could have turned Sherpur upside down. Despite affirmative indication depicted from oral

evidence of P.W.s, the issue in question may be fairly revealed predominantly from relevant documentary evidence and source authoritative old reports.

154. Exhibit-6, the attested photocopy of a report published on 16 August 1971 in The Daily Sangram [known as the mouthpiece of Jamat E Islami] shows that accused Muhammad Kamaruzzaman presided over the symposium held on the eve of 25th independence day [of Pakistan] at the local Muslim Institute, Mymensingh, in the capacity of the 'chief organiser of Al-Badar force'.

155. Provision of section 19(1) of the Act of 1973 empowers the Tribunal to admit such report published in news papers, if it deems to have probative value. Defence could not refute the credibility of this report in any manner. Besides, it is reasonably undisputed and believed that The Daily Sangram from the date of publication of the said report during the war of liberation until today has been a 'party journal', an organ of Jamat E Islami [JEI].Consequently, the report carries significant probative value and the Tribunal can act on it safely in arriving at decision that the accused Muhammad Kamaruzzaman was the 'chief organiser' of Al-Badar of greater Mymensingh.

156. Additionally, the above report [**Exhibit-6**] finds corroboration from **Material Exhibit-V**, the book titled **'Bangladesher Swadhinota: Judhdher Arale Judhdha'**, by *Professor Abu Sayeed*, published in March 1999 by Annyaprokash *[evsjv‡`‡ki ¯'vaxbZv hy×i Avov‡j hy×, Aa¨vcK AveymvBwq`, Ab¨cKvk, cKvkKvj gvP 1999].* In addition to numerous events, information and brief history that the writer attempted to narrate in this book, information has been narrated at page 162 in relation to name of 20 leaders of Al-Badar high command and the name of accused Muhammad Kamaruzzaman which finds place in serial number 5 as the 'chief organiser of Al-Badar Bahini'. The authority of the writer of the book cannot be attacked as he had, indisputably, full acquaintance with the history of our war of liberation.

157. Material Exhibit-I , the book titled '**Ekattorer Ghatok O Dalalra Ke Kothai (GKvËi NvZK I `vjvjiv †K †Kv_vq);** 1989 publication, Publisher:

Muktijudhdha Chetona Bikash Kendra, Dhaka [book's relevant page 111-112: Prosecution Documents Volume-1] demonstrates that the accused Muhammad Kamaruzzaman, the then chief of Mymensingh district Islami Chatra Sangha [ICS] directed the organising activities in forming Al-Badar bahini with the workers of Mymensingh district Islami Chatra Sangha[ICS] and in providing them armed training. Page 190 of this book contains the information that accused Muhammad Kamaruzzaman was the chief organiser of Al-Badar Bahini. **Material Exhibit-I** is an edited work and it carries authoritative value. Thus the information narrated therein offers corroboration to **Exhibit-6**. As corroborative evidence we do not find any rationale to exclude the reliability of **Exhibit-6** and **Material Exhibit-I**.

158. The averment that the Al-Badar force was formed with the workers belonging to Islami Chatra Sangha [ICS] finds support from the information narrated in the book titled **'Sunset at Midday'** written by *Mohi Uddin Chowdhury* , a leader of Peace committee , Noakhali district in 1971 who left Bangladesh for Pakistan[currently has been working in the university Karachi as Head of Department of Bengali] in May 1972 (Publisher's note): Qirtas Publications, 1998, Karachi, Pakistan] offers further corroboration to the information contained in **Material Exhibit-III**. The paragraph at page two at page 97 of the book [Prosecution documents volume 8] speaks that

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

159. The report titled **Òcv‡`wkK Qv Î ms‡Ni Ri¨i¨v mfv**Ó published on 10 November 1971 in **The Daily Ittefaq** that in a meeting of provincial executive council of Islami Chatra Sangha [ICS] presided by its President Ali Ahsan Mohammad Mujahid new working council was formed which included Muhammad Kamaruzzaman [accused] as its 'Office Secretary'. [**Source:** *Sangbadpatre Muktijuddher Birodhita: Ekattorer Ghatakder Jaban Julum Sharajantra*, Edited by Dulal Chandra Biswas: Bangladesh Press Institute: March 2013 Page 418]. It provides corroboration to the **Material Exhibits-I & V**. Therefore, it stands proved beyond doubt that the accused was a potential leader of Islami Chatra Sangha, Mymensingh district who on 10th November 1971 was given the post of 'office secretary' of provincial executive council of Islami Chatra Sangha [ICS].

160. More so, **Exhibit-12**, the attested photocopy of list of collaborators dated 12.2.1972 vide memo no. 18-72(1).608-Or communicated by the Police Directorate, Dacca under the signature of Assistant Inspector general of Police to the Ministry of Home Affairs, Government of Bangladesh demonstrates that accused Muhammad Kamaruzzaman [serial no.287 of the list] was arrested on 29.12.1971 as Al-Badar and detained in Dacca central Jail. The fact of arrest of the accused at the relevant time is however admitted by the D.W.4, the elder brother of the accused. Additionally, the report, with reference to a government hand out, published in **The Daily Azad** on 31.12.1971 [**Exhibit-4**], **The Daily Purbadesh** on 31.12.1971 [**Exhibit-14],** The daily 'Dainik Bangla' on 31.12.191 go to prove that the accused Muhammad Kamaruzzaman who was arrested was Al-Badar of greater Mymensingh.

161. The above proved material fact together with the facts as already proved from above documentary evidence unerringly lead us to pen the finding that the accused Muhammad Kamaruzzaman was in a potential position of the student wing [ICS] of Jamat E Islami and the fact that he was the 'chief organiser' of Al-Badar in greater Mymensingh and he actively coordinated its formation including providing armed training to members of Al-Badar. Those documents tendered and exhibited by the prosecution are authoritative and old in trait as well. Defence could not negate its probative value, in any way.

XIX. Adjudication of charges

162. It is to be noted first that prosecution witnesses have testified what they had experienced and heard about the events of crimes as listed in the charges framed including relevant facts. Defence cross-examined them with a view to shake their version as well as to stain their credibility. But with regard to the factual findings, the Tribunal is required only to make findings of those facts which are indispensable to the determination of guilt on a particular charge.

163. The Tribunal, according to recognised jurisprudence, is in no way obliged to pass on every phrase pronounced by a witness during his testimony but may, where it deems appropriate, stress the core parts of the testimony relied upon in holding up of a finding. Keeping it in mind we prefer to adjudicate the charges through providing 'reasoned opinion' on meticulous appraisal of the facts in question by referring the relevant and pertinent piece of evidence.

164. In support of factual aspects relating to all charges framed, both sides have advanced their argument on related legal issues by citing decisions together with drawing attention to the evidence of prosecution witnesses.

Legal Argument on Hearsay Evidence, Complicity, Inconsistencies, Mens Rea: By the Defence

165. Attacking the credibility and relevance of hearsay evidence of P.W.s on material facts, particularly in relation to charge no.2 the learned defence counsel Mr. Abdur Razzak has contended that according to jurisprudence evolved in *adhoc* tribunals [ICTY, ICTR] and ICC hearsay evidence is not inadmissible *per se*, but it needs to be corroborated by 'other evidence'. Prosecution relies chiefly upon hearsay evidence and there has been no corroborative evidence. As a result, hearsay statement of P.W.s on material facts deserves to be excluded. It has been further submitted that hearsay evidence may be taken into account only if it satisfies the test of relevance, credibility and probative value. In support of this contention a decision of ICTR Trial Chamber has been cited [**The Prosecutor v. Kajelijeli** : Case No. ICTR-98-44A-T, Judgment 1 December 2003, para 45].

166. Besides, citing decisions the learned senior counsel went on to submit further that hearsay evidence has limited probative value standing alone [**The Prosecutor v. Bagosora & three others** : ICTR Trial Chamber: Case No. ICTR-98-41-T: decision on admissibility of evidence of witness DP 18 November 2003, para 8]. If a witness could only state an accused was involved in a crime because this witness had heard about it, that does not result certainty about the conduct of an accused. [**The Prosecutor v. Joni Marques & 9 others**, East Timorese Transitional Administration Dili District Court, Special Panel For Serious Crimes Case No. 09/2000, Judgment 11 December 2001, para 677].

167. Thus the hearsay statement relating to alleged involvement of the accused with the act of abducting the victim Badiuzzaman does not offer certainty about the alleged fact that he accompanied the armed group. Probative value of hearsay evidence is to be determined in light of other evidence [ICC Pre Trial Chamber I : [***The Prosecutor v. Thomas Lubanga :*** Case No. ICC-01/04-01/06 : decision on the conformation of charges, 29 January 2007, para 106].

168. The matter of weighing hearsay evidence depends as to what extent the question of hearsay evidence is clarified by other evidence and it is proved to be reliable In this regard, the decision in the case of ***Limaj*** it has been observed that " whether any weight, and if so, what weight will attach to[hearsay opinion] will depend to what extent the question of hearsay is clarified by other evidence and it is shown to be reliable [Archbold International criminal Courts: page 751 : 9-104: HEARSAY].

169. As regards anonymous hearsay evidence the learned senior counsel has submitted that it is not correct to say that anonymous hearsay evidence is reliable even without corroboration, as argued by the learned prosecutor Ms. Tureen Afroz. Decision on the confirmation of charges in the case of The ***Prosecutor v. Germain Katanga & one other*** [Case No. ICC-01/04-01/07, 30 September 2008] the Pre-trial Chamber of the ICC has observed in paragraph 140 as below:

> **"Thus, in coming to its conclusions, the Chamber will not rely solely on anonymous hearsay evidence. However, the Chamber does hold that information based on anonymous hearsay evidence may still be probative to the extent that is (i) corroborates other evidence in the record, or (ii) is corroborated by other evidence in the record."**

Reply to Legal Arguments on Hearsay Evidence: By the Prosecution

170. Ms. Tureen Aforz, the learned prosecutor by citing the case of **Tadic** [decision on the motion on hearsay, August 5, 1996] and **Kajelijel** [ICTR Trial Chamber December 1, 2003, para 45] has argued that according to settled jurisprudence of International Law 'hearsay evidence' is not inadmissible *per se*, even when it is not corroborated by direct evidence. The Tribunal can safely act on 'anonymous hearsay' evidence without any corroboration. In support of this submission the learned prosecutor has cited the case of **Lubanga** [Lubanga (ICC Pre-Trial Chamber) January 29, 2007, para 106].

171. It has been further submitted that in the instant case the accused is being tried long four decades after the atrocities were committed. Naturally direct witness may not be available. Thus even anonymous hearsay evidence alone may be relied upon to prove a material fact, considering the reality and context prevailing in 1971. This view finds support from a recent decision given in the case of **Ruto** of the ICC [Ruto (ICC Pre-trial Chamber, January 23, 2012, paras 126-130, 148-150, 187-191 & 194-195] .

Prosecution's Argument on 'Old evidence doctrine'

172. Ms. Tureen Afroz, the learned Prosecutor reinforcing submission on 'old evidence doctrine', in reply to argument advanced by the defence , on the issue of 'inconsistencies'[inter and intra] occurred in testimony of witnesses examined by the prosecution, has submitted that perfect precision in testimony rather makes it suspicious and inconsistencies may naturally occur in recollecting and articulating of traumatic horrific event, particularly 40 years

after the events took place. Despite such immaterial inconsistencies the Tribunal has discretion to accept the testimony, if it is found to be reliable. Besides, merely for the reason of inconsistency on a particular fact does not impair the entire testimony. In support of this contention the learned Prosecutor Ms. Tureen Aforz drew attention to the observation made by the ICTR Trial Chamber in the case of ***Nyiramasuhuko*** which is as below

> **"The Trial Chamber enjoys broad discretion in choosing which witness testimony to prefer, and in assessing the impact on witness credibility of inconsistencies within or between witnesses' testimonies and any prior statements. Minor inconsistencies commonly occur in witness testimony without rendering the testimony unreliable, and it is within the Chamber's discretion to evaluate such inconsistencies and to consider whether the evidence as a whole is credible. It is not unreasonable for the Chamber to accept some, but reject other parts of a witness' testimony." [** ***Nyiramasuhuko, ICTR Trial Chamber, 24 June 2011, para 167]***

173. It has been further submitted by drawing attention to **paragraph 179** of the judgment in the case of ***Nyiramasuhuko*** [cited above] that for the reason of lapse of long passage of time witness may not be able recall every detail with precision and to perfectly corroborate to other witness. The relevant paragraph cited reads as: "Moreover, where a significant period of time has elapsed between the acts charged in the indictments and the trial, it is not always reasonable to expect the witness to recall every detail with precision."

Deliberations on Hearsay Evidence

174. The essence of submission advanced by the learned defence counsel thus stands that it is conceded that hearsay evidence is admissible but it must be corroborated by 'other evidence'- direct or circumstantial. Whereas, as argued by the prosecution, corroboration is not a legal requirement if hearsay evidence is found to have carried probative value.

175. The Tribunal, in view of above submissions backed by decisions cited, notes that probative value of hearsay evidence is to be weighed in light of context and circumstances related to material facts depicted from evidence led by the prosecution. Hearsay evidence thus can be relied upon to prove the truth of its contents, and the fact that merely the 'hearsay character' does not necessarily deprive the evidence of its probative value.

176. Reliability of the source of hearsay evidence is to be assessed on a case by case basis taking onto account factors such as the consistency of the information itself and its consistency with the evidence as a whole, the reliability of the source and the possibility for the defence to challenge the source [Pre-trial Chamber of the ICC: decision on the confirmation of charges in the case of ***Prosecutor v. Germain Katanga & one other***, Case No. ICC-01/04-01/07, 30 September 2008].

177. It is also the reality that where a significant period of time has elapsed between the acts for which the accused has been charged, it is not always reasonable to expect the witness to recall every detail with precision. In the case in hand, Prosecution depends mainly on testimony made by the witnesses before the Tribunal, in addition to documentary evidence submitted.

178. Apart from this reality long-term memory can store a very large quantity of information and can maintain that information for very long periods of time. It holds many different kinds of information including: facts, events, motor and perceptual skills, knowledge of physical laws, spatial models of familiar environments, attitudes and beliefs about ourselves and others, etc. Research shows that human memory only records fragments of events as observed. We are to move towards adjudication of the charges framed, keeping all these aspects in mind.

179. Context, however, is another pertinent factor. The term 'context' refers to the events, organizational structure of the group of *para militia forces*, policies that surround the alleged crimes perpetrated in 1971 during the war of liberation. Context prevailing in 1971 within the territory of Bangladesh

adequately illuminates as to whether it was probable to witness the atrocities as spectator. The Tribunal notes that context of committing such crimes which are internationally recognised crimes and totality of its horrific profile naturally left little room for the people or civilians to witness the events of the criminal acts.

180. Due to the nature of international crimes, their chaotic circumstances, and post-conflict instability, these crimes are usually not well-documented by post-conflict authorities. Determination of relevance, and probative value of hearsay evidence depends in certain circumstances and the task is to be done on case by case basis. However, keeping these basic factors the tribunal shall be making effort in penning its finding, while adjudicating the charges independently.

Adjudication of Charge No. 01

[Badiuzzaman killing]

181. Summary charge: During the period of War of Liberation in 1971, on 29 June 1971 at about 11:00 pm the accused Muhammad Kamaruzzaman, being chief organiser of Al-Badar Bahini as well as leader of Islami Chatra Sangha or member of group of individuals led a group of members of Al-Badar Bahini, apprehending and abducting a civilian one Badiuzzaman son of Md. Fazlul Haque from the house of one Ahammad Member of village Ramnagar under Jhenigati Police Station, district Sherpur with common intention, brought him to Ahammednagar army camp wherein he was tortured through out whole night and on the following day he was gunned down to death on the street and then his dead body was thrown to water beneath an wooden bridge. Therefore, the accused Muhammad Kamaruzzaman has been charged for joining and substantially facilitating and contributing to the commission of offences of 'murder, torture and other inhuman act as crimes against humanity' caused to unarmed civilian, or in the alternative for 'complicity to commit such crimes' as specified in section 3(2)(a)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

182. This charge (charge no.1) relates to the killing of Badiuzzaman. Prosecution, to prove the charge, has adduced and examined two witnesses. Of them P.W.4 is Fakir Abdul Mannan and P.W.6 is Md. Hasanuzzaman. Both of them are hearsay witnesses. P.W.6 Md. Hasanuzzaman is the brother of victim Badiuzzaman. Admittedly, hearsay evidence is not inadmissible *per se*. The atrocities including murder, killing, torture etc were committed in the context of war of liberation in 1971 and thus naturally live witness (eye) may not always be available, particularly for the reason of lapse of passage of time. Therefore, we are to act upon hearsay evidence weighing its probative value together with other relevant facts and circumstances. Now let us see what the witnesses have testified before the Tribunal.

Evidence

183. P.W.4 Fakir Abdul Mannan (62) who was the general secretary of Sherpur College students' union, as nominated by the Chatra League in 1971 is a hearsay witness relating to the event of killing Badiuzzaman.

184. In addition to the fact of his learning the event P.W.4 deposed why and how he went to India in 1971. He stated that on 26 March 1971 he moved to India for communicating a wireless message of Bangabandhu Sheikh Mujibur Rahman to Indian authority as entrusted by the local Awami League leaders and afterwards he returned back and received training together with students, mass people and EPR and had struggled the Pakistani army. But at the end of April they moved back to India where he started working as a political mobilizer at the '*Chenga Para'* youth camp. After the victory was achieved on 16 December 1971 he returned back to home. Defence could not impeach this statement, by cross-examining him.

185. The above unshaken version proves the fact that since the end of April 1971 to 16 December 1971 he had been in India and naturally he had no occasion to witness or learn the event of Killing Badiuzzaman during that period. Next, P.W.4 testified how he became aware of the event of killing Badiuzzaman as listed in charge no.1.

186. In narrating how and when he heard the event of Badiuzzaman killing, P.W.4 stated that the local Awami League leaders in Sherpur were preparing a list about the casualty and damages caused to people in the war of liberation. The affected people were providing information coming at the local Awami League offices. One day, he was present there during the time of providing information while one Sayedur Rahman of Ahmmednagar village was giving information. Sayedur Rahman had told that one of his relatives, Badiuzzaman [victim], who worked in the Pakistan army, had taken shelter in their house, as he could not leave for India. But Ahmed Ali Member, another of his [Syedur Rahman] relatives, was an anti-liberation activist. One night, some members of Al-Badar Bahini and Pakistani army took him [Badiuzzaman] to the Ahmmednagar camp and tortured him to death, stated the P.W.4 quoting Sayedur Rahman.

187. P.W.4 added, when local AL leaders asked Sayedur Rahman whether he had witnessed the incident, he replied that he had learnt it from his brother Makbul Hossain, who witnessed the incident. Later on, according to P.W.4, when he asked Makbul Hossain about the incident, he told him that it was a true event. Makbul Hossain also disclosed that Al-Badar members and Pakistan army had also attempted to pull him out but he managed to flee on the way to the Ahmmednagar camp. Defence could not be able to shake this version.

188. P.W.4 further stated that on his asking Makbul Hossain had told that he could recognise Kamaruzzaman [accused] who used to live in Sherpur, adding that there was enormous tittle-tattle in Sherpur that the present assistant secretary general of Jamat E Islami Kamaruzzaman [accused] was the person whom he has mentioned in his testimony. On cross-examination, P.W.4 has re-affirmed that since 1972 there had been an anecdote that Kamaruzzaman [accused] was a commander of Al-Badar.

189. From the above testimony of P.W.4 we have found that P.W.4 heard the event of taking Badiuzzaman away by the Al-Badar members and Pakistani army from the house of Sayedur Rahman as narrated in the charge no.1 not only from Sayedur Rahman but also from Makbul Hossain who in fact had

occasion to see the act of apprehending the victim Badiuzzaman. This Makbul Hossain was the source of learning the act of abducting the victim by the P.W.4 and Makbul Hossain had fair occasion to witness that the gang was led by accused Kamaruzzaman. It remains unshaken.

190. P.W.6 Md. Hasanuzzaman (65) is the brother of victim Badiuzzaman. He is a doctor by profession and was a first-year student of Dhaka Dental College in 1971 and used to live at the medical college hostel at Bakshibazar, Dhaka. He has testified how and who took away his brother. He chiefly stated that Muhammad Kamaruzzaman and his accomplices had abducted his brother who was tortured at a military camp in Sherpur and was later shot dead on June 30, 1971.

191. In narrating the relevant facts including the fact of apprehending his brother and taking him away to Ahmmednagar army camp P.W.6 stated that his brother Badiuzzaman worked in Pakistan navy and was posted in Karachi before the war. He came home on a month's leave at the end of February 1971. The Ahmmednagar camp was nearer to his in-laws' house and thus on 29 June in evening his brother Badiuzzaman came there to observe the army camp.

192. P.W.6 next stated that approximately at 11:00 of that night, a group of 10-11 armed men came to his father-in-law's house and asked the residents for food, presenting themselves as freedom fighters and with this his brother opened the door and his uncle-in-law Makbul Hossain gave them puffed rice. Afterwards, his (P.W.6) another uncle-in-law Sayedur Rahman and brother-in-law Jamshed Ali came with a hurricane and Sayedur Rahman saw that they were not freedom fighters and there was Al-Badar leader Kamaruzzaman in the group. Sayedur and Jamshed tried to bring Badiuzzaman away from the group, but Kamaruzzaman asked his brother to point out the army camp at Ahmmednagar and then his brother accompanying the group started moving towards the Ahammednagar camp. When the group left the place, Makbul Hossain found a loaded magazine there and followed the group to give it back and he was also forced to go with them. But Makbul, sensing motives of the gang pretended to answer a call of nature and thus managed to escape by hiding in a nearby jute field.

193. The fact of taking Badiuzzaman to Ahmmednagar army camp by adopting tricky mechanism from the house of father-in-law of P.W.6, as revealed from above hearsay testimony of P.W.4, remains unshaken and defence could not dislodge it in any manner.

194. P.W.6 further stated that the gang brought his brother [victim] to the camp wherein he was tortured throughout the night and afterwards was shot to death on the Sherpur-Jhenigati highway the next morning. The labourers who were forced to work at the camp had seen injury marks on his brother's body and a severed ear and they while working beside the highway had also witnessed the event of killing Badiuzzaman, he added.

195. In examination-in-chief P.W.6 stated that after liberation he visited his in-laws' place while he had talk with Makbul Hossain, Syedur Rahman and Jamshed. On cross-examination, P.W.6 has stated, in reply to question put to him, that after the event, Jamshed Ali came to his house and informing the event of his brother's killing had told that Sayedur Rahman told Jamshed that Al-Badar commander Kamaruzzaman [accused] accompanied by his group had brought Badiuzzaman to army camp apprehending him from his [P.W.6[in-laws' house.

196. P.W.6, on cross-examination, has re-affirmed that Jamshed came to his house after the killing of Badiuzzaman and informed him that his uncle-in-law Syedur Rahman had told him that the gang led by Al-Badar commandeer Kamaruzzaman [accused] brought Badiuzzaman to the camp of Pakistani army and on 30 June 1971 he was killed. P.W.6 has also re-affirmed that he learnt that Kamaruzzaman was the leader of Al-Badar camp set up at Suren Saha's house and used to carry out his atrocious activities there from.

197. P.W.6 stated that after the war of liberation, he talked with Sayedur Rahman, Makbul Hossain and Jamshed Ali as well as the labourers who had seen his brother's murder. His uncle-in-law Sayedur Rahman clearly told him that he had recognised Kamaruzzaman [at the time of abducting Badiuzzaman].Upon their information, he filed a case against 11 people,

including Al-Badar leader Kamaruzzaman [accused] and some days after the filing of the case the family had sought information about the case but later did not follow it up. P.W.6, in reply to question elicited to him by the defence stated that he lodged a case accusing 11 persons including Kamaruzzaman [accused].

198. In reply to question elicited by the defence , in cross-examination, P.W.6 has affirmed a material fact that he heard from Syedur Rahman and others that Kamaruzzaman[accused], during war of liberation, used to make anti liberation campaign by moving on Pakistani army's jeep and also used to visit army camps.

Deliberations

199. The learned prosecutor submitted that for the reason of context prevailing in 1971 war of liberation and horrific nature of crimes committed during that time eye witnesses may not be available, particularly for the reason of lapse of long passage of time and for the same reason mere inconsistencies occurred in P.W.s' testimony deserve to be viewed realistically taking the context into account. Defence duly cross-examined the P.W.4 and P.W.6 to challenge their heresy testimony on source of their learning, the material facts about the alleged conduct of the accused. Has the defence been able to impeach what the P.W.4 and P.W.6 had heard from Syedur Rahman and Jamshed? If the answer is no, their hearsay evidence on material facts, despite insignificant inconsistencies deserves to be relied upon.

200. On Contrary, Mr. Abdur Razzak, the learned senior counsel for the defence has mainly contended that the charge no.1 is based on hearsay evidence of P.W.4 and P.W.6. But their statement made before the Tribunal suffer from major inconsistencies. The charge framed alleges that the accused Muhammad Kamaruzzaman led the armed group in taking Badiuzzaman away to the Ahammadnagar army camp. But the witnesses made inconsistent statement relating to mode of abduction of the victim Badiuzzaman and also to the alleged fact of seeing Muhammad Kamaruzzaman with the armed men at the house of Syedur Rahman. Their hearsay evidence remains uncorroborated by other evidence and as such the same carries no probative value.

201. The learned defence counsel has further submitted that the 'burden of proof' and 'standard of proof' for the prosecution remains the same even after 40 years of the commission of crimes. Citing from the statements of P.W. Hasanuzzaman and P.W. Mannan they had given to the investigation officer of the case, their testimonies, in many cases, contradicts with their statements made before the Tribunal and as such their testimonies are totally unreliable. Citing decisions from the different *adhoc* tribunals and ICC, the learned counsel argued that 'corroboration', either by direct, or circumstantial evidence is a must for hearsay evidence. But on March 31, prosecutor Tureen Afroz, citing instances from different war crimes cases, incorrectly submitted that the "settled jurisprudence" of international law is that hearsay evidence is admissible, without corroboration.

202. However, on query, the learned senior defence counsel conceded that the fact of abducting Badiuzzaman from the place narrated in the charge to the army camp and later on he was killed is not disputed.

203. We have carefully perused the citations as placed by the learned senior defence counsel, on the issue of admissibility and probative value of 'hearsay evidence'. The Tribunal, in view of above submissions backed by decisions cited, notes that relevance and probative value of hearsay evidence is to be weighed in light of context and circumstances related to material facts depicted from evidence led by the prosecution. In a case like present one, hearsay evidence thus can be relied upon to prove the truth of its contents, and the fact that it is hearsay does not necessarily deprive the evidence of its probative value.

204. Defence got due opportunity to shake credibility of P.W.s. In the case in hand, defence duly cross-examined the P.W.4 and P.W.6 to challenge their heresy testimony on the source of their learning the material facts about the alleged conduct [leading the armed group of Al-Badars] of the accused. Has the defence been able to impeach what the P.W.4 and P.W.6 had heard from Syedur Rahman and Jamshed?

205. P.W.6 is the brother of the victim Badiuzzaman. In examination-in-chief he stated that After the war of liberation he visited his in-laws' house and had talk with his family Sayedur Rahman and Jamshed[husband of P.W.6's wife's sister] while Syedur Rahman told that he could recognize Al-Badar leader Kamaruzzaman[at the time of alleged event]

206. It appears that in reply to question put to him, in cross-examination, P.W.6 has stated that during the war of liberation Jamshed [husband of P.W.6's wife's sister] came to his [P.W.6] house and had told his [P.W.6] paternal father-in-law that Al-Badar commander Kamaruzzaman [accused] and his gang apprehended and brought Badiuzzaman to the army camp.

207. On appraisal, it is depicted that P.W.6 first had opportunity to know the event after it took place from Jamshed [husband of P.W.6's wife's sister] and next, as revealed on cross-examination, he further knew the event from Syedur Rahman when he [Syedur Rahman] and Jamshed visited their [P.W.6] place. The learned defence Colunsel has argued that P.W.6's above version is contradictory and as such cannot be relied upon.

208. We disagree. Purpose of cross-examining prosecution witness is to shake and deny what he or she states during examination by the prosecution. But what we see in the case in hand? First, the version made in examination-in-chief relating to what P.W.6 heard and from what source could not be impeached. Second, the version as made on cross-examination is in reply to question elicited to him by the defence and in this way the fact of learning the event of abducting Badiuzzaman by a gang led by accused Muhammad Kamaruzzaman stands re-affirmed. Third, P.W.6 is the brother of the deceased victim and his source of knowledge about the alleged event are his close relatives only who had a ready occasion to see and know the event of taking Badiuzzaman away from his [P.W,6] in-laws' house to Ahammednagar army camp.

209. It is patent from the evidence of P. W.4 and P.W.6 that they do not claim to have witnessed the event of alleged murder. They have testified what they had heard about the fact of taking the victim to the Ahmmednagar army camp

by the gang of Al-Badar members led by accused Muhammad Kamaruzzaman. This fact alone is sufficient for concluding the criminal responsibility of the accused Muhammad Kamaruzzaman. The Tribunal emphatically notes that any immaterial discrepancies could be due to the fallibility of perception and memory and the operation of the passage of time.

210. According to the settled jurisprudence inaccuracies and contradictions between the statement made to the Investigation officer and the testimony given before the Tribunal are also the result of the time lapse between the two. Memory overtime naturally degenerates, hence it would be wrong and unjust to treat forgetfulness as being synonymous with giving false testimony. Besides, it would be only an omission presumably due to his not being questioned on the point by the IO and as such that cannot be of any help to the defence to suggest that the witness was making intelligent improvements.

211. Individual criminal responsibility of accused may be well demonstrated and ascribed into the context of international crimes on the basis of knowledge of those who deliver evidence and who hear it. Apart from the settled jurisprudence the International Crimes (Tribunals) Act 1973 provides that hearsay evidence is admissible if it is found to have probative value. Taking the reality and other circumstances the Tribunal is to weigh the probative value of such 'hearsay evidence'. In assessing the probative value 'reliability' is to be weighed.

212. It is now settled international jurisprudence that the hearsay evidence is not inadmissible per se, even when it is not corroborated by direct evidence. However, the hearsay evidence is to be considered with caution and when relied upon, such evidence has, as all other evidence, been subject to the tests of *relevance, reliability* and *probative value*. This view has been laid down by the ICTR Trial Chamber [**Prosecutor v. Bagilishema**, Case No. ICTR-95-1A-T, Judgment 7 June 2001].

213. In the case in hand, statement made by the P.W.6 seems to be materially relevant to the fact of commission of the principal offence. Conduct or act of accompanying the armed group of Al-Badars is considered to be a constituent

of the 'attack' which was directed against a civilian that resulted in the commission of his murder. Defence by cross-examining the P.W.6 could not shake his credibility. Rather the statement made by him in examination-in-chief, on material facts, remained unshaken and has been re-affirmed too.

214. P.W.4 and P.W.6 described what they heard about the fact of abducting Badiuzzaman by the armed group of Al-Badars led by accused Muhammad Kamaruzzaman. We are not agreed that the narration they made in court what they heard on similar material and relevant fact suffer from any material inconsistencies, as argued by the learned defence counsel. The Tribunal notes that the testimony of the two witnesses, on similar marital fact, in no way contradictory, and the inconsistencies in their hearsay statement deserves to be characterized as 'additional consistent information'. Besides, corroboration of hearsay evidence is not a legal requirement, but rather concerns the weight to be attached.

215. It is already proved that accused was a potential leader of Al-Badar of greater Mymensingh. Badiuzzaman was abducted by armed group of Al-Badars and was brought to army camp at Ahammadnagar and afterwards he was killed. First it is validly inferred that intention of abducting the victim was to cause his death. Secondly, the act of abduction was naturally within conscious knowledge of the group of Al-Badars led by the accused and was committed in furtherance of common design of the group. Therefore, the hearsay statement of P.W.s on the material fact of abducting the victim by the armed group of Al-Badars led by accused from the place and in the manner inspires sufficient credence as it gets reasonable corroboration from circumstances and other relevant facts proved together with the context.

216. Thus, we are not ready to accept the argument that hearsay evidence of P.W.4 and P.W.6 are liable to be excluded straightway. In this regard we recall the observation given in the case of **Nahimana, Barayagwiza and Ngeze**, (Appeals Chamber: ICTR), November 28, 2007, para. 194 which is as below:

> **"The Appeals Chamber recalls that statements made by witnesses in court are presumed to be credible at the time they are made; the fact that the statements are taken under oath and that witnesses can be cross-examined constitute at that stage satisfactory indicia of reliability."**

217. The evidence as discussed above does not demonstrate that the accused Muhammad Kamaruzzaman himself perpetrated the actual commission of the offence of murder constituting the offence of crimes against humanity. The charge framed also does not allege it. However, it is now well settled that there can be several perpetrators in relation to the same crime where the conduct of each one of them fulfils the requisite elements of the definition of the substantive offence. That is to say, the offence of crimes against humanity is often the cumulative outcome of conducts and acts of individuals.

218. In the case in hand , the event of principal crime as listed in charge no.1 encompasses the act of abducting the victim Badiuzzaman to Ahmmednagar army camp and the fact of his killing on the following morning. The accused cannot be relieved from culpability even if he is not found to have physically participated to the actual perpetration of the offence of murder of Badiuzzaman.

219. The unimpeached fact depicted from hearsay evidence of P.W.6 demonstrates that the gang led by accused Muhammad Kamaruzzaman, by adopting tricky mechanism, abducted the victim Badiuzzaman to Ahmmednagar camp. Indisputably such criminal act was carried out in furtherance of plan as part of systematic attack directed against a civilian and the reason of targeting Badiuzzaman was that he was a pro-liberation Bangalee civilian who had been working in the Naval force and was on leave at the relevant time. The act of 'accompanying' and 'leading' the gang who abducted Badiuzzaman is sufficient to infer accused's complicity with the offence of his abduction followed by his murder. The hearsay evidence of P.W.6 relating to these facts carries weight as he has stated the source of his learning the facts he narrated. His statement made before the Tribunal cannot be branded as anonymous.

220. It appears that P.W.6 does not claim to have heard that accused Muhammad Kamaruzzaman had physically participated to the actual commission of torture and killing. Rather it is found that the Ahammednagar army camp had accomplished the perpetration of torture and killing of Badiuzzaman which was witnessed by the labourers who were forced to work at the camp. The killing took place within couple of hours the gang led by accused Muhammad Kamaruzzaman abducted Badiuzzaman and brought him to the army camp. This chain of facts constituting the principal offence of murder remains unimpeached. And the act of the accused leading the gang of Al-Badars in abducting the victim to the camp is a 'link' constituting the 'chain'.

221. We have found from evidence of P.W.6 that his brother was brought to the army camp by the gang of Al-Badar led by accused Muhammad Kamaruzzaman and on the following morning, the labourers who were forced to work at the camp had seen injury marks on his brother's body and a severed ear and they working beside the Sherpur-Jhenigati highway had also witnessed the event of killing Badiuzzaman. Defence does not appear to have been able to controvert this version. We do not find any earthly reason to exclude this piece of evidence.

222. The Tribunal notes that P.W.6, in reply to question elicited to him by the defence stated that he lodged a case accusing 11 persons including Kamaruzzaman. Lodging case immediately after the war of liberation gives further sturdy impression as to involvement of accused Kamaruzzaman who by his act of accompanying and leading the gang of Al-Badar members in abducting the victim Badiuzzaman substantially contributed to the commission of the principal offence of murder of Badiuzzaman on the following morning.

223. The Tribunal notes that P.W.6 has also re-affirmed that he had learnt that Kamaruzzaman was the leader of Al-Badar camp set up at Suren Saha's house and used to carry out his atrocious activities there from. We have already observed relying on sources that Al-Badar was the 'action section' of Jamat E

Islami and its mission was to carry out operation to stamp out the unarmed Bangalee civilians particularly who were pro-liberation minded.

224. The above piece of evidence also lends indubitable assurance that within the geographical area of Sherpur the accused had significant ability and influential authority to control over the members of Al-Badar, a para militia force set up to provide assistance and collaborate in accomplishing the atrocities directing the civilian population in violation of customary international law, in 1971. This pertinent relevant fact inspires credence to the fact that the accused led the gang of Al-Badar while the victim Badiuzzaman was taken away to the Ahammednagar army camp from the house of father-in-law of P.W.6.

225. According to P.W.4 he had learnt the event including the fact of abducting Badiuzzaman by the gang of Al-Badar led by accused Muhammad Kamaruzzaman from Sayedur Rahman and Makbul Hossain the residents of the house wherefrom Badiuzzaman [victim] was so unlawfully taken away. As regards the fact of taking away Badiuzzaman evidence of P.W.4 appears to have been corroborated by P.W.6. According to the narration made in charge no.1, Sayedur Rahman and Makbul Hossain had fair and possible opportunity to see the event of taking Badiuzzaman away to the army camp. It is also proved that the gang had also attempted to pull Makbul Hossain out but he managed to escape on the way to the Ahmmednagar camp. Defence could not be able to shake this version. Thus, the hearsay evidence of P.W.4 seems to be attributable as he had learnt the event of alleged taking away of Badiuzzaman from the persons only who had occasion to see and experience it, the part of commission of the principal offence of murder.

226. Indeed the onus squarely lies upon the prosecution to establish accused's presence, acts and conducts forming part of attack resulted in commission of the offences of crimes against humanity as enumerated in section 3(2) of the Act of 1973 for which he has been arraigned. Most of the prosecution witnesses have testified the acts, conducts of the accused claiming him as a potential leader of Al-Badar having significant influence and effective control over the camp set up at Suren Saha's house in Sherpur and another one set up at Zilla Parishad Dak Bungalow, Mymensingh.

227. The learned defence counsel has submitted that the 'burden of proof' and 'standard of proof' for the prosecution remains the same even after 40 years of the commission of crimes. Drawing attention to the evidence of P.W.4 and P.W.6 it has been contended too by the learned defence counsel that they have contradicted on many material facts and as such they are totally unreliable witnesses. According to P.W.4, Syedur Rahman did not tell him that he saw Muhammad Kamaruzzaman with the armed group. While P.W.6 stated that Syedur Rahman and Mokbul told him that they both saw Kamaruzzaman with the group who allegedly abducted Badiuzzaman.

228. It is to be noted that P.W.4 stated what he had heard from Syedur Rahman. Mere non disclosure by Syedur Rahman to P.W.4 that he [Syedur Rahman] himself also saw the accused with the armed group by itself does not impair P.W.4's hearsay testimony. Syedur Rahman might not have told the fact of his seeing the accused for the reason best known to him. Therefore, merely for this reason the testimony of P.W.6 that Syedur Rahman and Mokbul had told that accused Muhammad Kamaruzzaman accompanied the armed group of Al-Badar in committing the criminal of act of abduction of Badiuzzaman from the house of Syedur Rahman cannot be disbelieved.

229. Besides, considerable lapse of time affects the ability of witnesses to recall facts they heard and experienced with sufficient precision. Inconsistency itself should not be the sole consideration to exclude the entire evidence, particularly on material fact, cannot be excluded. The ICTR Appeal Chamber laid its view that *"the presence of inconsistencies within or amongst witnesses' testimonies does not per se require a reasonable Trial Chamber to reject the evidence as being unreasonable"*[**Muhimana**, (Appeals Chamber), May 21, 2007, para. 58]. Assessment of the evidence is to be made on the basis of the totality of the evidence presented in the case before us. The Tribunal, however, is not obliged to address all insignificant inconsistencies, if occur in witnesses' testimony. We may recall the decision of the IOCTR Appeal Chamber given in the case of **Muhimana** that ,

"The Appeals Chamber reiterates that a Trial Chamber does not need to individually address

> **alleged inconsistencies and contradictions and does not need to set out in detail why it accepted or rejected a particular testimony." [**ICTR Appeals Chamber, Judgment May 21, 2007, para. 99]

230. Therefore, an insignificant discrepancy does not tarnish witness's testimony in its entirety. Any such discrepancy 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]

231. The hearsay evidence is to be considered together with the circumstances and relevant material facts depicted. 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. This view finds support 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]

232. Further, inconsequential inconsistency by itself does not taint the entire evidence made by witness before the Tribunal. This principle adopted in trial of crimes against humanity is compatible with the evolved jurisprudence as well as with the Act of 1973. It has been observed by the ICTY trial Chamber in the case of **Prosecutor v.Mico Staisic & Stojan Jupljan** that

> **"In its evaluation of the evidence, in assessing potential inconsistencies, the Trial Chamber took into account: the passage of time, the differences in questions put to the witnesses at different stages of investigations and in-court, and the traumatic situations in which many of the witnesses found themselves, not only during the events about which they testified, but also in many instances during their testimony before the Trial Chamber. Inconsequential inconsistencies did not lead the Trial Chamber to automatically reject evidence as unreliable."** **[*Prosecutor v.Mico Staisic & Stojan Jupljan*** Case No. IT-08-91-T 27 March 2013**]**

233. It is sound commonsense to refuse to apply mechanically, in assessing the worth of necessarily imperfect human testimony, the maxim : *"falsus in uno falsus in omnibus"*. It would be appropriate and jurisprudentially logical if, in the process of appraisal of evidence, we separate the grains of acceptable truth from the chaff of exaggerations and improbabilities which cannot be safely or prudently accepted and acted upon.

234. As regards complicity, it has been argued by the learned defence counsel, by citing a decision of ICTY Trial Chamber in the case of **Du[Ko Tadi]** that 'accomplice' must knowingly provide assistance to the perpetrator of the crime and the accomplice must provide the kind of assistance which contributes directly and substantially to the commission of the crime [ICTY Trial Chamber : **Prosecutor v. Du[Ko Tadi]** Case No. I No. IT-94-1-T, Judgment 7 May 1997, para 688]. But the evidence led by the prosecution does not show that any conduct or act on part of the accused contributed directly or substantially to the actual commission of the crime. Additionally, it has been submitted that the prosecution failed to prove the *mens rea* of the accused's alleged conduct of accompanying the armed group in abducting the victim Badiuzzaman. In absence of intent requirement it cannot be assumed that the accused so accompanied the armed group of Al-Badars knew that the abducted Badiuzzaman would eventually be tortured and killed.

235. The Tribunal notes that *mens rea* or intent requirement is to be inferred from circumstances and relevant material facts. First, the accused himself need not have participated in all aspects of the alleged criminal conduct. It is to be noted that 'participation' may occur before, during or after the 'act' is committed. Second, the intent requirement may be well deduced from the mode of 'participation', by act or conduct of the accused forming part of the 'attack', and it can consist of providing assistance to commit the crime or certain acts once the crime has been committed. Physical presence or participation to the actual commission of the principal offence is not indispensable to incur culpable responsibility. 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."**

236. It has been argued by the learned defence counsel that the prosecution has failed to prove the charge and accused's complicity therewith beyond reasonable doubt. The accused is not alleged to have participated in the actual

act of killing alleged and there has been no evidence whatsoever, in this regard. The accused deserves to get the benefit of doubt created.

237. In view of above argument, the Tribunal notes that the test for proof beyond reasonable doubt is that "the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from the evidence, except that of guilt." Under Rule 56(2) on assessing the reliability and probative value test the Tribunal is authorized to give due consideration to hearsay evidence. The task is to be based on corroboration by 'other evidence' which includes circumstances, direct evidence on any material relevant fact. Having regard to the time, place and manner and context prevailing it was not usual for any other person to witness the act of abduction carried out by the armed Al-Badar men. The witnesses who have testified hearsay version had heard the incident of abduction from the persons actually who had occasion to see and witness it.

238. It is not disputed that Badiuzzaman was abducted by an armed group and was taken to army camp from the place and in the manner alleged. It has not been suggested to either of two witnesses that not the group of Al-Badars led by the accused but another group of armed men might have been responsible for the alleged abduction and taking the victim to the army camp. Therefore, on the facts found, the only reasonable conclusion may be drawn that the armed group of Al-Badars led by the accused abducted the victim Badiuzzaman and took him to the army camp, in execution of a common criminal purpose. In view of evidence and circumstances revealed before us there can be no other fair or rational hypothesis that the act of abducting and taking Badiuzzaman to the army camp may have been the act of a quite distinct group of armed men.

239. Defence however could not shake it reasonably , by cross-examining the witnesses, that not the armed Al-Badar men but some other group of perpetrators or Pakistani army had abducted the victim. It is proved that the accused was a potential Al-Badar leader of Al-Badar camp set up at Suren Saha's house in Sherpur town. From evidence of P.W.2, guard of Al-Badar camp it is proved that criminal activities were carried out at and by the camp under approval and on encouragement of the accused who had authority and

effective control over it and its Al-Badar men. These material circumstantial proof and undisputed facts together inevitably make the hearsay statement of witnesses credible, relevant having probative value. Thus the Tribunal can safely act and rely upon it.

240. It has been argued that the prosecution has failed to establish that the fact of abducting and taking the victim to the army camp itself does not explicitly proves the common design of causing death of the victim. But the Tribunal, disagreeing with this proposition, notes that obviously the armed group of Al-Badars led by the accused was aware of predictable consequence of their criminal acts that eventually resulted in killing of the victim and thus none of the group including the accused can evade the responsibility of murder of Badiuzzaman. This view finds support from the principle enunciated in the case of **Tadic** [ICTY Appeal Chamber] which is as below:

> **"While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk."[Prosecutorv. Du[Ko Tadi]** ICTY Appeal Chamber Case No.: IT-94-1-A15 July 1999, para, 204]

241. Therefore, there can be no room to deduce that the accused did not have contribution with the commission of crime alleged in any manner and thus he deserves to walk free. True that evidence does not suggest that accused Muhammad Kamaruzzaman himself physically participated to the actual perpetration of the substantial crime of killing Badiuzzaman. The Tribunal

notes 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'.

242. Actual physical presence of the accused when the offence of murder was committed was not necessary. It is enough to assume that the accused did not withdraw him from the group or principal perpetrators to facilitate the offence of murder that took place afterwards. Since the accused led the armed group of Al-Badars in unlawfully taking the victim to the army camp he should be viewed as participating in the committing of next criminal acts of confinement followed by torture and murder of Badiuzzaman. Therefore, the accused is considered to have participated even in the commission of the principal offence of murder based on the precedent of the Nuremberg war crimes trial as he is found to be 'concerned with the killing'. This proposition finds support from the view set by the ICTY Trial Chamber in the case of **Tadic** [**Prosecutor v. Du[Ko Tadi]** , Case No. IT-94-1-T, judgment 7 May 1997, paragraph 690,691].

243. The ICTY Trial Chamber in its judgment in the case of **Tadic** observed, [**Prosecutor v. Du [Ko Tadi],** Case No. IT-94-1-T, judgment 7 May 1997, paragraph 680] in determining the issue of *'assistance in the commission of mass extermination'* that

> **"In the Trial of Burn Tesch and Two Others ("Zyklon B case"), in the British Military Court, the suppliers of poison gas, normally used to kill vermin but in fact used to kill inmates of concentration camps, were charged with a war crime. The charge stated that they "in violation of the laws and usages of war did supply poison gas used for the extermination of allied nationals interned in concentration camps well knowing that the said gas was to be soused" between 1941 and 1945[Trial of Burn**

> **Tesch and Two Others, (Zyklon B case) Vol. I Law Reports 93.] ……..The court ultimately sentenced the two people to death after finding that they arranged for the supply of lethal gas to concentration camps and were aware of the purpose for which it would be used [Vol. VII Law Reports 49 and fn 1.]. The court necessarily must have made the determination that without the supply of gas the exterminations would not have occurred in that manner, and therefore that the actions of the accused directly assisted in the commission of the illegal act of mass extermination."**

244. It is true that the accused is not alleged to have been directly responsible for the murder of Badiuzzaman. But it has been proved that he was related to a scheme or system which had a criminal outcome. Thus it is immaterial whether the accused actually aided or assisted in the actual commission of the principal offence of murder. In light of the proposition depicted from the above view of the *adhoc* tribunal it may thus be lawfully inferred that the act of the accused Muhammad Kamaruzzaman who led the armed group of Al-Badars in abducting the victim Badiuzzaman to the army camp is indeed an act of 'assistance' or 'encouragement' that amounts to an act of 'complicity' in the commission of the principal crime, the murder. Without the act of abducting Badiuzzaman to the army camp the offence of his killing would not have occurred.

245. Thus, in the case in hand we are persuaded to conclude that the 'act' of the accused which has been proved beyond reasonable doubt directly and substantially assisted the perpetrators with intent to the accomplishment of actual commission of the principal offence of murder directing an unarmed civilian. The acts of murder may indeed be carried out in secret, and hence have little or no consequences for others in the population (who do not know of the murders).But if the murders are part of a larger plan, and that plan has widespread or systematic effects, then an individual act of murder, rape, or

torture could constitute a crime against humanity. It is to be noted here that the offence of murder as crime against humanity need not be carried out against a multiplicity of victims. The appeal Chamber of ICTR has observed in the case of ***Nahimana, Barayagwiza and Ngeze***, [November 28, 2007, para. 924] that

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

246. Additionally, it is quite immaterial whether the accused, by his act or conduct, neither intended to facilitate or contribute to the actual commission of the principal offence of murder. The Appeal Chamber of ICTY has observed in the case of **Kvocka** as below

> **"…….in contributing to the daily operation and maintenance of the Omarska camp, Kvocka allowed the perpetuation of the system of ill-treatment, thereby furthering the common criminal purpose. As such, Kvocka contributed to the perpetration of the crimes committed when he was employed in the camp, including the crimes of torture. Further, the Trial Chamber correctly established that Kvocka knew the common criminal purpose of the Omarska camp and intended to participate in it, which encompassed the perpetration of the crimes. Therefore, Kvocka's argument that he should not be found responsible since he had not wanted or contributed to the severe physical pain and psychological suffering of Witness**

> **AK, Asef Kapetanovic, Witness AJ and Emir Beganovic is rejected."**
>
> [**Kvocka,** (Appeals Chamber), February 28, 2005, para. 308]

247. The settled jurisprudence thus suggests that an act or omission to act on part of accused forming part of 'attack' directed against civilian population constituting the offence of crimes against humanity is sufficient to hold him individually criminally responsible, even simultaneously under the theory of civilian superior responsibility, if he is found to have exercised, in specific context, authority and ability to lead and control the members of an organised group. 'Superior responsibility' builds on the significance of authority and ability to control in affecting the conduct of others.

248. In the case of **Prosecutor v. Musema** the Trial Chamber of ICTR found *Musema* responsible for having ordered and by his presence and participation, aided and abetted in the crimes. In addition, the Chamber found that *Musema* incurred superior responsibility with respect to acts by his employees whom the Chamber identified as *Musema's* subordinates.

249. From the principle enunciated in the above cited case, we have got that the accused can be lawfully held to have incurred individual criminal liability simultaneously with the 'superior responsibility' as the accused is found to have had a level of control and authority over the members of Al-Badar of greater Mymensingh. Such 'superior responsibility' inevitably comes forward as an 'aggravating factor' in determination of the level of his culpability too.

250. It has been already proved that accused Muhammad Kamaruzzaman was the 'leader' and 'chief organiser' of Al-Badar force in greater Mymensingh. Therefore, he cannot be relieved even from the responsibility for culpable conducts of the members of the organised Al-Badar force. Reasonably, it is presumed that the Al-Badar force was set up to carry out atrocious activities in furtherance of its organizational intent and policy and as such even inaction on part of accused Muhammad Kamaruzzaman cannot help relieving him from responsibility for the criminal acts of members of Al-Badar force in greater

Mymensingh. Thus, under the same set of facts constituting the offence of murder as crimes against humanity there has been no bar in holding the accused Muhammad Kamaruzzaman liable simultaneously under section 4(1) and under the theory of 'civilian superior responsibility'. Although cumulative convictions under both mode of responsibilities is not permissible, under the same set of criminal acts for which the accused has been charged with and in such case the 'superior responsibility' can be taken into account as an aggravating factor for determination of level of culpability of the accused.

251. It is the 'context' that transform an individual's act into a crime against humanity and an accused if found to have acted being 'aware' of the context he be held culpable of such a crime. 'Attack' is considered as 'a course of conduct involving the multiple commissions of forbidden acts'. In the case in hand, the act of leading the armed gang of Al-Badars set up to provide assistance and collaboration to the Pakistani army and also as an 'action section' of a potential pro-Pakistan political organisation [JEI] is sufficient *indicia* to conclude that the accused Muhammad Kamaruzzaman in such capacity had carried out criminal activities being aware of the context. 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."

252. In light of above evaluation we are persuaded to conclude that the accused Muhammad Kamaruzzaman, a potential leader of Al-Badar who led the gang of armed Al-Badars consciously for causing unarmed civilian Badiuzzaman's abduction by adopting tricky means with intent to hand him over to the Ahmmednagar army camp and it unequivocally proves that as a part of 'attack' the accused being aware of the effect of his act instigated or abetted or encouraged or assisted or approved the perpetrators of the principal crime of murder of an unarmed civilian constituting the offence of crimes against humanity and thereby he had 'complicity' to the actual commission of murder of Badiuzzaman which constitutes the offence of crimes against humanity as enumerated in section 3(2)(a)(h) of the Act of 1973 and thus the accused Muhammad Kamaruzzaman incurs criminal liability under section 4(1).

Adjudication of Charge No. 02

[Inhuman acts caused to Syed Abdul Hannan]

253. Summary Charge: During the period of War of Liberation, in the afternoon of mid-May, the accused Muhammad Kamaruzzaman being chief organiser of Al-Badar Bahini as well as leader of Islami Chatra Sangha or member of group of individuals and his accomplices caused **i**nhuman acts to distinguished pro-liberation intellectual Syed Abdul Hannan the then Principal of Sherpur College, by compelling him to roam around the town making him almost undressed and by constant whipping, as he was a gallant supporter of War of Liberation and thereby accused Muhammad Kamaruzzaman has been charged for participating and substantially facilitating and contributing to the commission of offence of inhuman acts as crime against humanity caused to Syed Abdul Hannan which is an offence of crimes against humanity or in the alternative for 'complicity to commit such crime' as specified in section 3(2)(a)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

254. Prosecution claims that in all three witnesses e.g. P.W.2, P.W.3 and P.W.14 have testified in order to prove the offence of 'other inhuman act' as crime against humanity as listed in charge no.2. Of three witnesses P.W.2 and P.W.14 are eye witnesses who have stated the facts relevant to the commission of the principal offence charged. P.W.3 is hearsay witness.

Evidence

255. P.W.2 Md. Monwar Hossain Khan @ Mohan Munshi(63), a member of Al-Badar who had worked as a guard at the Al-Badar camp set up at Suren Saha's house, Sherpur town in narrating the story of his being attached with the camp eventually stated that as directed by Kamaruzzaman he was deployed at this camp as a 'guard'. In this way he worked at the camp for 4-5 months and not exceeding 07 months, as he stated. This version remains totally unshaken and thus it makes him [P.W.2] a competent witness who naturally had occasion to see, experience and know the activities carried out at and by the camp under the significant authority and supervision of the accused.

256. P.W.2, on cross-examination, has re-affirmed it by stating, in reply to question put to him by the defence that Kamaruzzaman [accused] used to attend meeting on the first floor of the Al-Badar camp and he[P.W.2] used to remain on duty on the ground floor. Additionally, P.W.2 has re-affirmed his version made in examination-in-chief that he and other Al-Badar members used to stay on the ground floor and he was the sole guard of the camp. He and his 'sir' Kamaruzzaman [accused] fled together from the camp two days before Sherpur was liberated, P.W.2 added in his cross-examination, in reply to question put to him. Thus, it stands proved that the accused Muhammad Kamaruzzaman was a potential Al-Badar and was in position to co-ordinate the activities carried out at and by the Al-Badar camp, in Sherpur where P.W.2 had been working as a guard for 07 months.

257. P.W.2, apart from the above narration, has testified facts relevant to charge no.2 i.e the fact of causing 'other inhuman act' to Principal Syed Abdul Hannan of Sherpur. P.W.2 Monwar Hossain Khan @ Mohan Munshi stated that two days after he joined the camp, he heard Kamaruzzaman [accused] Kamran, and other Al-Badars uttering amongst themselves that Principal Hannan would have to be forced to walk through the town with lime and ink on his face and his head shaved. With this Principal Hannan was compelled to walk through the town and he (P.W.2) witnessed the scene from the gate of the Al-Badar camp, stated P.W.2, adding that Hannan was afterwards brought to the camp at Suren Saha's house having tying rope around his waist and he instantly fell down on floor and lost sense. After he [victim Hannan] regained his sense he Major Riaz asked accused Kamaruzzaman to send him back to his home by his [Major Riaz] vehicle and also told Kamaruzzaman, Kamran and other Al-Badar not cause damage to innocent civilians. Defence could not controvert the core of the above statement, by cross-examining the P.W.2.

258. From above version of P.W.2 it is thus evinced that accused Muhammad Kamaruzzaman actively and consciously participated in carrying out the 'criminal act' of causing 'inhuman acts' to Principal Hannan, an unarmed civilian and a distinguished citizen and educationist of the town by providing instruction and approval to his fellow Al-Badar members. As the potential leader of Al-Badar, accused Muhammad Kamaruzzaman had sufficient ability

and authority to control over his accomplices. It becomes re-affirmed from testimony of P.W.2 who stated that his 'sir' accused Kamaruzzaman was the commander of Sherpur Al-Badar.

259. P.W.3 Jahurul Haque Munshi Bir Pratik (62) a resident of Sherpur, after receiving training in India entered Sherpur in October 1971 in disguise of a beggar to collect information about the Al-Badar camp in Sherpur and he saw an Al-Badar named Mohan Munshi [P.W.2] standing at the gate of the camp and also saw Kamaruzzaman [accused] and Major Ayub were approaching upstairs of the camp. He [P.W.3] visited the camp for once. Afterwards he heard that Kamaruzzaman [accused] and Major Ayub forced Hannan Shaheb [Principal Syed Abdul Hannan] to walk through the [Sherpur] town by smearing his face with soot and lime, shaving his head and tying rope around his waist as students were not attending his college.

260. P.W.3, on cross-examination, in reply to question elicited by the defence stated that Kamaruzzaman [accused] was the commander of greater Mymensingh and Kamran was his '2 IC' .

261. P.W.3 also stated that Kamaruzzaman [accused] and Major Ayub used to visit different Al-Badar training camps during the war of liberation and threatened people on loudspeakers of dire consequences if anyone helped the freedom fighters. Defence could not dislodge this crucial account in any manner. Rather P.W.3 has reaffirmed it, on cross-examination. P.W.3 also stated in cross-examination that he first saw the accused Muhammad Kamaruzzaman accompanying Major Ayub in the month of November 1971 at the camp at Suren Saha's house and he heard the event of causing 'inhuman act' to Principal Hannan in the first week of November, 1971.

262. P.W.3 stated a pertinent fact in cross-examination that major Riaz was wounded at 'Kamalpur battle' in the month of August and he was taken to Jamalpur and then to Pakistan.

263. P.W.14 Majibar Rahman Khan Panu(58) knew the accused Muhammad Kamaruzzaman and Kamran since prior to 26 March 1971. He

was a resident of Sherpur and a tailor by profession at the relevant time. In addition to the event of causing 'inhuman treatment ' to Principal Syed Abdul Hannan he has testified when and how he was apprehended by accused Kamaruzzaman and his accomplices and where he was kept detained and afterwards released.

264. P.W.14 chiefly testified the event of killing at Ahammednagar camp [as listed in charge no.5] together with the fact as to how he and Liakat [P.W.7] were abducted and brought to *Banthia* building camp and then to police station custody and finally to Ahammednagar army camp wherefrom they were released. In addition to it, P.W.14 claims to have witnessed the event of 'inhuman act' caused to Principal Syed Abdul Hannan [as listed in charge no.2]. In narrating ocular experience on it P.W.14 stated that In May 1971 Kamaruzzaman [accused], Kamran [Al-Badar] and some others picked up Sherpur College's Principal Syed Abdul Hannan and took him to the Al-Badar camp at Surendra Saha's house and then he saw that Principal Syed Abdul Hannan was forced to walk through Sherpur town with lime and ink on his face and his head shaved and tying rope around his waist.

265. The above event relating to charge no.2, as stated by P.W.14, could not be dislodged by the defence, in any manner. Rather P.W.14 has re-affirmed that he knew Principal Hannan well and he visited his house too. The event of causing such inhuman treatment to the Principal took place after his [P.W.14] release from the Ahammednagar army camp, P.W.14 stated in reply to question put to him in cross-examination.

Deliberations

266. The learned defence counsel Mr. Abdur Razzak has argued that the evidence of P.W.3 and P.W.14 carries no weight and can be relied upon. According to P.W.14 [as stated in cross-examination] he saw the incident after his release from the Ahammednagar army camp. Prosecution claims that P.W.14 and P.W.7 were abducted and kept detained together with other detainees and finally were brought to Ahammednagar army camp wherefrom they were finally released within couple of days of their detention [material fact in relation to charge no.5] . It has been alleged in charge no.5 that the

killing of several detainees allegedly took place in the month of Ramadan [corresponding to November 1971]. If it is so, the statement of P.W.14 claiming to have seen the event of causing 'inhuman acts' to Principal Syed Abdul Hannan in May 1971, after his release from the camp becomes untrue and carries no weight. It has been further argued that P.W.3 is a hearsay witness but his evidence does not disclose the source of his learning the event and as such it is liable to be excluded.

267. The learned defence counsel next argued that P.W.3 cannot be relied upon as he stated inconsistent date of the event. Statement made by P.W.2 and P.W.14 on some particulars is inconsistent. Due to such inconsistencies it is immaterial to see whether the statement made by them could be impeached by the defence through cross-examination. Inconsistencies between statements of two witnesses by itself make them unreliable and tutored.

268. Mr. Ehsan Siddique, the learned defence counsel added by arguing that the description of the alleged 'acts' as narrated in the charge no.2 is not consistent with the statement made by P.W.2, P.W.14. None of witnesses stated that the victim was undressed and whipped while he was allegedly forced to roam around the town. The acts inflicted, as found from evidence of witnesses, at best constitute an act of 'humiliation' and it does not fall within the offence of 'other inhuman acts' as the alleged 'acts' did not carry the similar seriousness required to constitute the offence enumerated in section 3(2) of the Act of 1973. It has been further argued that the prosecution failed to prove that carrying out such humiliating acts was part of systematic attack and the victim was subjected to the alleged 'other inhuman acts' on discriminatory intent. Since there has been no definition of 'other inhuman acts' the acts alleged are to be assessed objectively.

269. In reply, the learned Prosecutor has submitted that hearsay evidence is admissible under the Act of 1973. Besides, considering the context and situation prevailing in 1971 it was naturally not possible to witness the atrocities committed against unarmed civilians. Some atrocious events thus became anecdote and the people of the locality had valid reason of being aware of it. Thus non disclosure of source of knowledge as to the event *ipso facto* does not always impair the hearsay evidence of a witness [P.W.3]. As

regards evidence of P.W.14 the learned prosecutor has argued that P.W.14 has come up to depose in relation to three charges [charge no.2, charge no.4 and charge no. 5]. Merely for the reason of inconsistency yield up in his evidence, material fact in relation to any other specific charge does not tarnish his deposition made in its entirety. It would be appropriate to evaluate separately as to what he has stated in relation to those three charges. It would be found that P.W.14 has narrated his ocular experience which is quite consistent with the event of 'inhuman act' as listed in charge no.2. Thus, the evidence of P.W.14 together with the testimony of P.W.2 amply proves the event and complicity of the accused therewith.

270. On careful appraisal, the Tribunal finds that P.W.14 has deposed in relation to the events as listed in charge no.2, charge no.4 and charge no.5. Inconsistencies may naturally occur in evidence of a witness when he is on dock to narrate different events that took place long four decades ago. In dealing with the evidence so far it relates to charge no.2 we are to see whether his evidence is credible, relevant and consistent with the event narrated in the charge. The rest part of his evidence in relation to two other charges is to be evaluated when those charges would be resolved independently. In the case of ***Muvunyi, [*** (Appeals Chamber), August 29, 2008, para. 128] it has been observed that *"It is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony."* Thus, we do not agree to exclude the evidence of P.W.14, agreeing with what has been submitted by the learned defence counsel. Besides, it is also settled that the existence of reasonable doubt as to the truth of a statement on any particular fact by a witness is not evidence that the witness lied with respect to that aspect of his testimony, nor that the witness is not credible with respect to other aspects.

271. Thus, we have got two eye witnesses i.e P.W.2 and P.W.14 in relation to charge no.2 who claim to have seen the event of alleged 'inhuman acts' caused to Principal Syed Abdul Hannan. P.W.2 a member of Al-Badar who had worked as a guard of Al-Badar camp at Suren Saha's house in Sherpur town for long 07 months naturally had occasion to witness the event and according to him two days after he joined the camp, he heard Kamaruzzaman [accused] Kamran, and other Al-Badars uttering amongst themselves that Principal Hannan would have to be forced to walk through the town with lime

and ink on his face and his head shaved and afterwards Hannan was brought to the Al-Badar camp wherefrom under instruction of Major Riaz Principal Hanna was taken back to his home. P.W.2 seems to have narrated the relevant statement and we find no earthly reason to disbelieve him. P.W.2 witnessed the scene from the gate of the Al-Badar camp.

272. P.W.14 has corroborated it by stating that in May 1971 he saw that Principal Syed Abdul Hannan was forced to walk through Sherpur town with lime and ink on his face and his head shaved and tying rope around his waist. It remains unshaken too. According to P.W.14 first, Kamaruzzaman [accused], Kamran [Al-Badar] and some others picked up Sherpur College Principal Syed Abdul Hannan and then took him to the Al-Badar camp at Surendra Saha's house.

273. From statement made by P.W.14 it has been depicted that he returned to his home in Sherpur from India during the first part of May 1971 and within seven days of his return he was apprehended and brought to *Banthia* building camp where from he was first taken to police station custody wherein he was kept detained for two days and afterwards he was brought to Ahammednagar camp wherefrom he was finally spared, on condition to show up regularly at the camp. This piece of evidence relating to his detention and release from the camp remains totally unshaken. In resolving the charge no.2 it is thus redundant to find whether P.W.14 was really so detained and released in the month of Ramadan 1971[corresponding to November 1971]. Be that as it may, P.W.14 had occasion to witness the event of forcing Principal Syed Abdul Hannan to walk through Sherpur town with lime and ink on his face and his head shaved and tying rope around his waist, in the month of mid-May, 1971.

274. It is also evinced from the testimony of P.W.2 that the accused Muhammad Kamaruzzaman and the members of Al-Badar force of the camp were indeed enthusiastic with culpable intent to cause inhuman acts to Principal Hannan, in furtherance of common design. The accused was in position to control over his accomplice A-l-Badars of the camp but he instead of preventing them rather instigated, encouraged and approved in carrying out the criminal act of ‘inhuman acts’ to an unarmed civilian. We have got from evidence of P.W.2 that Major Riaz asked accused Kamaruzzaman to send him

back to his home by his [Major Riaz] vehicle and also told Kamaruzzaman, Kamran and other Al-Badar not cause damage to innocent civilians. This piece of statement sufficiently proves that the accused, by his significant act or conduct, 'instigated' or approved' or 'encouraged' in carrying out the criminal acts of causing 'inhuman acts'. Why Major Riaz told the accused and other Al-Badars of the camp not to cause damage to innocent civilians? It demonstrates further that the accused was actively involved with the criminal activities carried out by the camp.

275. It is found to have been re-affirmed by P.W.3[hearsay witness] in cross-examination, that he first saw the accused Muhammad Kamaruzzaman accompanying Major Ayub in the month of November 1971 at the camp at Suren Saha's house and he heard the event of causing 'inhuman act' to Principal Hannan in the first week of November, 1971. P.W.3 further stated a pertinent fact in cross-examination that major Riaz was wounded at 'Kamalpur battle' in the month of August and he was taken to Jamalpur and then to Pakistan. Thus we get three pertinent material facts: (i) accused Muhammad Kamaruzzaman was a close associate of Pakistani army (ii) Major Riaz had left Sherpur in August as he became wounded at a battle (iii) P.W.3 had heard the event of causing 'inhuman acts' to principal Hannan in first week of November.

276. The pertinent version made by P.W.3 in relation to the event narrated in charge no.2, although hearsay remains unshaken and there has been no rationale to exclude it merely on the ground that it is hearsay in nature. Because, the nature of the event of the offence alleged prompts us to infer that the event became an anecdote and naturally even without witnessing it the people had reason to become aware of it. On this score, his hearsay evidence cannot be brushed aside readily. This piece of evidence inspires credence as it appears to have been corroborated by P.W.2 and P.W.14, the eye witnesses relating to the event of causing inhuman treatment to Principal Syed Abdul Hannan.

277. It appears that P.W.3 remained silent as to from whom he had heard the event. Thus if we, considering the evidence of P.W.3 as uncorroborated 'anonymous hearsay' evidence, keep aside, agreeing with the argument

advanced by the learned defence counsel, the event of causing 'inhuman acts' as narrated in the charge no.2 is found to have been proved beyond reasonable doubt by the corroborating and consisting evidence of P.W.2 and P.W.14, the eye witnesses who are considered to be credible.

278. However, the Tribunal notes that as a general rule, the Tribunal can safely act even on anonymous hearsay evidence only to corroborate other evidence. This view finds support from the decision in the case of **Lubanga** [Lubanga (ICC Pre-Trial Chamber) January 29, 2007, para 106]. We have already found that the evidence of P.W.2 and P.W.14, the eye witnesses to the event, have made narrative as to commission of the criminal acts and complicity of the accused therewith. Thus on this score, the 'anonymous hearsay' evidence of P.W.3 is corroborative to eye witnesses' account.

279. The cumulative appraisal of evidence of above three witnesses amply portrays the position and authority of accused Muhammad Kamaruzzaman from which it may be indisputably concluded that he had such a level of influencing even the Pakistani occupation army. Such acts and conduct of the accused was in furtherance of common design and plan to carry out criminal acts with intent to wipe out the pro-liberation Bangalee civilians. In cross-examination, P.W.14 has re-affirmed that Kamaruzzaman [accused] was the Al-Badar commander of Mymensingh.

280. The unshaken fact of taking principal Syed Abdul Hannan to the Al-Badar camp at Suren Saha's house indubitably prompts us to conclude that the accused who had significant level of influence and authority over the members of Al-Badar of the camp had substantial complicity and contribution, by providing encouragement and approval to the actual perpetration of the offence of 'inhuman acts' as crime against humanity.
It has been settled in the case of ***Limaj*** that

> **"In a particular case encouragement may be established by an evident sympathetic or approving attitude to the commission of the relevant act. For example, the presence of a superior may operate as an encouragement or**

> **support, in the relevant sense**."[***Limaj,*** ICTY Trial Chamber, November 30, 2005, para. 517].

281. It is validly inferred from total evaluation of evidence presented, in relation to charge no.2, that the event of causing 'inhuman acts' was perpetrated within full knowledge and with assistance of the accused. It is thus immaterial to establish that the accused had direct participation to the accomplishment of such crime. Besides, it has been depicted from evidence of P.W.2 that on approval and encouragement of accused Muhammad Kamaruzzaman, Principal Syed Abdul Hannan was so forced to face such degrading inhuman acts causing physical and mental harm.

282. The Act of 1973 does not define 'other inhuman acts'. However, the phrase itself signifies that it is of such kind of 'treatment' which is detrimental to physical or mental wellbeing of an individual who is predominantly an unarmed civilian. 'Other inhuman acts' has been enumerated in section 3(2)(a) of the Act of 1973 in addition to 'acts' of murder, extermination, enslavement, deportation, torture, rape constituting the offences of crimes against humanity. Thus, we are persuaded to conclude that 'other inhuman acts' reasonably and logically encompasses the '*coercive acts'* which are injurious for one's physical or mental wellbeing.

283. The learned Prosecutor Ms. Tureen Afroz, in advancing her submission on the concept of 'other inhuman acts' which has been enumerated in the Act of 1973 as an offence of crimes against humanity has argued that the 'other inhuman acts' encompass a wide array of acts. The Rome Statute defines 'other inhuman acts' as *"other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."* [Article 7(1)(k) of the Rome Statute, 1998]. In the case in hand, the victim was a teacher and educationist and a teacher holds a very high esteem in the Islamic socio-religious culture of our society. The 'inhuman act' caused to and committed against Principal Syed Abdul Hannan is thus an 'attack' on 'human dignity' and also offensive to the victim's community as a whole.

284. We find substance in what has been submitted by the learned prosecutor Ms. Tureen Afroz. The act of compelling a non combatant civilian who was an esteemed member belonging to the teachers' community under coercion to walk through town with lime and ink on his face and his head shaved and tying rope around his waist is a grave and deliberate act of physical and mental violence that caused intense physical distress and mental anguish to the victim which of course can be qualified as an offence of crimes against humanity.

285. The element of "similar seriousness" is to be evaluated in light of all factual circumstances, including the nature of the act or omission, the context within which it occurred, the individual circumstances of the victim as well as the physical and mental effects on the victim. There is no requirement that the effects on the victim be long-term, however any such effects will form part of the determination whether the act or omission meets the "similar seriousness" requirement. Victim Syed Abdul Hannan was a senior 'teacher' of a college and belonged to educationist community. Alleged acts inflicted to him certainly caused grave mental harm and trauma too which carries 'similar seriousness' of the acts enumerated in section 3(2) of the Act of 1973.

286. 'Other inhumane acts' is a category of crimes against humanity recognised as forming part of customary international law. It functions as a residual category for serious crimes that are not otherwise enumerated in section 3(2) of the Act of 1973, but which require proof of the same recognised elements. We fully agree that the 'acts' committed against Principal Syed Abdul Hannan caused intense suffering and serious injury to body or to mental or physical health. Indisputably that 'act' formed an 'attack' to 'human dignity' and offensive to the community of the victim as well.

287. The crucial question is did the accused Muhammad Kamaruzzaman play any role in the commission of the criminal acts constituting the offence of 'other inhuman acts' as crimes against humanity and if so, in what role and to what extent ? From statement of P.W.2 it is evinced that on approval and encouragement of the accused Muhammad Kamaruzzaman given to his fellow Al-Badar commander Kamran and others the alleged incident of causing 'inhuman acts' to principal Syed Abdul Hannan took place. It is thus found

that the alleged 'other inhuman acts' were committed at the explicit instigation of, or with the approval or acquiescence of the accused Muhammad Kamaruzzaman who had significant level of authority, influence and control over the Al-Badar members of the camp at Suren Saha's house.

288. Why Principal Syed Abdul Hannan was chosen for causing harm to him? The reason is clear. He was a local senior educationist who had supported the pro-liberation Bengali nation in achieving independence or had opposed the campaign and activities by the local collaborator of the Pakistani occupation army. Similar acts caused to him may not cause mental harm equally to other person. In measuring mental harm caused, some factors need to be taken into account. Context, reason of targeting the victim, age and status of the victim, pattern of inflicting acts may be the necessary factors to be considered for determination of extent and 'seriousness' of the acts inflicted.

289. Predictably the Al-Badar force was created to carry out atrocious activities in furtherance of its organizational intent and policy and as such even inaction on part of accused Muhammad Kamaruzzaman who was a leader of Al-Badar cannot help relieving him from responsibility for the criminal acts of members of Al-Badar force of the camp set up at Suren Saha's house. Consequently, under the same set of facts constituting the offence of 'other inhuman acts' as crimes against humanity, as narrated in the charge no.2 there has been no bar in holding the accused Muhammad Kamaruzzaman accountable simultaneously under section 4(1) and under the theory of 'civilian superior responsibility'. Finding the accused individually responsible does not prevent the Tribunal from finding him responsible even under the doctrine of 'superior responsibility, even under the same set of criminal acts narrated in the charge.

290. Therefore, it has been unequivocally proved that as a part of systematic or organised 'attack' the accused as the leader of the Al-Badar camp consciously and being aware of the consequence of his act encouraged and approved the design to perpetrate the criminal acts by the Al-Badar members of the camp for causing 'other inhuman acts' directing an unarmed distinguished civilian constituting the offence of crimes against humanity and thereby he had 'complicity' to the actual commission of the offence of 'other

inhuman acts' caused to principal Syed Abdul Hannan which constitutes the offence of crimes against humanity as enumerated in section 3(2)(a)(h) of the Act of 1973 and thus the accused Muhammad Kamaruzzaman incurs criminal liability under section 4(1).

Adjudication of Charge No. 3

[Sohagpur mass killing]

291. Summary Charge: During the period of War of Liberation, on 25.7.1971 in the early morning, accused Muhammad Kamaruzzaman being chief organiser of Al-Badar Bahini as well as leader of Islami Chatra Sangha or member of group of individuals advised your accomplices belonging to Al-Badar and Razaker Bahini who accompanied the Pak army in contemplating and taking steps towards commission of large scale massacre, to raid the village Sohagpur and accordingly they launched planned attack and murdered about 120 unarmed civilians including the 44 victims as named in the paragraph 8.7 of the Formal Charge and committed rape upon women of the said village and thereby Muhammad Kamaruzzaman has been charged for participating, substantially facilitating and contributing to the commission of offences of 'murder as crime against humanity' or in the alternative for 'complicity to commit such crime' as specified in section 3(2)(a)(h) of the Act,1973 which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

292. Prosecution adduced and examined as many as 05 witnesses in order to substantiate this charge. Of them P.W.11, P.W.12 and P.W.13 are the victims of sex violence who have been examined in *camera* as prayed by the prosecution. P.W.2 Monwar Hossain @Mohan Munshi was a member of Al-Badar and at the relevant time he had been working as a guard of Al-Badar camp set up at Suren Saha's house, Sherpur and he had opportunity to see and know the activities of accused Muhammad Kamaruzzaman who was the leader of the camp, as claimed. P.W.10 Md. Jalal Uddin [one of victims of the massacre] is the son of martyr Safir Uddin of crime village Sohagpur. He narrated the horrendous event of massacre.

Evidence

293. We have already found in adjudicating charge no.2 that P.W.2 Md. Monwar Hossain Khan @ Mohan Munshi (63), a member of Al-Badar was attached to the camp set up at Suren Saha's house as a guard as directed by the accused Muhammad Kamaruzzaman and in this way he worked at the camp for the period of 4-5 months and not exceeding 07 months. It has also been proved that accused Muhammad Kamaruzzaman used to attend meetings on the first floor of the Al-Badar camp and he [P.W.2] and his 'sir' Kamaruzzaman [accused] had fled together from the camp two days before Sherpur was liberated. As regards the event of Sohagpur massacre P.W.2 does not claim to have witnessed the event. But Monwar's (P.W.2) duty as a guard of the Al-Badar camp that had been set up at Surendra Saha's house in Sherpur gave him the opportunity to witness Kamaruzzaman's [accused] activities during the war in 1971.

294. P.W.2 stated that one day during the war of liberation, he learnt Kamaruzzaman [accused] holding a meeting at the upper floor of the camp and Kamaruzzaman [accused] told that freedom fighters had reached Sohagpur village and they had to lay blockade to the village. Afterwards, they went to lay siege to the village and Al-Badar commander Kamaruzzaman also went there. In the following morning, he saw that many dead bodies were brought by truck and then those were brought to the Municipality Park where his 'sir' Kamaruzzaman [accused] said that they had killed them by carrying out 'operation' and Razakars had also taken part in the operation.

295. The above version implicating the accused Muhammad Kamaruzzaman with the act of orchestrating design and providing advices of carrying out the 'operation' at Sohagpur village could not be dislodged in any manner. Besides, on cross-examination, P.W.2 has re-affirmed that 'Sohagpur massacre' took place three and half months after he was attached to the Al-Badar camp as a guard. Thus, the commission of the event of 'Sohagpur massacre' and conduct of the accused facilitating the accomplishment of the event of criminal acts remain unshaken.

296. P.W.2, on cross-examination, stated that his boss Kamaruzzaman [accused] was a high flyer. He [accused] used to accompany Majors [of the Pakistani army]. If he [accused] wanted to, he could have turned Sherpur upside down. This version depicts the superior position and level of authority of accused Muhammad Kamaruzzaman over the Al-Badar members of the camp in Sherpur including the Pakistani occupation army.

297. P.W.10 Md. Jalal Uddin(62), the son [victim of the massacre] of martyr Safir Uddin of crime village Sohagpur stated that on 25 July 1971 at about 7:00am the Pakistan army along with Razakars and Al-Badar men came to Sohagpur village around. On being informed of it by his younger brother he remained in hiding at a nearby place, while his brother hid himself in their granary. He heard frequent gun firing and after sometime, when the shooting stopped, he saw dead bodies of Mantaj Ali, Sahid Alim, Abul Bashar and Hashem Ali lying on the eastside of Suruj Ali's house. When he came to his house running, he saw 11 bodies in their home yard. He found the dead bodies of his father Safir Uddin, his paternal uncle Kitab Ali, his cousin Monnas Ali, and Mohammad Ali, Momin Mia, Kutum Uddin, Rejot Ali and Iman Ali and some other unnamed people were lying there. Of them, Iman Ali was still alive but when Jalal and Iman's wife took him to his house's veranda, Iman died. They buried the bodies in three graves.

298. P.W.10 further stated that after the mass killing they took shelter in *Jugli* village and returned to his own village three days later and had tried to know from the people as to how the event of massacre took place. With this the elderly people of the crime locality who were alive described that 245 civilians of *Sohagpur* and *Benupara* village were killed on that day. They also told that Baka Bura, Nasa and Kadir Doctor were Razakars and Kamaruzzaman [accused] was their chief. They committed the massacre after bringing the Pakistan army to the villages.

299. Defence could not dislodge the above version of P.W.10. Rather the commission of the event of alleged indiscriminate mass killing directing the civilians of the crime village Sohagpur remains undisputed. Defence cross-examined him merely to stain his credibility. However, on cross-examination, P.W.10 stated that Razakar Baka Bura, Nasa and Kadir Doctor were the

residents of their locality. Thus, P.W.10 had reason to know them even since prior to the event alleged.

300. P.W.11 Hasen Banu (58) survived wife of victim Shaheed Abdul Latif of Sohagpur village. She narrated the event of massacre. She stated that during the war of liberation on 10th *Sravan* [corresponding to last part of July] her husband went out for *'haal chash'* and she was about to cook at house. Suddenly at about 09:00 in the morning she heard gun firing and with this she having her child and father-in-law and mother-in-law moved to western side of house and remained in hiding. Afterwards on returning home at about 04 pm she found dead body of her husband lying at the home yard and there were dead bodies of two more persons who were Zahurul Haque and another one was her brother's son Ansar Ali. At dawn their dead bodies were buried. P.W.11 further stated that Al-Badar Kamaruzzaman, [accused] who was a big leader, Razakar Nasa, Baka bura, Mozaffar conspired in killing her husband and others. On the preceding day at about 10 am three army men and Al-Badar chasing a girl forced to enter inside her house and then she was sexually ravished by one army man and the rest two remained at the door and had shown gun to her and afterwards they sexually violated her despite her repeated appeal .

301. On cross-examination, P.W.11 stated that the girl who was brought to her house by chasing was from village *'Kakorkandi'* but she could not tell her name. She also stated that the persons were killed pretending them to be *'Mukti'*. P.W.11 denied the suggestion that her husband was killed only by the military men. P.W.11 has re-affirmed it that Al-Badar and Razakars also killed her husband. P.W.11 has re-affirmed it too, on cross-examination, that Nasa, Bagabura, Mozaffar and Al-Badars also accompanied the Pakistani army [at the time of the attack causing massacre]. This piece of version gets corroboration from evidence of P.W.10.

302. P.W.11 in reply to question elicited to her by the defence stated that she could not say as to where and how Kamaruzzaman [accused] designed the conspiracy. It is thus quite hidden in this reply that, in other words, the fact of designing conspiracy by accused has been admitted. We have found that P.W.11 is an illiterate rural woman who naturally cannot be expected to know

about it in detail. Further, the act of 'conspiracy' cannot be expected to have been designed in public. It may be well inferred from circumstances and relevant facts.

303. P.W.12 Hafiza Bewa (56) also lost her husband in 1971 at the time of the event of mass killing as narrated in charge no. 3. She heard from the local elderly people that on 10 Sravan in 1971 at about 07:00 AM the Panjabees [Pakistani army], Al-Badar, Razakars and Kamaruzzaman [accused] of Sherpur had killed her husband Ibrahim. P.W.12 further stated that Kadir doctor, Baka Bura accompanied the gang and in conjunction of the event Pakistani army entering her house had hurt her by a rifle with which she fell down and then they ravished her [P.W.12 started shedding tears while testifying it]. P.W.12 next stated that on the same day Kadir doctor, Baka Bura had sexually ravished Korfuli Bewa [P.W.13], Samla Bewa and accused Kamaruzzaman was also with them. The perpetrators also killed her Uncle Seraj Ali, Khejur Ali, her brother Abul Hossain and many others.

304. The fact of killing of husband and relatives of P.W.12 and committing rape upon her and others as stated by her remain unshaken. Rather her testimony lends corroboration to P.W.10 and P.W.11. On cross-examination, P.W.12 has re-affirmed it that on 10 Sravan [04th month of Bangla calendar] in 1971 at about 07:00 am that the perpetrators had killed her husband while he was running back to home from field. She knew Kadar doctor, Baga Bura since earlier as their houses were about half mile far from her [P.W.12] house. Thus, naturally P.W.12 could recognize Kadar doctor, Baga Bura accompanying the gang of perpetrators.

305. P.W.13 Korfuly Bewa is another widow who lost her husband consequent to the horrendous massacre. She stated that on the day of event i.e 10 *Sravan* in 1971 in the morning she heard gun firing from the end of the field where from her husband returned back to home and then two Panjabees [Pakistani army] accompanied by Boga Bura, Nasa, Kamaruzzaman [accused] came and inquired whether her husband was a *'Mukti'*[freedom fighter] and then they gunned down her husband. They also killed her sister's husband. Afterwards, they, leaving the dead bodies, fled to *Nakla* and three days after returning to home they found her husband's dead body consumed by dogs and

foxes. They buried the skull and bones of her husband and again fled to village *Nakla.* Three days after they returned back to home and then Panjabees [Pakistani army] again came there and ravished her. The Panjabees were accompanied by Baga Bura, Nasa, Muje and Kamaruzzaman [accused].

306. The fact of mass killing and rape committed upon her as narrated by P.W.13 could not be materially dislodged by the defence. P.W.13 is an illiterate pastoral woman. She knew Baga Bura Nasa, Kadir doctor since prior to the war of liberation as she had occasion to see Baga Bura around their house and she heard their name as the leaders of Al-Badar. P.W.13 has re-affirmed it, on cross-examination. For obvious reason, general perception was the source of knowing who activists of Al-Badar were and for an illiterate rural woman it is not likely to display any document to authenticate her knowledge, as suggested by the defence.

Deliberations

307. Mr. A.K.M Saiful Islam the learned Prosecutor has submitted that it has been proved from evidence of P.W.2 that the accused by providing advices and support to his fellow Al-Badars of the camp participated in carrying out the operation by launching attack at Sohagpur village. Four victims [prosecution witness nos. 10-13] have narrated the event and presence of the accused at the crime site. The operation was destructive in nature and in conjunction of the event the perpetrators committed sexual ravishment on women. Instantly after the massacre the survived and sufferer villagers were compelled to flee to another village leaving their homes and property, in consequence of destructive pattern of the attack. The event truly falls within the definition of 'genocide' as specified in section 3(2)(c) (i) of the Act of 1973 instead of 'crimes against humanity.

308. The learned Prosecutor Nurjahan Mukta has submitted that three rape victims stood on dock in narrating the trauma they sustained in conjunction of the event of mass killing at Sohagpur village[as listed in charge no.3] . Indiscriminate sexual invasion caused to them and other women not only increases the gravity of the entire event but it reflects that the serious bodily or mental harm caused to them was with intent to destroy, either whole or in part, the women community or group of Sohagpur village which constituted the

offence of 'genocide'. In support of her submission, the learned prosecutor has cited the decision of the ICTR Trial Chamber in the case of ***Akayesu*** wherein it has been held that rape and other form of sexual violence constitutes genocide in the same way as any other act as long as they were committed with specific intent to destroy, in whole or in part, a particular group.

309. The learned defence counsel has argued that the accused has been indicted with the charge of providing *'advice'* to the Al-Badars of the camp for carrying out the operation at Sohagpur village. But there is no proof as to how he advised and such advice substantially contributed to the commission of the principal crimes alleged by the perpetrators. The charge lacks of corroborative and credible evidence. The act of providing *'advice'* akin to *'ordering'* which can only be made by a superior. But the accused has not been charged under section 4(2) of the Act of 1973 for 'superior responsibility' and as such he cannot be held responsible, on this score too.

310. Referring the observation made in **paragraph 174** of the judgment in the case of ***Pauline Nyiramasuhuko*** the learned Prosecutor Ms. Tureen Aforz went to add that the Tribunal may arrive at decision even on the basis of single testimony and 'corroboration' is simply one of factors to be considered in assessing witness' credibility. **Paragraph 174** of the judgment of the above cited case reads as below:

> **"There is no requirement that convictions be made only on evidence of two or more witnesses. The Chamber may rule on the basis of a single testimony if, in its opinion, that testimony is relevant and credible. Corroboration is simply one of potential factors in the Chamber's assessment of a witness' credibility. If the Chamber finds a witness credible, that witness' testimony may be accepted even if not corroborated. [Nyiramasuhuko,** ICTR Trial Chamber, 24 June 2011, para 174]

311. Tribunal notes that mere *inter* and *intra* consistency in testimony does not make a witness unreliable and the entire testimony of witness cannot be excluded from consideration. We reiterate that where a significant period of time has elapsed between the acts charged in the indictments and the trial, it is not always reasonable to expect the witness to recall every detail with precision. Besides, lack of precision or minor discrepancies between the evidence of different witnesses, or between the testimony of a particular witness and a prior statement, while calling for cautious consideration, is not regarded in general as necessarily discrediting the evidence. We are to evaluate the evidence presented before us keeping some inevitable factors in mind together with the settled jurisprudence.

312. The charge framed does not allege that the accused directly or physically had participated to the commission of the crimes. The accused has been charged for complicity to the commission of the offence alleged .Now, we are to see how the accused acted and conducted to the accomplishment of the substantive horrific crime that took place at Sohagpur village. It appears that the defence could not dislodge the version relating to the commission of the event of attack causing indiscriminate mass killing directing the civilians of the crime village Sohagpur, as stated by P.W.10. Defence cross-examined him merely to tarnish his credibility. However, on cross-examination, P.W.10 stated that Razakar Baka Bura, Nasa and Kadir Doctor were the residents of their locality. Naturally P.W.10 had reason to know them even since prior to the event alleged. Thus it stands proved that local Razakars also accompanied the gang of perpetrators to the crime site.

313. The facts of killing of husband and relatives of P.W.11, P.W.12 and P.W.13 and committing rape upon them, in conjunction of the attack, as stated remain unshaken. They heard that accused Kamaruzzaman also accompanied the perpetrators. However, they have testified that local Bangalee perpetrators Razakar Nasa, Bagabura, Mozaffar, Kadir doctor accompanied the gang at the time of committing the atrocities. According to them they also heard from local elderly people, later on, that accused Muhammad Kamaruzzaman also accompanied the perpetrators at the crime site. This piece of hearsay evidence of rape victims who also lost their husbands inspires credence and cannot be excluded. Presence of local Razakars at the crime site is not disputed. Thus,

presence of the accused with them at the crime site, as heard by the P.W.11, P.W.12 and P.W.13 from the local elderly people is considered to be believable and natural.

314. We have found from evidence of P.W.2, the guard of the Al-Badar camp that the Al-Badars [of the camp] went to lay siege to the village Sohagpur and Al-Badar commander Kamaruzzaman also went there. Thus not only by act of providing 'advices' to fellow Al-Badars but the accused accompanied the perpetrator Al-Badars, local Razakars and Pakistani army to the crime site, as stated by the P.W.10, P.W.11, P.W.12 and P.W.13 . Merely for the reason of inconsistencies in their testimony which is quite natural, for the lapse of long passage of time, their version cannot be turned down terming it to be untrue. They have testified the event of killings and committing rape upon them by the perpetrators. But the defence could not able to make the very facts of killing of their husbands as well as of having sexual ravishment by the perpetrators untrue, by cross-examining them.

315. Therefore, it stands proved beyond reasonable doubt that the numerous civilians were killed pretending them to be *'Mukti',* as stated by P.W.10 , P.W.11 ,P.W.12 and P.W.13 fits to the evidence of P.W.2 who has testified relating to the design orchestrated at Al-Badar camp set up at Suren Saha's house, Sherpur for launching an invasion targeting freedom fighters[civilians] staying at Sohagpur village. Defence however does not dispute the event of mass killing as narrated in the charge.

316. It has been argued by the learned defence counsel that D.W.1's [defence witness] father was also killed by the Pakistani army during the attack launched at Sohagpur village causing grave massacre. He witnessed the event but does not support, while testified before the Tribunal, the alleged presence of the accused at the crime site. Defence has attempted to show by exhibiting two books [Exhibit-A and B] that the same do not narrate complicity of the accused with the event alleged in any manner.

317. In a criminal trial, onus to prove the indictment squarely lies upon the prosecution and defence is not needed to prove innocence and any negative assertion. The Tribunal does not find even a hint as to in support of which

defence or a definite plea of alibi D.W.1 has been examined. Rather it appears that D.W.1 has corroborated the event of massacre at Sohagpur village as narrated in charge no.3 by raising finger to Nasa, Kadir doctor and the Pakistani army who were responsible for the atrocities, although he remains silent as to complicity of the accused. Two books have been exhibited by this D.W.1 who stated that those narrate the event of Sohagpur massacre.

318. It is to be noted that the prosecution witnesses examined in support of the charge no.3 have testified that at the time of commission of the crime accused Muhammad Kamaruzzaman, Boga Bura, Nasa, Kadir doctor, the local collaborators whom they knew since earlier, were with the Pakistani troops. For obvious reason, D.W.1 carefully avoided mentioning the name of the accused as accomplice of the principals, although he seems to have corroborated what has been testified by the prosecution witnesses.

319. Understandably, defence admitting the perpetration of the horrific event of Sohagpur massacre committed on the date and time submitted those two books predominantly aiming to exclude complicity of the accused Kamaruzzaman as the same do not include any narration implicating the accused with the event. That is to say, the two books have been admitted into evidence and marked as exhibit-A, B merely to substantiate a 'negative assertion'. But according to the settled jurisprudence a 'negative assertion' is not required to be proved by adducing evidence.

320. The Tribunal notes that mere non-describing the name of the accused involving him with the commission of the event in those books does not *ipso facto* helps the defence to disprove prosecution case. Besides, authenticity of information narrated in these books raises reasonable question. Because the author himself seems to be not convinced about what he describes therein. Thus we are not persuaded to assume the authoritative value of Exhibit-A and B, in determining the accountability of the accused.

321. It may be validly perceived that the defence by examining D.W.1 has attempted to exclude accused's presence at the crime site and complicity with the crimes committed which becomes futile. Besides, despite absence of physical participation even one may be held 'concerned with the commission'

of the principal crime if he is found to have had 'complicity', even by his single act, to the commission of the crime. According to the charge framed the accused was concerned with the commission of event of massacre by his act of providing advice and explicit approval to the Al-Badar members of the camp which needs to be unearthed from the facts related to his conduct and also from his act before and after the event occurred. Thus, the evidence of D.W.1 can no way be considered as decisive as to success or failure of the charge no.3 brought against the accused.

322. It is evinced from testimony of P.W.2, the guard Al-Badar of the Al-Badar camp at Suren Saha's house, Sherpur that one day during the war of liberation, Kamaruzzaman [accused] holding a meeting on the upper floor of the camp and Kamaruzzaman [accused] told that freedom fighters had reached Sohagpur village and they had to lay blockade to the village. Afterwards, they went to lay siege to the village and Al-Badar commander Kamaruzzaman also went there.

323. The above version implicating the accused Muhammad Kamaruzzaman with the act of designing 'operation' by providing advices of carrying out operation at Sohagpur village and participating in actual accomplishment of the operation forming attack could not be dislodged in any manner predominantly when it is proved from evidence of P.W.2 that afterwards many dead bodies were brought by truck to the Municipality Park, Sherpur where Kamaruzzaman [accused] uttered that they had killed them by carrying out operation and Razakars had also taken part in the operation. It thus patently proves that the accused Kamaruzzaman had significant complicity to the commission of the crime of mass killing and rape committed at Sohagpur village and he cannot evade criminal responsibility even if it is not proved that he himself was present at the crime site at the time of committing the mass killing constituting the offence of crimes against humanity.

324. The notion of complicity encompasses 'designing plan' or 'advising' the accomplices and aiding encompasses 'instigation' or 'encouragement' or 'moral support'. After bringing the dead bodies to the Municipality Park by truck the declaration of accused Muhammad Kamaruzzaman that they had killed them by carrying out 'operation' and Razakars had also taken part in the

operation is considered as an unequivocal demonstration of his [accused] complicity to the actual commission of the massacre. Cumulative effect of the conduct of the accused prior to the event and that of the accused subsequent to the event goes to show beyond reasonable doubt that the accused Muhammad Kamaruzzaman had 'participated' to the commission of the crimes alleged.

325. It is to be noted that 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. The acts of the accused do not always need to be committed in the midst of the attack provided that if they are sufficiently connected to the attack. This view finds support from the decision of Trial Chamber, ICTY in the case of **Limaj,**[November 30, 2005, para 189]. Additionally, we have got a picture from evidence of P.W.2 about status or position and authority of the accused on the strength of which he used to assert significant influence over the Al-Badar camp and also use to maintain close and active affiliation with local Pakistani army officials. It remains unshaken that accused Muhammad Kamaruzzaman was a high flyer who used to accompany Majors [of the Pakistani army], and if he wanted to, he could have turned Sherpur upside down.

326. Tribunal notes that 'participation' may occur before, during or after the act is committed. 'Participation' encompasses providing advices, encouragement, and moral support to commit the crime. Conduct or behaviour of the accused i.e holding meeting with Al-Badar members and advising them to launch attack directing the civilians residing at Sohagpur village clearly constitute significant instigation or abetment of the perpetrators of the crime and thereby the accused incurs liability for participation to the accomplishment of the mass killing at Sohagpur village.

327. It is not alleged, in the charge framed, that the accused himself directly participated to the commission of the crime, although his presence at the crime site appears to have been claimed by the witnesses [victims]. But merely for this reason the accused cannot be relieved from liability if he is found to have acted in such a manner that substantially facilitated the actual commission of the event of alleged massacre. The accused himself need not have participated

in all aspects of the alleged criminal conduct. It has been observed in the case of **Blaskic** that :

> **"The actus reus of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated [Blaskic, (Appeals Chamber), July 29, 2004, para. 48].**

328. In the case of **Tadic**, (Trial Chamber), May 7, 1997, para. 691 it has been observed 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.'**

329. Evidence demonstrates that a large scale killing of 245 non combatant civilians, massive sexual violence and internal displacement of civilians creating reign of intense horror were perpetrated targeting the unarmed civilians of village Sohagpur. We have found from evidence of P.W.2 accused Muhammad Kamaruzzaman by holding a meeting at the Al-Badar camp told that *'Mukti'*[freedom fighters] had reached Sohagpur village and they had to lay blockade to the village. It is clear that in furtherance of such 'prior design' or 'decision' the massacre was perpetrated at Sohagpur village and by carrying out the 'operation' to mash the civilians the perpetrators had killed 245 unarmed civilians.

330. The freedom fighters and pro-liberation Bengali people assisting them were treated as *'miscreants'*. They were the target of the Pakistani occupation army. In furtherance of plan and policy they were so targeted. Even reward was announced for causing their arrest or to provide information about their activities. A report titled *" miKvi wm×vš : `ywZKvix `i †MdZvi ev Le‡ii Rb¨ cy¯vi †`Iqv n‡eÓ* published on 25 November 1971 in **The Daily Pakistan [‰`wbK cwK¯vb]** demonstrates it patently. The report, pursuant to a government press note, termed the 'miscreants' in five classes which is as below:

> `ywZKvix‡`i †kYxwefvM wb¤i‡c n‡et
>
> K. Z_vKw_Z gyj³ ewnbxi wbqwgZ m`m¨, Z_vKw_Z gyj³ ewnbx fwZ‡Z mnvh¨Kvixiv|
>
> L. †¯”Qvq we‡`vnx‡`i Lv`¨, hvbevnb I Ab¨vb¨ `e¨ mieivnKvix|
>
> M. †¯”Qvq we‡`vnx‡`i Avkq`vbKvix|
>
> N. we‡`vnx‡`i ÔBbdigvi Õ ev evZvevnKi‡c hviv KvR K‡i Ges
>
> O. Z_vKw_Z gyj³ ewnbx m¤úwKZ bvkKZvgj¤K wjd‡jU, c¨v¤ú‡jU cfvZi †jLK ev cKvkK|
>
> [**Source**: *Sangbadpatre Muktijuddher Birodhita: Ekattorer Ghatakder Jaban Julum Sharajantra*: Edited by Dulal Chandra Biswas: Bangladesh Press Institute: March 2013 Page 324]

331. Thus plan was not only to liquidate the freedom fighters but to wipe out the pro-liberation Bengali people who were in favour of freedom fighters by providing them shelter, information and who were engaged in writing in favour of them. Unambiguously, Al-Badar, an action section of Jamat E Islami [JEI] had acted accordingly in accomplishment of such policy and plan.

332. Attacking mainly the credibility of P.W.11, P.W.12 and P.W.13 the learned defence counsel has submitted that these witnesses are tutored and untrustworthy as their statement made on dock suffers from material inconsistencies and discrepancies. Their discrepant hearsay statement does not prove accused's presence at the crime site.It has been further argued that P.W.11, P.12 and P.W.13 are not reliable witnesses as they did not state earlier to the IO what they have testified before the Tribunal. Besides, P.W.2 does not claim to have had occasion to be present at the time of alleged planning at Al-Badar camp. They have made exaggeration before the Tribunal.

333. The Tribunal notes that mere omission in narrating event with detail precision is not 'contradiction' and does not impair witness's sworn testimony. Accused was a potential leader of Al-Badar of greater Mymensingh and he had acted as the chief organizer of Al-Badar, it stands proved. Naturally within the geographical area of greater Mymensingh, it became an anecdote to the civilians. Therefore, hearing the fact of presence and accompanying the gang of perpetrators at the crime site from the local elderly

residents by these women victims who sustained immense trauma offers credence.

334. Tribunal further notes that exaggerations *per se* do not render the evidence brittle. Inconsistencies in different statements from the same witness do not necessarily mean the witness is unreliable. Besides, it is not unlikely that after the crime or event, the witness will hear more about it with others, who also may have been at the same place. When giving his statement or testimony, he will reproduce what he has seen and heard, attributing his information to his eye witness status while in reality he has acquired the information from post hoc sources.

335. We are not convinced to accept the argument extended by the defence on 'inconsistencies' and discrepancies of witnesses' testimony or the witnesses have made lied statement before the Tribunal. Naturally inconsistencies and discrepancies [inter and intra] may occur in witnesses' testimony. Inconsistency is a relevant factor in judging weight but need not be, of itself, a basis to find the whole of a witness' testimony unreliable **[** ***Prosecutor v. Delalic,*** ICTY Appeal Chamber, Case No. IT-96-21-A, 20 February 2001, para 496**]**.

336. A witness may recall only the core fragmented events, not details. The ***Akayesu*** judgment notes that discrepancies could be due to the fallibility of perception and memory and the operation of the passage of time:

> **"The majority of the witnesses who appeared before the Chamber were eye-witnesses, whose testimonies were based on events they had seen or heard in relation to the acts alleged in the Indictment. The Chamber noted that during the trial, for a number of these witnesses, there appeared to be contradictions or inaccuracies between, on the one hand, the content of their testimonies under solemn declaration to the Chamber, and on the other, their earlier statements to the Prosecutor and the Defence. This alone is not a ground for believing that the witnesses gave false testimony […] Moreover,**

> **inaccuracies and contradictions between the said statements and the testimony given before the Court are also the result of the time lapse between the two. Memory overtime naturally degenerates, hence it would be wrong and unjust for the Chamber to treat forgetfulness as being synonymous with giving false testimony."[*Akayesu* case, ICTR, para. 140]**

337. In the case in hand, the hearsay statement made by the rape victims gets corroboration from the evidence of P.W.10. Besides from evidence of P.W.2 it is proved that the accused provided advice to the Al-Badar members of the camp, by holding meeting, to launch an attack to Sohagpur village. The act of providing '*advice'*, in other word, was a substantial kind of assistance and explicit approval by orchestrating a common plan to facilitate the actual commission of the crime. The act of providing *'advice'* entails a person in a position of authority using that position to convince and approve another to commit an offence. It is also demonstrated from P.W.2's evidence that after providing such *'advice'* the accused left the camp. Advice given by the accused rather instigated and prompted the Al-Badar members of the camp to activate the design of launching the attack. Therefore, the contribution of the accused Muhammad Kamaruzzaman, the leader of Al-Badar had an effect on the commission of the crime of mass killing and rampant rape. It is not necessary to prove that the principal crime of massacre committed at Sohagpur village would not have been perpetrated without the accused's direct participation. On this score as well the accused incurs liability for the crimes alleged in charge no.3.

338. On cumulative appraisal of statement made P.W.11, P.W.12 and P.W.13 in examination-in-chief and cross-examination as well it is depicted that an operation was carried out causing killing of hundred of civilians including husbands of P.W.11, P.W.12 and P.W.13 at the relevant time and the mass killing was perpetrated by the Pakistani army and Al-Badar and Razakars; the military accompanying the gang sexually debased them and many others. It also reveals from circumstances together with the testimony of P.W.2 that the massacre was committed in furtherance of prior design orchestrated on accused Muhammad Kamaruzzaman's advice at Al-Badar camp at Suren

Saha's house, Sherpur. Thus the accused was significantly concerned with event of mass killing and rapes committed at Sohagpur village. Involving with designing plan or providing advices constitute the act of 'abetment' and 'instigation' which makes him [accused] 'concerned;' with the commission of substantive crime.

339. Thus the totality of evidence of all these P.W.s shows a demonstrable link of the accused to the actual commission of Sohagpur massacre. Indisputably, the hearsay statement of P.W.11, P.W.12 and P.W.13 seem to be reasonably credible. As regards inconsistencies occurred in their testimony we acknowledge the impact of trauma upon them, the victims and their ability to recount the events with clarity and detail. Earlier statement made to Investigation officer is not evidence and any omission in stating any fact to the IO which substantially does not necessarily affect wetness's sworn testimony unreliable cannot be treated as glaring contradiction. Additionally, failure to describe precise detail about an event that took place four decades back rather makes witness' testimony more reliable. An illiterate traumatized woman cannot be expected to narrate the event with full and accurate precision. This is reality.

340. We find substance in core submission extended by the learned Prosecutor Ms. Tureen Afroz. In assessment of testimony of witnesses who stood on dock after a long lapse of time, so many factors are to be kept in mind. In stating what they [P.W.11, P.W.12 and P.W.13] had heard inconsistency or discrepancy may naturally occur, due to lapse of time together with trauma they sustained impacting memory. What happens, then, when the issue of trauma is sandwiched together with that of memory? The ICTR ***Nyiramasuhuko*** case considers this issue:

> **"Many witnesses lived through particularly traumatic events and the Chamber recognises that the emotional and psychological reactions that may be provoked by reliving those events may have impaired the ability of some witnesses to clearly and coherently articulate their stories. Moreover, where a significant period of time has elapsed**

> **between the acts charged in the indictments and the trial, it is not always reasonable to expect the witness to recall every detail with precision."[*The Prosecutor v. Pauline Nyiramasuhuko,* ICTR-98-42-T, Judgement, 24 June 2011, para. 179]**

341. We also acknowledge the circumstances existing at the relevant time when the victims were of illiterate rural women of young age who still belong to the poverty trodden class. This sensible view finds support from the observation made by the ICTY in the case of ***Kunarac*** which is as below:

> **"By their very nature, the experiences which the witnesses underwent were traumatic for them at the time, and they cannot reasonably be expected to recall the minutiae of the particular incidents charged, such as the precise sequence, or the exact dates and times, of the events they have described […] In general, the Trial Chamber has not treated minor discrepancies between the evidence of various witnesses, or between the evidence of a particular witness and a statement previously made by that witness, as discrediting their evidence where that witness has nevertheless recounted the essence of the incident charged in acceptable detail […] The Trial Chamber has also taken into account the fact that these events took place some eight years before the witnesses gave evidence in determining whether any minor discrepancies should be treated as discrediting their evidence as a whole.[*Prosecutor v. Kunarac* , ICTY Trial Chamber IT-96-23-T and IT-96-23/1-T, Judgement, 22 February 2001, para. 564]**

342. The learned defence counsel drawing attention to several inconsistencies occurred in P.W.2's testimony has submitted that P.W.2 is an untrustworthy

witness and as such he cannot be relied upon, although the prosecution considers him to be a 'star witness'. The inconsistencies so occurred in his testimony affect the credibility of what he has stated.

343. In view of facts and circumstances of the case in hand, we disagree with the above argument. In the case of ***Kajelijeli,*** [Appeals Chamber, ICTR, May 23, 2005, para. 167] it has been held that "Trial Chamber is entitled to rely on any evidence it deems to have probative value and it may accept a witness's testimony only in part if it considers other parts of his or her evidence not reliable or credible. [See also ***Musema*** Appeal Judgement, ICTR Appeal Chamber para. 82].

344. We reiterate that first, alleged inconsistencies do not appear to be significant and related to core and relevant facts. Second, the Tribunal is not obliged to address all the inconsistencies so occurred in witness' testimony for assessing credibility of witness. Third, mere inconsistencies do not render witness' entire testimony. Fourth, despite inconsistency on a particular fact the Tribunal may safely act upon the other part of statement made on material facts. We are to see how far the part of P.W.2's statement relating to material facts. This view finds support from the observation made in the case of **Muvunyi**, [ICTR Appeals Chamber, August 29, 2008, para. 128] which is as below:

> **"In addition, the Appeals Chamber recalls that a Trial Chamber has the discretion to rely on uncorroborated, but otherwise credible, witness testimony and that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony." [See also Muhimana Appeal Judgement, para. 101]**

345. In view of above careful appraisal of evidence the facts that have been found patently proved are **(a)** the accused Muhammad Kamaruzzaman, a leader of Al-Badar had significant influence and authority over the fellow Al-Badars of the camp set up at Suren Saha's house in Sherpur town, **(b)** the accused by his conscious act of providing 'advices' instigated and explicitly and substantially approved the Al-Badars to facilitate launching the attack at

the village Sohagpur by accompanying the local Razakars and Pakistani army, **(c)** more than hundreds of unarmed civilians were murdered resulted from the attack launched, **(d)** the subsequent explicit behaviour and gesture of the accused that he had shown after bringing dead bodies to the Municipality Park, Sherpur from the crime site unerringly proves his culpability, **(e)** the principal perpetrators were the Al-Badar members of the camp at Suren Saha's house, apart from the Pakistani army and local Razakars**, (f)** the accused Muhammad Kamaruzzaman also accompanied the perpetrators to the crime site, and **(g)** the accused being the leader of the Al-Badar failed to prevent the commission of the crimes.

346. We are not persuaded with the misconceived argument advanced by the learned prosecutors that the event of mass killing and indiscriminate sexual invasion narrated in charge no.3 falls within the definition of 'genocide'. Mere multiplicity of victims of murder cannot term the event 'genocide'. Prosecution could not bring the elements necessary for constituting the offence of 'genocide' at the stage of charge matter hearing. The offence of 'rape' has been enumerated as an offence of crime against humanity in the Act of 1973. Besides, the learned prosecutor has failed to justify his argument with reference to evidence and relevant jurisprudence. Prosecution could not show the 'genocidal requirement' and 'group requirement' for bringing the event within the ambit of the offence of 'genocide'. The charge framed lacks of necessary legal particulars as to constitution of the offence of 'genocide'. Additionally, without giving the matter of alteration of charge to the notice of the accused, at the stage of judgement there has been no lawful scope to alter the charge, accepting the unfounded argument.

347. In the case in hand, conduct, act, behaviour and the level of influence and authority of the accused together, which have been convincingly proved, are thus qualified to be the constituent of **'participation'** too to the 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 has been charged with. Not only mass killing, rampant sexual ravishment also took place, in conjunction of the event of massacre, as testified by three victims P.W.11, P.12 and P.W.13.

348. The Tribunal notes that even a distinct offence could have been proved at trial, under the same set of facts narrated in the indictment. Therefore, finding on commission of a distinct offence under the same set of facts narrated in the charge framed is permissible. The charge framed describes the commission of the offence of rape and three sex victims have testified before the Tribunal narrating the trauma they sustained. It is found that the offence of indiscriminate sexual invasion under coercive circumstances, in conjunction of the attack that resulted in causing numerous murders of civilians, was also done to women of the crime village.

349. It is legitimate to draw a conclusion that the accused Muhammad Kamaruzzaman, a significant leader of Al-Badar of greater Mymensingh had acted the role of 'advisor' and he was aware of his act and the entire operation as well and thus he was responsible for the entire action causing the appalling mass killing of civilians and rampant sexual ravishment, committed in conjunction of the event, at Sohagpur village. The event of massacre attributed to the accused Muhammad Kamaruzzaman was not the outcome of an individual action but it was the result of the activities of a group of Al-Badars to which he was in leading position and by his conscious acts, instigated the perpetrators to carry out the operation, at its preparatory stage and its actual commission stage too.

350. It has been proved beyond reasonable doubt that the accused Muhammad Kamaruzzaman acted substantially in carrying out the 'operation' and his act and conduct, before and after the event, formed part of 'attack' which was committed against the unarmed civilian population for causing atrocious criminal act of murder which has been enumerated in the Act of 1973 as crimes against humanity. In conjunction of the horrendous event, shameful act of rampant sexual violence upon the women was also committed and it obviously has diagnosed the event more shocking and graver. Perpetrators of and persons concerned with such shocking and horrendous crimes against humanity are known as the enemies of the mankind. The accused Muhammad Kamaruzzaman, for his substantial act and conduct of providing advices and approval, is equally accountable for the crimes as listed in charge no.3 in the same manner as if it were done by him alone. Thus, he is held responsible for the actual commission of the offence mass killing of hundreds of unarmed

civilians constituting the offence of murders as crimes against humanity as enumerated in section 3(2)(a)(h) of the Act of 1973 and thus the accused Muhammad Kamaruzzaman incurs criminal liability under section 4(1)of the Act of 1973.

Adjudication of Charge No. 4

[Mostafa Killing]

351. Summary Charge : During the period of War of Liberation, on 23.8.1971 at the time of *Magrib* prayer the accused Muhammad Kamaruzzaman being chief organiser of Al-Badar Bahini as well as leader of Islami Chatra Sangha or member of group of individuals instructed the members of Al-Badar Bahini to apprehended Golam Mostafa, a civilian, son of late Asir Uddin of village Gridda Narayanpur, Mostafabag thana road, PS [now district] Sherpur and accordingly, from the place known as 'college morh' at about 07:30 am to 11:00 he was brought to the Al-Badar camp which was set up in the house of one Surendra Mohan Saha. Thereafter, Tofael Ahmed, uncle of the apprehended person came to the accused and requested to set him at large. But in the night, the accused and his Al-Badar Bahini brought Golam Mostafa and one Abul Kasem to the 'Serih Bridge' and gunned them down causing death of Golam Mostafa but Abul Kasem survived as he could jump to the river even having gun shot on his fingers and thereby the accused Muhammad Kamaruzzaman has been charged for substantially participating, facilitating and contributing to the commission of offence of 'murder as crime against humanity' or in the alternative for 'complicity to commit such crime' as specified in section 3(2)(a)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

352. Prosecution, in order to prove the charge has adduced three witnesses who have been examined as P.W.2, P.W. 5 and P.W. 14. Of them P.W.2 Md. Monwar Hossain Kahn @ Mohan Munshi a member of Al-Badar of the camp set up at Suren Saha's house who used to work there as its guard and as such he had opportunity to witness and know the Al-Badar force's organiser Muhammad Kamaruzzaman's activities, and his authority and control over the

camp. P.W.5 Mosharaf Hossain Talukdar the younger brother of victim Golam Mostafa who has testified how his brother[victim] was apprehended and brought to the Al-Badar camp and how they made effort for his release there from which was eventually in vain. P.W.14 Majibur Rahman Panu is a hearsay witness who has testified facts relevant to the event of abduction and killing of Golam Mostafa which he claims to have learnt from his brother Ansar Ali who allegedly used to work as a vehicle mechanic in front of the Pakistani army camp at Ahammednagar, Sherpur. However, now let us see what the P.W.s have testified before the Tribunal relating to the event and involvement of the accused thereto as narrated in charge no.4.

Evidence

353. P.W.2 Md. Monwar Hossain Kahn @ Mohan Munshi a member of Al-Badar who used to work at the Al-Badar camp set up at Suren Saha's house at the relevant time stated that Golam Mostafa of village *'Kharkharia'* was brought to the camp, blindfolded and tied up, and was kept beside him and he was screaming and asking for water as he was beaten but was not given. P.W.2 added that one from *'Kajir Khamar'* and his [victim] uncle from *'Kharkharia'* came to the camp and had attempted to get him[victim] released but they did not respond. Just before dusk Major Riaz came to the camp and Kamaruzzaman [accused] told him that one devotee of Awami League was captured. After Major Riaz had left the camp one retired army Nasir came to the camp and brought Mostafa, still blindfolded, by a rickshaw towards 'Seri Bridge' being equipped with a Chinese rifle. Kamaruzzaman had left the camp five minutes earlier.

354. PW.2 further stated that after half an hour, Kamaruzzaman [accused] and Nasir returned to the camp together and he heard Nasir telling [others in the camp] that 'sir' [Kamaruzzaman] could now aim well, that he had courage and he could operate a gun.

355. In cross-examination, P.W.2 stated that he could not recollect as to how many days before or after bringing Askar doctor, victim Golam Mostafa was brought to the camp. One Sushil was converted to Muslim at the camp by his 'sir' [accused] and this event took place prior to the events of Principal

Hannan [victim of charge no. 2], Askar doctor and Golam Mostafa [victim of charge no.4]. Thus, the fact of bringing Golam Mostafa to the Al-Badar camp becomes significantly admitted, in other words. P.W.2 also stated that his 'sir' Kamaruzzaman was the commander of Sherpur Al-Badar. It lends adequate assurance that the accused was in a potential position that authorized him to exercise effective control over the members of the Al-Badar camp.

356. P.W.5 Mosharaf Hossain Talukdar (56) brother of martyr Golam Mostafa is a hearsay witness. He testified that his brother Golam Mostafa was an HSC examinee from Sherpur College during the War. Mostafa, at that time was the literary secretary of Sherpur College unit Chhatra Union and a regular contributor to Radio Rajshahi. After 26 March 1971 he [Golam Mostafa] went to India for arms training and returned to their native home after around one and a half months.

357. The above piece of version remained unshaken and thus we find that the victim Golam Mostafa was a youth of pro-liberation and progressive mind who also received arms training in India.

358. P.W.5 further stated that before the HSC examinations in 1971, it was announced that those who would not take part in the exam would be treated as *'anti-Pakistani'* and supporters of 'freedom fighters' and as such his [P.W.5] uncle Tofael Islam Talukder who was a member of local peace committee, had convinced Mostafa to sit for the exam, assuring him of all-out support.

359. The above version too remained undislodged. Therefore, the fact of staying of Golam Mostafa at Sherpur town, at the relevant time, for the purpose of sitting HSC examination stands proved. Besides, the fact that victim's uncle Tofael Islam Talukdar was a member of local peace committee remained totally undisputed.

360. P.W.5 went on to testify what he had heard, after liberation, about the event of alleged abduction. P.W.5 stated that on 23 August 1971 after *Magrib* prayers his brother Golam Mostafa went to Sherpur College intersection to buy batteries for the radio and at that time, at the instruction of Sherpur Al-

Badar chief Kamaruzzaman [accused], some of Al-Badar members picked up his brother and took him to a camp set up at the house of Surendra Mohan Saha, a prominent businessman of Sherpur. On being informed of the matter, his uncle Tofael Islam [member of local peace committee] went to the Al-Badar camp and met Mostafa that night. He [Tofael] met Kamaruzzaman [accused] at the Al-Badar camp and requested him to release his brother but Kamaruzzaman [accused] asked his uncle to leave the camp. Later, his uncle Tofael approached to another Shanti [peace] Committee leader Samidul Haque to cause release of Mostafa and accordingly Samidul also requested Kamaruzzaman to set Golam Mostafa free. Defence could not impeach the above pertinent version as made by P.W.5. What happened afterwards? How the P.W.5 knew the subsequent event of killing Badiuzzaman?

361. By cross-examining P.W.5 the defence could not shake the above pertinent facts of apprehending and bringing Golam Mostafa to the Al-Badar camp, making repeated appeal to accused Muhammad Kamaruzzaman to set him free which was in vain. These unshaken facts are patent relevant facts proving substantial and conscious participation of the accused to the criminal act of forcibly bringing and confining Golam Mostafa at the camp which was significantly controlled by the accused.

362. P.W.5 claims to have heard the event of murder of his brother from Abul Kashem who somehow managed to survive despite the perpetrators brought him too with Golam Mostafa to Seri Bridge from the Al-Badar camp set up at Suren Saha's house in Sherpur town for causing their death. P.W.5 also heard that at first Mostafa was charged with bayonet and afterwards he was shot to death and Kashem survived as he jumped into the river with bullet injuries on the fingers of his right hand.

363. Defence could not refute the above version. On cross-examination, P.W.5 stated that he himself could not see the accused Kamaruzzaman giving order or instruction when his brother Golam Mostafa was caught and brought from the college *morh.* With this reply, P.W.5 has rather re-affirmed the fact of apprehending and bringing Golam Mostafa to Al-Badar camp on instruction of the accused. In reply to another question put by the defence, P.W.5 has stated that the day his brother was abducted was his [victim brother] examination

day. Thus, the fact of abducting Golam Mostafa appears to have been re-affirmed in cross-examination.

364. P.W.5 denied the suggestion that his brother Golam Mostafa was abducted by the Pakistani army from his examination hall and the numerous reports published in news papers and journals speak so.

365. P.W.14 Majibur Rahman Khan Panu (58) received training as freedom fighter in India [*Dalu*, Meghalya state] and returned back in the month of May 1971, on getting information of his mother's ailment. He stated that his brother Ansar Ali Khan Mantu had good relation with Major Riaz of Ahmmednagar army camp as he [his brother] used to mend the vehicles of Pakistani army in front of the camp.

366. In addition to the fact of his own abduction and detention and the acts of the accused he experienced during his detention at the Ahammadnagar army camp he [P.W.14] narrated what he had learnt about the fact of abducting Golam Mostafa and causing his murder as listed in charge no. 4.

367. P.W.14 narrated that in the last part of May 1971, on the following morning after his release from Ahammednagar camp, while he was on the way to the army camp to show up, he had occasion to meet Golam Mostafa who on asking informed that he [Golam Mostafa] was going to appear in examination. P.W.14 stated that after coming back home from the camp, he came to know from his brother Ansar Ali that Kamaruzzaman[accused] and his cohorts picked up Mostafa and took him to the Al-Badar camp at Suren Saha's house and next day , he learnt that the bullet injured body of Mostafa was left under Seri Bridge. This version could not be dislodged by the defence in any manner. It does not appear to have been denied even.

Deliberations

368. It is not alleged that the accused himself accompanied the Al-Badars in abducting and bringing Golam Mostafa to the Al-Badar camp. The accused has been indicted to instruct the Al-Badar men to commit the criminal act of

such abduction. The charge framed next alleges that the victim was brought to Seri Bridge by the accused and his fellow Al-Badar who gunned down him [victim Golam Mostafa] there.

369. From the evidence of above three P.W.s, it appears that none of them claims to have witnessed the event of principal offence of killing. The matter of providing 'instruction' may not always be tangible and is expected to have witnessed. It may be well inferred from relevant facts and circumstances. First, we are to see whether the victim Golam Mostafa was brought to the Al-Badar camp. Second, the presence and activities of the accused at the camp, during detention of the victim needs to be evaluated on the basis of evidence presented. It is to be noted that by examining witness as D.W.2 defence has made an effort to establish that Golam Mostafa was so killed by the Pakistani army, by excluding complicity of the accused.

370. The learned defence counsel has argued mainly attacking credibility of witnesses. It has been submitted that P.W.14 who is hearsay witness cannot be relied upon as the date of his learning the event does not correspond to the month or date of the event alleged. P.W.2 is a tutored and untrustworthy witness who has made inconsistent statement on many facts, and hearsay statement of P.W.5 does not appear to have been corroborated by other evidence.

371. Tribunal notes that 'corroboration' is not a matter of legal requirement to act relying on hearsay testimony. Besides, the phrase 'other evidence' includes circumstantial proof and relevant material facts which may reasonably extend corroboration to hearsay evidence. Next, mere inconsistency in witness' testimony does not impair his or her entire testimony, particularly the other part of his or her testimony made on material and relevant facts. Keeping this settled jurisprudential norm involving adjudication of arraignment of 'crimes against humanity', committed in violation of customary international law in mind let us concentrate on evidence presented.

372. P.W.2 used to work as a guard at Al-Badar camp set up at Suren Saha's house, Sherpur for about 07 months. Naturally he had fair opportunity to see

and experience the activities carried out there and by its member Al-Badars including the accused. In reply to question elicited to him by the defence P.W.2 stated that he had to attend the camp in morning and sometimes had to stay there during night time. *"My boss Kamaruzzaman was a high flyer. He used to accompany majors [of the Pakistani army]. If he wanted to, he could have turned Sherpur upside down"*—this unshaken version made by P.W.2 is perceptibly a fair indication that the accused was in a key position in carrying out atrocious activities by the camp and the Al-Badar members. Telling Pakistani Major Riaz that one devotee of Awami League was captured [as stated by P.W.2] also prompts to deduce the extent of accused's informal influence even over a Pakistani army Major.

373. Next, the evidence of P.W.2 proves that the victim Golam Mostafa was brought to the camp where he was beaten and tortured when accused Muhammad Kamaruzzaman was present there and the conversation that he [accused] made with Major Riaz demonstrates his [accused] antagonistic attitude toward pro-liberation Bangalee civilian and afterwards one Nasir a retired army man brought Golam Mostafa toward 'Seri bridge'. This unshaken pertinent fact could not be shaken by cross-examining the P.W.2. We do not find any earthly reason to exclude this piece of testimony made on pertinent fact. Thus, the circumstances as revealed led us to an unerring finding that the criminal act of forcible bringing Golam Mostafa first at the camp was carried out at the instruction and on approval of the accused Muhammad Kamaruzzaman.

374. The fact that victim's uncle Tofael Islam Talukdar who was a member of local peace committee and Samidul also requested Kamaruzzaman to set Golam Mostafa free. But the accused did not pay heed to it. Defence could not impeach this pertinent version as made by P.W.5. This fact lends further assurance as to the fact of abducting and bringing Golam Mostafa to the Al-Badar camp over which the accused Muhammad Kamaruzzaman had significant level of influence and authority and he [accused] approved his detention and causing torture to him[victim] at the camp .

375. The facts, as have been depicted from testimony of P.W.2, that Just before dusk Major Riaz came to the camp[Al-Badar camp] and

Kamaruzzaman [accused] told him that one devotee[Golam Mostafa] of Awami League was captured and after Major Riaz had left the camp one retired army Nasir came to the camp and then being equipped with a rifle brought Mostafa, still blindfolded, by a rickshaw towards 'Seri Bridge' and Kamaruzzaman[accused] had left the camp five minutes earlier and they, after half an hour, returned to the camp together and he [P.W.2] heard Nasir telling [others in the camp] that 'sir' [Kamaruzzaman] could now aim well, that he had courage and he could operate a gun, coupled with other relevant facts as conversed above, unambiguously prove that the accused actively and consciously concerned in the commission of the offence of murder of Golam Mostafa. It is to be noted that actual participation to the accomplishment of a crime does not always need to be established by direct evidence. It may be well inferred from circumstances and relevant facts as well.

376. The fact of returning back of the accused to the camp together with said Nasir after half an hour together with the utterance of Nasir that -- *'sir' [Kamaruzzaman] could now aim well, that he had courage and he could operate a gun'* [*m¨v‡ii nvZ GLb mB nB‡Q GLb mvnm nB‡Q e›`ªK Pvjv B‡Z cv‡i]* are quite adequate for a valid inference that the accused himself too actively participated to the actual commission of the killing of Golam Mostafa.

377. P.W.2 also stated that after Kamaruzzaman [accused] and Nasir[Al-Badar man] had come back to the camp, Major Riaz again arrived there and inquired about the detainee Golam Mostafa. With this Kamaruzzaman[accused] told that Nasir had brought him away on hearing which Major Riaz reacted badly and assaulted Nasir with the gun. Afterwards, Major Riaz had left the camp and Kamaruzzaman [accused] accompanying 20-25 armed Razakars started moving towards *'Nakla'* by a truck.

378. The matters which may be well perceived from the above statement of P.W.2 are that Major Riaz did not like the criminal act of killing Golam Mostafa, without his approval; that the accused was notoriously involved in carrying out atrocious acts by accompanying not only the Al-Badars but also the Razakars. Defence could not refute these facts relevant to the culpable profile of the accused Muhammad Kamaruzzaman in 1971.

379. From the conduct, act and culpable presence of the accused at the camp, at the time to keeping Golam Mostafa captive there and even after his killing by taking him out of the camp we are forced to infer that the accused Muhammad Kamaruzzaman even substantially aided and abetted for the commission of the principal crime by providing assistance, encouragement which is indicative of conveying his explicit approval to the criminal acts. It is now settled jurisprudence that the assistance and encouragement may consist of physical acts, verbal statements, or even mere presence. The presence of a person in a position of authority at a place where a crime is being committed, or at which crimes are notoriously committed, may convey approval for those crimes which amounts to aiding and abetting.

380. Defence could not shake the pertinent version made by P.W.5 that after bringing Golam Mostafa to the Al-Badar camp, repeated appeal was made to the accused Muhammad Kamaruzzaman to set him free which was in vain.

381. Defence could not refute the version that P.W.5 [brother of victim] heard the event of murder of his brother from Abul Kashem who somehow managed to survive despite the perpetrators brought him too with Golam Mostafa to Seri Bridge from the Al-Badar camp set up at Suren Saha's house in Sherpur town for causing their death. On cross-examination, P.W.5 stated that he himself could not see the accused Kamaruzzaman giving order or instruction when his brother Golam Mostafa was caught and brought from the college *morh*. With this reply, P.W.5 has rather re-affirmed the fact of apprehending and bringing Golam Mostafa to Al-Badar camp on instruction of the accused. Additionally, from the circumstances and activities of the accused carried out at the camp sufficiently prompts us to infer the matter of providing 'instruction' to carry out the act of abduction of Golam Mostafa.

382. It has been argued by the learned defence counsel that the alleged event of Golam Mostafa killing, as narrated in the charge no.4, took place on 23.8.1971. But P.W.14 has testified that he had learnt the event at the end of May 1971 and thus his hearsay evidence, in this regard, cannot be taken into consideration.

383. We find substance in what has been submitted by the defence. It appears that in narrating the fact of his own detention at the Ahammadnagar army camp and his release afterwards there from, P.W.14 stated that he was so apprehended, detained and released in the month of May 1971 and at the end of May 1971 when he went to show up at the Ahammednagar camp he had learnt from his brother that Golam Mostafa was murdered. Thus the month P.W.14 has mentioned while testifying does not fit to that [23.8.1971] of event narrated in the charge, true. Should we exclude his entire evidence merely on this discrepancy? Before we arrive at decision on it we should have look to testimony of P.W.7 Md. Liakat Ali. Because P.W.14 claims that he found Md. Liakat Ali [P.W.7] too detained at the camp, during his detention and finally both of them were released from Ahammednagar camp.

384. For the reason of above glaring and fatal inconsistency as to the date or month of his learning the event of Golam Mostafa's killing, the statement, made by P.W.14 deserves exclusion. Such glaring inconsistency creates doubt too as to the fact of his meeting with Golam Mostafa on the date of his abduction, on his [P.W.14] way to the Ahammadnagar camp, as stated by him. Reliance cannot thus be placed on his statement made in relation to charge no.4. But however, his statement made on some other relevant facts may not be kept out of consideration. Because the facts of his own abduction and detention and afterwards his release from Ahammednagar army camp remained unshaken and proved. Thus, we are not reluctant to take the statement made by P.W.14 so far it relates to acts and conducts of the accused he experienced during his detention at the army camp.

385. Evidence of P.W.14 demonstrates that at Ahammednagar army camp, Kamaruzzaman [accused] told Major Riaz *'they shouldn't be released. They are freedom fighters. If they are released, it would be too harmful for us'*. Kamaruzzaman [accused] told the Major two or three times to *'Halak'* [finish] them. Defence could not dislodge this version.

386. From the above unshaken piece of evidence we have found that the accused Muhammad Kamaruzzaman used to maintain close association even with the Ahammednagar army camp in Sherpur and he was in position even to *'advice'* the Pakistani army as to which detainee was to be released or who

was to be finished. It inevitably indicates his level of influence over the members of Al-Badar and the Pakistani army as well. It clearly signifies his superior position. It is also established that Kamran was his [accused] close associate. It would be relevant to note that D.W.2 Alhaj Askor Ali admits, on cross-examination, that Kamran, Samidul, Mofazzal, Suruzzaman were the notable persons who used to provide assistance to the Pakistan army in 1971.

387. The cumulative effect of the evidence of P.W.2 and P.W.5 sufficiently and beyond reasonable doubt proves that Golam Mostafa was abducted and brought to Al-Badar camp set up at Suren Saha's house by the Al-Badar men. Why he was so targeted? It reveals from evidence of P.W.5 that Golam Mostafa after receiving training as freedom fighter in India he returned back to their native village with arms. Predictably he was targeted for the reason that he was a pro-liberation progressive minded Bangalee civilian. It has also been proved by the P.W.2. It is reasonably undisputed that the Pakistani occupation army and their cohorts including the *para militia* forces committed atrocities in furtherance of plan and policy to wipe out the pro-liberation Bangalee civilians.

388. The criminal act in question was not an isolated crime. In context of war of liberation and the Pakistani occupation army and its local collaborators and auxiliary forces, with a view to resist it under designed and common policy had carried out atrocious criminal activities directing the Bangalee civilians. It is thus quite patent that in furtherance of such policy and common design Golam Mostafa, a civilian, was abducted and brought to the Al-Badar camp, as part of systematic attack. It is now settled that even a single act of aiding, encouraging and approving the perpetrators might be committed on such a scale and pattern as to amount to *'systematic attack'* which constitutes a crime against humanity. Thus, the phrase 'attack' refers to the 'context' that elevates an act from the level of a domestic and isolated crime to a 'crime against humanity'.

389. It is immaterial to argue that the accused was not the actual perpetrator or he himself physically participated to the commission of the criminal acts. The accused must be the cog in the wheel of events leading up to the result which in fact happened. Next, it is to be seen whether he conducted to promote the

object of actual accomplishment of the crime. It is to be noted that such object can be furthered not only by giving orders for, but by a diversity of other means and his acts. The accused shall not have exoneration if he is found to have acted in any manner which eventually facilitated the actual carrying out of the criminal acts. This view finds support from the observation made in the case of **Prosecutor v. Du [Ko Tadi**] which is as below:

> **"……many of international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the propensity of single individuals but constitutes manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. 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 Appeal Chamber in the case of Prosecutor v. Du [Ko Tadi]: Case No. IT-94-1-A Judgement 15 July 1999, Paragraph: 191].**

390. It has been established too that after bringing Golam Mostafa at the Al-Badar camp, his relatives initiated repeated appeals to Kamaruzzaman to set him free but the attempt was in vain. It indicates patently that the accused was concerned with the event of abduction and detention of Golam Mostafa at the Al-Badar camp. For the reason of the level of his leadership and authority he could have prevented the commission of the criminal act of murder of Golam

Mostafa. But he failed to prevent it. Rather, the evidence of P.W.2 who was a guard of the Al-Badar camp set up at Suren Saha's house proves that the victim Golam Mostafa was brought to the camp where he was beaten and tortured in presence of the accused Muhammad Kamaruzzaman and the conversation that he [accused] made with Major Riaz demonstrates his [accused] antagonistic attitude toward the victim Golam Mostafa.

391. The Tribunal notes that acts of the accused do not always need to be committed in the midst of the attack provided that if they are sufficiently connected to the attack. We are persuaded to pen our finding that the conduct, act, behaviour or omission to act by the accused Muhammad Kamaruzzaman, particularly at the camp in relation to the detained victim Golam Mostafa, which have been convincingly proved, are thus qualified to be the constituent of **'participation'** to the accomplishment of the crimes as it encouraged the principal[s].

392. In the case of **Tadic** it has been held that

> **"Actual physical presence when the crime is committed is not necessary . . . an accused can be considered to have participated in the commission of a crime . . . if he is found to be 'concerned with the killing." [** ***Tadic,*** ICTY Trial Chamber , May 7, 1997, para. 691].

393. In the case in hand the facts we have found proved from evidence presented are **(i)** that the victim Golam Mostafa was abducted and brought to Al-Badar camp **;(ii)** that he was so brought at the camp by Al-Badar men; **(iii)** that despite approaching to accused Muhammad Kamaruzzaman by two local members of peace committee the victim was not set free ; **(iv)** that conversation with major Riaz about detainee Golam Mostafa reflects antagonistic attitude of the accused; **(v)** that the accused allowed and approved Al-Badar man Nasir to bring Golam Mostafa to Seri Bridge[crime site]; **(vi)** that the accused and Nasir came back to the camp together after killing of Golam Mostafa; **(vii)** that the accused failed to prevent the commission of the event of killing, despite the fact that he had significant authority and control over the Al-Badar men.

394. The evidence presented in relation to above material facts indisputably suggests that the accused consciously and being aware of the consequence of his acts and conducts encouraged, approved and provided moral supports to the actual commission of crime alleged and thereby the accused had 'complicity' to the commission of the principal crimes. In the case of **Limaj** it has been observed by the ICTY Trial Chamber that

> **"In a particular case encouragement may be established by an evident sympathetic or approving attitude to the commission of the relevant act. For example, the presence of a superior may operate as an encouragement or support, in the relevant sense."[** ***Limaj,*** *ICTY* Trial Chamber, November 30, 2005, para. 517:]

395. Therefore, we deduce that the accused is considered to have participated in the commission of a crime as he is found 'concerned with the killing' of Golam Mostafa , an unarmed civilian by his acts forming part of attack. As a result, the accused Muhammad Kamaruzzaman is equally liable for the crimes as listed in charge no.4 in the same manner as if it were done by him alone. The accused is therefore held to have 'participated' to the actual commission of the offence murder of Golam Mostafa, an unarmed civilian constituting the offence of murder as 'crimes against humanity' as enumerated in section 3(2)(a)(h) of the Act of 1973 and thus the accused Muhammad Kamaruzzaman incurs criminal liability under section 4(1)of the Act of 1973.

Adjudication of Charge No.5

[Killing at Ahammednagar Camp]

396. Summary Charge: During the period of War of Liberation, in the mid of '*Ramadan'* at about 07:30 pm the accused Muhammad Kamaruzzaman being chief organiser of Al-Badar Bahini as well as leader of Islami Chatra Sangha or member of group of individuals and his 4/5 accomplices apprehended Md. Liakat Ali and Mujibur Rahman Panu from their houses located in the area of 'Chakbazar' under police station and district Sherpur and brought them to the Razakar camp housed in the '*Banthia* building' at *Raghunathpur* Bazar

wherein confining them they were subjected to torture. Thereafter, they were sent to police station wherein they kept detained and afterwards, on order of the accused they and 11 other civilians were shifted to '*Jhinaigati* Ahammad Nagar Army Camp'. Thereafter, they were brought to a ditch behind the Ahammad Nagar UP office and then segregating three from the line the rest were gunned down to death and at the time of causing death by gun shot the accused and his accomplice one Kamran were present there. Therefore, the accused Muhammad Kamaruzzaman has been charged for substantially participating, facilitating and contributing to the commission of offence of 'murder as crime against humanity' and or in the alternative for 'complicity to commit such crime' as specified in section 3(2)(a)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

397. The charge no.5 relating to the killing of civilians at Ahammednagar camp rests on two witnesses who have been examined as P.W.7 and P.W.14. Both the witnesses, as they have narrated, had occasion to experience the acts and conducts of the accused Kamaruzzaman at the army camp where they were kept detained together. They do not claim to have witnessed the event of actual commission of killings alleged. They however, narrated some facts relevant to the commission of the event of the criminal acts. According to the charge framed, 11 civilians were kept detained including these two witnesses of whom 08 were killed and 03 including them were released.

Evidence

398. P.W.7 Md. Liakat Ali (60) was a college student in 1971 and he organized the EPR and student organisations to resist the Pakistani army in March 1971, but failed and then he went to *Dalu* camp in Meghalya, India. Afterwards he came back to *Nalitabari*[Sherpur]. In one evening the Al-Badar members apprehended him from the house in Sherpur where he used to stay and they brought him to *Banthia* building camp. He found that two others namely Majibur Rahman [P.W.14] and Sattar were also brought there and kept detained. In night they were taken to police station custody where they were kept detained for two days and then they were shifted to Ahmmednagar army

camp. Defence however could not dislodge this statement, by cross-examining him.

399. P.W.7 further stated that on the day of event at about 12:00 noon Pakistani army forced them to stand in a large ditch, behind the Union Parishad Office near the Ahammednagar camp and one captain ordered them to recite *'kalema'* and the moment he ordered to shoot them Major Riaz suddenly arrived there and asked to stop shooting and called them three by their names and with this they came out of the ditch. On approaching forward he saw Kamran[Al-Badar] and perhaps Kamaruzzaman [accused] behind him and then they [P.W.7, P.W.14 and another one detainee] were released and returned back to Sherpur.

400. P.W.7 remained silent as to in which month or on which date he was so apprehended and brought first to *Banthia* building camp, police station custody and finally to Ahammednagar army camp. In cross-examination, P.W.7 however stated that the event of his abduction he narrated took place about one month before the country was liberated [corresponds to November, 1971].

401. P.W.14 Majibar Rahman Khan Pannu, testified that Kamaruzzaman [accused], Mintu Khondoker, Advocate Tara, Halu Mia and his 4/5 armed cohorts apprehended him at his home in May, 1971 and they bringing him there from kept detained at '*Banthia* building camp', Sherpur where he found one Liakat [P.W.7] already detained there and Abdus Sattar and Chhana Master were also taken there later on. At night, Kamaruzzaman [accused] directed Tara [accomplice of Kamaruzzaman] to take the detainees to Sherpur Police Station custody and around midnight they were taken there where he found 07 others from *Tikarchar* detained.

402. P.W.14 went on to narrate that around 11:00am, two days after detention at police station custody, four-five Pakistani army men took them to the Ahmmednagar camp there from and forced 11 detainees including him to stand on the road on the east of Ahmmednagar School. After some time, the detainees were placed next to a big and deep ditch and a few minutes later, an

army officer asked them to stand up and they on his order started praying. After 10 minutes, Major Riaz, Kamaruzzaman [accused] and Kamran arrived there on a jeep and Major Riaz stopped from shooting them and asked their names. At a stage, Kamaruzzaman [accused] told Major Riaz *'they shouldn't be released. They are freedom fighters. If they are released, it would be too harmful for us'*. Kamaruzzaman [accused] told the Major two or three times to *'Halak'* [finish] them.

403. How the P.W.14 could recognize the accused Kamaruzzaman and his accomplice Kamran? P.W.14 stated that he knew Kamaruzzaman [accused] and Kamran as they used to get their clothes made at his shop. Thus P.W.14 had fair reason of recognizing the accused and his accomplice Kamran at Ahammednagar camp.

404. P.W.14 further stated that Kamaruzzaman and Kamran left the place at around 5:00 pm and then he [P.W.14] and Liakat [P.W.7] were released on the Major's directives and on condition to show up at the army camp regularly.

405. Thus the above is the evidence relating to abduction, detention and release of P.W.4 and Liakat [P.W.7]. The evidence also speaks of acts, conducts and role of the accused Muhammad Kamaruzzaman that P.W.14 experienced during his detention at *Banthia* building camp and Ahammednagar camp.

Deliberations

406. It has been argued by the learned defence counsel that the event of killing at Ahammednagar army camp allegedly took place in the month of *Ramadan* in 1971[corresponds to November, 1971]. The charge framed discloses that P.W.7 and P.W.14 were kept detained together for in all 3-4 days. But P.W.14 who testified in support of this event has stated that he was detained at the camp together with P.W.7 and other detainees in the month of May 1971. It appears that the month of May 1971 did not correspond to the *Arabic* month of *Ramadan* in 1971. Thus, statement of P.W.14 so far it relates to his abduction, detention and release carries no value.

407. According to the charge framed P.W.7 and P.W.14 were apprehended and abducted to *Banthia* building camp by the accused Muhammad Kamaruzzaman and his armed cohorts in the month of *Ramadan* in 1971. And both of them were first kept detained together at a camp and then at police station custody and finally were brought to Ahammednagar camp along with other detainees. P.W.14 claims that eventually on Major's directives he and Liakat [P.W.7] were released, despite protest of accused Muhammad Kamaruzzaman. But as regards date or month of the alleged event of their detention version of P.W.14 does not corroborate to what has been deposed by the P.W.7, one of his [P.W.14] co-detainees.

408. According to P.W.14 the event of their detention took place in the month of May 1971. The month of May 1971 did not correspond to the *Arabic* month of *Ramadan* in 1971. While P.W.7 testified that the event of their alleged abduction and detention took place one month prior to independence was achieved [November 1971].

409. Thus evidence of P.W.7 and P.W.14, on crucial fact relating to the principal event of murder of their co-detainees as narrated in the charge no.5 inevitably becomes glaringly contradictory, not merely inconsistent. We are not ready to accept that such contradiction between their testimonies, on material fact, might have occurred due to memory failure due to lapse of long passage of time, as argued by the learned prosecutor. Such contradictory statement significantly impairs their testimony they have made about the fate of the rest of their co-detainees from *Tikarchar*. P.W.7 and P.W.14, as claimed by the prosecution, are the witnesses who have stated material facts related to the principal crime of murder of their co-detainees at the camp. But statement of P.W.14 as to month of his detention at the camp and release there from grossly fluctuates from that as narrated in the charge framed.

410. In narrating the date of an incident, discrepancy of few days naturally may occur, in one's testimony, chiefly for the reason of lapse of long passage of time. But deviation of six months, as found from P.W.14's statement, cannot be considered as mere 'memory failure', particularly when P.W.7, on cross-examination, stated that the event of their detention took place one month before the independence [November 1971]. Tribunal also notes that

P.W.14 has categorically stated that within seven days of his return, in May 1971, from India he was apprehended and brought to *Banthia* building camp. If it is so, we do not find rationale to infer that such discrepancy of long six months occurred in his testimony is merely due to failure of his memory for the reason of lapse of long passage of time.

411. We are thus not persuaded with the argument advanced by the learned prosecutor that it is a mere inconsistency and as such it does not tarnish the testimony of P.W.14 in its entirety made in relation to charge no.5. Because the story of his having learning the principal event of murder of 08 co-detainees at the Ahammednagar camp stems from the very fact of his[P.W.14] and P.W.7's detention at the camp and release there from.

412. The charge narrates that the alleged killings occurred in the month of *Ramadan* 1971. But P.W.14 stated that after his release from Ahammednagar camp, on the following day [in the month of May 1971] he went to the camp to show up as directed and then had heard from Sattar [detainee] that on the preceding day, four detainees from *Tikarchar* were gunned down to death on instruction of Kamaruzzaman [accused]. P.W.14 also stated that the rest 05 detainees were set freed during his presence at the camp.

413. Since the charge discloses that the alleged event of murder of civilian detainees at Ahammednagar army camp took place in the month of *Ramadan* in 1971 the above version of P.W.14 appears to be unrealistic and tainted by reasonable doubt, for the reasons stated above. P.W.7 has not however narrated anything as to the fate of the other detainees. Merely for the reason that P.W.14 had fair occasion to know the accused and his accomplice Kamran since prior to the event as they used to get their clothes made at his [P.W.14] shop it cannot be concluded that the version relating to charge no. 5 made by him is free from reasonable doubt.

414. The charge narrates that out of 11 detainees three were freed and the rest 08 were gunned down to death. But according to P.W.14 on the following day [in the month of May 1971] he had heard of murder of 04 detainees that took place on the preceding day [in the month of May 1971] under

Kamaruzzaman's [accused] instruction. Thus the charge does not appear to have been proved by the testimony of P.W.7 and P.W.14. Their evidence seems to be patently incongruous with the narration made in the charge. The fact that they were abducted and detained at the camp and afterwards released, as has been stated by them appears to have been tainted by conspicuous doubt.

415. On careful appraisal of evidence of P.W.7 and P.W.14 we find substance in what has been argued by the learned defence counsel. Prosecution appears to have been miserably failed to prove the charge by adducing credible and consistently chained evidence. However, the event of murder of detainees at the Ahammednagar camp, as narrated in the charge no.5 remains undisputed. For the reason of glaring lack of credibility of statement made by P.W.14 on material fact, we consider it precarious to act on rest of his [P.W.14] statement made involving the alleged act or conduct on part of accused constituting his link to the actual commission of the principal event of criminal acts of murder of detainees at Ahammednagar camp. Prosecution has utterly failed to prove the complicity of the accused with the perpetration of the crime alleged in charge no.5. The accused Muhammad Kamaruzzaman, as a result, is not held criminally liable for the criminal act of murder as crimes against humanity as listed in charge no.5.

Adjudication of Charge No. 06

[Tunu Murder]

416. Summary Charge: During the period of War of Liberation in 1971, in the month of November one Didar along with some members of Al-Badar bahini abducted Tunu and one Jahangir from *Golki Bari* and took them to the District Council Dak Bungalow, Mymensingh. Subsequently Tunu was tortured to death at Al-Badar Camp housed in the District Council Dak Bungalow. Therefore, the accused Muhammad Kamaruzzaman has been charged for substantially participating, facilitating and contributing to the commission of offence of 'murder as crime against humanity' and or in the alternative for 'complicity to commit such crime' as specified in section 3(2)(a)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act as you are found liable for the said offences under section 4(1) of the Act .

Witness

417. Pursuant to argument placed by the learned Prosecutor, this charge rests on evidence of P.W.1 Md. Hamidul Huq who has testified what he had heard about the event as narrated in the charge no.6. It is alleged that P.W.1 was kept detained at the Al-Badar Camp housed in the District Council Dak Bungalow, Mymensingh for 26 days and as such he had opportunity to experience and see the activities carried out at and by the camp and the accused as well.

Evidence

418. P.W.1 Hamidul Huq stated that in the month of July 1971 the Al-Badar members apprehending him and one Taher, a freedom fighter brought them to the Al-Badar Camp housed in the District Council Dak Bangalow, Mymensingh and they were subjected to torture. At a stage, Brigadier Kadir Khan, during his visit to the camp, knowing his [P.W.1] credential, asked all concerned at the camp not to kill him and then he was kept there under house arrest for 26 days. During his detention at the camp he had occasion to meet the accused Kamaruzzaman there who encouraged him to continue fight for preserving Pakistan. He [P.W.1] also observed that accused Muhammad Kamaruzzaman used to design anti-liberation operational plans and at night he used to go out being accompanied by the Al-Badar members of that camp to carry out ‘operations’.

419. The fact of detention of P.W.1 at the Al-Badar Camp housed in the District Council Dak Bungalow, Mymensingh is found to have been corroborated by P.W.15 Dabir Hossain Bhuiyan who was also apprehended and brought to the same camp at the end of July 19071 and was kept detained there for 26-27 days, as deposed by him [P.W.15].

420. P.W.1 stated that after he had escaped from the camp with the help of Sultan, a member of Al-Badar of the camp he moved towards *Shambhuganj* and during his staying there he came to know that by launching raid at the house of the owner of ‘Mijan Arts’ at ‘*Gulkibari*, Mymensingh one Tunu was killed by Al-Badars under the direct supervision of Kamaruzzaman [accused].

Deliberations

421. The learned defence counsel has argued that there has been no lawful evidence, direct, hearsay or circumstantial to substantiate this charge. P.W.1's anonymous hearsay testimony does not offer any valid indication that the accused was concerned with the murder of Tunu, in any manner. Prosecution failed to show how the accused acted in facilitating the criminal act for which he has been charged with. Merely for the reason, if believed, that P.W.1, during his alleged detention at the camp, had met and conversation with the accused it cannot be the sole circumstance for arriving at a finding as to complicity of the accused with the accomplishment of the crime alleged.

422. The learned Prosecutor Mr. A,K.M Saiful Islam, during his argument, could not show accused's involvement or complicity with the event of murder Tunu in any manner, on the basis of evidence presented.

423. The charge narrates that the members of Al-Badar bahini abducted Tunu and one Jahangir from Golki Bari and took them to the District Council Dak Banglow, Mymensingh and subsequently Tunu was tortured to death at the Al-Badar Camp. The charge itself offers no hint as to the mode of accused's contribution or participation to the perpetration of the event of murder of Tunu. Now let us see what the P.W.1 has stated in this regard.

424. It appears that the testimony that has been made by P.W.1 in relation to charge no.6 does not speak of specificity. From whom and when the P.W.1 heard the event? Where Tunu was killed? Is there evidence to show that Tune was brought to the Al-Badar camp housed in Zilla Parishad Dak Bungalow, Mymensingh? In cross-examination, in reply to question put to him by the defence, P.W.1 stated that Tunu was killed few days after he had escaped from the camp. P.W.1 also stated that after the war of liberation he visited the family members of the deceased Tunu and heard the event from them. If it is so, why P.W.1 could not narrate what he had heard, in detail?

425. According to P.W.1 he was brought to the camp at the end of July 1971 and was kept detained there for 26-27 days. But according to the indictment,

the alleged event took place in the month of November 1971. If it is so, the fact of learning the event of killing Tunu, as deposed by P.W.1 does not inspire credence of any degree, particularly when he [P.W.1] failed to state when he heard the event.

426. P.W.1 stated that the accused used to maintain close and significant association with the camp of Al-Badar and was involved with the act of designing plans of carrying out 'operations' at night. Merely this piece of statement dose not ipso facto proves that Tunu was also brought to the camp and was killed on approval or instruction of the accused, particularly when it is fact of common knowledge that apart from members of auxiliary forces, Pakistani occupation troops also had killed numerous civilians by carrying out operation by its own. In absence of proof of bringing and torturing the victim Tunu at the camp we are not agreed with the unfounded argument advanced by the learned prosecutor that since the accused Muhammad Kamaruzzaman was associated with Al-Badar camp and he had authority and influence over it he is criminally responsible for the crime alleged.

427. It is true that mode of participation may be proved by evidence, direct, hearsay or circumstantial. But so far the charge no.6 is concerned we do not consider it just and safe to act relying solely on anonymous and unspecified hearsay version of P.W.1 to presume that the accused contributed to the commission of murder of Tunu. The fact that Tunu was murdered by Al-Badar remains undisputed. But in view of above reasons, we constrained to arrive at decision that there has been no evidence or circumstance that could prompt us to infer culpability of the accused Muhammad Kamaruzzaman with the commission of murder of Tunu as listed in charge no. 6. Consequently, we are persuaded to pen our view that the prosecution has utterly failed to prove culpability of the accused in relation to charge no.6 and thus the accused is found not guilty accordingly.

Adjudication of Charge No. 07

[Killing o6 civilians including Dara]

428. Summary charge: During the period of War of Liberation, on 27 Ramadan at about 01:00 pm the accused being chief organiser of Al-Badar

Bahini as well as leader of Islami Chatra Sangha or member of group of individuals being accompanied by 15-20 armed Al-Badar members raided the house of one Tepa Mia of village Golpajan Road, Kachijhuli, police station-Kotwali under district Mymensingh abducted Tepa Mia and his elder son Zahurul Islam Dara and took them to Al-Badar camp situated at District Council Dak Bungalow. On the next early morning the Al-Badars took them along with five others to the bank of river Brahmmaputra. After tying their hands they were lined up and at first Tepa Mia was attempted to be charged with bayonet but he escaped by jumping to river. The Al-Badars then fired gun shots and in the result Tepa Mia received injury on the leg and he managed to escape. But the rest 06 unarmed civilians were charged with bayonet to death. Therefore, the accused Muhammad Kamaruzzaman has been charged for substantially participating, facilitating and contributing to the commission of offence of 'murder as crime against humanity' or in the alternative also for 'complicity' to commit such crime' as specified in section 3(2)(a)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

429. Prosecution claims that three witnesses have testified to substantiate this charge. The witnesses are P.W.1Md. Hamidul Haque, P.W.9 Abul Kashem and P.W.15 Dabir Hossain Bhuyian. They are claimed to have stated relevant and material facts to connect the accused Muhammad Kamaruzzaman with the perpetration of the event of criminal acts narrated in the charge. Of these three witnesses P.W.1 and P.W. 15, as claimed, were kept detained at the Al-Badar camp set up at Zilla Parishad Dak Bungalow, Mymensingh and as such they had occasion to know and experience the atrocious activities carried out by the camp as well as the influence of the accused over it.

Evidence

430. It is found from evidence of P.W.1 that he was abducted and brought to the camp in the month of July 1971 and was kept detained there for 26 days. P.W.1 Md. Hamidul Huq claims to have witnessed the activities of accused Kamaruzzaman during his detention at the camp housed at Mymensingh Zilla Parishad Dak Bungalow. His evidence depicts accused's role, status and his substantial influence over the camp and his affiliation with the Pakistani occupation army in carrying out criminal activities.

431. According to P.W.1, he was kept confined at a room on the first floor of the camp set up at Zilla Parishad Dak Bungalow, Mymensingh and the accused Muhammad Kamaruzzaman used to sit and stay at one of rooms of the camp. Besides, P.W.1 has reaffirmed in cross-examination that Kamaruzzaman [accused] was in charge of Islami Chatra Sangha of greater Mymensingh and he used to attend meetings with political leaders for 'operational' purpose. 20-30 or sometimes 40 members of Al-Badar used to stay at the Al-Badar camp at Zilla Parishad Dak Bungalow.

432. In addition to above unimpeached statement on material facts relevant to the activities of the camp and portrayal of accused's influence and authority over it P.W.1 , as regards the event as listed in charge no.7, has deposed that Dara the son of Tepa Mia of Mymensingh town was also murdered and Tepa Mia luckily escaped. This piece of version remains unrefuted. P.W.1 is not found to have stated anything more about the event of killing of Dara.

433. P.W.9 Md. Abul Kashem (62) chiefly stated how he was abducted by the armed Al-Badars and brought to the camp at Zilla Parishad Dak Bungalow, Mymensingh on 04th December 1971. According to him he was kept detained there till the Al-Badars had fled leaving the camp on 10th December. According to him, on 09th December at about 8/9 pm Ashraf, leader of Islami Chatra Sangha [ICS] accompanied by Kamaruzzaman [accused] came to his room at the camp and Ashraf had told that his accomplice's name was Kamaruzzaman, leader of Al-Badar. He [P.W.9] knew Ashraf from earlier but he had not seen Kamaruzzaman earlier. When Mymensingh was freed on December 10, 1971, they were released.

434. P.W.9 further stated that Al-Badar leaders Kamaruzzaman and Ashraf used to control Mymensingh [during the Liberation War] and during his confinement at the camp, he heard that people were killed every night on the river bank adjacent to the camp. Defence could not dislodge this statement. Presumably it became anecdote that Al-Badars under the leadership of Muhammad Kamaruzzaman often brought the unarmed civilians on the bank of river adjacent to the camp and gunned them down.

435. The above material versions depicting the fact of P.W.9's confinement at the camp and activities carried out by it remains totally unchallenged. However, as regards the event of Dara killing, P.W.9 merely stated what he heard. According to him he heard that prior to their confinement at the camp, Hamidul Haque [P.W.1], Tepa Mia [father of Dara] , Shahed Ali, Dara [victim of charge no.7] and Dabir Uddin [P.W.15] were brought and kept detained at the camp and among them Dara was killed.

436. In reply to question elicited by the defence, P.W.9 stated that he could not say when they were so brought and detained at the Al-Badar camp and released there from. With this reply the fact of bringing them to the camp and keeping them detained there appears to been re-affirmed. P.W.9 however, excepting the above hearsay statement has not testified anything more related to the fact of abducting Dara and his father Tepa Mia and killing of Dara implicating the accused therewith.

437. P.W.15 Dabir Hossain Bhuyian mainly narrated how he was abducted by 6/7 armed men and brought to the camp at Zilla Parishad Dak Bungalow, Mymensingh and subjected to torture there. According to P.W.15 he was kept detained at the camp from the last part of July 1971 to last part of August 1971 i.e for about one month.

438. On cross-examination, P.W.15 stated that Kamaruzzaman [accused] was a leader of Al-Badar and on the first day of his detention at the camp, he didn't see any arms in his [accused] hand. Later, he had seen him [Kamaruzzaman] carrying arms on his shoulder. During the visit of the camp by Brigadier Kadir Khan, he and detainee Hamidul were produced before him [Brigadier]. Kader Kahn was present at Kamaruzzaman's room at the Dak Bungalow camp and Al-Badar men produced Hamidul, him [P.W.15] and another detainee [before Kader].

439. P.W.15 further stated that during his detention there he also found Dara [victim of charge no.7], Hamidul [P.W.1] , Tepa Mia, Rashid detained at the same room of the camp. During his 26-27 days' detention at the camp, in

furtherance of instruction of Kamaruzzaman [accused] Tepa, Dara, Rashid and Shahed Ali were brought out of the camp and thus they disappeared.

440. P.W.15 has re-affirmed, on cross-examination, that he was brought to the camp blind folded on 20/22 of July 1971 and since earlier he knew Rashid, Hamidul [P.W.1[, Tepa Mia and his son Dara whom he [P.W.15] found detained in his room at the camp. P.W.15 has re-affirmed too, on cross-examination, that Kamaruzzaman [accused] used to visit his[P.W.15] book shop [in Mymensingh town] since March-April 1970.

Deliberations

441. The learned defence counsel Mr. Ehsan Siddique in advancing his argument has submitted that statement of either of the three witnesses does not demonstrate any hint even that the accused being accompanied by 15-20 Al-Badars raided the house of one Tepa Mia and abducted him and his son Dara and brought to the camp at Zilla Parishad Dak Bungalow. Mere saying [as stated by P.W.1] that Dara was killed and his father Tepa Mia somehow escaped cannot be considered as evidence to tie the accused with the event of alleged criminal acts. P.W.9 does not state as to from whom he had heard that Dara and his father Tepa Mia were kept detained at the camp and how Dara was murdered.

442. The learned defence counsel went on to argue that the event of alleged abduction and murder of Dara and other detainees took place on 27 *Ramadan* in 1971[Corresponding to November 1971]. But P.W.15 claims to have seen Dara and his father Tepa Mia detained in the same room of the camp, during his detention there. This piece of evidence is untrue. Because according to P.W.15 he himself was brought to the camp on 20/22 of July 1971 and kept there detained for 26-27 days. After his [P.W.15] release at the end of August 1971, as stated by him, he was not supposed to see Dara and his father Tepa Mia detained there on 27 *Ramadan* in 1971[corresponding to November 1971]. This glaring contradiction impairs credibility of his statement so far it relates to the fact of detention of Dara and his father Tepa Mia at the camp.

443. In reply to argument extended by the defence, the learned Prosecutor has submitted that the three witnesses were kept detained at the Al-Badar camp set up at Zilla Parishad Dak Bungalow Mymensingh and they have narrated the activities carried out at the camp under the supervision and influence of the accused Muhammad Kamaruzzaman. Defence does not dispute the fact of killing Dara. P.W.9 was kept detained at the camp since 04th December 1971 and after his release there from he heard that prior to his detention, Hamidul Haque [P.W.1], Tepa Mia [father of Dara] , Shahed Ali, Dara [victim of charge no.7] and Dabir Uddin [P.W.15] were brought and kept detained there and among them Dara was killed. This piece of hearsay evidence carries probative value. Material facts together with this evidence relating to activities of accused and his culpable and close affiliation with the camp proves it beyond reasonable doubt that the accused had 'complicity' in committing the act of abduction , keeping detained and murder of Dara as narrated in the charge. Corroborating statement of P.W.15 also makes it strengthen. Thus, the variation as occurred in his statement as to the month or date of his detention and release there from is a mere inconsistency occurred due to memory failure which does not impair his evidence on some other material facts.

444. We are quite convinced to exclude the statement made by P.W.15 so far it relates to seeing Dara and his father Tepa Mia detained in the same room of the camp, during his [P.W.15] detention there. Because according to P.W.15 he himself was brought to the camp on 20/22 of July 1971 and kept there detained for 26-27 days. Therefore, naturally P.W.15 was not supposed to see Dara and his father Tepa Mia detained there on 27 *Ramadan* in 1971[corresponding to November 1971]. This is glaring contradiction which taints his above version. Gross variation occurred in his testimony in narrating the month of finding Dara and his father detained at the camp cannot be viewed casually. But however merely for this reason the other part of his testimony cannot be turned down in its entirety.

445. Keeping concentration on the narration made in the charge framed the Tribunal notes that the success of prosecution in proving the instant charge depends on some relevant facts which are **(i)** the criminal act of abduction of Dara and his father Tepa Mia was carried out by the accused and his

accomplices or accused had 'complicity' in committing the criminal act; **(ii)** Dara and his father Tepa Mia was brought to the Al-Badar camp at Zilla Parishad Dak Bungalow, Mymensingh and were kept detained there **(iii)** afterwards they including other detainees were brought to the bank of river Brahmaputra by Al-Badars **(iv)** Dara and three other detainees were gunned down to death there and Tepa Mia managed to escape.

446. Considering the context and pattern of offence people are not expected to witness the event of abduction, detention at the camp and killing of the detainees afterwards. 'Complicity' or 'participation' of accused may be well inferred and well perceived from relevant facts and circumstances which prompts not to draw any other hypothesis excepting the guilt of the accused, despite lack of explicit evidence in this regard. Long forty years after the alleged event direct evidence may not be available and the witnesses before the Tribunal, due to lapse of long passage of time, may not be expected to memorize accurately what they had heard and seen.

447. Let us have a look to the relevant and material facts revealed from evidence of P.W.9. The tribunal notes that P.W.9 was kept detained at the camp since 04th December to 10th December 1971 at the Al-Badar camp set up at Zilla Parishad Dak Bungalow, Mymensingh. It remained unimpeached. P.W.9 heard that before his detention, Hamidul Haque [P.W.1], Tepa Mia [father of Dara], Shahed Ali, Dara [victim of charge no.7] and Dabir Uddin [P.W.15] were kept detained at the camp and among them Dara was killed. It is proved from evidence of P.W.1 that he was also kept detained at the same Al-Badar camp for 26 days.

448. It is true that in reply to question elicited by the defence P.W.9 stated that he could not say when they [detainees as named in examination-in-chief] were so brought and detained at the Al-Badar camp and released there from. Thus the fact of bringing them [detainees including Dara and his father Tepa Mia] to the camp and keeping them confined there stands re-affirmed. It is not disputed that hearsay evidence is admissible. But hearsay statement of witness is to be corroborated by other evidence. The phrase 'other evidence' includes direct evidence or circumstantial proof or relevant material fact. A piece of hearsay evidence is said to have inspired credence when it is found to have

been corroborated by circumstantial proof or even a single relevant fact. According to the provisions contained in the Act of 1973 and also in light of jurisprudence evolved in *adhoc* tribunals hearsay evidence is admissible and the Tribunal can safely act on it if it s found to have carried rationale probative value. Probative value of hearsay evidence is to be weighed on concurrent appraisal of circumstances and relevant material facts.

449. It is true that P.W.9 has not stated anything as to the fact of abduction of Dara and his father Tepa Mia and taking them out of the camp to the bank of river Brahmaputra by Al-Badars. But it has been proved from what has been stated by him that Dara and his father Tepa Mia were kept detained at the camp and Dara was killed. This fact by itself seems to be sufficient to prove it inevitably that they were brought there by way of abduction, a criminal act and the perpetrators were the Al-Badar men of the camp. In the context prevailing in 1971 no unarmed civilian was expected to go or visit a notorious Al-Badar camp on his own accord.

450. Next, bringing or abducting one to the Al-Badar camp and keeping him confined there is another pertinent relevant fact that validly prompts a man of normal prudence that the perpetrators were none but the Al-Badars of the camp who committed the criminal act of abduction of Dara and his father and keeping them confined there. It is not disputed that Dara was murdered and his father Tepa Mia managed to survive. We have found that civilians were brought to Al-Badar camp and kept captive there and that the accused as a potential leader of the camp used to act and contribute to the commission of crimes by the Al-Badar men of the camp.

451. It remains unchallenged that Dara and his father were brought to the camp and afterwards Dara was killed at the bank of river nearer to the camp by the Al-Badar men. On totality of assessment of evidence presented as required under Rule 56(2) of the ROP the relevant fact and circumstance revealed lends assurance and corroboration to the above hearsay evidence of P.W.9 and it does not prompt us to infer any other reasonable hypothesis excepting the ‘complicity’ of the accused with the offence perpetrated.

452. In view of circumstances as conversed above the facts and circumstances stand proved are **(i)** the criminal act of abduction of Dara and his father Tepa Mia was carried out by the Al-Badars of the camp Zilla Parishad Dak Bungalow, Mymensingh as they were brought to the said Al-Badar camp and were kept there detained, as stated by P.W.9 **(ii)** 20-30 or sometimes 40 members of Al-Badar used to stay at the said Al-Badar camp, as stated by P.W.1 **(iii)** it became an anecdote that Al-Badars under the leadership of accused Muhammad Kamaruzzaman often brought the unarmed civilians on the bank of river adjacent to the camp and gunned them down, as stated by P.W.9 **(iv)** Kamaruzzaman [accused] was in charge of Islami Chatra Sangha of greater Mymensingh and he used to attend meetings with political leaders for 'operational' purpose **(vii)** accused Muhammad Kamaruzzaman was seen carrying fire arms with him when he used to sit at his camp's office, as stated by P.W.15 **(viii)** Detainee Dara was killed afterwards and his father managed to survive.

453. We reiterate that the test for proof beyond reasonable doubt is that "the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from the evidence, except that of guilt." The above material circumstances derived from statement of the witnesses are the fair indicia to arrive at rational hypothesis of accused's complicity with the criminal activities carried out by the Al-Badar camp including the criminal acts constituting the offence of murder of Golam Mostafa.

454. Criminal responsibility may be imputed to all the Al-Badar men of the camp. Because as a leader having significant authority and control over the camp accused Muhammad Kamaruzzaman predictably knowing the consequence of the criminal acts of fellow Al-Badars, in execution of the common design the accused was either reckless or approved or provided moral support to the actual accomplishment of the principal crimes. This is enough to incur criminal liability. The accused need not be shown to have directly participated to the all parts of commission of the principal crimes.

455. In view of circumstantial proof as stated above it has been proved that the accused Muhammad Kamaruzzaman, as a potential leader of Al-Badars

having significant level of authority and control over the camp was related to a scheme or system which had a criminal outcome. In furtherance of such scheme or system, the Al-Badar men abducting Dara and his father brought to the camp and afterwards Dara was killed.

456. Thus it is immaterial whether the accused actually aided or assisted in the actual commission of the principal offence of murder. It is sufficient to prove that the accused being a leader either failed to prevent commission of the offence alleged. Despite enjoying superior position, accused's failure to prevent commission of offence encompasses providing *'approval'* or *'moral support'* or *'encouragement'* to the perpetrator Al-Badars for committing the criminal acts forming part of attack against an unarmed civilian with intent to cause murder of Dara and thereby the accused Muhammad Kamaruzzaman is equally held responsible for the actual commission of the offence of murder as crimes against humanity as enumerated in section 3(2)(a)(h) of the Act of 1973 and thus he is found to have incurred criminal liability under section 4(1)of the Act of 1973.

XX. Activities carried out at and by the Al-Badar camps set up in Mymensingh and Sherpur and the Role and level of authority of the accused Al-Badar over these camps

457. It is already found that amongst the event of atrocities narrated in seven charges framed the events as listed in first 05 charges were allegedly carried out under the supervision of Al-Badar camp set up at Suren Saha's house in Sherpur and the events narrated in charge nos. 6 and 7 allegedly carried out under the control of Al-Badar camp set up at Zilla Parishad Dak Bungalow, Mymensingh.

458. A clear portrayal of status and position of the accused Muhammad Kamaruzzaman, as Al-Badar, within the geographical area of greater Mymensingh in 1971 needs to be unearthed, on the basis of evidence and materials before us. Such depiction is indispensable in calculating the height of accused's culpability with the crimes for which he has been found criminally responsible and guilty. In this regard, we may have look chiefly to the statement made by P.W.1, P.W2, P.W.8 and P.W.15. Of them P.W.1 and

P.W.15 were allegedly kept detained at different Al-Badar camps. P.W.2 allegedly used to work as a guard of Al-Badar camp at Suren Saha's house, Sherpur town. P.W.8, returning from India, after war of liberation had heard from his mother how his father was abducted and killed allegedly on instruction of accused Kamaruzzaman.

459. P.W.2 was also a member of Al-Badars who had worked as a guard at the Al-Badar camp set up at Suren Saha's house in Sherpur town. Naturally, he had sufficient and reasonable opportunity to experience, know and see the activities of the camps carried out under the vigorous coordination and approval of the accused. P.W.2, in addition to the events as listed in the charges has testified about the criminal acts which he claims to have witnessed at the camp. The events beyond the charges framed narrated by him may be of significance in determining the degree of accused's culpable status and his dominant authority and effective control over the camp as well.

Activities at Al-Badar camp at Zilla Parishad Dak Bungalow, Mymensingh

460. P.W.1 Md. Hamidul Haque was abducted and kept detained at Al-Badar camp set up at Zilla Parishad Dak Bungalow, Mymensingh in July 1971. P.W.1 stated that Kamaruzzaman, Kamran, Ashraf, Didar, Shelly were the active leaders of the camp. Kamaruzzaman, during his [P.W.1] detention at the camp, met him and asked to 'save Pakistan' and join the movement for wiping out freedom fighters. P.W.1 further stated that during his detention at the camp Kamaruzzaman [accused] visited Pakistan and returning back he disseminated his learning achieved from the visit and encouraged the Al-Badars for preserving Pakistan and liquidating the freedom fighters. This piece of unshaken evidence amply demonstrates accused's potential position as Al-Badar and his significant degree of authority over the camp. This is thus evident that the atrocities were carried out at and by the camp on his tacit approval.

461. Statement of P.W.1 further demonstrates that apart from Al-Badar camps in Sherpur and Jamalpur there had been camps at *Nalitabari*, *Phulpur Boalia Madrasa.* All these camps were under supervision of Kamaruzzaman [accused].

462. The above facts including the fact of P.W.1's being detained at the Al-Badar camp set up at Zilla Parishad Dak Bungalow, Mymensingh could not be dislodged by the defence, in any manner. Rather P.W.1 has re-affirmed it on cross-examination that he was kept detained at a lock-up on the first floor of the camp and Kamaruzzaman used to sit in a different room and Kamaruzzaman came to the lock-up, two-three days after his detention, to meet him.

463. P.W.1 also has re-affirmed, on cross-examination, that during his staying at the camp under surveillance, he often had occasion to meet and talk with Kamaruzzaman[accused] at the drawing room on ground floor of the camp. He saw him [accused] availing jeep.

464. Quoting Sultan, an Al-Badar of the camp, P.W.1 Md. Hamidul Haque stated too that Kamaruzzaman[accused] had taken part in an 'operation' at Ananda Mohan College in which a bearer of the college dormitory was killed and Dr. Sirajuddin, the then Principal of the college, was tortured by Al-Badar and Pakistani army. After liberation, Principal Sirajuddin told the event to him and now he is sick and about in death bed and has been staying in Dhaka. Defence could not impeach this version by cross-examining the P.W.1. It is true the accused has not been arraigned of the criminal acts depicted from this piece of evidence. But it however once again proves accused's potential and active position and culpable and explicit alliance with the Al-Badars of Mymensingh town.

465. P.W.8 Md. Ziaul Islam (61) is a hearsay witness as to the event of his father's abduction and killing by the Al-Badar men of Zilla Parishad Dak Bungalow camp, Mymensingh. No charge framed includes this event. However, non-bringing the event of his father's abduction and killing in the indictment does not impede the course of appraisal as to what he has stated involving the Al-Badar camp and its activities.

466. P.W.8 stated that he took part in the Liberation War and he along with his associate fighters went to India through Haluaghat border. He had no

communication with his father during the nine-month-long war. On the way to his return back to home after 10th December 1971, he heard from one of his friends at *Haluaghat* that the Pakistani army had killed his father. Afterwards, his mother told him that when he joined the war of liberation, people of the Shanti Committee [peace committee] , an anti-liberation force mounted pressure on his [P.W.8] father to know his [P.W.8] whereabouts.

467. P.W.8 also stated that his mother had told that under the instruction of the then Al-Badar commander Kamaruzzaman[accused], Tayeb, son of the Imam of Mymensingh Bara Masjid, and Rabbani picked up his father in the first half of November [1971] and took him to the Al-Badar camp at the [Mymensingh] District Council Dak Bungalow. He also heard that when his family asked Tayeb and Rabbani, both Al-Badar members, about his father, they said Al-Badar leader Kamaruzzaman [accused] ordered them to pick up his father. The Al-Badar men at the camp had told his family members that they had no orders from Kamaruzzaman [accused] to free him. On the night of November 23, 1971, his father along with another person named Kenedy was taken to *Barera Khal* of *Ghagra* union, five miles away from Mymensingh town and then they were killed with bayonets and Al-Badar members left the dead bodies over there.

468. P.W.8 has re-affirmed, on cross-examination that he went to India at the end of April 1971, after the Pakistani army had occupied Mymensingh town and had been in India till 10th December 1971. The version as to abducting his [P.W.8] father in November 1971 on Muhammad Kamaruzzaman's instruction to the Al-Badar camp at the Mymensingh District Council Dak Bungalow and the fact that Tayeb and Rabbani [Al-Badar men of the camp] had no orders from Kamaruzzaman to free his [P.W.8] father there from and later on he was killed by Al-Badars taking out of the camp remained totally unimpeached.

469. Instead of making attempt to dispel what has been stated by P.W.8 involving accused Muhammad Kamaruzzaman, defence, as it appears, chiefly made effort to show that P.W.8 is a man belonging to an unmerited family as his wife and son had to face criminal prosecution on some matters and for defaulting in payment of electricity bill. But these are not the indicators to

diminish witness's credibility, particularly if he is found to have not made any dexterous exaggeration, in narrating the material facts that he had heard.

470. There has been no earthy reason to doubt that P.W.8 had heard these material facts from his mother, after returning from India. As a result the piece of hearsay testimony of P.W.8 carries reasonable probative value and thus it together with the evidence of P.W.1, as discussed above, unerringly prompts to conclude that the accused Muhammad Kamaruzzaman had 'effective control' and potential influence over the camp at Zilla Parishad Dak Bungalow, Mymensingh and its Al-Badar members who perpetrated many other atrocious criminal acts, although the accused has not been indicted in the charges.

471. P.W.15 Dabir Hossain Bhuyian (65) was also abducted to Al-Badar camp at Zilla Parishad Dak Bungalow, Mymensingh at the end of July 1971 and kept detained there for 26-27 days, as he stated. It remains unshaken. It also remains unimpeached that P.W.15 found Hamidul Haque [P.W.1] detained at the camp in July 1971. Already it is found from evidence of P.W.1 that he was kept detained at the camp in July 1971. Thus the statement made by P.W.15 as to his detention at the camp inspires credence.

472. On cross-examination, P.W.15 replied that Brigadier Kader Kahn was present at Kamaruzzaman's room at the camp and Al-Badar men produced Hamid [P.W.1], him and another person of their room before Kader. P.W.15 also replied to question elicited by the defence that on the first day at the camp, he didn't see any arms in his [accused] hand. Later, he had seen him [Kamaruzzaman] carrying arms on his shoulder. The above version affirming the position and authority of the accused over the camp also demonstrates that accused Muhammad Kamaruzzaman was an armed potential Al-Badar leader of greater Mymensingh.

473. The Tribunal notes that above significant facts depicted from evidence of P.W.1, P.W.8 and P.W.15 of whom P.W.1 and P.W.15 were kept detained at the Al-Badar camp at Zilla Parishad Dak Bungalow, Mymensingh overtly prove the position, status and level of authority and influence of the accused

Muhammad Kamaruzzaman over the Al-Badar camp and the same are fair indicators in arriving at an unerring conclusion that the atrocious criminal acts forming part of attack directing the unarmed civilians were routinely carried out in furtherance of organised plan orchestrated at the camp on his[accused] explicit instigation, advices , instructions, encouragement, approval and substantial moral support provided to the perpetrators Al-Badar men of the camp.

Activities at Al-Badar camp at Suren saha's House, Sherpur

474. P.W.2 Monwar Hossain @ Mohan Munshi was a member of Al-Badar and had worked for 07 moths at the Al-Badar camp set up at Suren Saha's house in Sherpur town. Unquestionably, he had ample occasion to see and hear the activities carried out at and by the camp and the role of the accused Muhammad Kamaruzzaman as well. According to his unimpeached version that his boss Kamaruzzaman [accused] was a high flyer who used to accompany Majors [of the Pakistani army] and if he [accused] wanted to, he could have turned Sherpur upside down adequately demonstrates the position of the accused as Al-Badar.

475. In addition to the events narrated in the charges framed P.W.2 has testified some other events that he had opportunity to see and hear as he worked at the camp as its guard for 07 months in 1971.

476. P.W.2 stated that one day, during the war, Kamaruzzaman accompanied a group of 20-25 armed Razakars, an auxiliary force of the Pakistani occupation forces, and abducted one Shushil from a Hindu-slum between *Nurundi* and *Pearpur*. Kamaruzzaman, after talks with Pakistani Major Riaz, converted Shushil to Islam and named him Mahiruddin. Afterwards, Kamaruzzaman came to the camp in the evening and had an altercation with Nasir and Kamran [Al-Badar men]. At one stage of their altercation, Kamaruzzaman gunned down Shushil to death by taking the gun from Nasir. Defence did not care to refute and shake this fact, by cross-examining P.W.2

477. On the day of Hannan's [victim of charge no.2] release, Al-Badar men brought civil surgeon Askar to the Al-Badar camp but subsequently he was

released on Kamaruzzaman's directive. It indicates that the accused had 'effective control' over the camp and he was in such position that he could even prevent commission of any atrocity.

478. Next, Al-Badar men also caught and released football player Kajal with an instruction that he would leave Sherpur town. Kamaruzzaman [accused] instructed Nasir, Mahmud and Kamran [Al-Badars] to follow him and told them to kill Kajal if he tried to go to Jamalpur by crossing the river. Later he [P.W.2] heard that Kajal had been gunned down to death and his body could not be recovered, P.W.2 added. This fact remained totally unshaken in cross-examination.

479. The facts narrated by P.W.2 involve three other distinct criminal acts causing murder, confinement, abduction, forcible conversion to other religion for which separate charges have not been framed. But non framing charge on those events do not straight way diminish the truthfulness of those atrocious events and the culpable scenario of the camp and profile of its leader the accused as depicted from above evidence.

480. Effective control is primarily a question of fact, not of law, to be determined by the circumstances of each case [**Peri{i}** Appeal Judgement, para. 87; **Nahimana** Appeal Judgement, para. 605.] In the case in hand, we have already found from the aforesaid deliberations that the accused Muhammad Kamaruzzaman as a potential leader of Al-Badar exercised his significant influence and also had 'effective control' over the Al-Badar camps set up at Zilla Parishad Dak Bungalow, Mymensingh and at Suren Saha's house, Sherpur town.

481. For establishing accused's 'effective control' over the camps no formal document is needed. It could have been well articulated from circumstances and relevant material facts revealed in a particular case. This view finds support from the observation made by the ICTR Trial Appeal Chamber in the case of **Nahimana** which is as below:

> **"Effective control is primarily a question of fact, not of law, to be determined by the**

circumstances of each case [231 Peri{i} Appeal Judgement, para. 87**; Nahimana** Appeal Judgement, para. 605].

482. We have found from evidence of P.W.2, the guard of Al-Badar camp at Suren Saha's house, Sherpur town that Al-Badar men brought civil surgeon Askar to the Al-Badar camp but subsequently he was released on Kamaruzzaman's directive. Thus it is patent that the accused had ability and authority in taking 'necessary and reasonable measure' to prevent commission of criminal acts by the Al-Badar men. The Tribunal notes that the determination of what constitutes "necessary and reasonable measures" is not a matter of substantive law but of fact, which must be assessed on a case-by-case basis, taking into account the particular circumstances of each case protesting against or preventing criticizing criminal action.

483. The above deliberations made on unshaken statement of P.W.1 who remained in detention at the Al-Badar camp set up at the Zilla Parishad Duk Bungalow, Mymensingh makes the rationally built conclusion that accused Muhammad Kamaruzzaman was not only a member of Al-Badar, but he was a potential leader of this para militia force which was the creation of Jamat E Islami and acted as its action section. The accused was in position to exercise authority and effective control over the camp and substantial ability to influence its activities.

XXI. Investigation Procedure

484. No argument has been advanced on part of the defence attacking the fairness and legality of investigation procedure. However, we deem it expedient to address the issue, in light of provisions contemplated in the Act of 1973 and the ROP together with the deposition made by the IO before the Tribunal. Investigation officer [P.W.18] is a mere formal witness. Any procedural flaw even if found in the task of investigation does not necessarily impair the entire investigation and in no way affects the merit of the case. Besides, it is to be remembered that the investigation under the Act of 1973 is a quite unique job for the officer assigned with it. The 'report' submitted by the Investigator arraigning the accused does not relate to the offence under the normal Penal Law. In fact the Investigation Officer had to deal with the

alleged offence of crimes against humanity committed in violation of customary international law and *prima facie* involvement of the accused therewith.

485. P.W.18 Md. Abdur Razzak Kahn PPM, an Investigation Officer of the Investigation Agency constituted under section 8(1) of the Act of 1973 was entrusted with the task of investigation. As stated by P.W.18 the information obtained through the record of Pallabi Police Station case no. 60 dated 25.1.2008 and Keraniganj Police Station case No. 34 dated 31.12.2007 was registered as 'complaint' on 21.7.2010 by the Investigation Agency of the Tribunal under Rule 5 of the ROP. During investigation P.W.18 prayed through the Chief Prosecutor for detention of the accused Muhammad Kamaruzzaman for the purpose of effective and proper investigation; visited the crime sites; examined the witnesses and recorded their statement; seized documents and materials from different organisations. On his [P.W.18] requisition, Monwara Begum another member of the Investigation Agency assisted him to carry out the task of investigation and she also seized many documents, books etc relevant to prove indictment. On conclusion of investigation he [P.W.18] submitted report on 30.10.2011 in the office of the Chief Prosecutor.

486. Afterwards, subsequent to submission of the 'report' the IO [P.W.18] seized some more books and recorded statement of additional witnesses on examining them. It is to be noted that prosecution shall not be precluded from calling additional witnesses or tendering any further evidence, at any stage of trial, with the permission of the Tribunal [section 9(4) of the Act of 1973].

487. Rule 2(6) of the ROP defines; 'complaint' on the basis of which investigation is to be done. Under Rule 2(6) a 'compliant' is defined as *"any information oral or in writing obtained by the Investigation Agency including its own knowledge relating to the commission of a crime under section 3(2) of the Act"*. That is to say, the Investigation Agency is authorized to initiate investigation predominantly on information it obtains. There has been no legal bar in obtaining information even from the said compliant petitions of Pallabi and Keraniganj police stations cases, as stated by P.W.18. But that does not mean that those compliant petitions were the sole foundation of investigation

into the alleged criminal acts of the accused allegedly committed during the war of liberation in 1971. Information obtained however merely allows the investigation agency to initiate the investigation process.

488. For the reason of absence of any legal sanction of transferring those two cases to ICT the same, after receiving by the Registry of ICT, were in fact simply sent to the Investigation Agency of the ICT as the information relating to allegations brought therein falls within the jurisdiction of the Act of 1973, as observed by the Magistrate Court. Rule 5 of the ROP speaks of procedure of maintaining 'complaint register' and not the procedure of initiating investigation. Rather Section 8 and Rule 4 contemplate the procedure of holding investigation and it appears that the IO (P.W.18) accordingly has done the task of investigation. The 'report' submitted by the Investigation Agency before the Chief Prosecutor under Rule 11 of the ROP, in true sense, is the foundation of the case. On receipt of such 'report' the Chief Prosecutor is authorized to examine it and documents , materials submitted therewith and to decide whether 'Formal Charge' is to be submitted under section 9(1) of the Act of 1973.

489. On total appraisal, we do not find anything flawed in the investigation task. Fundamentally, investigation under the Act of 1973 on information obtained relates to the process of procuring documentary evidence, recording statement of witnesses if found available and identifying the event[s], crime site[s] and casualty caused by the alleged criminal acts and also to identify whether the criminal acts alleged fall within the definition as enumerated in section 3(2) of the Act of 1973. The Tribunal notes that the Investigation Officer [P.W.18] , in compliance with the norms and provisions contemplated in the Act of 1973 and the ROP, carried out its investigation on completion of which he duly submitted 'report' before the Chief Prosecutor.

XXII. Al-Badar: Armed para militia force acted as 'auxiliary force'

490. It is a fact of common knowledge now that Al-Badar was an armed para militia force which was created for 'operational' and 'static' purpose of the Pakistani occupation army. Under the government management Al-Badar and Razakars were provided with training and allocated fire arms. Why these para

militia forces were created? Of course, objective was not to guard lives and properties of civilians. Rather, it is reasonably undisputed that the Al-Badar force had acted in furtherance of policy and plan of Pakistani occupation army and in so doing it had committed atrocities in a systematic manner against the unarmed Bengali civilians through out the territory of Bangladesh in 1971. Pro-liberation civilians, intellectual group, Hindu community were their key targets.

491. Material **Exhibit-II**, the attested photocopy of statement [relevant file: civil & military administration of Netrokona sub-division, 1971: **prosecution documents volume-1**] seized from the Liberation War Museum demonstrates the detail of allocation of fire arms and ammunitions to Al-Badar and Razakar forces. Al-Badar acted as the Pakistan army's '**death squads'** and exterminated leading left wing professors, journalists, litterateurs, and even doctors [**Source: Pakistan Between Mosque And Military**: *Hussain Haqqani*: published by Carnegie Endowment For International Peace, Washington D.C, USA first published in 2005, page 79]

492. The freedom fighters and pro-liberation Bengali people were treated as *'miscreants'*. Even reward was announced for the success of causing their arrest or to provide information about their activities. Objective of such announcement was to wipe out the pro-liberation Bengali civilians to resist and defy the war of liberation which was the core policy of the Pakistani occupation armed forces. A report titled **ÒmiKv‡ii wm×vš : `ywZKvix‡`i †MdZvi ev Le‡ii Rb¨ cÖ¯‘wi †`Iqv n‡eÓ** published on 25 November 1971 in **The Daily Pakistan** [‰`wbK cwK¯vb] demonstrates it patently. The report, pursuant to a government press note, classified the *'miscreants'* in five categories as below:

`ywZKvix‡`i †kYxweÁvM wb¤iæc n‡et

K. Z_vKw_Z gyj³ ewnbxi wbqwgZ m`m¨, Z_vKw_Z gyj³ ewnbx fwZ‡Z mnvh¨Kvixiv|

L. †¯”Qvq we‡`vnx‡`i Lv`¨, hvbevnb I Ab¨vb¨ `e¨ miei vnKvix|

M. †¯”Qvq we‡`vnx‡`i Avkq`vbKvix|

N. we‡`vnx‡`i ÔBbdigvi Õ ev evZvevnKi æc hviv KvR K‡i Ges

0. Z_vKw_Z gyj³ ewnbx m¤úwKZ bvkKZvgjvK wjd‡jU, c¨v¤ú‡jU cfvZi †jLK ev cKvkK|

[**Source: Sangbadpatre Muktijuddher Birodhita: Ekattorer Ghatakder Jaban Julum Sharajantra**: Edited by Dulal Chandra Biswas: Bangladesh Press Institute: March 2013 Page 324]

493. Therefore, when it is established that the Al-Badar force was an armed *para militia* force created under the active vigilance of Jamat E Islami and Pakistani occupation army it may be unerringly concluded that it acted as an 'auxiliary force' for 'operational' , Static' and 'other purposes' of the occupation armed force. It is also found from the book titled **'Muktijudhdhe Dhaka 1971'** that in 1971, Jamat E Islami with intent to provide support and assistance to the Pakistani occupation army formed armed Razakar and Al-Badar force and obtained government's recognition for those *para militia* forces. The relevant narration reflected in the book is as below:

ÒRvgvqv‡Z Bmjvgx gyj³ hy×i ïi“ †_‡K †kl chš mvgwiK Rvšv‡K mg_b K‡i| Zv‡`i mnvqZvi Rb¨ Ab¨vb¨ agvÜ `j wb‡q c_gZ MVb K‡i kwš Kwgw U| cieZx mg‡q mk¯ ewnbx ivRvKvi I Avje`i MVb K‡i Ges miKvix ¯xKZx. Av`vq e‡i| hy×‡K aghy× wn‡m‡e cPviYv Pwj‡q DM agxq Dbœv`bv mÿgi †Póv K‡i| Avi Gi Avov‡j ˆmb¨‡`i mnvqZvq Pvjvq wbwePv‡i bkxsm MYnZ¨v, jyj, bvix wbhvZb, AcniY I Pvùv Av`vq| me‡kl RwZi we‡eK ey×Rxex‡`i nZ¨v Kiv nq| Ó

[Source: **Muktijudhdhe Dhaka 1971**: edited by Mohit Ul Alam, Abu Md. Delowar Hossain, Bangladesh Asiatic Society , page 289 : Prosecution Documents Volume 03 page 583]

494. The narrative extracted from the old report of **Fox Butterfield** published in the **New York Times**- **January 3, 1972** unambiguously establishes that the Al-Badar was equipped and acted as directed by the Pakistani occupation forces.

"……..There is growing evidence that Al Badar was equipped and directed by a special group of Pakistani army officers. Among papers found in the desk of Maj-Gen. Rao

> **Farman Ali, the military adviser to the Governor of East Pakistan, were a series of cryptic references to Al Badar…... "Captain Tahir, vehicle for Al Badar", and "use of Al Badar", one scrawled note said. Captain Tahir is believed to have been the almost legendary Pakistani Commander of the Razakars, the Bihari militia used by the Pakistani army to terrorise Bengalis."**
>
> **[Source**: **Bangladesh Documents Vol. II** page 576, Ministry of External Affairs, New Delhi].

495. Since the Al-Badar force was an armed para militia force and it acted in furtherance of policy and plan of Pakistani occupation armed forces no formal letter of document needs to be shown to prove that it was under placement and control of Pakistani occupation armed forces, for designating it as 'auxiliary force'. Relying on the old reports as conversed above it can be safely concluded that the 'Al-Badar' was an *'auxiliary force'* as defined in section 2(a) of the Act of 1973. Besides, the information depicted from documents, as referred to above, are considered to be the necessary constituents of the phrases 'placement under the control' of armed force.

XXIII. Mode of responsibility: Superior responsibility

496. On the issue of 'mode of responsibility', Ms. Tureen Afroz, the learned prosecutor has contended that the accused can be held responsible also under the theory of superior responsibility, if the evidence and materials demonstrate it patently, despite the fact that the accused has been charged only for incurring individual criminal responsibility under section 4(1) of the Act of 1973. She has argued further, drawing attention to section 16 of the Act of 1973 that the charges to be framed need not state the 'mode of responsibility'. Mainly the charges framed need to contain particulars of the alleged crimes which may reasonably sufficient to give the accused 'notice' of 'the matter with which he is charged'. Thus there can be no legal bar in holding the accused liable under the theory of civilian superior responsibility' also under section 4(2) and it can be taken into account as an aggravating factor to assess

the degree of accused's participation to the accomplishment of criminal acts as narrated in the charges.

497. Conversely, Mr. Ehsan Siddique, the learned defence counsel argued, on this point, that without altering charge, for the purpose of providing notice to the person accused with the crimes alleged, as required under section 16 of the Act of 1973 he cannot be held guilty under a distinct mode of liability i.e under section 4(2) of the Act of 1973. In all the charges made the accused has been described to have incurred individual criminal responsibility for his alleged 'act' or 'conduct'. Additionally, prosecution has failed to prove that the accused acted as 'superior' of the persons who perpetrated the actual crimes.

498. On plain construal of section 16 of the Act of 1973, we find substance in what has been submitted by Ms. Tureen Afroz, on issue of 'mode of liability'. It is true that in the charges framed, the mode of liability has been specifically stated for the crimes alleged. In fact, stating particulars of the alleged crimes in the charges framed is sufficient to give notice of the matter with which the accused has been charged. In a criminal trial, mode of liability can be appropriately determined only in trial on the basis of evidence, materials presented before a court of law and surrounding relevant circumstances revealed.

499. If it is proved from the facts depicted in trial that the accused participated to the commission of crimes alleged also in the capacity of 'superior' of the perpetrators, he may be held responsible cumulatively under section 4(1) and section 4(2) of the Act of 1973. But his liability as 'superior' may be taken into consideration only as an aggravating factor, and on the same set of facts narrated in charges the accused cannot be held guilty and convicted cumulatively for the liability both under section 4(1) and section 4(2) of the Act of 1973. It is to be noted that the definition of a 'superior' is not limited to military superiors only; it also may extend to *de jure* or *de facto* civilian superiors.

500. In essence, the finding on mode of responsibility under section 4(1) of the Act of 1973 does not prevent the Tribunal [ICT-2] from rendering its finding on responsibility even additionally under section 4(2) of the Act of 1973. The Tribunal [ICT-2], therefore, is not precluded from considering both forms of responsibility in order to get a full reflection of culpability of the accused, in light of the facts revealed from evidence and materials. But however, we consider that 'cumulative convictions' under section 4(1) and 4(2) of the Act of 9173 is impermissible for the same conduct or act forming part of attack that resulted in actual commission of the crimes alleged.

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

501. The definition of crimes against humanity requires that the individual criminal act, for example, a murder, be committed within a broader setting of specified circumstances and context. The reason for the inclusion of a context element in crimes against humanity is to distinguish ordinary crimes under national law from international crimes which are criminal under international criminal law even if national law does not punish them.

502. The multiple commission of crimes required for crimes against humanity increases the gravity of the single crime as it increases the danger of the individual perpetrator's conduct. For example, a victim who is attacked in the broader context of a widespread or systematic attack is much more vulnerable. A victim of ordinary criminal conduct has far better means of defense. He or she can call police or neighbours or even defend himself or herself without having to fear that the perpetrator calls to his or her peers for support. A perpetrator of crimes against humanity also poses a greater threat because ordinary social correctives cannot function properly in prevailing context. Public disapproval of criminal behaviour, a strong counter incentive against criminal conduct, is not available in such context. On the contrary, collective action tolerated or supported by the authorities helps to overcome natural inhibitions. Yet another reason for the magnified danger of the single perpetrator has been pointed out by **Judge Cassese** who noted that, in contrast to the perpetrator of an ordinary crime, a perpetrator committing a crime against humanity may not fear punishment. [**Prosecutor v. Tadic**, ICTY, Case

No. IT-94-1-A and IT-94-1-A, Separate Opinion of Judge Cassese, 26 January 2000, para. 14.]

503. To qualify as a crime against humanity, the crimes enumerated in section 3(2)(a) of the Act of 1973 must be committed against the 'civilian population'. An "attack against a civilian population" means the perpetration against a civilian population of a series of acts of violence, or of the kind of mistreatment referred to in sub-section (a) of section 3(2). Conducts constituting 'Crimes' committed against 'civilian population' refers to organized and systemic nature of the attack causing acts of violence to the number of victims.

504. The accused Muhammad Kamaruzzaman has been prosecuted and tried for the offences enumerated in section 3(2)(a) of the Act of 1973 which are not punishable under the normal penal law of the country. The offences enumerated in the Act of 1973 are known as crimes committed in violation of customary international law. Murder punishable under Penal law is isolated crime and needs no 'contextual requirement'. But murder as crime against humanity must be shown to have been committed within a context so that it can be distinguished form isolated crime. In the commission of an offence of crimes against humanity 'attack' is the event of which the enumerated crimes must form part. Indeed, within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape and deportation. Such 'attack' must be committed against 'civilian population' and the 'attack' must be systematic, in furtherance of policy or plan . These requirements make the offence of crimes against humanity distinguished from the offences punishable under normal penal law.

505. From the segment of our deliberations on adjudication of charges we have already found that the events of atrocities constituting crimes against humanity, narrated in the charges proved were perpetrated directing the unarmed Bengali civilians belonging to pro-liberation ideology. The offences proved as narrated in charge nos. 1,2,3,4 and 7 took place during the period of war of liberation in 1971.

506. It has been proved that the accused Muhammad Kamaruzzaman was a potential leader of Islami Chatra Sangha (ICS) and was nominated as the 'office secretary' of the central committee of the then East Pakistan Islami Chatra Sangha. It is also proved that he was concerned with the commission of crimes alleged in the capacity of a significant leader of Al-Badar and he activated significantly in the formation of Al-Badar in greater Mymensingh. We have also found from the book titled **'Sunset at Midday'** [paragraph two at page 97] that *"The workers belonging to purely Islami Chatra Sangha were called Al-Badar"*.

507. We have already deduced that Al-Badar was an 'auxiliary force' within the meaning of section 2(a) of the Act of 1973. Therefore, it becomes patent that the accused Muhammad Kamaruzzaman had acted and participated to the actual commission of crimes proved as a potential leader of Al-Badar, an *'armed wing'* meant to provide aid and assistance in committing atrocities by exercising his authority and influence over the members of two Al-Badar camps, one in Sherpur town and another in Mymensingh town.

508. Under what context the accused committed such acts forming part of attack committed against unarmed civilian population? We need to have look to the 'contextual backdrop' of perpetration of such crimes in furtherance of 'operation search light 'on 25 March 1971.

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

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

510. Thus, even from reading and interpretation of section 3(2) of the Act of 1973 a crime must not, however, be an isolated act. A crime would be regarded as an "isolated act" when it is so far removed from that 'attack'. Now, it is to be considered whether the alleged criminal acts committed in violation of customary international law constituting the offences enumerated in section 3(2)(a) of the Act of 1973 were connected to policy or plan of the government or an organization. It is to be noted too that such policy and plan are not the required elements to constitute the offence of crimes against humanity. These may be taken into consideration as factors for the purpose of deciding the 'context' upon which the offences were committed.

511. The expression 'committed against civilian population' as contained in section 3(2) of the Act of 1973 itself is an expression which specifies that in the context of a crime against humanity the civilian population is the primary object of the 'attack'. As regards elements to qualify the 'attack' as a 'systematic character' the Trial Chamber of ICTY in the case of **Blaskic** [ICTY Trial Chamber , March 3, 2000, para 203] has observed as below:

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

512. Thus, the term 'context' stems from 'policy or plan' in furtherance of which 'attack' was committed in 'systematic' manner which characterizes the offence, the outcome of the attack, as crime against humanity.

Context prevailing in 1971 in the territory of Bangladesh

513. It is indeed a history now that the Pakistani occupation army with the aid of its auxiliary forces, pro-Pakistan political organizations implemented the commission of atrocities in 1971 in the territory of Bangladesh in furtherance of following policies:

(i) Policy was to target the self-determined Bangladeshi civilian population

(ii) High level political or military authorities, resources military or other were involved to implement the policy

(iii) Auxiliary forces were established in aiding the implementation of the policy

(iv) The regular and continuous horrific pattern of atrocities perpetrated against the targeted non combatant civilian population.

514. The above facts in relation to policies are not only widely known but also beyond reasonable dispute. The context itself reflected from above policies is sufficient to prove that the offences of crimes against humanity as specified in section 3(2)(a) of the Act of 1973 were the predictable effect of part of 'systematic attack' committed against 'civilian population'. This view finds support from the observation made by the Trial Chamber of ICTY in the case of **Blaskic** as mentioned above[ICTY Trial Chamber , March 3, 2000, para 203].

515. It is quite coherent from the facts of common knowledge involving the backdrop of our war of liberation for the cause of self determination that the Pakistani occupation armed force, in execution of government's plan and

policy in collaboration with the local anti liberation section belonging to JEI and its student wing ICS and auxiliary forces and other religion based pro-Pakistan political parties , had to deploy public and private resources and target of such policy and plan was the unarmed civilian Bangalee population, pro-liberation people, Hindu community, intellectuals and pursuant to such plan and policy atrocities were committed to them as a 'part of a regular pattern basis' through out the long nine months of war of liberation in 1971.

516. In the case in hand, it would reveal that apart from the events of crimes narrated in the charges numerous atrocious incidents of murder, confinement, torture, abduction, conversion to religion etc. were carried out in the territory of greater Mymensingh by the Al-Badar , Razakars and Pakistani army, in a regular pattern basis. It may thus be legitimately inferred from the phrase "committed against any civilian population" as contained in the Act of 1973 that the acts of the accused forming part of 'attack' comprise part of a pattern of 'systematic' crimes directed against civilian population.

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

'OPERATION SEARCH LIGHT'

BASIS FOR PLANNING

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

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

[**Source: A Stranger In my Own Country: East Pakistan, 1969-1971**, *Major General (Retd) Kahdim Hussain Raja*, Oxford University Press, 2012, page 114. *See also* **'Songram Theke Swadhinata'(msMvg †_‡K ¯vaxbZv)** : Published in December 2010, By ; Ministry of Liberation War Affairs, Bangladesh; Page 182]

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

> "SO THE ARMY is not going to pull out. The Government's policy for East Bengal was spelled out to me in the Eastern Command headquarters at Dacca. It has three elements: **(i)** The Bengalis have proved themselves "unreliable" and must be ruled by West Pakistanis **(ii)** The Bengalis will have to be re-educated along proper Islamic lines. The "Islamisation of the masses" – this is the official jargon – is intended to eliminate secessionist tendencies and provide a strong religious bond with West Pakistan **(iii)** When the Hindus have been eliminated by death and flight, their property will be used as a golden carrot to win over the under-privileged Muslim."
>
> [**Source**:http://www.docstrangelove.com/uploads/1971/foreign/19710613_tst_genocide_center_page.pdf : *See also*: **Bangladesh Documents Volume I,** page 371: Ministry of External Affairs, New Delhi]

519. Therefore, the crimes for which the accused Muhammad Kamaruzzaman has been found guilty were not isolated crimes, rather these were part of systematic and planned 'attack' intended to accomplishment of the offence of crimes against humanity as enumerated in section 3(2) of the Act, in furtherance of policy and plan. From the backdrop and context it is thus quite evident that the existence of factors, as discussed above, lends legitimate assurance that the atrocious criminal acts, as alleged in the charges, were 'committed against civilian population' within a context forming part of 'systematic attack'.

520. Section 3(2) (a) of the Act of 1973 enumerates which acts are categorized as the offence of crimes against humanity. Any of such acts committed 'against any civilian population' shall fall within the offence of crimes against humanity. The notion of 'attack' thus embodies the notion of acting purposefully to the detriment of the interest or well being of a civilian population and the 'population' need not be the entire population of a state,

city, or town or village. Thus a single act of an accused forming part of attack committed against even a single unarmed civilian causing criminal act constituting the offence enumerated in the Act of 1973 is sufficient for holding him criminally responsible.

521. The phrase 'acts committed against any civilian population' as occurred in section 3(2)(a) clearly signifies that the acts forming attack must be directed against the target population to the accomplishment of the crimes against humanity and the accused need only know his acts are part thereof .Therefore, the facts and circumstances unveiled before us unmistakably have proved the contextual requirement to qualify the offences for which the accused has been charged with as crimes against humanity.

XXV. The accused need not participate in all aspects of the crime

522. To incur criminal liability, in a case of crimes against humanity, the accused himself need not have participated in all aspects of the alleged criminal conduct. [**Stakic**, ICTY Trial Chamber, July 31, 2003, para. 439]. The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated [**Blaskic**, ICTY Appeals Chamber, July 29, 2004, para. 48]. Participation may occur before, during or after the act is committed.

523. It has been argued by the learned defence counsel that prosecution has not been able to establish that the accused Muhammad Kamaruzzaman was directly involved with the commission of principal criminal acts constituting the offence as narrated in the charges. No witness claims to have witnessed the accused committing the criminal acts constituting the offences alleged. Without proving participation of accused in the commission of offences as listed in the charges he cannot be held guilty.

524. Tribunal notes 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 context of war of liberation in 1971. Section 22 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. Thus, in the case in

hand, if we keep the provision of section 22 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.

525. The acts of the accused do not always need to be committed in the midst of the attack provided that if they are sufficiently connected to the attack. This view finds support from the decision of Trial Chamber, ICTY in the case of **Limaj**[November 30, 2005, para 189]. The judicial pronouncements of *adhoc* tribunals have established that the accused himself need not have participated in all aspects of the alleged criminal conduct. The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated.

526. 'Participation' includes both direct participation and indirect participation. It has been observed in the case of **Kvocka** that

> **"It is, in general, not necessary to prove the substantial or significant nature of the contribution of an accused to the joint criminal enterprise to establish his responsibility as a co-perpetrator: it is sufficient for the accused to have committed an act or an omission which contributes to the common criminal purpose."[Kvocka et al., (Appeals Chamber), February 28, 2005, para. 421]**

527. In the case in hand, conscious conduct, act, behaviour or omission to act of the accused Muhammad Kamaruzzaman knowing the consequence of his 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 has been charged with.

528. The killing of Badiuzzaman as listed in charge no.1 took place within couple of hours the gang led by accused Muhammad Kamaruzzaman abducted Badiuzzaman and brought him to the army camp. This chain of facts constituting the principal offence of murder remains unimpeached. Thus by act of accompanying and leading the gang in the capacity of potential Al-Badar member in abducting the victim, as part of attack, the accused is found to have substantially contributed and facilitated the actual commission of the crime committed by the principals and as such he was 'concerned with the commission' of the murder alleged. The conscious act of accompanying and leading the gang of perpetrators signifies common intent and is a constituent of 'participation'.

529. It has been proved, in relation to charge no.2, that the accused Muhammad Kamaruzzaman by his acts approved or instigated or abetted the perpetrators, the Al-Badar members of the camp for causing the offence 'inhuman acts' to Principal Syed Abdul Hannan. 'Participation' encompasses 'approval' or 'instigation' or 'encouragement' or 'aiding' or 'abetment'. The accused who was a potential Al-Badar having influence , authority and material ability to control over the member Al-Badars of the camp instead of preventing them, encouraged and instigated for inflicting extreme dishonour causing mental and physical harm to Principal Syed Abdul Hannan.

530. As regards charge no.3 [mass killing and rape], it could not be possible to establish as to which persons belonging to Al-Badar, Razakar and Pakistani occupation army had physically participated to the actual commission of the crime of mass killing and rampant sexual ravishment although it has been depicted from evidence that the accused's explicit act of designing plan and providing advices to the Al-Badar members of the camp formed part of the 'attack' directed against the civilians of Sohagpur village by the gang of perpetrators. On this score too, the accused is equally liable for the crimes as listed in charge no.3 in the same manner as if it were done by him alone.

531. We have already found it proved that the accused Muhammad Kamaruzzaman consciously acted in such a manner in exercise of his influence over the members of Al-Badar particularly of two camps—one in

Sherpur town and another one in Mymensingh town and Pakistani occupation army that eventually facilitated and contributed to the actual commission of the crimes of murder, rape, inhuman acts, abduction, confinement, torture etc. Accused's acts substantially instigated, encouraged and approved the principals in perpetrating the crimes for which he has been found guilty in relation to charge nos. 4 and 7. His acts and conducts clearly constitute instigation or abetment to the perpetrators of the crime.

532. Question may be raised that why and how the accused alone is said to be accountable for the crimes narrated in the charges, particularly when the alleged criminal acts could not have been perpetrated by an individual alone. 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. In this regard, the Tribunal notes that in adjudicating culpability of the person accused of criminal acts , context and situations prevailing at the relevant time i.e the period of war of liberation in 1971[March 25 to December 16 1971] is to be considered.

533. It is immaterial to argue that the accused was not the actual perpetrator or he himself physically participated to the commission of the criminal acts. It is to be noted that in furtherance of attack directed against the civilian population the alleged crimes as enumerated in section 3(2)(a) of the Act of 1973 were committed. 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. This has been now a settled jurisprudence and it finds support from the principle enunciated in the case of **Akayesu** which is as below:

> **"A person may be tried for complicity in genocide "even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be**

> **proven." [Akayesu**, ICTR Trial Chamber, September 2, 1998, para. 531: See also **Musema,** ICTR Trial Chamber, January 27, 2000, para 174 **].**

534. In the case in hand, prosecution has been able to prove that the accused Muhammad Kamaruzzaman was related to a scheme or system which had a criminal outcome. The evidence indisputably suggests that the accused consciously and being aware of the consequence of his acts and conducts aided, encouraged and provided moral supports and approval to the commission of crimes alleged. It is now settled that the acts of aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in the commission of the crime.

535. In the case in hand, it has been established that the accused Muhammad Kamaruzzaman, as a potential member of Al-Badar, a para militia force used to maintain close association not only with Al-Badar camps set up at Suren Saha's house, Sherpur town and at Zilla Parishad Dak Bungalow, Mymensingh but also with the Pakistani occupation army and he had significant influence over them in carrying out criminal acts, during the period of war of liberation in1971 within the territory of greater Mymensingh.

XXVI. Deliberations on Defence case

536. Defence adduced and examined in all 05 witnesses including elder brother and son of the accused. They have testified mainly **(i)** to negate complicity of the accused with the atrocities alleged **(ii)** to negate the fact that he was Al-Badar leader **(iii)** to negate that the accused was involved with student politics in 1971 and **(iv)** claiming that the accused had been staying at his native village and not in Mymensingh or Sherpur town in 1971. It is to be reiterated that success of prosecution does not depend upon failure of the defence in proving its own defence. In a criminal trial onus solely lies on the prosecution. Understandably, despite this legal position defence intended to examine witnesses with an aim of shaking prosecution's case reasonably.

D.W.1 Md. Arshed Ali

537. Defence examined this witness as D.W.1 to refute complicity of the accused with the commission of the event of Sohagpur massacre, admitting the event to be true. It has been averred by this witness that the books exhibited, written by local freedom fighters do no describe complicity of the accused with the events in any manner. According to D.W.1 his father was also killed in conjunction of the event by the Pakistani army who launched the operation causing grave massacre at Sohagpur village. D.W.1 claims to have witnessed the event but does not support the alleged presence of the accused at the crime site. Thus the defence has argued that the evidence of prosecution witnesses examined in support of charge no.3 does not carry any amount of credence.

538. In a criminal trial, onus to prove the indictment squarely lies upon the prosecution and defence is not needed to prove innocence and any negative assertion. In the case in hand, defence has been permitted to produce and examine in all 05 witnesses mostly to prove the plea of *alibi*. But what we see in testimony of D.W.1 Md. Arshed Ali made before the Tribunal? The Tribunal does not find even a hint as to anything in support of a definite plea of *alibi* in the testimony of D.W.1.

539. Rather it appears that D.W.1 has corroborated the event of massacre at Sohagpur village as narrated in charge no.3 by raising finger to Nasa, Kadir doctor and the Pakistani army claiming them responsible for the atrocities, although he remains quiet as to complicity of the accused. Two books have been exhibited by this D.W.1 who stated that those contain the event of Sohagpur massacre. It is to be noted that the prosecution witnesses examined in support of the charge no.3 have testified that at the time of commission of the crime, accused Muhammad Kamaruzzaman, Boga Bura, Nasa, Kadir doctor, the local collaborators whom they knew since earlier, were with the Pakistani troops. For obvious reason, D.W.1 carefully avoided mentioning the name of the accused as accomplice of the principals, although he seems to have corroborated what has been testified by the prosecution witnesses on material fact.

540. Defence, admitting the perpetration of the horrific event of Sohagpur massacre committed on the date and time, submitted two books predominantly aiming to exclude complicity of the accused Kamaruzzaman as the same do not include any narration implicating the accused with the event. That is to say, the two books have been admitted into evidence and marked as exhibit-A, B merely to substantiate a 'negative assertion'. But the settled jurisprudence does not require a 'negative assertion' to be proved by adducing evidence.

541. The Tribunal notes that mere non-describing the name of the accused involving him with the commission of the event in those books does not *ipso facto* helps the defence to disprove prosecution case. Besides, authenticity of information narrated in these books raises reasonable question. Because the author himself seems to be not convinced about what he describes therein. Thus we are not persuaded to assume the authoritative value of Exhibit-A and B, in determining the accountability of the accused.

542. D.W.1 does not appear to have been examined in support of any specific 'defence case' or any definite *'plea of alibi'*. Therefore, mere statement of D.W.1 that the books Exhibit A and B do not contain any description as to complicity of the accused does not suggest anything favourable to the defence.

D.W.2 Alhaj Askor Ali

543. Defence examined this witness as D.W.2 aiming to negate the complicity of the accused with the commission of the event of abduction and killing of Golam Mostafa as listed in charge no.4. In similar manner, D.W.2 Alhaj Askor Ali while describing the incident of killing Golam Mostafa [as listed in charge no.4] , has deposed that Golam Mostafa was killed at the end of August 1971 by the Pakistani army . On cross-examination, he stated that he heard from the people of the locality that Pakistani army killed Golam Mostafa and he first heard the name of accused Kamaruzzaman 10-12 years back when he had participated general election as a candidate of Jamat E Islami.

544. The learned defence counsel has argued that D.W.2 could have disclosed the name of accused Kamaruzzaman if really he [accused] had complicity with the commission of the murder as listed in charge no. 4, in any manner. D.W.2

is an elderly man of the crime locality and had occasion to be associated with the family of the deceased and thus he is a credible witness in disproving the charge no.4.

545. We disagree. Defence is not obliged to disprove prosecution case. It is permitted to adduce and examine witness to prove *plea of alibi* or specific defence case, if any. Unattributable hearsay testimony of D.W.2 does not suggest deducing that he had sufficient acquaintance about the event of murder of Golam Mostafa and he[D.W.2] has come up on dock to depose as asked by the brother of accused Muhammad Kamaruzzaman. The evidence of D.W.2 does not disprove the prosecution case in relation to charge no.4, particularly when the prosecution seems to have been able to prove the charge eliciting culpability of the accused with the perpetration of the crime.

546. Mere recitation that Golam Mostafa was killed by Pakistani army does not exclude accused's involvement with the commission of crime alleged, particularly when he claims to have heard it from the people of the locality. Thus, the evidence of D.W.2 does not inspire credence, when the prosecution seems to have been able in discharging its onus by proving the arraignment brought against the accused.

547. From the trend of cross-examination of prosecution witnesses no specific and substantive defence case could have been perceived excepting the *plea of alibi.* But D.W.2 however, in a similar way, remained unvoiced as regards *plea of alibi.*

D.W.3 Mohammad Hasan Iqbal

548. D.W.3 Mohammad Hasan Iqbal Son of the accused Muhammad Kamaruzzaman has merely proved photocopy of some books, journal and papers [submitted in volumes of defence documents]. D.W.3 by proving those documents has stated that neither of those describes complicity of his father [accused] with any of atrocities committed in the district of greater Mymensingh, during 1971 war of liberation. That is to say, D.W.3 has testified merely to negate the allegation of his father's [accused] involvement with any of atrocities for which he has been charged. But it is settled legal

dogma that 'negative assertion' does not need to be proved by evidence. Additionally, the authors of those books, as it appears, do not seem to have portrayed the atrocities on the basis of their own experience. They even have not mentioned the source[s] they relied in describing the atrocities in the books written by them. On this score, those are not safe to be considered as authoritative ones, to exclude accused's involvement with atrocities narrated in the charges framed against him.

549. D.W.3 further claims that Exhibit-E (4) [Defence Documents: Volume 3], a book titled *'Ekattorer Bijoygatha'* [edited by Muntasir Mamun], published in 2000 narrating the war in Mymensingh and Sherpur does not portray his father's [accused] name. It has been argued by the defence that if the accused really had participated in any antagonistic and criminal acts alleged it would have been narrated in this book.

550. Understandably, the alleged books and journal have been submitted and exhibited in support of 'negative assertion'. The narrative of atrocities in those books does not appear to have been exploited from authoritative sources. The books are found to be devoid of sources through the use of footnotes or other citations to the sources used. These are not considered as published works of researchers.

551. First, according to settled norms of criminal jurisprudence, a negative assertion is not needed to be proved by adducing evidence. Second, the history of the war of liberation of Bangladesh and atrocities committed during 1971 directing unarmed civilians is not a mere piece of petite tale that it can be narrated or documented in couple of paragraphs of a book containing hundred pages.

552. Exhibit-D [Defence Documents: Volume 2] , the photocopy of a book titled *'Ekattorer Judhdhaporadhider Talika'* published in February 2009 and edited by one S.M Zahangir Alam. DW.3 claims that this document too does not list his father's [accused] name. But is it a complete or authoritative list of persons responsible for atrocities committed in 1971 within the territory of Bangladesh? About four decades after the war of liberation this book has been

published. It is not old documentary evidence that can be relied upon safely. Besides, mere non listing of accused's name in the book edited by an individual writer does not *ipso facto* proves his innocence or disproves his complicity with the atrocities for which he has been arraigned.

553. Similarly, **Exhibit-F** [Defence Documents: Volume 4] the January 2005 issue of a locally published journal ***'Alor Michil'*** which does not narrate the presence of accused at PTI camp is a very frail piece of publication which has been published long three and half decades after the war of liberation. It cannot be brushed aside that for various social and political factors and also due to lapse of long passage of time information on particular facts might have been distorted or documented in incomplete manner. Finally, the above books which do not narrate the name of the accused do not baffle the facts that the accused was a potential Al-Badar and a leader of the then East Pakistan Islami Chatra Sangha [ICS].

D.W.5 Abdur Rahim

554. This defence witness, as it appears, has been examined to negate the fact that the accused was not a member of Al-Badar in 1971. D.W.5 Abdur Rahim (69), a resident of Mymensingh town claiming him to be a freedom fighter merely stated that he had not heard of any Al-Badar or Razakar named Kamaruzzaman, either during the period of war of liberation or afterwards.

555. We are not forced to pen our view that by this statement the defence has been successful in dispelling the fact that the accused Kamaruzzaman was an Al-Badar. Already it has been established even by documentary evidence that the accused was a member of Al-Badar of Sherpur and he was arrested at the end of December 1971 from Dhaka and also he was elected as the 'office secretary' of Islami Chatra Sangha [ICS] in 1971. Besides, D.W.5, on cross-examination, admits that he does not have certificate as freedom fighter and he could not say whether Razakar or Al-Badar force were created during the period of war of liberation.

556. The above astonishing version makes D.W.5 an unreliable witness and it is inferred too that he was on dock before the Tribunal merely with intent to

put aside the accused by hiding truth. It is not believable at all that a freedom fighter [as claimed] could not say about the formation and existence of Al-Badar and Razakar force during the war of liberation. Existence of Razakar and Al-Badar forces in 1971 is a fact of common knowledge. Next, in absence of certificate it becomes untrue too that he was a freedom fighter. On total evaluation, his testimony suffers from intense fragility and lack of credence.

D.W.4 Kafil Uddin

557. D.W.4 Kafil Uddin is the elder brother of the accused. It is found that defence adduced and examined four witnesses i.e. D.W.1, D.W.2, mainly to negate the fact of accused's complicity with the event of criminal acts as listed in charge no. 3 and charge no.4 while D.W.3 by exhibiting some documents made effort to exclude accused's involvement with atrocities committed in greater Mymensingh in the capacity of Al-Badar. Such negative assertion relates to 'innocence' which shall have to be adjudicated on weighing prosecution evidence. No obligation lies with the defence to prove it. However, defence shall have right to take *plea of alibi* and to adduce evidence to substantiate it, although adjudication of guilt or innocence cannot be based solely either on success or failure of such plea.

558. All the defence witnesses excepting D.W.4 remained unvoiced as regards the *plea of alibi*. Only D.W.4 the elder brother of the accused appears to have been examined in support of the *plea of alibi* including the alleged claim that the accused was not associated with student politics. Now let us see what he has stated on *alibi plea* and how far it appears to have reasonably disproved the prosecution case.

559. D.W.4 Kafil Uddin, brother of accused Muhammad Kamaruzzaman deposed in favour of the accused. Mainly he stated that his brother Kamaruzzaman [accused] had been in their native village, leaving Sherpur town, during the entire period of war of liberation and he [accused] was not involved with student politics. Before we resolve the *plea of alibi*, as stated by D.W.4 we may have look to some material facts. D.W.4, on cross-examination, stated that his brother Muhammad Kamaruzzaman was arrested in Dhaka at the end of December 1971, on suspicion.

560. Why Muhammad Kamaruzzaman was so arrested at the end of December, 1971 in Dhaka? What was the reason of his coming to Dhaka at that time [immediate after the independence was achieved on 16 December 1971], particularly when D.W.4 claims that throughout the period of war of liberation his brother [accused] had been in their native village? Defence has failed to offer any explanation on it. However, A government handout published under the title **ÒAv‡iv 15 Rb `vjvj †MdZviÓ** on 31 December 1971 in **The Daily Pakistan** [‰`wbK cwK¯vb] , demonstrates that it contains the name of the accused Muhammad Kamaruzzaman as Al-Badar of Sherpur in serial no.14. [**Source: Sangbadpatre Muktijuddher Birodhita: Ekattorer Ghatakder Jaban Julum Sharajantra**, Edited by Dulal Chandra Biswas: Bangladesh Press Institute: March 2013 Page 358]

561. Exhibit-12, the attested photocopy of list of collaborators obtained from the Ministry of Home Affairs, Government of Bangladesh also corroborates it. The list shows accused Muhammad Kamaruzzamn's name in serial no. 297 as an arrestee Al-Badar of Sherpur. Thus it is quite evinced that the accused was a member of Al-Badar of Sherpur which disproves the claim that the accused had been in his native village during the period of war of liberation, as stated by D.W.4. Besides, it is quite natural human instinct that a person usually prefers to hide the truth to save his own brother from accountability of committing dreadful atrocities. D.W.4, as the elder brother of the accused has simply made such an effort.

562. D.W.4, on cross-examination, neither denied nor admitted whether his brother Muhammad Kamaruzzaman was the 'office secretary' of the then East Pakistan Islami Chatra Sangha [ICS] in 1971. He simply replied that he could not say it. D.W.4 tended to hide the truth again. The claim that the accused was not involved with student politics, as stated by D.W.4, becomes a blatant fallacy as it is found from a report titled **Òcv‡`kK QvÎ ms‡Ni Ri¤ix mfvÓ** published on **10 November 1971** in **The Daily Ittefaq** that in a meeting of provincial executive council of Islami Chatra Sangha [ICS] presided by its President Ali Ahsan Mohammad Mujahid new working council was formed which included Muhammad Kamaruzzaman [accused] as its 'Office Secretary'. [**Source:** *Sangbadpatre Muktijuddher Birodhita: Ekattorer Ghatakder Jaban Julum*

Sharajantra, Edited by Dulal Chandra Biswas: Bangladesh Press Institute: March 2013 Page 418]

563. Therefore, the pertinent relevant facts that the accused was a potential leader of the East Pakistan Islami Chatra Sangha [ICS] the student wing of Jamat E Islami [JEI] and also a potential leader of Al-Badar could not be disproved or refuted by the defence through examining D.W.4.

XXVII. Plea of Alibi

564. As regards *plea of alibi,* D.W.4 stated that in the wake of movement in 1971 he, as asked by his mother, brought his brother Muhammad Kamaruzzaman to their native village from Mymensingh and throughout the war of liberation period he [accused] had been staying there. D.W.4 further stated that he [accused] was not involved with politics either in his school or college life. Prosecution denied this version categorically.

565. It is settled proposition that the *plea of alibi* taken by the accused needs to be considered only when the burden on the prosecution has been discharged satisfactorily. Once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the *plea of alibi* to prove it with certainty so as to exclude the possibility of his presence at the site and time of crimes.

566. It is to be borne in mind too that the plea of an *alibi* by the defence does not constitute a defence case in its proper sense. If an accused raises an *alibi*, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a Defence in its true sense at all. By raising this issue, the accused does no more than require the Prosecution to eliminate the reasonable possibility that the *alibi* is true.

567. Defence case is meant to confront the prosecution case for removing or shaking the truthfulness of complicity of accused with the commission of offence with which he is charged. A person accused of a criminal charge is presumed to be innocent until he is proven guilty. Therefore, the defence is not obligated to plead any case of his own to prove his innocence and the

burden entirely lies upon the prosecution to prove the accused guilty of the charges.

568. First, in support of the above version relating to *plea of alibi* there has been no corroborating evidence or circumstances that could lead us to believe it as reasonable. Second, it has been depicted from his cross-examination that Ahammadnagar army camp [at Sherpur town] was 5/6 kilometer far from their native village and he [D.W.4] used to carry on his business in Sherpur town and stay there during the war of liberation. Thus, it demonstrates that their native village was not far from Sherpur town and he [D.W.4] considered it favourable to stay in Sherpur town for carrying on his business there. If it is so why the D.W.4 attempted to emphatically state that his brother [accused] had never visited Sherpur town during war of liberation? It is considerably implausible too that the accused, throughout the period of war of liberation, had been staying at their native village and he had never visited Sherpur town, as claimed by D.W.4. He [D.W.4] as elder brother of the accused has come on dock merely to accumulate his accused brother and not to unfold the truth.

569. When a *plea of alibi* is raised by an accused it is for the accused to establish the said plea by affirmative and definite evidence which has not been led in the present case. Thus, the plea of alibi and statement of D.W4 in this regard does not inspire any amount of credence and it does appear to be a futile effort to evade from the charges brought against him.

570. In course of trial the defence shall have right to put his defence case or plea of alibi, while cross-examining the prosecution witnesses. But in the case in hand, no specific defence case can be attributed from the trend of cross-examination of prosecution excepting the plea of alibi with patent un-specificity.

571. In a criminal trial, defence is not burdened to disprove prosecution case. Rather, defence is burdened to prove its on defence and plea of alibi, if any. The fate of prosecution i.e adjudication of guilt or innocence does not depend upon success or failure of defence in proving its own defence or plea of alibi.

Besides, the plea of alibi comes into consideration only when the prosecution establishes the charges.

572. It is well settled proposition of law that the onus of proving the plea of alibi is on the accused. Though the burden on the prosecution is not lessened because of plea of alibi taken by the accused and such a plea is to be considered only when the prosecution has discharged the onus placed on it, once it is done, it is then for the accused to prove alibi with absolute *certainty* so as to exclude the possibility of his presence at the spot at the time of commission of the offence [AIR 1997 SC 322, **Rajesh Kumar v Dharambir and others].**

573. The accused herein has miserably failed to bring on record any credible facts or circumstances which could make the plea of his absence even probable, let alone, being proved beyond reasonable doubt. The plea of alibi has to be proved with absolute certainty so as to completely exclude the possibility of the presence of the accused in the locality of Sherpur and Mymensingh, at the relevant time.

XXVIII. The Role of Jamat E Islami (JEI) in 1971

574. A potential religion based political party of Pakistan Jamat E Islami the brainchild of Mawlana Sayyid Abu'l-A'la Mawdudi was significantly pro-active in collaboration with the Pakistan occupation army in carrying out its mission of wiping out the Bengali nation and to stand firm against the war of liberation in 1971, in the name of shielding Pakistan. In continuation of the earlier segment of this judgment which relates to the 'brief historical background' we deem it indispensable to get a scenario on the role and stand of Jamat E Islami [JEI] in 1971, particularly when it has already been established that the Al-Badar was an *'action section', 'armed wing'* of Jamat E Islami and the Al-Badar was formed mainly of the workers of its student wing Islami Chatra Sangha [ICS]. Besides, the victims and sufferers of the diabolical atrocities do have right to know the role Jamat E Islami played in 1971.

575. It is found from the book titled '***Muktijudhdhe Dhaka 1971'*** that in 1971, Jamat 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:

> *ÒRvgvqv‡Z Bmjvgx gyª hy×i ïi“ †_‡K †kl chš mvgwiK Rvšv‡K mg_b K‡i| Zv‡`i mnvqZvi Rb¨ Ab¨vb¨ agvÜ `j wb‡q c_gZ MVb K‡i kwš KwgwU| cieZx mg‡q mk¯ ewnbx ivRvKvi I Avje`i MVb K‡i Ges miKvix ¯xKZx. Av`vq e‡i| hy×‡K aghy× wn‡m‡e cPviYv Pwj‡q DM agxq Dbœv`bv myó i †Póv K‡i| Avi Gi Avov‡j ˆmb¨‡`i mnvqZvq Pvjvq wbwePv‡i bkxsm MYnZ¨v, jyÝ, bvix wbhvZb, AcniY I Pvùv Av`vq| me‡kl RwZi we‡eK ey×Rxex‡`i nZ¨v Kiv nq| Ó*
>
> **[Source**: ***Muktijudhdhe Dhaka 1971***: edited by Mohit Ul Alam, Abu Md. Delowar Hossain, Bangladesh Asiatic Society , page 289 : Prosecution Documents Volume 03 page 583]

576. Peace committee, constituted in 1971 was with the Pakistani occupation armed force. The history says what kind of brutal atrocities were committed by the Pakistani occupation army in the territory of Bangladesh in 1971. Who were the members of central peace committee? It is found from a report published in **The Daily Sangram** 17 April 1971 that a delegation team comprising of members of Central Peace Committee including Professor Ghulam Azam [also the then Amir of Jamat E Islami] in a meeting with the Governor of East Pakistan **Lt. General Tikka Khan** expressed solidarity and their adherence to the armed forces. Representing the delegation by the then Amir of Jamat E Islami predictably indicates that as an 'organisation' JEI, together with other religion based political parties, had endorsed the policy and plan of Pakistani occupation armed force in annihilating the Bengali nation. [See also, '**Sangbadpatre Muktijudhdher Birodhita : Ekattorer Ghatokder Jaban Julum Sharojantra Chitra (*msev`c‡Î gyª hy×i we‡ivaxZv: GKvË‡ii NvZK‡`i Revb Rvjvj Ioh‡ši wPÎ)*** : Edited by Dulal Chandra Biswas, Bangladesh Press Institute, March 2013, page 91].

577. *Hussain Haqqani* in his book titled **'Pakistan between mosque and military'** citing source narrated that

> **"In addition to motivating the troops with religious frenzy, the regime gave the Jamaat-e-Islami, the various factions of the Muslim League, the Nizam-e-Islam Party, and the Jamiat Ulema Pakistan—the parties that had lost the election to the Awami League—a semiofficial role. Members of these parties formed peace committees throughout Pakistan's eastern wing [the then East Pakistan], at district and even village levels. These parties functioned as the intelligence network of the Pakistan army".**
>
> [**Source: Pakistan Between Mosque And Military:** *Hussain Haqqani:* published by Carnegie Endowment For International Peace, Washington D.C, USA first published in 2005, page 77]

578. Thus it is evinced that Jamat E Islami played key role in formation of Peace Committees in 1971 and the objective was to crush the Bengali nationalists, by maintaining unholy alliance with the Pakistani army.

579. It is thus also a fact of history that Jamat E Islami [JEI] established an alliance with the Pakistani army. Why it preferred to do it? Instead of party's political activities why JEI did form such alliance with army? *Seyyed Vali Reza Nasr* in his book titled **'Vanguard Islamic Revolution: The Jama'at-I-Islami of Pakistan'** narrates that

> **"Driven by its dedication to Pakistan's unity and unable to counter the challenge of the Awami League, the Jama'at abandoned its role as intermediary and formed an unholy alliance with the Pakistan army, which had been sent to Dhaka to crush the Bengali nationalists**."
>
> [**Source:'Vanguard Islamic Revolution: The Jama'at-I- Islami of Pakistan'**: Seyyed Vali Reza Nasr, (Assistan Professor of Political Science at the University of San Diego, Published by

University of California Press, Berkeley, Los Angeles, USA in 1994, page 168]

580. The then chief of Jamat E Islami Professor Ghulam Azam afterwards in a press conference in Rawalpindi proposed the government for proper arming of the people having belief on ideology and solidarity of Pakistan to combat the *'miscreants'* [known as freedom fighters] and their supporters. [**Source**: **The Daily Sangram** 20 June 1971: see also, 'Sangbadpatre **Muktijudhdher birodhita : Ekattorer Ghatokder Jaban Julum Sharojantra Chitra(*msev`c‡Î gyªhtyi we‡ivaxZv: GKvËi NvZK‡`i Revb Ryyy Ioh‡ši wPÎ)***: Edited by Dulal Chandra Biswas, Bangladesh Press Institute, March 2013, page 200]

581. Jamat E Islami with objective to support the Pakistani occupation army endorsed the formation of 'peace committees' in 1971. It would reveal from the dispatch written by **Sydney H. Schanberg** the new Delhi correspondent of **The New York Times**, who was expelled from East Pakistan on June 30, 1971 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 and Jamat-e-Islami."**
>
> [**Source: Sydney H. Schanberg, New York Times,** July 14, 1971; see also: Bangladesh Documents Vol. I page 414, Ministry of External Affairs, New Delhi].

582. Thus the Pakistan government and the occupation military setup number of auxiliary forces such as the Razakars, the Al-Badar, the Al-Shams, the Peace Committee etc, essentially to act as a team with the Pakistani occupation army in identifying and eliminating all those who were perceived to be pro-liberation, individuals belonging to minority religious groups especially the Hindus, political groups belonging to Awami League and

Bangalee intellectuals and unarmed civilian population of Bangladesh, terming them ‘miscreants, ‘intruders’.

583. Al-Badar was formed with the workers of Islami Chatra Sangha [ICS] the student wing of Jamat E Islam [JEI] and it provided support to the occupation armed forces. A report published in **The Economist 01 July, 2010** speaks as below:

> **“Bangladesh, formerly East Pakistan, became independent in December 1971 after a nine-month war against West Pakistan. The West's army had the support of many of East Pakistan's Islamist parties. They included Jamaat-e-Islami, still Bangladesh's largest Islamist party, which has a student wing that manned a pro-army paramilitary body, called Al Badr.”**
>
> [**Source: The Economist: 01 July 2010:** *see also*
>
> http://www.economist.com/node/16485517?zid=309&ah=80dcf288b8561b012f603b9fd9577f0e]

584. The vital role of jamat E Islami [JEI] in creating the Al-Badar is also reflected from the narrative of the book titled **‘Sunset at Midday’** [**Material Exhibit-III**] which articulates as below:

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

> **speaking generally known as Bihari were called al-Mujahid**."
>
> [**Source: 'Sunset at Midday'** , *Mohi Uddin Chowdhury* , a leader of Peace committee , Noakhali district in 1971 who left Bangladesh for Pakistan in May 1972 [(Publisher's note): Qirtas Publications, 1998, Karachi, Pakistan, paragraph two at page 97 of the book]

585. Why should we place reliance on the book titled **'Sunset at Midday'**? Mostly the profile and credential of the author may be considered as a key indicator for determination of authoritativeness of narration made in a book. ***Mohiuddin Chowdhury*** the author, in his book has narrated about himself as below:

> "I decided to join Jamaat-e-Islami after my education is over. In 1962 I did my M.A and joined Jamaat-e-Islami in January, 1963 as a supporter **[page 65 of the book**]. ……I was selected Secretary of District PDM and then District DAC. I was selected Secretary and then elected as Amir of District Jamaat-e-Islami in 1968. I was holding the post of District Jamaat till dismemberment of East Pakistan in 1971. In 1971 when peace committee had been formed to cooperate with Pakistan Army to bring law and order in East Pakistan, I was again elected Secretary, District Peace Committee [**page 66 of the book]"**

586. The publisher's note of the book also reflects that Mohiuddin Chowdhury, the author was a leader of a political party [Jamaat-e-Islami] and Peace Committee, Noakhali. He left Bangladesh and reached Pakistan in the month of May, 1972 when the Bangalees in Pakistan opted for Bangladesh. Thus the autobiographic recitation made by the author in his book portrays his active and considerable affiliation too with the politics of Jamat E Islami which makes the information made therein authoritative and dependable.

587. Jamat E Islami [JEI] had played substantial role in organising and establishing its two wings conceivably to join the military's efforts. *Hussain*

Haqqani, in his book titled **'Pakistan between mosque and military'** citing sources narrated that

> **"The Jamaat-e-Islami and especially its student wing, the Islami Jamiat-e-Talaba [IJT], joined the military's effort in May 1971 to launch two paramilitary counterinsurgency units. The IJT provided a large number of recruits…….The two special brigades of Islamists cadres were named Al-Shams[the sun, in Arabic] and Al-Badr [the moon]…….A separate Razakars Directorate was established……..Two separate wings called Al-Badr and Al-Shams were recognized. 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, where the remainder were grouped together under Al-Shams, which was responsible for the protection of bridges, vital points and other areas…….Bangladeshi scholars accused the Al-Badr and Al-Shams militias of being fanatical. They allegedly acted as the Pakistan army's death squads and "exterminated leading left wing professors, journalists, litterateurs, and even doctors."**
>
> [**Source: Pakistan Between Mosque And Military**: *Hussain Haqqani*: published by Carnegie Endowment For International Peace, Washington D.C, USA first published in 2005, page 79]

588. Hussain Haqqani, the author of the above cited book was the former adviser to Pakistani Prime Ministers Ghulam Mustafa Jatoi, Nawaz Sharif and Benazir Bhutto. He also served as Pakistan's ambassador to Sri Lanka from 1992 to 1993. The book is an authoritative and comprehensive account of the origins of the relationship between Islamist groups and Pakistani army.

However, the above cited sourced account also offers a portrayal of active affiliation and alliance of Jamat E Islami with Pakistani army and also in establishing the Al-Badar, the death squad, in execution of common policy and plan.

589. What had enthused Jamat E Islami, an Islamist political party to maintain affiliation with the army? The sourced account made in the book titled **'Vanguard Islamic Revolution: The Jama'at-i-Islami of Pakistan'** demonstrates the relation with the Pakistani army evidently. *Seyyed Vali Reza Nasr*, the author of the book, reproduced the sourced information as below:

> **"After a meeting with General Tikka Khan, the head of the army in East Pakistan, in April 1971, Ghulam Azam, the amir of East Pakistan [JEI], gave full support to the army's action against "enemies of Islam". Meanwhile, a group of Jama'at members went to Europe to explain Pakistan's cause and defend what the army was doing in East Pakistan……In September 1971 the alliance between the jama'at and the army was made official when four members of the Jama'at-i-Islami of East Pakistan joined the military government of the province. Both sides saw gains to be made from their alliance."**
>
> [**Source: Vanguard Islamic Revolution: The Jama'at-i-Islami of Pakistan** : *Seyyed Vali Reza Nasr* (Assistan Professor of Political Science at the University of San Diego, Published by University of California Press, Berkeley, Los Angeles, USA in 1994, page 169]

590. Who was General Tikka Khan? Notoriety of his butchery in 1971 in the territory of Bangladesh was in fact directed against the entire mankind and had shocked the global conscious. In his book titled **'Pakistan between mosque and military'** *Hussain Haqqani* narrates that *'the commander of Pakistan's forces in East Pakistan, General Tikka Khan, was soon nicknamed* ***"Buthcer***

of Bengal" *in the international media.……..…..'* **Hussain Haqqani** quoting Lt. Gen. Niazi further narrates that

> **"Lieutenant General A.A.K Niazi, who took over command from Tikka Khan in April 1971, described the initial operation:**
>
> > **'On the night between 25/26 March 1971, general Tikka Khan struck. Peaceful night was turned into a time of wailing, crying, and burning. General Tikka let loose everything at his disposal as if raiding an enemy, not dealing with his own misguided and misled people. The military action was a display of stark cruelty more merciless than the massacres at Bukhara and Baghdad by Chengiz Khan and Halaku Khan…….General Tikka……..resorted to the killing of civilians and a scorched earth policy. His orders to his troops were: *"I want the land and not the people……."* Major General Rao Farman had written in his table diary, *"Green land of East Pakistan will be painted red."* It was painted red by Bengali blood."**
>
> [**Source: Pakistan Between Mosque And Military:** *Hussain Haqqani:* published by Carnegie Endowment For International Peace, Washington D.C, USA first published in 2005, page 79]

591. Thus we see that Jamat E Islami [JEI] deliberately and knowing the butchery of Pakistani army and their intent approached to the Pakistani army and its General Tikka Khan **[Butcher of Bengal who wanted the land and not the people]** declaring their support to the army's action against *"enemies of Islam' , 'miscreants'* and their supporters.

592. The Fortnightly Secret Report on the situation in East Pakistan for the first half of October 1971 demonstrates that even the Pakistan Democratic Party [PDP] was aware of the atrocities committed by Razakars and Jamat E Islami workers. **Paragraph 2** of the report says

> **"An extended meeting (50) of the Executive Committee of East Pakistan Regional PDP was held on 3.10.71 at Dacca residence of Mr. Nurul Amin with himself in the chair. The meeting discussed the present political situation and deteriorating economic condition of the country and favoured participation in the causing bye-elections. Some of the speakers mentioned about atrocities committed by the enemies as well as by the Jamaat-e-islami workers and Razakars on innocent people in the rural areas ……..."**
>
> **[Source: Fortnightly Secret Report** on the situation in East Pakistan for the first half of October 1971: Government of East Pakistan, Home(Political) Department: No. 686(172)-Poll/S(1)]

593. Razakars, an auxiliary force was formed to collaborate the Pakistani occupation army in liquidating the Bengali nation. But what fueled Jamat E Islami, a political party to act and approve such atrocious activities? Why it preferred to brand the pro-liberation Bengali people as their *'enemies'* and *'miscreants'*? However, the above information narrated in the report unmistakably reflects that Jamat E Islami's workers and Razakars were affianced in committing atrocities on innocent people of which even a like minded pro-Pakistan political party PDP was also aware and critic.

594. 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 Jamat E Islami and member of Central Peace Committee almost since the beginning of 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].

595. Such approach on part of the Amir of Jamat E Islami together with the fact of appalling atrocities committed on innocent pro-liberation people offers

an inevitable portrayal as to antagonistic, hostile and notorious role of Jamat E Islami which stood against the whole Bengali nation and its war of liberation, in the name of preserving Pakistan. A call, on part of Jamat E Islami's the then Amir for arming civilians who believed in so called solidarity of Pakistan rather substantially provided explicit agreement, approval and moral support to the Razakars, Al-Badars, Al-Shams, Peace Committees in carrying out horrific criminal activities. This reflects fair *indicia* of significant culpable role of Jamat E Islami [JEI] in 1971 in the territory of Bangladesh.

596. Therefore, it is now history based on old authoritative documents that chiefly it was Jamat E Islami (JEI) that played substantial role in formation of Al-Badar, Razakar, Al-Shams and Peace Committees and of course not with intent to guard the civilians and their property. Rather , it is undisputed history too that those para-militia forces actively collaborated the occupation armed forces to the accomplishment of their barbaric atrocities directed against the unarmed Bengali civilians in the territory of Bangladesh in 1971.

597. Actions carried out in concert with its local collaborator militias, Razakar, Al-Badar and Jamat E Islami (JEI) and other elements of religion based pro-Pakistan political parties were intended to stamp out Bangalee's national liberation movement and to mash the national feelings and aspirations of the Bangalee nation. Predominantly the Al-Badar force had acted as an **'action section'** of Jamat E Islami [JEI]. This was the core makeup of Al-Badar. **Fox Butterfield** wrote in the **New York Times**- **January 3, 1972** that

> **"Al Badar is believed to have been the action section of Jamat-e-Islami, carefully organised after the Pakistani crackdown last March"**
>
> [**Source: Bangladesh Documents Vol. II** page 577, Ministry of External Affairs, New Delhi].

598. Mr. John Stonehouse, British Labour M.P told to PTI in an interview in New Delhi on 20 December 1971 as to who were responsible for organising the murders of large number of intellectuals in Dacca, although he declined to name the officers responsible for the murders. **Mr. John Stonehouse** however told that

> **"…..during his visit to Dacca yesterday (December 19), he got the names of these Pakistani army officers who organised the murders, and members of 'Al Badar', an extremist Muslim group, who carried out these heinous crimes just before the surrender of Pakistani forces in Dacca."**
>
> [**Source: The Hindustan Times**, New Delhi, 21 December, 1971: published in Bangladesh Documents, Volume II, Ministry of External Affairs, New Delhi, page 572]

599. The report titled **'Butchery By Al-Badar**' published in **PATRIOT**, New Delhi, 23 December 1971 also demonstrates an appalling depiction of the role of Jamat E Islam[JEI] and its **'armed wing'** Al-Badar that perpetrated the murder of leading intellectuals, the best sons of our soil. The report speaks that

> **"When the Pakistanis were overpowered, they left the killing to the fascist 'Al Badar', the armed wing of the Jamat-e-Islami. This fascist body has already butchered about 200 leading intellectuals, doctors, professors and scientists, including such eminent men like Sahidulla Kaiser and Munir Chowdhury."**
>
> [**Source: PATRIOT**, New Delhi, 23 December, 1971: see also, Bangladesh Documents, Volume II, Ministry of External Affairs, New Delhi, page 573]

600. In September 1971, the alliance between Jama'at-e-Islami and the Pakistani army was made official when members of the Jama'at-e-Islami of East Pakistan joined the military government of the province [**Source**: **The vanguard of the Islamic Revolution**: **The Jama'at-i-Islami of Pakistan** (1994), page 169 and 255]. To be fair, in 1971, during the war of liberation, Jamat E Islami did not only collaborated the Pakistani occupation army, but it became also a fraction of the Military Government and the army. Al-Badar was made up of militants from the student wing of Jamat E Islami [JEI]. History accuses this group [force] of working like 'death squad'---killing, looting and disgracing Bengalis whom they accused of being 'anti-Islam'.

Thus the brutality of their contribution, as found, to the perpetration of systematic atrocities indeed was no lesser than that of the Pakistan occupation army. Jamat E Islami, as it is found, acted as the think tank and colluded as key architect of the crimes against humanity committed, in territory of Bangladesh in 1971, in violation of customary international law.

601. Jamat E Islami was thus indulged in indiscriminate massacre of their political opponents belonging to Bengali nation, in the name of liquidating *'miscreants', 'infiltrators'* for which they were using Razakars, Al-Badar comprising with the workers of Islami Chatra Sangha [ICS], its student wing. Incontrovertibly the way to self-determination for the Bangalee nation was arduous, swabbed with mammoth blood, struggles and sacrifices. Due to widespread and whole sale terror reigned over the Bangladesh by the Pakistani occupation armed force and its para militia forces Al-Badar, Razakar, Al-Shams and Peace Committee, over nine million of Bengali civilians had to take refuge in India.

602. In a press conference in Rawalpindi, Pakistan professor Ghulam Azam, the then Amir of Jamat E Islami proposed for proper arming of 'patriotic elements' to combat the 'miscreants' [**Source: The Daily Sangram**, 21 June 1971]. Any such 'proposal' made by a party chief of course reflects party's stand and ideology. Such proposal's objective was indubitably to make the antagonistic and ghastly criminal actions of Al-Badar, Razakar and other forces toughened to combat the pro-liberation Bengali civilians , *'miscreants'* [freedom fighters and their local adherents] . Even in the early part of November 1971 such proposal on part of Jamat E Islami was again ensued. From a report published in **Pakistan Times**, *Lahore November 28, 1971* it is found that

> **"Professor Ghulam Azam, Amir, Jamaat-e-Islami, East Pakistan, has made three proposals (November 27) to meet the present situation in the country—striking India from West Pakistan, proper arming of patriotic elements in East Pakistan and full trust in genuine elements of that Wing."**

[**Source: Pakistan Times**, Lahore, 28 November 1971 : see also Bangladesh Documents, Volume II, Ministry of External Affairs, New Delhi, page 141]

603. The narrative of the book titled **'Muktijudhdhe Dhaka 1971'**demonstartes encouragement and substantial contribution of Jamat E Islami in scheming and coordinating the training of the ***Al-Badar*** and ***Razakars*** the *'armed cadres'*. The relevant narration is as below:

> ***ÒAvje`iiv wQj †gav m¤úb mk¯ ivR¯‹bwZK K¨vWvi| Bmjvgx Qv Î msiNi †bZe¨,` G ewnbx MVb Ki‡i Ges †K›`xqfv‡e Rvgvqv‡Z Bmjvgxi wbqš¿b G ewnbx cwiPwjZ nq| 17 †m‡Þ¤i ce© cwK¯vb Rvgvqv‡Z Bmjvgxi Avgxi †Mvjvg AvRg †gvn¤§v`cyiwdRK¨vj †Uwbs K‡j‡R Ae¯Z Gi †nW‡KvqvUvi I cwkÿY †K›` cwi`kb K‡ib|***
>
> [**Source: Muktijudhdhe Dhaka 1971**: edited by *Mohit Ul Alam, Abu Md. Delowar Hossain*, Bangladesh Asiatic Society , page 284 : Prosecution Documents Volume 03 page 631]

604. Mr. Williams A. Boe the then Secretary General of the Norwegian Refugee Council who flew in Calcutta from Delhi, told newsman at Dum Dum airport on 10 October 1971 that *"the influx of over nine million evacuees into India could be said to be 'the biggest tragedy since World War II.'* [**Source: Bangladesh Documents Vol. II** page 200, Ministry of External Affairs, New Delhi]. It demonstrates the extent of reigning terror through out the country by the Pakistani occupation army with the aid of its para militia forces ***Al-Badar, Razakars,*** the creation of jamat E Islami. In the present-day world history, conceivably no nation paid as extremely as the Bangalee nation did for its self-determination.

605. Jamat E Islami [JEI] cannot be relieved from the accountability of unspeakable mayhem and murders committed by the Al-Badar which was created by it and had acted as its **'action section'**, **'fascist body'** and **'armed wing'** in 1971. On cumulative evaluation of above material facts revealed from authoritative old reports and books depicts an inescapable aggressive and culpable profile principally of Jamat E Islami which was fully cognizant about the criminal activities of Al-Badar, Razakars, Al-Shams, Peace committees actuated in the name of providing aid to Pakistani occupation

army and to preserve Pakistan. Right to preserve Pakistan did not give license to Jamat E Islami to contribute, encourage and approve the accomplishment of unspeakable atrocities directed against civilian population by reigning terror in the territory of Bangladesh, by creating Al-Badar, Razakar, Al-Shams and Peace committees.

606. Jamat E Islami [JEI] rather could have played a role in preventing the commission of atrocities by exercising its control over their creation Al-Badar, Razakars, Al-Shams, Peace Committee. But instead of doing it , as an 'organisation, Jamat E Islam [JEI] evidently appears to have substantially and consciously contributed especially to Al-Badar, its *'fascist armed wing'* in carrying out dreadful criminal activities, in violation of customary international law, in 1971 during the war of liberation of Bangladesh.

607. The above discussion based on old reports and narrative of authoritative books incontrovertibly suggests that Jamat E Islami [JEI] had allowed their creation Al-Badar and Razakars to operate an assembly line of incalculable atrocities in the territory of Bangladesh in 1971. The nation will be failing to acknowledge the sacrifices of millions of people who laid their lives and honour for the cause of our heard earned independence if individuals like the present accused are not brought to book for their notorious role and active contribution and endorsement for committing the systematic atrocities in 1971, in the territory of Bangladesh.

XXIX. Accountability of the Accused as Superior of the perpetrators under the doctrine of Civilian Superior Responsibility.

608. The learned Prosecutor Ms. Tureen Afroz in advancing argument on this issue has submitted that the accused Muhammad Kamaruzzaman was 'superior' of the Al-Badars in greater Mymensingh and as such he can be brought under the theory of civilian superior responsibility too for the commission of crimes by the Al-Badar members over whom he had effective and material ability to control. It has been proved that the actual perpetrators

were the members of Al-Badar of Mymensingh and Sherpur and the evidence shows that accused Muhammad Kamaruzzaman was a potential leader of those camps who used to exercise significant influence and authority on the activities carried out by the camps. Therefore, the accused can also be held criminally responsible under the doctrine of civilian superior responsibility as contained in section 4(2) of the Act of 1973. The provision contained in section 4(2) is equally applicable to civilian superior as well.

609. The Tribunal notes that the accused has been arraigned for 'complicity' to the commission of crimes alleged for his acts or conducts forming part of the 'attack'. The terms 'complicity' and 'accomplice' even may encompass conduct broader than 'aiding' and 'abetting'. Thus the 'accomplice' will also be held responsible for all that naturally results from the commission of the act in question. Accordingly, on appraisal of evidence adduced we have already found that the accused Mohammad Kamaruzzaman has incurred individual criminal liability under section 4(1) of the Act in relation to the events of criminal acts as narrated in charge nos. 1,2,3,4, and 7.

610. But the evidence presented before the Tribunal also patently depicts that the accused Mohammad Kamaruzzaman was a potential Al-Badar leader having significant authority and effective control over co-members of Al-Badar, particularly at the camp set up at Suren Saha's house in Sherpur and thereby he incurs 'superior responsibility' for his acts forming part of attack causing perpetration of substantial crimes by the Al-Badar men of the camp. Such 'superior responsibility' under section 4(2) can be taken into consideration as 'aggravating factor' in determining the degree of his culpability.

611. Now the question is how to perceive that there had been superior-subordinate relationship between the accused Muhammad Kamaruzzaman and the perpetrators. First let us have look to the international jurisprudence evolved, in this regard. The accused need not have a formal position in relation to the perpetrator, but rather that he has the **'material ability'** to prevent the crime [**Celibici** Appeal judgment, ICTY Appeal Chamber, Judgment 20 February 2001, para 197,256,266 and 303] . The ICTY Trial Chamber in the case of **Celibici** held that in the absence of direct evidence,

circumstantial evidence may be used to establish the superior's actual knowledge of the offences committed, or about to be committed, by his subordinates.[**Celibici** Trial Chamber, ICTY, Judgment 16 November 1998, para 386]. For instance, the fact that crimes were committed frequently and notoriously by subordinates of the accused, indicates that the superior had knowledge of the crimes [**Celibici** Trial Chamber, ICTY, Judgment 16 November 1998, para 770].

612. We have already got from evidence of P.W.2 that accused was a commander of Al-Badar camp set up at the house of Suren Saha, Sherpur and he was the Al-Badar commander of greater Mymensingh, as stated by P.W.1, a detainee witness. The authority of a 'superior' or 'commander' may not be *de jure* in nature, it may be *de facto* too and it is not needed to be proved by any formal documentary evidence. *De facto* nature of superior position can be lawfully inferred even from circumstances and relevant facts depicted from evidence presented. We are to see whether the person accused had 'effective control' over the perpetrators of the crimes. In the case of ***Blagojevic and Jokic,*** it has been observed that

> **"A *de facto* commander who lacks formal letters of appointment, superior rank or commission but does, in reality, have effective control over the perpetrators of offences could incur criminal responsibility under the doctrine of command responsibility."[*Blagojevic and Jokic,*** ICTY Trial Chamber, January 17, 2005, para. 791 ; *See also* ***Stakic,*** (Trial Chamber), July 31, 2003, para. 459].

613. From the principle enunciated in the above decision of ICTY Trial Chamber that for establishing *de facto* superior position no formal letter of appointment or any such related document is needed. The ability to exercise effective control is necessary for the establishment of *de facto* superior responsibility, in civil setting. Thus, the absence of formal appointment is not fatal to a finding of criminal responsibility, under the theory of civilian superior responsibility, provided certain conditions are met.

614. It is to be noted that the indicators of 'effective control' are more a matter of evidence than of substantive law. As to whether the superior has the requisite level of control, this is a matter which must be determined on the basis of the evidence presented in each case. In the case in hand, Exhibit-6, Material Exhibit-I and V amply prove that the accused was the chief organiser of Al-Badar in greater Mymensingh. Exhibit-4 and 12 also show that instantly after the independence on 16 December, 1971 the accused was arrested as he was a member of Al-Badar.

615. Evidence of P.W.1 and P.W.2 goes to prove it beyond doubt that the accused was a potential Al-Badar having *de facto* authority and material ability to control over the members of Al-Badars of the camps set up at Suren Saha's house, Sherpur and Zilla Parishad Dak bungalow camp, Mymensingh and he was significantly concerned with the crimes alleged committed by Al-Badars within the territory of Sherpur, as narrated in charge nos. 1,2,3,4 and 7.

616. The accused by his acts forming attack directing unarmed civilians causing murders, rape, abduction, confinement and inhuman treatment fulfils 'a key coordinating role' and his **'participation'** was of an exceedingly significant nature and at the 'leadership level.' In the case in hand the Tribunal notes further that the accused Muhammad Kamaruzzaman used to maintain his significant attachment with the camps of Al-Badar and influence the matter of carrying out operations and sometimes in furtherance of plan designed at the meeting with the members of Al-Badar of the camp and thereby the accused being at the 'leadership level' effectively encouraged, instigated, abetted, approved and provided moral support in launching attack selecting the unarmed non combatant Bangalee civilians that resulted even into killing of hundred civilians, mass sexual violation and internal displacement , abduction, confinement and inhuman treatment.

617. Indeed, the term participation is to be defined broadly and may take the form of assistance in, or contribution to, the execution of the common plan and intent. The intent may be proved either directly or as a matter of inference from the nature of the accused's level of authority and influence within the Al-Badar camps. We are, in view of evidence and facts and circumstances, persuaded to hold that the accused Mohammad Kamaruzzaman was

significantly concerned with the commission of atrocities for which he has been charged with in the capacity of a potential leader of Al-Badar of greater Mymensingh, particularly of the camp set up at Suren Saha's house in Sherpur. Thus the accused may also be brought under the theory of 'civilian superior responsibility' in determining the degree of his culpability.

618. It may be argued that section 4(2) of the 1973 Act only provides for holding military commanders and superiors responsible for criminal acts of subordinates; and it does not provide for civilian superiors to be held similarly accountable.

619. But as per the amendment of section 3 of the Act of 1973, the Tribunal now has jurisdiction to try and punish any non-military person [civilian], whether superior or subordinate, who has direct or indirect involvement with the relevant crimes. In other words, the Tribunal now has jurisdiction to try any accused who is a non-military person, including a civilian superior.

620. The doctrine of superior responsibility is applicable even to civilian superiors of paramilitary organizations. As a matter of policy, civilians should also be subject to the doctrine. The elements to be proven for a person to be held responsible under the theory of superior responsibility are **(1)** crime has been perpetrated **(2)** crime has been perpetrated by someone other than the accused **(3)** the accused had material ability or influence or authority over the activities of the perpetrators **(4)** the accused failed to prevent the perpetrators in committing the offence.

621. It is now settled both in ICTR and ICTY jurisprudence that the definition of a **'superior'** is not limited to military superiors; it also may extend to *de jure* or *de facto* civilian superiors. [**Bagilishema**, Appeals Chamber, July 3, 2002, para. 51]. It suffices that the superior had effective control of his subordinates, that is, that he had the material capacity to prevent the criminal conduct of subordinates. For the same reasons, it does not have to be established that the civilian superior was vested with 'excessive powers' similar to those of public authorities.

622. Ms. Tureen Aforz, the learned Prosecutor has argued that section 4(2) of the 1973 Act generally asserts the superior liability for crimes. This section uses the terms 'commander' or 'superior officer' in general. But the said section does not preclude the liability of the civilian superiors. If the amended section 3 and the section 4(2) of the 1973 Act are read together it would affirm that liability for crimes under section 4(2) would also entail the liability of the civilian superior.

623. It has been further submitted by the learned prosecutor that in essence, to establish superior responsibility under the Act of 1973 the prosecution is not required to prove that the accused superior either had any 'actual knowledge' (knew) or 'constructive knowledge' (should have known) about commission of the subordinate's crime. Under the 1973 Act, a superior is always responsible for the activities of his subordinates, whether he had any kind of knowledge or not.

624. The 'knowledge' requirement is not needed to prove accused's superior position within the ambit of the Act of 1973. However an individual's superior position *per se* is a significant *indicium* that he had knowledge of the crimes committed by his subordinates.

625. Additionally, *'knowledge'* may be proved through either direct or circumstantial evidence. What we see in the case in hand? Total evaluation of evidence of P.W.1 and P.W.2 goes to show unerringly that the accused used to coordinate the activities carried out at and by the Al-Badar camps set up in Sherpur town and Mymensingh town. Apart from the events of crimes narrated in the charges framed series of criminal activities are found from evidence to have been committed by the members of Al-Badars of those camps. The accused used to maintain office at those camps wherein he often had talk and discussion with the Pakistani army official. The accused used to encourage, approve and advice the Al-Badar members of the camps, by his acts and conducts, to carry out criminal activities. The events of crimes alleged were committed at places geographically nearer to the Al-Badar camps. In some cases, as it is proved, Al-Badar members were the principal perpetrators and in some cases Pakistani army committed the principal crime with the aid and contribution provided by Al-Badar members and in all cases,

the accused had complicity or participation by his act or conduct of instigation or approval or assistance to the accomplishment of the crimes alleged. All these material relevant facts are considerable *indicium* to prove accused's knowledge.

626. In the case in hand, we are persuaded to infer that since the accused Muhammad Kamaruzzaman was a potential leader of the Al-Badar camps which are found to have activated the event of criminal acts alleged in the charges framed and beyond, logically and naturally the information was available to him about the offences committed or to be committed by the members of Al-Badars of the camps, although the accused may not have specific details of the crimes.

627. In plain English literature, commander means one who can command and superior officer means senior officers. Both these posts can be found in the military as well as non-military or civilian strata and as such, criminal liability under section 4(2) of the Act of 1973 can be applicable for both military and civilian superiors.

628. Additionally, the Tribunal notes that a civilian superior will be held liable under the doctrine of superior criminal responsibility if he was part of a superior-subordinate relationship, even if that relationship was an indirect one. No formal document is needed to prove this relationship. It may be well inferred from evidence presented and relevant circumstances revealed.

629. It is now settled that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates [the principal perpetrators] which is similar to that of military commanders. It cannot be expected that civilian superiors will have disciplinary power over their sub-ordinates equivalent to that of military superiors in an analogous command position. Even no formal letter or document is needed to show the status of 'superior'. In the case of **Blagojevic and Jokic** it has been observed that –

> **"A de facto commander who lacks formal letters of appointment, superior rank or**

> **commission but does, in reality, have effective control over the perpetrators of offences could incur criminal responsibility under the doctrine of command responsibility." [**Trial Chamber: ICTY, January 17, 2005, para. 791]

630. From the principle enunciated in the above decision of ICTY Trial Chamber that for establishing *de facto* superior position no formal letter of appointment or any such related document is needed. In this regard we may recall the decision of the ICTR Trial Chamber in the case of **Zigiranyirazo** which is as below:

> **"It is not necessary to demonstrate the existence of a formal relationship of subordination between the accused and the perpetrator; rather, it is sufficient to prove that the accused was in some position of authority that would compel another to commit a crime following the accused's order.[Zigiranyirazo**, ICTR Trial Chamber, December 18, 2008, para. 381]

631. It is found proved that the criminal acts alleged were carried out either at any of two Al-Badar camps or by the members of the camps or at Ahammadnagar army camp with the aid of Al-Badars. In the case in hand, the conducts, acts, behaviour, activities and significant attachment of the accused Muhammad Kamaruzzaman to the camps of Al-Badar sufficiently establish that the accused had such a level of authority and control over the members of Al-Badar , the para militia force which was believed to be the **'action section'** of pro-Pakistan political party Jamat E Islami and by dint of such authority and ability to control he was in position to prevent Al-Badar members from committing the horrific criminal acts proved. But instead of doing it he rather encouraged, motivated, advised, planned, influenced, instigated and provided substantial moral support and approval for effecting the actual perpetration of crimes by his co-members of Al-Badar force. On this score and agreeing with the contention extended by the learned Prosecutor Ms. Tureen Afroz, we are

convinced to deduce that the accused has also incurred criminal liability under the 'theory of civilian superior responsibility' which is covered by section 4(2) of the Act of 1973 and it may legitimately be taken into account as an 'aggravating factor', for the purpose of determining the degree of accused's culpability and awarding sentence.

632. However, it is not appropriate to convict under both sections 4(1) and 4(2) of the Act of 1973. Where under both sections 4(1) and 4(2) responsibility are found to have been incurred under the same charge framed, and where the legal requirements pertaining to both of these heads of responsibility are met, it would be appropriate to enter a conviction on the basis of section 4(1) only, and consider the accused's superior position as an aggravating factor in sentencing only.

XXX. Conclusion

633. Despite lapse of long 40 years time the testimony of P.W.s of whom some had fair occasion to see and experience the acts and conducts of accused, including the activities carried out by the Al-Badar camps in Sherpur and Mymensingh town on approval and encouragement of accused, an Al-Badar leader, on substantial facts relevant and material to the event of atrocities and culpability of the accused as narrated in the charges does not appear to have been suffered from any material infirmity. Besides, no significant inconsistencies between their testimony made before the Tribunal and their earlier statement made to the Investigation Officer could be found that may crash their credibility.

634. Section 3(1) provides jurisdiction of trying and punishing even any 'individual' or 'group of individuals' including any 'member of auxiliary force' who commits or has committed, in the territory of Bangladesh any of crimes mentioned in section 3(2) of the Act, apart from member of armed or defence forces. We have already resolved in our foregoing deliberations that 'Al-Badar' was an 'auxiliary force' and the accused Muhammad Kamaruzzaman was a potential leader of Al-Badar in greater Mymensingh. Additionally, we have found it proved that the accused had played a key role in formation of Al-Badar in greater Mymensingh.

635. We are convinced from the evidence, oral and documentary, led by the prosecution and the sourced documents that the accused, at the relevant time had acted as an atrocious and potential leader of Al-Badar to the actual accomplishment of the crimes charged and beyond. Accused's conscious and culpable conduct---antecedent, contemporaneous and subsequent, as have been found---all point to his guilt and are well consistent with his 'complicity' and 'participation' in the commission of the crimes proved. As a result, we conclude that the accused Muhammad Kamaruzzaman had ‘complicity’ to the commission of the offences in relation to charge nos. 1, 2, 3, 4 and 7 for which he has been charged in the capacity of a potential leader and chief organiser of Al-Badar which was truly an ‘action section’ of jamat E Islami[JEI].

636. According to section 4(1) of the Act of 1973 the accused Muhammad Kamaruzzaman, being equally responsible, has incurred individual criminal liability for the commission of crimes proved. It also stands proved that the accused, by his acts and conduct, also incurs superior responsibility under section 4(2) of the Act of 1973 for the same set of facts described in the charges proved [charge nos. 1,2,3,4 and 7]. However, we refrain from convicting him cumulatively for both mode of liability, excepting taking it into account as an aggravating factor. Accordingly, the accused is held criminally responsible under section 4(1) of the Act of 1973 for the commission of crimes proved as listed in charge nos. 1,2,3,4 and 7.

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

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

> **"conventional" methods. Against this background one must view the appalling catastrophe of East Pakistan whose scale is so immense that it exceeds the dolorimeter capacity by which human sympathy is measured. No one can hope to count the dead, wounded, missing, homeless or stricken whose number grows each day. "**
>
> **[Source**: Bangladesh Documents: Volume, page 442: Ministry of External Affairs, New Delhi]

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

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

640. We reiterate that 'no innocent person be convicted, let hundreds guilty be acquitted'—the principle has been changed in the present time. In this regard it has been observed by the Indian Supreme Court that

> "A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties." **[Per Viscount**

Simon in Stirland vs. Director of Public Prosecution: 1944 AC(PC) 315: quoted in State of U.P Vs. Anil Singh : AIR 1988 SC 1998]

XXXI. VERDICT ON CONVICTION

641. For the reasons set out in this Judgement and having considered all evidence and arguments, the Tribunal unanimously finds the accused **Muhammad Kamaruzzaman**

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

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

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

Charge No.4: GUILTY of offence of 'complicity' to commit murder as **'crimes against humanity'** as specified in section 3(2)(a)(h) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.5: NOT GUILTY of the offence of murders as **'crimes against humanity'** as specified in section 3(2)(a) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No.6: NOT GUILTY of offence of murder as **'crimes against humanity'**as specified in section 3(2)(a) of the Act 1973 and he be acquitted thereof accordingly.

Charge No.7: GUILTY of offence of 'complicity' to commit murder as **'crimes against humanity'** as specified in section 3(2)(a)(h) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act

XXXII. VERDICT ON SENTENCE

642. Mr. Syed Haider Ali, the learned Prosecutor submitted that accused Muhammad Kamaruzzaman should face the highest sentence, being a sentence of death, as he is proved to have participated to the commission of barbaric criminal acts with fanaticism and sadism. Accused's superior position together with the intrinsic gravity and extent and pattern of criminal acts constituting the offence of crimes against humanity deserves to be considered as an 'aggravating factor' in awarding the highest sentence. For only such sentence would be just and appropriate to punish, deter those crimes at a level that corresponds to their overall magnitude and reflect the extent of the suffering inflicted upon the millions of victims.

643. In the case in hand, considering the charges proved and facts relevant thereto we take some factors into account as the key requirement of aggravating circumstances for the purpose of sentence to be imposed and these are **(i)** the position of the accused, that is, his position of leadership, his level of influence and control in the context of his affiliation with the Al-Badar camp **(ii)** the accused's role as fellow perpetrator, and the enthusiastic participation of a superior in the criminal acts of subordinates **(iii)** the violent, and humiliating nature of the acts and the vulnerability of the victims.

644. As a cursory review of the history of punishment reveals that the forms of punishment reflect norms and values and aspirations of a particular society at a given time. Distressed victims may legitimately insist appropriate and highest sentence while the defence may demand acquittal, in a criminal trial. But either of such demands is never considered as a catalyst in deciding the sentence to be inflicted upon the person found guilty of a criminal charge, in a

court of law. Undeniably, the punishment must reflect both the calls for justice from the persons who have directly or indirectly been victims and sufferers of the crimes, as well as respond to the call from the nation as a whole to end impunity for massive human rights violations and crimes committed during the war of liberation 1971.

645. There may be a well-built potential for people's perceptions, to exert strain on judicial decision-making where international crimes are concerned. This phenomenon needs to be addressed with a measure of caution, with compassion for the emotions involved but with due respect for the letter of the law, in order to ensure the legitimacy of the decisions. Therefore, in determining the gravity of the crimes, the Tribunal solely respects to the legal nature of the offences committed, their scale, the role of the accused played in their commission, and the shock sustained by the victims and their families together with the preamble of the Act of 1973.

646. The preamble of the Act of 1973 unequivocally demonstrates that this piece of legislation was enacted for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law. Thus the accused has been arraigned not for committing any isolated offence as codified in normal penal law and as such the charge brought under the Act of 1973 itself portrays magnitude, gravity and diabolical nature of the crime and in the event of success of prosecution in proving the charge the accused must and must deserve just and highest punishment.

647. At the same time a sentence must always reflect the inherent level of gravity of a crime which requires consideration of the particular circumstances of the cases, as well as the form and degree of the participation of the accused in the crime. Active abuse of a position of authority, which would presumably include participation in the crimes of subordinates, can aggravate liability arising from superior authority. The conduct of the accused in the exercise of his superior authority could be seen as an aggravating circumstance. In the case in hand, we deem it just and appropriate to pen our finding that the accused was a perpetrator in white gloves who deserves the highest penalty.

648. We have taken due notice of the intrinsic magnitude of the offence of murders as 'crimes against humanity' being offences which are predominantly shocking to the conscience of mankind. We have also carefully considered the mode of participation of the accused to the commission of crimes proved and the proportionate to the gravity of offences.

649. The fierceness of the event of the attack [**as listed in charge no.3: Sohagpur massacre**] was launched in such grotesque and revolting manner in which the helpless victims, the unarmed hundred of civilians could not save their lives and honour is indicative of the fact that the act of massacre and devastation of human honour was diabolic and detrimental to basic humanness. The accused by his acts and conducts participated to the perpetration of such horrendous attack that resulted in murder of hundreds of unarmed civilians constituting the offence of crimes against humanity. Undeniably the act of indiscriminate sexual invasion committed on women, in conjunction of the event of mass killing at Sohagpur village, shocks the conscience of humankind and aggravates the pattern of the criminal acts and liability of the accused as well. Since the event the victims have been living carrying colossal and unspeakable trauma they sustained. Three rape victims who also lost their husband at the event of mass killing standing on dock narrated the trauma and demanded justice for causing extreme dishonour and sexual invasion to them. Letters of law cannot remain non responsive to the rape victims. If this act forming systematic attack directed against civilian population causing mass killings and widespread rape and creating reign of terror is not repellent or dastardly, it is beyond comprehension as to what other act can be so. Additionally, mode of participation of the accused in committing the crimes as listed in charge nos. 3 and 4 together with his superior position increases accused's culpability which deserves to be taken into account as 'aggravating factor'.

650. In view of the facts together with the context we are of the unanimous view that there would be failure of justice in case 'highest sentence' is not awarded for the crimes, considering the mode and degree of complicity of the accused, as listed in **charge nos. 3 and 4** as the same indubitably falls within the kind of such gravest crimes which tremble the collective conscience of mankind.

651. Keeping the factors as conversed above in mind we are of agreed view that justice would be met if for the crimes as listed in **charge nos. 3 and 4** the accused Muhammad Kamaruzzaman who has been found guilty beyond reasonable doubt is condemned to a **'single sentence of death';** for the crimes as listed in **charge nos. 1 and 7** to the single sentence of **'imprisonment for life'** and for the crimes as listed in **charge no. 2** to the sentence of **'imprisonment for ten(10) years'** under section 20(2) of the Act of 1973. Accordingly, we do hereby render the following **ORDER** on **SENTENCE.**

Hence, it is

ORDERED

That the accused **Muhammad Kamaruzzaman** son of late Insan Ali Sarker of village-Mudipara Police Station- Sherpur Sadar District- Sherpur at present House No. 105, Road No. 4, Block No. F, Section-11, Journalists residential Area, Police Station Pallabi, Dhaka Metropolitan Police,[DMP], Dhaka found **guilty** of the offences of **'crimes against humanity'** enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973 as **listed in charge no.s 1, 2, 3, 4 and 7** and he be convicted and condemned to a '**single sentence of death' for the crimes as listed in charge nos. 3 and 4** and he be hanged by the neck till he is dead under section 20(2) of the International Crimes (Tribunals) Act, 1973.

The accused Muhammad Kamaruzzaman also be convicted and condemned to a single sentence of **'imprisonment for life'** for the crimes as listed in **charge nos. 1 and 7 and to** the sentence of **'imprisonment for ten(10) years'** for the crimes as listed in **charge no. 2** under section 20(2) of the Act of 1973.

However, as the convict Muhammad Kamaruzzaman is **'sentenced to death'**, the sentence of **'imprisonment for life'** and the sentence of **'imprisonment for ten(10) years'** will naturally get merged into the '**sentence of death'**. This sentence shall be carried out under section 20(3) of the Act of 1973.

Accused Muhammad Kamaruzzaman is found not guilty of offences as listed in **charge nos. 5 and 6** and thus he be acquitted thereof.

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

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

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

Justice Obaidul Hassan, Chairman

Justice Md. Mozibur Rahman Miah, Member

Judge Md. Shahinur Islam, Member