

FULL TEXT OF THE JUDGMENT
DELIVERED BY THE INTERNATIONAL CRIMES TRIBUNAL-2
IN THE CASE OF ABUL KALAM AZAD

I. Opening words

In the judicial history of Bangladesh, it is indeed the historic occasion that today this Tribunal (ICT-2), a lawfully constituted domestic judicial forum, after dealing with the matter of prosecution and trial of internationally recognized crimes i.e. crimes against humanity, genocide which were perpetrated in 1971 in the territory of Bangladesh, during the War of Liberation is going to deliver its first verdict. At all stages of proceedings the prosecution and the defence have made laudable efforts extending their precious arguments on academic and legal aspects including citation of the evolved jurisprudence. It inevitably has inspired us to address the legal issues closely involved in the case, together with the factual aspects as well. We take the privilege to appreciate their significant endeavor.

In delivering the verdict we have deemed it necessary 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 and then discuss and evaluate evidence adduced in relation to charges independently and finally have penned our finding on culpability of accused.

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

II. Commencement of proceedings

1. The Chief Prosecutor, on the basis of the report and documents submitted therewith by the Investigation Agency, after completion of investigation, submitted the 'Formal Charge' on 02.9.2012 under section 9(1) of the Act of 1973[**hereinafter referred to as the 'Act of 1973'**] before this Tribunal alleging that the accused **Moulana Abul Kalam Azad @ Abul Kalam Azad @ Bachchu** as a significant member of Razaker, the auxiliary force and also as an 'individual', had committed the offences of crimes against humanity, genocide including the offence of providing contribution and moral support to the accomplishment of such crimes in different places of Faridpur district during the period of War of Liberation in 1971 and thereby proceedings commenced.

2. Thereafter, the Tribunal, under Rule 29(1) of the Rules of Procedure[**hereinafter referred to as 'ROP'**], took cognizance of offences as mentioned in section **3(2) (a)(b)(g)(h)** of the Act of 1973 and issued warrant of arrest for causing appearance of the accused as required under Rule 30 of the ROP. But the warrant could not be executed as the accused remained absconded. Thereafter, in compliance of legal requirement for holding trial in *absentia* by appointing state defence counsel to defend the absconded accused, the Tribunal on hearing both sides on charge framing matter framed 08 charges against the accused **Abul Kalam Azad @ Bachchu** by its order dated 04 November 2012 and thus the trial commenced.

III. Historical Background

3. Atrocious and horrendous crimes were committed during the nine-month-long war of liberation, which resulted in the birth of Bangladesh, an independent state. Some three million people were killed, nearly quarter million women were raped and over 10 million people were forced to flee to 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 wound on the country's political psyche and the whole nation. The impunity they enjoyed held back political stability, saw the ascend of militancy, and destroyed the nation's Constitution.

4. 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.”

5. 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/>]

6. 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 eventually named West Pakistan and the eastern zone was named East Pakistan, which is now Bangladesh.
7. 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 thus marking the beginning of language movement that eventually turned to the movement for greater autonomy and self-determination and eventually independence.

8. In the general election of 1970, the Awami League under the leadership of Bangabandhu Sheikh Mujibur Rahman became the majority party of Pakistan. Despite this overwhelming majority, Pakistan Government did not hand over power to the leader of the majority party as democratic norms required. As a result, movement started in this part of Pakistan and Bangabandhu Sheikh Mujibur Rahman in his historic speech of 7th March, 1971, called on the people of Bangladesh to strive for independence if people's verdict is not respected and power is not handed over to the leader of the majority party. 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.
9. The massacres started with program 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**). Actions in concert with its local collaborator militias , Razakar, Al-badar and Jamat E Islami (JEI) were intended to stamp out Bengali national liberation movement and to crush the national feelings and aspirations of the Bengalis.
10. In the War of Liberation that ensued, all people of East Pakistan wholeheartedly supported and participated in the call to free Bangladesh but a small number of Bangalees, *Biharis*, other pro-Pakistanis, as well as members of a number of different religion-based political parties, particularly Jamat E Islami (JEI) and its student wing Islami Chatra Sangha (ICS) joined and/or collaborated with the Pakistan military to actively oppose the creation of independent Bangladesh and most of them committed and facilitated the commission of atrocities in violation of customary international law in the territory of Bangladesh. As a result, 3 million (thirty lac) people were killed, near about quarter million women were raped, about 10 million (one crore) people deported to

India as refugees and million others were internally displaced. It also experienced unprecedented destruction of properties all over Bangladesh.

- 11.** The Pakistan government and the military setup number of auxiliary forces such as the Razakars, the Al-Badar, the Al-Shams, the Peace Committee etc, essentially to collaborate with the military in identifying and eliminating all those who were perceived to be sympathized with the liberation of Bangladesh, individuals belonging to minority religious groups especially the Hindus, political groups belonging to Awami League and other pro-Independence political parties, Bangalee intellectuals and civilian population of Bangladesh. Jamat E Islami (JEI), as an organization, substantially contributed in creating these paramilitias forces (auxiliary force) for combating the unarmed Bangalee civilians, in the name of protecting Pakistan. Undeniably the road to freedom for the people of Bangladesh was arduous and torturous, smeared with blood, toil and sacrifices. In the contemporary world history, perhaps no nation paid as dearly as the Bangalees did for their emancipation.

IV. Brief account of the accused

- 12.** Accused Moulana Abul Kalam Azad @ Bachchu son of late Abdus Salam Mia & late Magfura Khatun of village-*Barakhardia (Choi ani)*, Police Station- Saltha, District-Faridpur at present sector no. 07, road no. 33, house no. 06, Police Station-Uttara, DMP, Dhaka and 'Azad Villa', 279/6 Chan Para, Uttarkhan, Dhaka was born on 05.03.1947 in village '*Barakhardia*'. He studied in Faridpur Rajendra College and was a close associate of Ali Ahsan Mohammad Mujahid, the then President of East Pakistan Islami Chatra Sangha (ICS). Till formal formation of Razaker force, Moulana Abul Kalam Azad @ Bachchu actively aided the Pakistani army as an armed member of volunteer Razakar Force formed in Faridpur in committing criminal acts alleged. He, during the war of liberation in 1971, assisted the Pakistani occupation force initially in the capacity of 'Razaker' and subsequently as chief of Al-Badar *bahini* of Faridpur. At one time, Moulana Abul Kalam Azad @ Bachchu was

‘*rokan*’ of jamat-E-Islami and now he is not associated with any political party. He is the chairman of ‘Masjid Council, a non government organization [NGO]. He could speak in Urdu well as he studied in ‘*madrasa*’. On 21 April, 1971 he being united with the local anti liberation circle welcomed the Pakistani army in Faridpur district. He was a close associate of Pakistani army and actively and substantially assisted them as a potential member of Razakar (Volunteer) force in committing atrocities targeting the civilians and Hindu community and pro-liberation Bangalee people. In Faridpur, he was in charge of Razaker bahini which was equipped with rifles.

V. Introductory Words

- 13.** International Crimes (Tribunals) Act, 1973 (the Act XIX of 1973)[hereinafter referred to as ‘the Act of 197’] is an *ex-post facto* domestic legislation enacted in 1973 and after significant updating the ICTA 1973 through amendment in 2009, the present government has constituted the Tribunal (1st Tribunal) on 25 March 2010 . The 2nd Tribunal has been set up on 22 March 2012. The degree of fairness as has been contemplated in the Act and the Rules of Procedure (ROP) formulated by the Tribunals under the powers conferred in section 22 of the principal Act are to be assessed with reference to the national needs such as, the long denial of justice to the victims of the atrocities committed during 1971 independence war and the nation as a whole.
- 14.** 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 quite permitted. It is to be noted that the ICTY, ICTR and SCSL the judicial bodies backed by the UN have been constituted under their respective retrospective Statutes. Only the ICC is founded on prospective Statute.
- 15.** Bangladesh Government is a signatory to and has ratified the ICCPR, along with its Optional Protocol. It is necessary to state that the provisions of the ICTA 1973 [(International Crimes (Tribunals) Act,1973] and the Rules framed there under offer adequate compatibility

with the rights of the accused enshrined under Article 14 of the ICCPR. The 1973 Act of Bangladesh has the merit and mechanism of ensuring the standard of safeguards needed universally to be provided to the person accused of crimes against humanity.

16. As state party of UDHR and Geneva Convention Bangladesh cannot evade obligation to ensure and provide justice to victims 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.

VI. Jurisdiction of the Tribunal

17. The Act of 1973 is meant to prosecute and punish not only the armed forces but also the perpetrators who belonged to '**auxiliary forces**', or who committed the offence as an '**individual**' or a '**group of individuals**' and nowhere the Act says that without prosecuting the armed forces (Pakistani) the person or persons having any other capacity specified in section 3(1) of the Act cannot be prosecuted. Rather, it is manifested from section 3(1) of the Act of 1973 that even any person (**individual or group of individuals**), if he is *prima facie* found individually criminally responsible for the offence(s), can be brought to justice under the Act of 1973. Thus, the Tribunals set up under the Act of 1973 are absolutely domestic Tribunal but meant to try internationally recognised crimes committed in violation of customary international law.

VII. Procedural History

18. At pre-trial stage, the Investigation Agency constituted under section 8(1) of the Act of 1973, through the Chief Prosecutor prayed for causing arrest of the accused Abul Kalam Azad @ Bachchu by filing an application on 25 March 2012, for effective and proper investigation [Rule 9(1) of the ROP]. The Tribunal directed to submit a progress report about the task of investigation and fixed 03 April 2012 for hearing and disposal of the application. On having the progress report as

mentioned the Tribunal on hearing application issued warrant of arrest against the accused. But the enforcement agency of the Dhaka Metropolitan Police could not execute it as the accused Abul Kalam Azad @ Bachchu, on sensing the matter of issuance of warrant of arrest had absconded.

19. However, finally, the Chief Prosecutor, on the basis of the report and documents submitted therewith by the Investigation Agency, after completion of investigation, submitted the 'Formal Charge' on 02.09.2012 under section 9(1) of the Act of 1973 before this Tribunal alleging that the accused as a potential member of Razaker force in Faridpur, the auxiliary force and also as an 'individual' had committed the offences of crimes against humanity, genocide including the offence of providing substantial contribution, assistance and moral support to the Pakistani army to the accomplishment of such horrific crimes in different places of Faridpur district during the period of War of Liberation in 1971 and thereby proceedings commenced. Thereafter, the Tribunal, under Rule 29(1) of the Rules of procedure, took cognizance of offences as mentioned in section **3(2) (a)(b)(g)(h)** of the Act of 1973 and issued warrant of arrest for causing appearance of the accused as required under Rule 30 of the ROP.

20. Dhaka Metropolitan Police (DMP) submitted the execution report before the Tribunal stating that the accused Abul Kalam Azad @ Bachchu could not be arrested as he has already absconded and he is learnt to have left the country instantly before the earlier warrant for arrest issued by this Tribunal. In this circumstance, the Tribunal, as required under Rule 31 of the ROP, ordered to publish a notice in two daily news papers, one in Bangla and another in English asking the accused to appear before this Tribunal within ten (10) days from the date of publication of such notice. Accordingly, the notice has been published on 25 October issue of 'The Daily Janakantha' (Bengali daily) and 'The Daily Star' (English daily). But despite publication of such notice the accused has not appeared before this Tribunal.

21. On 07 October, the Tribunal has observed in its order that there have been reasons to believe that the accused has absconded or has concealed himself so that he cannot be arrested and produced before the Tribunal and there is no immediate prospect for arresting him, and as such it ordered that the trial against the accused shall be held in his *absentia* under section 10A(1) of the International Crimes (Tribunals) Act 1973 (as amended up-to-date) together with the Rule 32 of the ROP and accordingly it appointed Mr. Abdus Shukur Khan, Advocate, Bangladesh Supreme Court, as state defence counsel to defend the absconded accused who will have remuneration to be determined by the Tribunal [Section 10A(2) of the Act]. Tribunal also directed the prosecution to submit copy of formal charge and the documents which it intends to rely upon by 11 October for supplying the same to the appointed state defence counsel. On 11 October, the state defence counsel informed the Tribunal that he received the copy of formal charge, statement of witnesses and documents submitted therewith from the office of the Registrar. Thereafter, the Tribunal fixed 21 October for hearing the charge matter. After hearing both sides, the Tribunal framed eight (08) independent charges including the charge of crimes against humanity and genocide against the accused Abul Kalam Azad @ Bachchu by its order dated 04 November 2012.

VIII. Applicable laws

22. The proceedings before the Tribunal shall be guided by the International Crimes (Tribunals) Act 1973, the Rules of Procedure 2012 (ROP) 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 into its judicial notice of fact of common knowledge which is not needed to be proved by adducing evidence [**Section 19(4) of the Act**]. The Tribunal may admit any evidence [**Section 19(1) of the Act**]. The Tribunal shall have discretion to consider hearsay evidence too by weighing its probative value [**Rule 56(2)**]. The defence shall have liberty to cross-examine prosecution witness on his credibility and to take contradiction of the evidence given by him [**Rule 53(ii)**]. Cross-

examination is significant in confronting evidence, even in case of holding *absentia* trial. The Act 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, although the prosecution by filing an application has prayed to receive statement of four witnesses made to the Investigation Officer. The defence shall have right to cross-examine prosecution witnesses. Accordingly the state defence counsel duly cross-examined all the prosecution witnesses.

23. The Act provides provision of holding trial in *absentia* [**section 10A**] after due compliance of necessary legal requirement as contemplated in the Act and the ROP.

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

IX. Right to Disclosure

25. 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 seems to have been reflected compatibly in the **Rule (3) of ICT-BD 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.” But it could not be complied with, in the instant case, as the accused Abul

Kalam Azda @ Bachchu remained absconded and finally, pursuant to execution report of the warrant of arrest, he fled away from country.

26. Further, **Rule 18 (4) of ICT-BD ROP** 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.*” For the reason of absconsion of accused the Tribunal, after necessary procedural formalities as required under the ROP, ordered for holding *absentia* trial by appointing Mr. Abdus Shukur Khan, Advocate, Bangladesh Supreme Court as state defence counsel to defend the absconded accused and it also ordered to submit copies of the formal charge, statement of witnesses and documents which the prosecution intends to rely upon for supplying the same to the state defence counsel for preparation of defence. Thus, this Tribunal has the ability to hold trials *in absentia* in such a way as to refrain from violating human rights norms guaranteed by the International Covenant on Civil and Political Rights (ICCPR) and other agreements.

27. Therefore, right to disclosure and adequate opportunity to prepare defence have been adequately ensured so that the appointed state defence counsel can have due opportunity to defend the interest of absconded accused Abul Kalam Azad @ Bachchu keeping consonance with the Article 9(2) and 14(3)(a) ICCPR.

X. Witnesses adduced by parties

28. Prosecution adduced and examined in all 22 witnesses of whom P.W.21 is a seizure witness and P.W.22 is the Investigation Officer. It took 13 working days to complete examination and cross-examination of 22 P.W.s. After closing of P.W.s, the learned state defence counsel informed the Tribunal once again that he would not adduce and examine any witness in support of defence as he could not have been able to submit the list of witnesses, documents as required under section 9(5) of the Act as he failed to have instruction from relatives of the absconded accused, despite contact that he made to them. Accordingly the Tribunal

fixed next date for summing up of prosecution case as required under section 10(1)(i) of the Act of 1973. Accordingly the learned Prosecutor Mr. Syed Haider Ali and Mr. Shahidur Rahman have summed up prosecution case and thereafter the learned state defence counsel also presented summing up of defence case by agitating several crucial legal issues.

XI. The way of adjudicating the charges

- 29.** The evidence produced by the prosecution in support of its respective case is mainly testimonial. The Tribunal considered that most of prosecution witnesses directly experienced and witnessed the terrible events they have narrated and that such trauma could have an impact on their testimonies. However, despite this reality, their testimony seems to be invaluable to the Tribunal in its search for the truth on the horrendous and atrocious incidents that happened in 1971 war of liberation in different areas of Faridpur district directing the Bangalee Hindu community, after duly weighing value and credibility of such testimonies. Despite the indisputable atrociousness of the crimes committed during the war of liberation in 1971 by the Pakistani armed force in collaboration with the local perpetrators like accused Abul Kalam Azad @ Bachchu, we require to examine the facts constituting offences alleged in a most dispassionate manner, keeping in mind that the accused is presumed innocent.
- 30.** The incidents took place about 40/41 years back, in 1971 and as such memory of live witnesses may have been faded and as a result discrepancy may have occurred in their version made in court. Such discrepancy is usual. The case before us, as we have already said, depends mostly on narratives of live witnesses who claim to have witnessed the commission of crimes and sustained trauma as well, as sufferer. Their testimony is based on their explicit memories.
- 31.** Therefore, in the case in hand, together with the testimony of prosecution witnesses of whom most are live witnesses, we shall have to depend upon too **(i)** facts of common knowledge **(ii)** context of the attack directed against unarmed Hindu civilians **(iii)** documentary evidence, if

any (iv) relevant facts (v) circumstantial evidence (vi) Political status of the accused at the relevant time (vii) link of the accused with the local Pakistani armed force and (viii) the jurisprudence evolved on these issues in the *ad hoc* Tribunals, if it is considered essential to rely upon. In the prosecution of crimes against humanity, principally accused's status, position, authority, activities, link with the state organization are pertinent issues. In determining culpability of the accused, all these factors have to be addressed and resolved as well.

XII. Burden of the Prosecution

32. The prosecution, in the light of the charges framed, is burdened to prove (a) the commission of crimes narrated in charges (b) mode of participation of the accused in committing the crimes for which he has been charged (c) What was the status and role of the accused at the relevant time and how he had maintained association with the Pakistani army (d) the context of carrying out alleged atrocious crimes directed against civilian population and a particular group of population. In determining culpability of the accused prosecution is to establish too that (1) the perpetrator must know of the broader context in which the act occurs and (2) the act must not have been carried out for purely personal motives of the perpetrator.

XIII. Backdrop and Context

33. 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.
34. As we see in the case in hand, the crimes are alleged to have been committed between the period of May 1971 to July 1971 in furtherance of accomplishment of policy and plan of Pakistani army. Why? What

was the role of the accused during this period? What were his activities? How he acted to the accomplishment of crimes alleged? What he did and for whom and in which capacity? Had he link, in any manner, with the Pakistani occupation force or local administration in implementing organizational policy or plan and if so, why?

35. Admittedly, during the period of War of Liberation in 1971 parallel forces e.g. Razaker Bahini, Al-Shams, Al-Badar Bahini, , Peace Committee were formed as auxiliary forces of the Pakistani armed force who provided moral supports, assistance and substantially contributed and also physically participated to the commission of horrendous atrocities in the territory of Bangladesh. It is the fact of common knowledge that thousands of incidents happened through out the country as part of organized and planned attack. Target was the pro-liberation Bangalee civilian population, Hindu community, pro-liberation political group, freedom fighters and finally the ‘intellectuals’. We are to search for answers of all these crucial questions which will be of assistance in determining the culpability of the accused for the offences for which he has been charged. The charges against the accused arose from some particular events allegedly constituting the offences of crimes against humanity and genocide, during the War of Liberation in 1971.

XIV. Points to be determined

36. In determining culpability of the accused for the perpetration of offences with which he has been charged we are to adjudicate the fundamental issues such as (i) Whether the accused was a potential member of Razakar (Volunteer) force at the relevant time (ii) whether the accused was substantially associated with Pakistani army and their activities for facilitating commission of offences (iii) whether the accused physically participated in the commission of crimes alleged and (iv) whether the allegations against the accused constitute a serious case of ‘crimes against humanity’ and ‘genocide’ within the Tribunal’s jurisdiction.

XV. Discussion

37. The case, as it transpires, is founded on oral evidence and documentary evidence as well. The evidence adduced by the prosecution is to be evaluated together with the circumstances revealed, relevant facts and facts of common knowledge. It would be expedient to have a look to the facts of common knowledge of which Tribunal has jurisdiction to take judicial notice [Section 19(3) of the Act of 1973] and the reports published in foreign news papers in 1971.

38. Therefore, before we address the above decisive issues we prefer to make a portrayal related to factual aspects. Inevitably this portrayal would lend us a clear depiction as to pattern, extent and nature of atrocities committed during 1971 War of Liberation that may qualify the offences as crimes against humanity as specified in section 3(2)(a) and the offence of genocide as specified in section 3(2) (c)(i) of the Act of 1973.

XVI. Addressing legal issues agitated

39. Before we enter into the segment of our discussion on adjudication of charges we consider it convenient to address and resolve the legal issues agitated during summing up of cases of both parties.

Argument advanced by the State defence Counsel on legal aspect

40. Mr. Abdus Shukur Khan, Advocate, Bangladesh Supreme Court and the learned state defence counsel defending the absconded accused Abul Kalam Azad @ Bachchu, in course of summing up case has taken pain in raising some pertinent legal issues. He argued that 40 years delay in prosecuting the accused is not sufficiently explained and such delay creates doubt and fairness of prosecuting the accused; that trial in absence of accused is not valid, particularly in prosecution and trying an individual on allegation of committing internationally recognised crimes; that the phrase 'individual' and 'group of individuals' have been purposefully incorporated in the Act of 1973 by way of amendment in 2009 and such amendment does not have retrospective effect and as such the accused cannot be brought to jurisdiction of the Tribunal as an 'individual'; that the Act of 1973 was enacted to prosecute , try and

punish 195 listed Pakistani war criminals who have been exonerated on the strength of tripartite agreement of 1974 and as such without prosecuting those listed war criminals present accused cannot be brought to justice; 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 army; that if the accused was actually prosecuted, tried and punished under the Collaborators Order 1972, now prosecuting him for the same offences is barred by the doctrine of double jeopardy; that it is not claimed that the accused alone had committed the offences alleged and thus without bringing his accomplices to justice the accused alone cannot be prosecuted; that the crimes alleged are isolated in nature and not part of organized attack; that the offences have not been adequately defined in the Act of 1973 and for characterizing the criminal acts alleged for constituting offence of crimes against humanity the Tribunal should borrow the elements as contained in the Rome Statute.

Reply of Prosecutor to argument extended by the Defence

41. In reply to these legal contentions, Mr. Syed Haider Ali, the learned Prosecutor submitted that there is an historical context of delay in bringing the 'individuals' to the justice although the legislation enacted in 1973 was prevailing. Step was taken by forming prosecution team composed of four eminent senior counsels for prosecuting the perpetrators of offences specified in the Act of 1973. But after the dark history of assassination of Bangabandhu Sheikh Mujibur Rahman and his family on 15 August 1975 the process was halted and even the Collaborators Order 1972 was repealed on 31.12.1975. Democracy remained halted till 1991 and also till 2009 there was no favourable situation, strong political will and consensus to prosecute the offenders under the Act of 1973. This history of common knowledge itself is explanatory for delayed prosecution. Besides, there is no limitation in bringing criminal prosecution, particularly when it relates to 'international crimes' committed in violation of customary international law. Mr. Prosecutor went on to submit that the tripartite agreement is not a clog in bringing prosecution under the Act of 1973 against 'auxiliary

force ‘ and ‘individual’ or ‘group of individuals’. Besides, the tripartite agreement did not give immunity to listed 195 war criminals belonging to Pakistani occupation army. The agreement was not in consonance with the norms of compelling laws.

42. In respect of definition and elements of crimes against humanity, Mr. Prosecutor submitted that the phrase ‘ **directed 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. The ICTY Statute does not contain the ‘systematic or widespread’ requirement. Subsequently, through judicial pronouncements it has been settled jurisprudence of ICTY that the offences of crimes against humanity must have been committed as part of ‘systematic or widespread attack’. 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. The amendment of the Act of 1973 bringing the phrase ‘individual’ or ‘group of individuals’ have to be considered together with the preamble of the Statute and thus it is misconceived to say that merely for the reason of such subsequent amendment to the Act an ‘individual’ cannot be brought under jurisdiction of the Tribunal. As regard trial in *absentia*, it has been submitted that section 10A of the Act of 1973 provides provision of holding trial in *absentia*. The accused Abul Kalam Azad @ Bachchu deliberately remained absconding since pre-trial stage to evade the process of justice and as has been reported he has left the country. It signifies that he deliberately did not intend to face the prosecution. Absconcion itself is an incriminating circumstance to be considered together with evidence for determining culpability of the accused.

(i) Does Delay obstruct bringing prosecution under the Act of 1973?

- 43.** 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.
- 44.** Still the Nazi war criminals of the Second World War are being prosecuted. Trials of genocides committed during the 1973 Chilean revolution and the Pol Pot regime of Cambodia in the 1970s are now ongoing. The sovereign immunity of Slobodan Milosevic of Serbia, Charles Taylor of Liberia, and Augusta Pinochet of Chile (with the Chilean Senate's life-long immunity) as the head of state could not protect them from being detained and prosecuted for committing genocides, crimes against humanity, and war crimes.
- 45.** In view of above settled position and in the absence of any statutory limitation, as a procedural bar, only the delay itself does not preclude prosecutorial action to adjudicate the culpability of the perpetrator of core international crimes. Indubitably, a prompt and indisputable justice process cannot be motorized solely by the painful memories and aspirations of the victims. It requires strong public and political will together with favourable and stable political situation. Mere state inaction, for whatever reasons, does not render the delayed prosecution readily frustrated and barred by any law.
- 46.** Prolonged impunity and the related denial of the truth will allow old wounds to fester and may increase post-traumatic stress suffered by the victims of human rights crimes. [Special Rapporteur on the Right to Restitution, Comp. & Rehab. for Victims of Gross Violations of Human

Rights & Fundamental Freedoms, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, 135, Common on Human Rights, Econ. & Soc. Council, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993) [hereinafter van Boven] (by Theo van Boven).]

47. In this respect, Cohen has observed that “after generations of denials, lies, cover-ups and evasions, there is a powerful, almost obsessive, desire to know exactly what happened.” [STANLEY COHEN, *STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING* 225 (2001)]. In Bangladesh, the efforts initiated under a lawful legislation to prosecute, try and punish the perpetrators of crimes committed in violation of customary international law is an *indicia* of valid and courageous endeavor to come out from the culture of impunity. Customary international law has finally progressed to a stage where States may not point to the passage of time to escape their duty to prosecute and punish perpetrators of genocide, crimes against humanity, and war crimes in their own courts.

48. Crimes against humanity and genocide, the gravest crime never get old and that the perpetrators will face justice. We should not forget it that the millions of victims who deserve that their tormenters are held accountable; the passage of time does not diminish the guilt. Considerations of material justice for the victims should prevail when prosecuting crimes of the extreme magnitude is on the process. Therefore, justice delayed is no longer justice denied, particularly when the perpetrators of core international crimes are brought to the process of justice. However, there can be no recognised theory to insist that such a ‘system crime’ can only be pursued within a given number of years. Therefore, delayed prosecution does not rest as a clog in trying the accused and creates no mystification about the atrocities committed in 1971

(ii) Validity of holding Absentia trial

- 49.** The Act of 1973 provides provision of holding trial in *absentia*, if the appearance of the accused could not be ensured for the reason of his absconion [Section 10A (1) of the Act]. In the international context, the issue of trials *in absentia* arose with the first modern international criminal tribunal, the International Military Tribunal (IMT) at Nuremberg, which was established to try war criminals operating under the European Axis Powers during World War II. Article 12 of the Charter of the International Military Tribunal allowed for trials *in absentia* whenever the Tribunal found it necessary to do so in the interest of justice. Famously, Martin Bormann, who served as the Nazi Party secretary, was indicted, tried, and sentenced to death, all *in absentia*, despite doubts as to whether he had even been informed of the proceedings.
- 50.** United Nations reversed its policy against trials *in absentia* with the Special Tribunal for Lebanon (STL or Lebanon Tribunal) in 2006. The STL allows trials "to commence and to end..... without an accused ever having showed up in court. The STL (Special Tribunal for Lebanon) expressly allows for trials in the absence of the accused in article 22 of the STL Statute, entitled "Trials in absentia." Article 22(1), lists the situations where the STL can hold trials in the accused absence.
- 51.** According to Professor William Schabas under section 22(1) (c) of the STL Statute, the accused may be tried *in absentia* when he refuses to appear after an initial appearance (absconded) or is otherwise unable to be found after all reasonable steps have been taken to inform him of the proceedings including media publication and communication with his known state of residence.
- 52.** Accused Abul Kalam Azad @ Bachchu could have due opportunity of being properly informed of the proceedings in advance if the warrant of arrest could have been executed. But by remaining absconded and leaving country the accused has willfully declined to exercise his right to be present for facing trial and as such under this circumstance, trial in his

absence would be permissible "in the interest of the proper administration of justice."

53.In the case in our hand, at pre-trial stage, for the purpose of effective investigation this Tribunal ordered for his arrest by issuing warrant and as it appears from the execution report, the accused knowing it preferred to remain absconded, instead of facing proceedings and trial. The accused has not intended to take part in the trial, rather wished to escape prosecution. The jurisprudence of both the ICCPR and the ECHR confirms that a trial *in absentia* will not violate a person's right to be present when he has expressly declined to exercise this right. The circumstance and the time and way the accused had gone to absconion and left country led us to lawful inference that the accused has expressly declined to exercise his right to be present in trial.

54.That is to say, despite all reasonable steps taken to inform him of the proceedings including media publication, the accused Abul Kalam Azad @ Bachchu seems to be unwilling to face the trial, as he remained absconded and fled away even from country. It is a patent *indicium* that the accused, by his conduct, has waived his right to be present, and as such on this score too trial in his absence is quite permissible.

(iii) Incorporating 'Individual or group of individuals' to the Act by amendment

55.It is submitted by the learned counsel appearing on behalf of the accused (absconded) that since the subsequent amendment brought in 2009 of the Act of 1973 by inserting the phrases 'individual' and 'group of individuals' in section 3(1) carries 'prospective effect', in reality, the present accused cannot be prosecuted in the capacity of an 'individual' for the offences underlying in the Act which is admittedly 'retrospective'. Since such amendment has not been expressly given retrospective effect interpretation stands that the amendment is prospective. Prosecution could not show that the accused belonged to Razakar force or subsequently Al-Badar Bahini and as such on this score

too he cannot be prosecuted under the Act of 1973 by bringing him within the ambit of the phrase ‘individual’.

56. At the outset, before we resolve the issue, 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.

57. 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.

58. The legislative modification that has been adopted by bringing amendment in 2009 has merely extended jurisdiction of the Tribunal for bringing the perpetrator to book if he is found involved with the commission of the criminal acts even in the capacity of an ‘individual’ or member of ‘group of individuals’. It is thus validly understood that the rationale behind this amendment is to avoid letting those who committed the most heinous atrocities go unpunished. This is the intent of bringing such amendment.

59. It may be further mentioned here that the words ‘individual’ or ‘group of individuals’ have been incorporated both in section 3 of the Act of 1973 and in Article 47(3) of the Constitution by way of amendments in 2009 and 2011 respectively. The right to move the Supreme Court for calling any law relating to internationally recognised crimes in question by the person charged with crimes against humanity and genocide has been taken away by the provision of Article 47A(2) of the Constitution. Since the accused has been prosecuted for offences recognised as international crimes as mentioned in the Act of 1973 he does not have right to call in

question any provision of the International Crimes (Tribunals) Act 1973 or any of amended provisions thereto.

60. Thus, we hold that the application of prospectiveness or retrospectivity as to amendment to section 3(1) of the Act of 1973 raised by the defence is of no consequence to him 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.

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

61. 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. Such agreement was an ‘executive act’ and it cannot create any clog to prosecute member of ‘auxiliary force’ or an ‘individual’ or member of ‘group of individuals’ as the agreement showing forgiveness or immunity to the persons committing offences in breach of customary international law was derogatory to the existing law i.e the Act of 1973 enacted to prosecute those offences.

62. It is settled that the *jus cogens* principle refers to peremptory principles or norms from which no derogatory is permitted, and which may therefore operate a treaty or an agreement to the extent of inconsistency with any such principles or norms. We are thus inclined to pen our convincing view that the obligation imposed on the state by the UDHR (Universal Declaration of Human Rights) and the Act of 1973 is indispensable and inescapable and as such the ‘tripartite agreement’ which is mere an ‘executive act’ cannot liberate the state from the responsibility to bring the perpetrators of atrocities and system crimes into the process of justice.

63. 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.

64. Next, the Act of 1973 is meant to prosecute and punish not only the 'armed forces' but also the perpetrators who belonged to 'auxiliary forces', or who committed the offence as an 'individual' or member of 'group of individuals' and nowhere the Act says that without prosecuting the armed forces (Pakistani) the person or persons having any other capacity specified in section 3(1) of the Act cannot be prosecuted. Rather, it is manifested from section 3(1) of the Act of 1973 that even any person (individual or member of group of individuals), if he is *prima facie* found individually criminally responsible for the offence(s), can be brought to justice under the Act of 1973. Therefore, the argument that since the main responsible persons (Pakistan Army) have escaped the trial, on the strength of the tripartite agreement providing immunity to them, the next line collaborators or perpetrators cannot be tried is far-off to any canons of criminal jurisprudence. We are of the view that the 'tripartite agreement' is not at all a barrier to prosecute even a local civilian perpetrator under the Act of 1973.

(v) The accused could have been prosecuted and tried under the Collaborators Order 1972 and if prosecuted present prosecution for same offences is barred by the doctrine of Doctrine of Double Jeopardy

65. An offence for which the accused could have been convicted on the initial indictment if actually brought against him under the Collaborators Order 1972 does not appear to be same for which the accused has been prosecuted under the Act of 1973. The Tribunal, in determining the

issue of double jeopardy, is concerned with offences or crimes as clearly refer to the Act of 1973 and not the Collaborators Order 1972.

66. There has been no proof that the accused was prosecuted and tried under the Collaborators Order 1972. It is not correct to say that the accused could have been prosecuted if actually he had perpetrated any of crimes enumerated in the Act of 1973 for which he has been charged now. Next, if the accused was really prosecuted and tried under the Collaborators Order 1972 the present prosecution under the Act of 1973 cannot be said to be barred by the doctrine of double jeopardy.

67. It is to be tested whether two criminal offences are the same for the purposes of double jeopardy jurisprudence, **Lord Morris** explained that what has to be considered is whether the crime or offence charged in the later indictment is the same or is in effect or is substantially the same as the crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those on some earlier proceedings. **[1964] A.C. 1254 at 1306 [H.L.(E.)]**.

68. Thus, the doctrine of double jeopardy prohibits that the accused should not have been put in peril of conviction for the same criminal offence as that with which he is then prosecuted and punished. First, there is no paper or document before us to show that accused was prosecuted under the Collaborators Order 1972 and the fate of such prosecution.

69. 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.

70. In the case in hand, we have found that there are sufficient grounds to presume *prima facie* that the accused was physically associated with the perpetration of the offences enumerated in the 1973 Act. Therefore, we are disinclined to accept the argument that merely for the reason that since the accused was not brought to justice under the Collaborators Order 1972 now he is immune from being prosecuted under the Act of 1973.

(vi) Whether the accused can be prosecuted without prosecuting his accomplices

71. Another question has been agitated by the defence. According to the charges it will reveal that apart from the accused, some other armed Razakars and co-perpetrators accompanied the accused at the crime scene in committing the crimes. But excepting accused, none of his accomplices has been brought to justice. It is true. But that by itself does not make the horrendous episode of atrocities directing the civilian population belonging to Hindu community constituting crimes against humanity and genocide untrue or give any immunity to accused Abul Kalam Azad @ Bachchu. If the accused is found guilty and criminally liable beyond reasonable doubt for his culpable acts, inaction in prosecuting his accomplices cannot be the reason for holding the former innocent or relieved from liability. In this regard we may recall the provision as contained in section 4(1) of the Act of 1973.

(vii) Definition and Elements of Crime

72. The learned defence counsel has argued that the offences specified in section 3(2) are not well defined and the same lack of elements. Section 3(2) of the ICTA 1973 does not explicitly contain the 'widespread or systematic' element for constituting the crimes against humanity. In this regard this Tribunal may borrow the elements and definition of crimes as contained in the Rome Statute.

73. We are not agreed with the above submission. Section 3(2)(a) of the Act is self contained and fairly compatible with the international jurisprudence. Before coming to a finding as to whether the attack directed against civilian population, in 1971, on political, racial, ethnic or religious grounds was 'systematic'? Let us have a look to the jurisprudence evolved on this issue.

74. If we make a closer look to the contemporary standards of definition of 'Crimes against Humanity' in various Statutes, first this observation can be made that there is no 'consistency' among definitions. The definition of 'Crimes against humanity' as contemplated in Article 5 of the ICTY Statute 1993 neither requires the presence of 'Widespread and Systematic Attack' nor the presence of 'knowledge' thereto as conditions for establishing the liability for 'Crimes against Humanity'. True, the Rome Statute definition differs from that of both ICTY and ICTR Statutes.

75. **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;'

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

Humanity'. It is the jurisprudence developed in ICTY that identified the 'widespread' or 'systematic' requirement.

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

78. 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. The Tribunal, as per section 19(3) of the 1973 Act, shall not require proof of facts of common knowledge; it shall take judicial notice of such fact. The specific offences committed as 'Crimes against Humanity' during 1971 war, were very much a part of a 'systematic attack' of the ongoing atrocious activities.

79. The section 3(2)(a) of the Act states the 'acts' constituting the offences of crimes against humanity is required to have been **'directed against any civilian population'** or **'persecution on political, racial, ethnic or religious grounds'**. To qualify as a crime against humanity, the acts enumerated in section 3(2)(a) of the Act must be committed against the 'civilian population' on national, political, ethnic, racial or religious grounds. Thus, an "attack against a civilian population" means the perpetration against a civilian population of a series of acts of violence, or of the kind of mistreatment referred to in sub-section (a) of section 3(2). Conducts constituting 'Crimes' directed against 'civilian

population' thus refers to organized and systemic 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 1973 Act is visibly baseless.

XVII. Relevant and Decisive Factual Aspects

80. For the purpose of adjudicating the charges, at the outset, the following decisive factual aspects need to be resolved. These aspects relate to the context and status of the accused at the relevant time of perpetration of crimes alleged. To qualify the criminal acts allegedly committed by the accused as the offences of crime against humanity these aspects are essentially needed to be resolved first.

(i) When the Pakistani army rolled into Faridpur Town

81. This factual issue is crucially related to the events of crimes alleged. Because, from the charges framed against the accused it reveals that all the events of alleged atrocities were committed between the period of 14 May to 26 July 1971. The accused Abul Kalam Azad @ Bachchu allegedly in the capacity of Razakar and his accomplices perpetrated all these crimes and charge nos. 1 and 2 demonstrate that the accused used to maintain close and active association with the Pakistani army at different camps set up in Faridpur.

82. On prayer of prosecution, the Tribunal has permitted it to adduce attested photocopy of the East Pakistan Police Abstract of Intelligence [Vol XXV No. 17] dated April 24 1971 and the attested photocopy of the East Pakistan Police Abstract of Intelligence [Vol XXV No. 18] dated May 1 1971, as additional evidence under section 9(4) of the Act of 1973, as it considered those relevant for adjudication of the charges. The documents have been marked as **Exhibit- 10 and 11.**

83. It is quite evident from evidence of witnesses that the Pakistani army rolled into Faridpur town on 21 April 1971, in furtherance of 'operation search light' executed on 25 March 1971 in Dhaka and all the events of

atrocities as listed in the charges took place since the entry of Pakistani army into Faridpur town and target of such horrific atrocious acts was mostly the Hindu community. Exhibit 10 and 11 add strength to an unerring inference on these pertinent relevant facts.

84. The East Pakistan Police Abstract of Intelligence [Vol XXV No. 17] dated April 24 1971(**Exhibit-10**) so far it relates to 'Faridpur' in serial 387 speaks as below:

“**387. Faridpur.**—On 21st April, 1971, some deserters from East Bengal Regiment along with some '*Mukti Fauz*' numbering about 20/25 approached the Deputy Commissioner, Faridpur and the Superintendent of Police, Fairdpur, at the latter's residence and demanded arms and ammunition and Police Force from them to resist the Pakistan Army who were coming to Faridpur on that day. They refused to fulfill their demands. At this the '*Mukti Fauz*' and EBR deserters surrounded the residence of the Superintendent of Police when some police personnel who were present there took their position to encounter them. Then the '*Mukti Fauz*' and EBR deserters left the place, and fled away from Faridpur town just before the arrival of the Army on 21st April 1971.”

85. Thus, it has been conclusively proved that the Pakistan Army rolled into Faridpur town on 21 April 1971 and there was an attempt to resist their entry on part of '*Mukti Fauz*' and pro-liberation members of (East Bengal Regiment (EBR) (who were treated as deserters). We have also found from testimony of P.W.7, P.W. 15 and P.W. 18 that entry of Pakistan Army into Faridpur town on 21 April 1971 was almost unhindered as the attempted resistance on part of pro-liberation group of Bengali people became futile as they lacked war-arms to encounter. Additionally, Exhibit-10 extends convincing reason to assume the above P.W.s quite credible as well.

86. Next, the East Pakistan Police Abstract of Intelligence [Vol XXV No. 18] dated May 1 1971 (**Exhibit-11**), so far it relates to 'Faridpur' in serial 431 says as follows:

“431, Faridpur.—At the instance of the Pakistan democratic Party, Faridpur, a 'Peace Committee' has been formed on 27th April , 1971, with Mohammad Afzal Husain (PML), Advocate, Faridpur town, as convener and 38 others, as members.”

87. It is thus also established that within week the Pakistani army rolled into Faridpur, local peace committee was formed on 27 April with Mohammad Afzal Husain (PML), Advocate, Faridpur town, as convener and 38 others, as members.

(ii) Formation of Razakar in Faridpur in 1971

88. In order to get a picture as to the role and status of the accused including his political affiliation during the War of Liberation in 1971, at the outset we need to concentrate to what has been testified by the prosecution witnesses. It would be fairly relevant and indispensable for adjudication of his culpability. It appears that P.W.7 and P.W.15 and P.W.18 have made the portrayal, in this regard.

89. P.W.7 Md. Amir Hossain (60) from village East Khabashpur police station Kotwali district Faridpur, a freedom fighter has testified that on 21 April 1971 the Pakistani troops started rolling towards Faridpur town and the pro-liberation people together with police, Ansar , VDP attempted to resist them at Goalanda Ghat but had failed as they were not equipped with war-weapons. Afterwards, they moved towards Faridpur town where at a place known as '*Goalchamat*' they found Advocate Afzal Hossain, Alauddin Khan, Khokon, Abul Kalam Azad @ Bachchu (accused) and 300/400 biharis welcoming the Pakistani troops and they started celebrating and chanting.

90. As regard formation of Razakar force in Faridpur, P.W.15 Proboadh Kumar Sarker stated that during the first part of the month of May 1971

Razakar force was locally formed in Faridpur. P.W.15, in reply to question elicited in his cross-examination, replied that Abul Kalam Azad @ Bachchu received fire arms operating training possibly at Faridpur stadium. First, it has been established from evidence of most of P.W.s that the Pakistani troops had set up camps at Faridpur stadium and Faridpur circuit house. Second, it is found that at the time of implementing attack directed against civilians, accused Abul Kalam Azad @ Bachchu used to carry a rifle with him. Thirdly, the victims and sufferers of atrocities which were committed during the period of 14 May to 26 July 1971 have unequivocally testified that at that time the accused was known as a Razakar and such testimony could not have been impeached by the defence.

- 91.** P.W.5 Ranjit Kumar Nath, a freedom fighter and a victim of atrocious torture has also stated in cross-examination that accused Bachchu was also involved with the process of formation of Razakar force and subsequently he was the head of Faridpur Al-Badar force. This version remained unshaken.
- 92.** P.W.8 Profulla Kumar Mondol (63). He knew accused Abul Kalam Azad @ Bachchu as he saw him attending meetings in support of Jamat E Islami and he (accused) was a student, junior to him, at Faridpur Rajendra College. This is why P.W.8 knew accused Abul Kalam Azad @ Bachchu. Defence failed to refute its credibility. From this version of P.W.8 it is evident that the accused was affiliated to Jamat E Islami politics.
- 93.** However, P.W.8 who is a natural witness has also stated in his cross-examination, in reply to question put to him by the defence, that he learnt that Razakar force was formed ten-twelve days after the Pakistani troops entered in Faridpur and accused was its commander. Similarly P.W.10 Tushta Kumar Mondol (54) testified the event of crime of killing as listed in charge no.4 incriminating the accused. He however also stated that at that time accused Abul Kalam Azad @ Bachchu was the Razakar

Commander. This version as well remained unshaken in his cross-examination.

94. From a report containing information (**Exhibit-7: page 150 of the volume of prosecution's document**) about the accused as transmitted to the Special Superintendent of Police, City Special Branch, Dhaka by the Police Super, Faridpur vide its MEMO No. 1782 dated 12.4.2010 goes to show that initially accused Abul Kalam Azad @ Bachchu was a Razakar and was also the head of Faridpur Al-Badar force.

95. It is also found in a report titled "**Pakistani Regime Is Preparing For Long Guerrilla War in East**" published in the New York Times, July 30 1971 issue (By MALCOLM W. BROWNE) that-

“ After brief training the recruit is given a rifle.....The Government says it has already recruited more than 22,000 Razakars of a planned force of 35,000.”

96. The above report together with the East Pakistan Police Abstract of Intelligence [Vol XXV No. 17] dated April 24 1971 (**Exhibit-10**) has adequately proved that the then Pakistan Government organized the Razakar force in Faridpur instantly after the Pakistani troop rolled into Faridpur in furtherance of 'operation search light' on 25 March 1971 to encounter the Bengali nation who started fight for freedom.

97. The Investigation Officer P.W.22 has explained why he could not collect sufficient necessary documents (old evidence) which were kept archived till 1975 in the office of the Deputy Commissioner, Faridpur, during his investigation. Undeniably, state support and co-operation and strong political will are required for the prosecution of perpetrators of internationally recognised system crimes by way of access direct evidence, such as archives or confidential information.

98. The history says, after the gloomy episode of assassination of the father of nation and his family happened on 15 August 1975 the persons and parties in state power started allowing individuals and political organizations which played visibly a notorious and antagonistic role resisting the war of Liberation in 1971 of being rehabilitated and recognized in all spheres of state. Even some of potential individuals actively affiliated with the politics of Jamat E Islami (JEI) in 1971 and its student wing Islami Chatra Sangha (ICS) got fair opportunity of sharing state power and even the privilege of hoisting our pride and heard earned national flag in their houses and vehicles. Unfortunately, the nation carrying enormous pains had to play the role of mere spectator. Because, the situation was not favourable for raising voice for prosecuting the perpetrators of serious crimes committed in violation of customary international law in 1971. Thus, the likelihood that by using the passage of time and situation favourable to them the beneficiary quarter has destroyed the relevant documents that might be enough to establish their culpability cannot be brushed aside.

99. However, despite the above challenge, eventually we have got two matters proved. One is entry of Pakistani troops into Faridpur on 21 April 1971 and another is the present accused Abul Kalam Azad @ Bachchu was provided training with a rifle having which with him he allegedly participated the commission of crimes being accompanied by his accomplices and these two facts lend assurance that he was recruited by the Pakistani troops as a potential armed Razakar and at the relevant time he perpetrated crimes in such capacity and subsequently he became the head of Faridpur Al-Badar force. That is to say, at the time of perpetration of alleged horrific crimes alleged his status was a potential Razakar who was also a close affiliate of Pakistani army in Faridpur.

(iv) Conduct of accused relevant to prove his status and association with Pakistani army

100. P.W.7 has stated that the Pakistani troops established their camps at Faridpur stadium, Police line, Ambika memorial hall, Faridpur

Rajendra College with the aid of those people i.e. Advocate Afzal Hossain, Alauddin Khan, Khokon, Abul Kalam Azad @ Bachchu (accused). This version remained unshaken.

101. P.W.7 has testified that on the same day i.e on 21 April 1971, accused Bachchu Razaker with the assistance of Pakistani troops and local biharis looted the business concern of Badrilal Ramkrishna Agarwal situated at Chwak Bazar area and had set up his own office on the first floor of the building for administering anti-liberation activities there from. Later on, Bachchu Razaker had occupied the house of one Hiralal Mukhtar situated at Kabi Jasimuddin road where he had set up a training center for Al-badar. Defence could not shake all these pertinent versions.

102. Thus it is proved that the accused aided and substantially contributed in setting up army camps in Faridpur town wherefrom they used to operate their atrocious activities. Next, prosecution has been able to prove the role and conduct of accused who started his atrocious activities from the beginning of entry of Pakistani troops in Faridpur. This is of course a key relevant fact in determining his culpable role and status during the period of commission of offences of which he has been charged. Such conduct and activities of accused amply proves that he was a close accomplice of Pakistani army.

103.P.W.7 stated too that on 27.7.1971 some 7/8 armed Razakars including some *biharis* apprehended him from a place known as Jessore road at Goalchamat pretending him a freedom fighter and handed him over to Major Koraishi at Faridpur stadium camp. He was kept there confined in a room of the gallery's ground floor where he found some more detainees. This version could not be dislodged in his cross-examination. That is to say the fact of remaining of P.W.7 confined at the camp is proved.

104.We have found from testimony of P.W7 that at the camp he found Ishaque, Anwar and Mansur of Maheshpur, EPR Hanif Mohammad of

Bhanga, Subedar Golam Mostafa and badiuzzaman of Madaripur, Anukul of Khabashpur, Kabir, son of head master of Faridpur high school detained there . P.W.7 stated that he was kept confined there for long one month and during the period of his confinement he also saw bringing Khalil, Badal, Kislul, owner of Khondoker hotel and Abu Ysuf Pakhi (P.W.18) to the confinement cell.

105.P.W.7 denied that he did not state it to the Investigation Officer, while the defence drew it to his attention, to contradict his version that he made earlier to the IO. True, the P.W.7 did not state it to the IO, as it appears. But merely for this reason the version that he has made on dock narrating the fact of his confinement does not go on air. Mere omission in narrating a piece of fact earlier stated does not make the entire evidence of P.W.7 deposed in court untrue, particularly when the fact of his confinement in the camp of Faridpur stadium remains undisputed and unshaken.

106.P.W.7 also stated that during his confinement in the camp he saw accused Abul Kalam Azad @ Bachchu always accompanying Major Koraishi and he thought that he (accused) would initiate for his release as he was his class mate but he instead of doing it had told Major Koraishi –“he is a freedom fighter, finish him” and with this the Pakistani army had tortured him mercilessly. He could also hear screaming of women from a nearby torture cell. Defence could not impeach this pertinent version relating to the fact of affiliation of the accused with Pakistani army at the camps.

107.It is thus blatantly proved that accused Abul Kalam Azad @ Bachchu was a potential accomplice of Pakistani army which presumably being induced and encouraged by him used to initiate and commit atrocities.

(v)Whether the accused can be prosecuted as a member of ‘auxiliary force’?

108.It is a fact of common knowledge as well that the Pakistani occupation army organized Razakar, Al-Badar for the purpose of their operational support in implementing its atrocious activities in furtherance of policy and organized plan.

109. Together with the Al-Badr and Al-Shams paramilitary forces, the Razakar were under Pakistani Army command. The Razakar force was composed of mostly pro-Pakistani Bengalis. Razakars were actively associated with many of the atrocities committed by the Pakistan Army during the 9-month war of liberation in 1971. On September 7, 1971, Pakistan Defence Ministry through an official order (No:4/8/52/543 P. S.= 1 /Ko/ 3659 D-Ko) elevated members of the Razakar Bahini to the status of auxiliary force of the Pakistan Armed Forces, it is true. But even before such elevation, accused as a member of volunteer Razakar force acted and conducted actively along with and in association with the Pakistani army in committing atrocities. It has been proved. This is enough for an unerring inference that the accused had acted as a member of a militia force under control of Pakistani army for their operational and other purposes and therefore, we are of view that at the time of committing crimes for which he has been charged with the accused was a member of 'auxiliary force' as defined in section 2(a) of the Act of 1973

110. How the P.W.7 knew the accused Abul Kalam Azad @ Bachchu? It is a vital question to be resolved for weighing credibility of evidence of P.W.7. It is found that in reply to question put to him by the defence during cross-examination P.W.7 replied that accused Abul Kalam Azad @ Bachchu was his class mate when he was a student of arts group in Faridpur Rajendra College. It could not be refuted in any manner. Therefore, the testimony of P.W.7 that he saw the accused and his accomplices welcoming the Pakistani troops on 21 April 1971 at a place known as Goalchamat, Faridpur and later on he saw the accused at the army camp where he (P.W.7) was kept confined inspires full credence.

111. The above relevant facts have clearly proved that at the time of perpetration of alleged horrific crimes alleged status of accused was that he was a potential Razakar and a close affiliate of Pakistani army in Faridpur.

XVIII. Adjudication of Charges

112. Charge no.7 relates to the crime of 'genocide' as specified in section 3(2)(c)(i) of the Act while the remaining 07 charges relate to the criminal

acts constituting the offences of ‘crimes against humanity’ as specified in section 3(2) (a) of the Act. For the sake of convenience of discussion we consider it expedient to adjudicate the charge no.7 first as the nature of crimes related to it differs from that as described in the latter ones.

(i) Adjudication of Charge No 07

113.Summary Charge: On May 17 1971 in the early morning, accused Abul Kalam Azad @ Bachchu (absconded) a member of Razakar Force and subsequently the local commander of Al-Badar Bahini or as a member of group of individuals, being accompanied by his 30/35 armed accomplices is alleged to have caused indiscriminate destruction and killing of (1) Sharat Chandra Poddar, (2) Suresh Poddar, (3) Shyama Pada Saha, (4) Jatindra Mohan Saha, (5) Nil Ratan Samadder , (6) Subol Koyal and (7) Mallik Chakravarti, the members of Hindu community, by gun shot. It is also alleged that in conjunction of the incident, the accused and his accomplices gunned down (8) Haripada Saha residents of crime village Hasamdia and (9) Probir Kumar Saha @ Puitta to death by abducting them to the river bank of ‘*Maindia bazar*’ and thereby the accused has been charged for the physical participation and also for substantially contributing to the actual commission of offence of ‘**genocide**’ for ‘**killing the members of Hindu community**’, with intent to destroy the Hindu religious group, either whole or in part as specified in section 3(2) (c)(i) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

114.Prosecution adduced and examined in all 04 witnesses as P.W.16, P.W.17, P.W.19 and P.W.20 in support of the charge no.7 which relates to the offence of genocide as specified in section 3(2) (c)(i) of the Act. Of them P.W.16 and P.W.19 are the live witnesses. The alleged event of massacre relates to two crime sites. One is Hasamdia village under police station Boalmari district Faridpur and another one is Moindia Bazar under the same police station. The massacre alleged continued till noon from early part of morning. P.W.16 claims to have witnessed the second part of the event that took place at Moindia Bazar. P.W.19 the son of victim Shyamapada Saha a resident of the crime village Hasamdia had opportunity to witness the destructive incident remaining in hiding inside a bamboo bush adjacent to his house, as he has claimed.

P.W.17 and P.W.20 are hearsay witnesses. Now let us see what the P.W.s have stated.

Discussion of Evidence

115.P.W.16 Abdul Mannan (56), Union Parishad member from Moindia Sreenagar village under police station Boalmari district Faridpur has claimed to have witnessed the killing of Haripada and Puitta and the acts of looting and carrying out arson at Moindia Bazar under Boalmari police station. P.W.16 has testified that on 02nd Jaistha in 1971 at about 06:00 in the morning he had heard sounds of shooting from Hasamdia 'uttar para' (the first crime site) also known as 'Hindu Para' and then he approached to Moindia Bazar where there were a mosque and a bush on the west side of the Bazar and nearer to '*Kumar*' river. After going there, he saw Bachchu Razakar (accused) being accompanied by Pakistani army bringing two apprehended persons who were Haripada and Puitta towards the Bazar (market). At that time it was about 08:00 hrs. Thereafter, he (P.W.16) found more Razakars and Pakistani army arrived at the market by two big boats and started looting the shops of the market and it continued till 11:00 hrs. Such looting took place under the leadership of Bachchu Razakar (accused) and in presence of Pakistani army and other Razakars. Afterwards, they had burned the shops at market, P.W.16 added. After the criminal acts of looting and burning shops at Bazar and before they left the crime site with the looted goods, he saw that Bachchu Razakar (accused) himself gunned down Haripada and Puitta to death beside the mosque on the edge of the river.

116.In his cross-examination the above version as to commission of destructive criminal acts of looting, burning and killing remained totally unshaken. Defence simply suggested that accused did not accompany the perpetrators and he was not a member of Razakar force and not the accused but the Pakistani army had killed Haripada and Puitta.

117.How P.W.16 knew accused Abul Kalam Azad @ Bachchu and had he opportunity of seeing the accused committing criminal acts to the

accomplishment of the offence of looting, burning and killing? In this regard, P.W.16 in reply to question elicited in his cross-examination stated that the house of Abul Kalam Azad @ Bachchu was about one kilometer far from his (P.W.16) house. He (accused) had studied at Madrasa and he (accused) in 1971 used to attend meetings of Jamat E Islami at Moindia Bazar. Earlier he (P.W.16) knew him (accused) as Bachchu Mia and through out 1971 he (accused) became known as 'Bachchu Rzakar' as he had participated in many killings. Even prior to 1971 accused used to attend meetings in support of electoral symbol 'scale'. He (accused) also had studied in Faridpur Rajendra College. Association with political meetings held locally and his role in local politics was the reason to make the accused known to public of the locality. Therefore, the P.W.16 could naturally recognize the accused when he did criminal acts to the commission of killing of Haripada and Puitta at Moindia Bazar(second crime site). We do not find reason to disbelieve what he has stated on dock.

118.P.W.16 further stated in his cross-examination that they saw 20-25 armed Razakars led by Abul Kalam Azad @ Bachchu moving around the locality of Hasamdia, Moindia and Ujirpur. Why the accused used to move in such a manner having arms with him? This pertinent relevant fact inescapably is a link between his criminal acts and the accomplishment of crimes directed against civilian population, in 1971. This version has rather confirmed again that the accused was an armed member of a group of Razakars.

119.As regard first part of the massacre that took place at Hasamdia village in the early morning, P.W.16 stated what he learnt. He stated that at 15:00 hrs on the same day he had learnt that the gang led by Bachchu Razakar had killed Shyamapada Saha (father of P.W.19), Sharot Poddar (father of P.W.17) and his son Joggeswar Saha, Subol Koyal, Mallik Thakur and 2-3 others at the village Hasamdia. Later on he moved to Hasamdia village(first crime site) wherein he saw the dead bodies of victims and had learnt from Sushil (P.W.17) , Mansur Fakir, Jalil Molla and many others that Bachchu Razakar and his accomplices perpetrated

the event of massacre and killings. Of the persons from whom he had learnt the incident only Sushil (P.W.17) is still alive, P.W.16 added.

120. Thus, P.W.16 is a hearsay witness in respect of the first part of the massacre that took place at Hasamdia village. But in his cross-examination, defence has not denied that P.W.16 had learnt the incident of Hasamdia village from the persons he stated in his examination-in-chief. Defence simply suggested that accused Abul Kalam Azad@ Bachchu did not accompanied the gang to the crime site and had not killed 7/8 civilians belonging to Hindu community. Therefore, taking the total evidence of P.W.16 into account we are of view that his hearsay testimony so far it relates to the first part of the massacre that took place at village Hasamdia carries sufficient probative value.

121.P.W.17 Sushil Kumar Podder (84), the son of victim Sharot Chandra Poddar and a resident of Hasamdia, the first crime village has testified that at about 06:00 hrs on May 17, 1971 corresponding to second day of Bangla month Jaistha on hearing that military had entered into their village he asked his parents to remain in hiding wherever they liked. Their village was predominantly Hindu populated. With this they along with family inmates remained in hiding inside a '*pan baroj*' adjacent to their house and he (P.W.17) and his brother Suresh remained stood inside a mango orchard. At a stage, his brother Suresh leaving him there had attempted to see as to what was happening, by moving forward. P.W.17 saw that the military gunned down his brother Suresh to death when he had moved 40-50 yards from the mango orchard. P.W.17 further stated that after the firing had stopped he heard sound of burning houses and saw smoke. After the Pakistani army and Razakars had left the crime site, he on the way back to his house had heard that the Pakistani army and their 10-15 armed civilian accomplices had killed his father Sharot Chandra Poddar, his brother Suresh Chandra Poddar, Sachin Saha. He also heard that the perpetrators had also killed Jatindra Mohan Saha, Shyamapada Saha, Surja Kumar Das, Nil Ratan Samadder, Nepal Chandra Paul, P.W.17 added. Later on, he (P.W.17) found burnt and bullet injured dead body of Jatindra Mohan Saha

having his hands and legs tied up condition at the courtyard of his (P.W.17) house. Moving a bit forward P.W.17 also found bullet injured Surja Kumar Das who appealed for giving him water. He (Surja Kumar Das) had told him that Bachchu Razakar accompanied the Pakistani army to the accomplishment of the events. Thereafter, they leaving the country deported to India and returned back after the independence.

122.P.W.17 has narrated the heart wrenching event of massacre to the accomplishment of which accused Abul Kalam Azad @ Bachhu accompanied the Pakistani army and Razakars. In cross-examination, in reply to question put to him P.W.17 stated that he himself could not see Bachchu but he had heard from Surja Kumar Das that accused Abul Kalam Azad @ Bachhu accompanied the Pakistani troops at the crime site. Surja Kumar Das also deported to India and he died 4-5 years after his coming back to home after independence.

123.P.W.19 Satya Ranjan Saha, son of Late Shyamapada Saha, one of victims has testified the events of killings narrated in charge no. 7. He is a live witness. At the relevant time P.W. 19 was 20 years of age. In narrating the incident, in detail, P.W.19 stated that on 02nd Jaistha, in 1971 at about 06:30 hrs, on hearing firing and uproar from the house of Sharot Poddar, inmates of their family being frightened started fleeing and he himself had put him out of sight inside a clump of bamboos wherefrom he saw that Bachchu (accused) and Pakistani army shoot his father to death. The gang then looted their house. Bachchu attacked their house, being accompanied by 25/30 Razakars and Pakistani army. On their way back, they had burnt houses of their neighbours Sharot Poddar, Rasik Saha, Nil Ratan and other residents and they killed 8/10 civilian residents of their village including Sharot Poddar, Suresh Poddar, Sachin, Jatindra Saha, Goutam and his father Nil Ratan and he (P.W.19) found their dead bodies there later on, after the gang left the crime scene, P.W.19 added.

124.In respect of the second part of the event that took place at Moindia Bazar P.W.19 also stated that he had heard from many people of

Moindia Bazaar that the gang of Bachchu (accused) and his accomplices Razakars and Pakistani army, on their way back from their village (Hasamdia) , looted 50/60 shops of the Bazaar and burnt the same including their own shop. They, in conjunction of this event, killed Haripada Saha and Puitta and the local people buried their dead bodies by the bank of river. After this dreadful event they and almost all the residents of their village deported to India, P.W. 19 added.

125.P.W.19 stated in his cross-examination that he knew the accused Bachchu from his boyhood as he (accused) used to reside at their neighboring village and he (accused) had studied in a school at *Khardia*. Thus the reason how P.W.19 could recognize the accused at the first crime site (Hasamdia) committing the criminal acts by accompanying Razakars and Pakistani army has become rather established. Thus, the claim of witnessing the accused committing the offence of killing his father is quite credible.

126.P.W.20 Asit Baran Saha is a hearsay witness about the horrific incident as listed in charge no.7. He was a resident of village *Sree Nagar Madhya Para* under police station Boalmari district Faridpur. At the relevant time he was about 20 years old. According to him he had learnt the massacre and mass killing committed at Hasamdia Hindu village committed by 12/13 Razakers led by Bachchu (accused) and Pakistani army.

127.P.W.20 also stated that afterwards, the gang of Bachchu (accused) came to Moindia Bazar and being frightened they remained in hiding and later on he saw the committed acts of destruction, looting and burning 50/60 shops of Moindia Bazar. He found dead body of Haripada Saha and Puitta on the bank of river. He had learnt that Bachchu Razakar (accused) and his accomplices killed them. 25 days after the incident they being frightened deported to India.

Evaluation of Evidence and Finding

128.The learned prosecutor drawing attention to the incriminating evidence of four P.Ws examined in support of this charge has submitted that commission of the atrocious event has been proved and it could not be impeached by the defence. Prosecution has been able to establish the fact that accused Abul Klama Azad @ Bachchu accompanied the armed gang of Razakars and Pakistani army to the accomplishment of massacre and the accused substantially participated to its commission with intent to destroy Hindu group of crime village. The accused himself physically participated to the act of killing father of P.W.17 and father of P.W.19. The fact that instantly after the horrific events of massacre , destruction , looting and killings, civilians belonging to Hindu community of the crime locality deported to India indicates the destructive pattern of the crimes and intent of the perpetrators to commit thereof. Thus the event as described in charge no.7 can lawfully be characterized as an offence of ‘genocide’ as specified in section 3(2)(c)(i) of the Act of 1973.

129.In respect of this charge, the learned state defence counsel has argued that considering the horrific nature of the event it is not believable that it was possible for any one of seeing the event even remaining in hiding and thus evidence of P.W.16 and P.W.19 as to recognition of accused accompanying the perpetrators to the crime sites inspires no credibility.

130.From the evidence of 04 P.Ws examined in support of charge no.7 together with argument advanced by the learned state defence counsel one thing is quite patent that perpetration of the event of massacre and killings of members of Hindu community of the crime village is not disputed. Defence has merely attempted to exclude the fact that accused accompanied the gang of perpetrators and was present at the crime sites.

131.P.W.16 claimed to have seen the second part of the attack causing killing of Haripada and Puitta at Moindia Bazar. But he is hearsay witness in respect of the first part of the attack that resulted into killing of 7/8 more Hindu people at Hasamdia Hindu Para. According to him after the perpetrators left the crime scene (Moindia Bazar) he had gone

there and found dead bodies of the persons killed there and had heard from Sushil (P.W.17), Mansur Fakir, Jalil Molla and many other people as to who killed them. Of them Shushil Kumar Poddar has testified as P.W.17 who is a son of one of victims of the killing.

132.It thus reveals from testimony of P.W 16 that in conjunction of the attack targeting Hasamdia Uttar para known as 'Hindu para' in the morning the gang led by accused Bachchu also killed 7/8 members of the local Hindu community and the pattern the armed gang led by the accused Bachchu launched the attack reflects that they carried out the attack with knowledge of the consequence and intention of the perpetrators was to destroy the local Hindu community, even in part, in accomplishment of policy and organised plan of the Pakistani army and their local collaborators and accomplices.

133.P.W.17 does not claim to have witnessed the accused killing his father and brother. But he has stated that he learnt instantly after the incident from Surja Kumar Das, a bullet-injured victim that accused Abul Kalam Azda @ Bachchu accompanied the army during the killing. Thus it is inferred that the accused substantially contributed and encouraged the gang of perpetrators in accomplishment of the crimes.

134.Defence did not put any question to P.W.17 with a view to dislodge the fact of his learning the first part of the attack at village Hasamdia from him by the P.W.16. Additionally, we do not find any reasonable ground to discard the hearsay evidence as to learning the incident of killing of 7/8 persons at Hasamdia Hindu para. Rather, P.W.16 and P.W.17 seem to be natural witnesses, particularly in absence of any reason whatsoever of being interested to tell a lie.

135.P.W.17 narrated the incident but could not say it categorically as to specific act or conduct of accused with the commission of crimes. But his hearsay evidence lends corroboration at least to the fact that the accused accompanied the Pakistani army and was present at the first crime site in perpetrating atrocities and his presence there i.e presence

and accompanying the principals at the crime site adequately indicates that he rendered practical assistance, encouragement and support to the Pakistani army and Razakars to the accomplishment of crimes. Therefore, the hearsay evidence of P.W.17 so far it relates to the fact of his learning as to involvement of accused with killing of his father and other killings and destructive acts carries reasonable probative value.

136. Learning a fact related to the commission of alleged massacre from an injured victim (Surja Kumar Das) instantly after the perpetrators had left the crime site inspires credence and carries sufficient probative value. It will appear that the defence failed to dislodge the commission of the alleged event of massacre and killing as stated by the P.W.17. Thus, the mere suggestion put to P.W.17 that accused Abul Kalam Azad @ Bachchu did not accompany the Pakistani troops and he was not present at the crime site does not make the event and presence of the accused at the crime site (Hasamdia village) tarnished in any manner.

137. P.W.17 also stated that afterwards, the gang of Pakistani army and Bachchu (accused) and his accomplices on their way towards Moindia Bazar (second crime site) looted and burned the house of Dr. Nani Gopal and then they also looted and had burned the shops of Moindia Bazar and killed Haripada and Puitta there. It remains unshaken in cross-examination. Additionally, considering the context and havoc of the massacre it was not natural and possible for mass people to witness the event. It is lawfully presumed that most of the civilians around the crime site preferred to remain in hiding and some could not. Despite the atrocious pattern of the event some persons might have opportunity to remain in hiding and thus had opportunity to see the event and criminal acts including the presence of the accused as a co-perpetrator accompanying the principals at crime sites. It is quite natural. Therefore, hearsay evidence of P.W.17 as to learning the fact of presence of accused Abul Kalam Azad @ Bachchu deserves legitimate consideration.

138.It is to be noted that now it is settled that mere presence at the scene of the crime may, under certain circumstances, be sufficient to qualify as complicity (as, for instance, when such presence may be shown to provide encouragement and moral support to the principal offender). So acts of encouragement or assistance such as providing help in identification members of the targeted group by accompanying the principals to killing sites could have been lawfully inferred from the fact of presence of the accused under the circumstances depicted from evidence.

139.Defence could not however controvert the commission of the event of crimes, by cross-examining P.W.19. Rather, his evidence has rendered corroboration to what has been testified by the P.W.16, P.W.17 on the acts of killing, destruction, looting and involvement of accused therewith. P.W.19, a live witness, is the son of one of victims of the horrific atrocities who had opportunity to witness the incident of killing his father Shayamapada Saha by remaining in hiding in a bamboo bush. It remains undisputed. Additionally, P.W.19 knew the accused from earlier as he (accused) was a resident of their neighboring village Kahrda. P.W. 19 is a natural and live witness and there is no reason to exclude what he has testified.

140.Perpetration of the horrific event including murder of numerous civilians targeting the Hindu group including the father of P.W.19 on the date time and manner as narrated by a live witness P.W.19 has been proved. At the same time we have found from evidence of P.W.19 that the accused accompanied the gang of perpetrators and how he had directly participated to the commission of destructive crimes. All these facts remain totally undisputed in cross-examination of P.W.19.

141.How P.W.20 could recognize the accused accompanying the armed gang and Pakistani army at Moindia Bazar , the second crime site ? In reply to question put to him P.W.19 has stated in his cross-examination that he knew Abul Kalam Azad @ Bachchu from boyhood who used to reside about one and half to two kilometers far from their village and

had studied at Sreenagar high school. Bachchu (accused) became known as Razakar after the Pakistani army rolled into Faridpur and he had learnt too that prior to the event of massacre he has described accused Abul Kalam Azad @ Bachchu gunned down Shudhangshu Mohon Roy to death at their Kolaron village home and since then he(P.W.20) became aware that Bachchu was a member of Razakars. The relevant fact as have been depicted from cross-examination of P.W.20 lends adequate and valid assurance as to conduct and acts of the accused together with the fact of his incriminating association with Pakistani army as a member of armed Razakars.

142.It is found from his evidence of P.W.20 that he had learnt the first part of the event of massacre that took place at village Hasamdia. But he saw accused Abul Kalam Azad @ Bachchu, his accomplice Razakars and Pakistani army coming to Moindia Bazar, the second crime site. In cross-examination, P.W.20 stated that at the time of event he had been at Moindia Bazar and in the evening of the day of event he visited the first crime village Hasamdia and witnessed the horrific extent and nature of destructive atrocities done there.

143.It is now settled, by the verdicts of *ad hoc* tribunals (ICTY, ICTR) constituted by the United Nations to try internationally recognised crimes committed in violation of international humanitarian law and customary international law that even a single piece of evidence that is relevant will be relied upon to determine culpability of the accused. Additionally, we reiterate that the Tribunal(ICT-2) is not bound by the strict rules of evidence and that in any case, probative value of testimony of even a single witness is to be weighed and accordingly, acceptance of and reliance upon uncorroborated evidence, *per se*, does not constitute an error in law, in finding an accused guilty under the Act of 1973. However, in the case in hand, we have found that the prosecution has been able to prove culpability of the accused by the evidence of P.W.16, P.W.17, P.W.19 and P.W.20 of whom P.W.16 and P.W.19 are the live witnesses.

144. Generally, considering the horrendous nature of crimes the event could not be expected to have been witnessed by numerous persons. Incidentally some one might have opportunity of seeing it remaining in hiding at a place adjacent to the crime site. Apart from them, other person cannot be perceived to have seen the event of massacre. So, the perpetration of crime and acts and conduct of perpetrators could have been learnt from an injured victim or person who had incidental opportunity of seeing the event. It is quite natural and thus the testimony of P.W.17 and P.W.20 though hearsay inspires credence, particularly when such hearsay testimony gets fair corroboration from live witness's (P.W.16 and P.W.19) account.

145. The way and the pattern of perpetrating the crimes alleged adequately demonstrate that the accused, apart from his own physical participation, substantially encouraged and provided moral support and aided the principals to the accomplishment of crimes. Pattern of the criminal acts, as narrated by P.W.19, speaks adequately that accused Abul Kalam Azad @ Bachchu accompanied the Pakistani army in committing atrocities by launching attack targeting the Hindu group of civilians of their village and later on, as has been testified, all the Hindu residents of their village deported to India. That is to say, the massive atrocities and mass scale killing and destruction compelled the members of Hindu community of the crime village to deport. Displacement from own residing place does not conform to the internationally recognised principle of human rights.

146. The portrayal that has been depicted from the evidence of P.W.19 inspires us in arriving at an unerring finding that on the date, time and in the manner the horrific atrocity of attack was launched targeting the unarmed Hindu community of Hasamdia village which was also known as 'Hindu Para' and then Moindia Bazar, the second crime site with intent to destroy the community, even in part and in conjunction of the attack in all about 10 members of the Hindu community were killed and the perpetrators led by accused Azad committed substantial scale of

looting, destruction of properties and burning the houses and shops belonging to the Hindu civilians of the crime locality.

147.It has also been established from evidence of P.W.16. P.W.17, P.W.19 and P.W 20 that few days after the horrendous crimes almost all the members of the Hindu community residing at the crime village including the relatives of victims and sufferers became compelled to deport to India leaving their properties, houses etc. and they returned back only after achieving the victory on 16 December. That is to say, the cumulative effect of the atrocities including killing, destruction and looting of properties, mental harms compelling the Hindu community of the crime village inevitably imprints an unmistakable notion that the aim and intent of the perpetrators was to destroy the ‘Hindu group or community’, in part. This notion is qualified as ‘genocidal intent’ as required to constitute the offence of ‘genocide’. It remains totally uncontroversial.

148.Targeting the group of Hindu community residing at the crime villages itself is rather emblematic of the overall Hindu community of the country. Thus, targeting part of the community qualifies as substantial, for the purpose of inferring the ‘genocidal intent’. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial.

149.The accused and his co-perpetrators, as evidence shows, targeted a significant section of Hindu community of the crime locality and in conjunction of the event they committed destruction of properties, looting, burning houses and shops together with killing of members of Hindu religion. The pattern of perpetration of crimes alleged in charge no.7 adequately indicates the ‘intent’ of the perpetrators. The intent to destroy a group may, in principle, be established if the destruction is related to a significant section of the group. In the case of *Jelusic*, (Trial Chamber: ICTY), December 14, 1999, para. 83 it has been observed that

“It is accepted that genocide may be perpetrated in a limited geographic zone.” The geographical zone in which an attempt to eliminate the group is made may be “limited to the size of a region or . . . a municipality.”

150.It is now settled jurisprudence that the victims of genocide must be targeted by reason of their membership in a ‘group or community’. The intent to destroy a ‘group’ as such, in whole or in part, presupposes that the victims were chosen by reason of their membership in the group whose destruction was sought. In the case in hand, it is patent that the local Hindu community was chosen by the accused Abul Kalam Azad @ Bachchu and his co-perpetrators for no other reason, but with intent to destroy it even in part. The physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to ‘annihilate the group’ as a distinct entity in the geographic area at issue.

151.The basic principle of the concept of ‘genocide’ is: indiscriminate and systematic destruction of members of a group because they belong to that group. Thus, merely the number of individuals of Hindu group killed cannot be the only objective for an inference as to constitution of genocide. Destruction as transpired from the evidence of P.W.16, P.W.17, P.W.19 and P.W.20 was patently indiscriminate targeting the members of a ‘group’ i.e Hindu community because they belong to Hindu religion.

152.In the case in hand, from the evidence before us relating to charge no.7 it is proved that barbarity of combined acts aiming to cause organized destruction was against the members of collectivity i.e ‘Hindu religious group’ which exceeded the concept of human rights. The attacks were carried out against individuals of a collectivity i.e Hindu religious group. The intent of the author of the crime was not only to harm an individual, but also to cause massive damage to the collectivity to

which the later belongs. Offenses of such gravest nature bring harm not only to human rights, but also and most especially they undermine the fundamental basis of the social order of a particular group of civilian population.

153.Evidence, without a doubt, shows that the accused and his accomplices intended to destroy a substantial part of the local Hindu community. Considering the pattern of destructive atrocities together with the killing of about 10 members of Hindu community, number of persons killed becomes immaterial in arriving at a decision as to ‘genocidal intent’. It is now settled jurisprudence that the number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. The alleged attack was perpetrated at a segment of the crime village which was dominantly Hindu populated and thus targeting and killing about 10 Hindu individuals is to be evaluated for inferring ‘genocidal intent’.

154.According to Section 3(2)(c)(i) of the Act of 1973 ‘genocide’ is the deliberate and systematic destruction of a national, ethnic, racial, religious or political group. The extermination of individuals because of their membership to distinct national, ethnic, racial, religious or political group has been perpetrated throughout the period of War of Liberation in 1971 within the territory of Bangladesh. It is the history of common knowledge and need not be proved by adducing evidence.

155.The relevant provisions of Section 3(2)(c) of the Act of 1973 are as follows:

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

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

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

156. The accused Abul Kalam Azad @ Bachchu has been charged with the offence of genocide as he allegedly acted and participated to the commission of **‘killing members of the Hindu religious group’** with **‘intent to destroy’** it, **‘in whole or in part’**. The meaning of ‘genocide’ as contained in the Act of 1973 seems to be in conformity with the Article 6 of the Rome Statute.

157. However, in holding the accused criminally responsible for the offence of genocide with which he has been charged we are to arrive at a finding that he committed such a crime, as an individual or as a member of Razakar force, an armed militia group jointly with Pakistani army, regardless of whether that other person is criminally responsible or he induced, aided and substantially contributed to the commission of such a crime with the knowledge of the intention of the principals by acting with a common purpose with the aim of furthering the perpetration of crime of genocide.

158. Determination of the targeted group is to be made on a case-by-case basis. In light of the narration depicted from evidence relating to charge no.7, from subjective standpoint we consider that the victims of the killing were perceived by the accused and his co perpetrators of the crime as belonging to the group i.e ‘Hindu religion or community’ targeted for destruction. Hindu community is a group sharing common beliefs. It is clear that the victims were targeted because they belonged to this group.

159. In a report titled **‘Hindus are targets of Army Terror in an East Pakistan Town’** of *Sydney H. Schanberg*, the special correspondent published in The New York Times: **29 June 1971**

“ An undetermined number of Faridpur’s 10.000 Hindus have been killed and others have fled across the border to predominantly Hindu India.....On April 21, when the army rolled into Faridpur, the old woman and her 84-year old husband ran to seek refuge in a Hindu village, Bodidangi, about three miles away. The next day the army hit Bodidangi and, reliable local reports say, as many as 300 Hindus were massacred. The campaign against the Hindus was – and in some cases still is systematic.Only about half of Faridpur’s 35,000 people have returned, although the flow has been growing. Recently the army eased up on its executions and burning of villages in an attempt to demonstrate that normality has returned. The change in tactics began in mid-June, just before the central Government announced that it was allowing foreign newsmen back into the region.”

[Source:http://www.docstrangelove.com/uploads/1971/foreign/19710704_nyt_hindus_are_targets_of_army_terror_in_an_east_pakistani_town.pdf]

160. It will appear that all the events, excepting that one narrated in charge no.2, constituting offences for which the accused has been charged with took place in between the period of mid-May to 08 June of 1971. Further it is found from the report that the Pakistani army rolled into Faridpur town on 21 April 1971 which has been established too by the testimony of P.W.s. Next, the above report also reflects that annihilation of Hindu community was the intent of Pakistani army and its local pro-Pakistan collaborators who assisted them in accomplishment of atrocities. We have found from evidence of P.W.s that instantly after rolling into Faridpur town, the local Bengali accomplices aided the Pakistani army in launching systematic attack, particularly targeting Hindus. The report of the **New York Times of June 29 1971** reflects it too.

161.It is now settled that genocide is a subset of crimes against humanity and it covers many of the same physical acts, but requires a very specific intent (genocidal intent) that is not required to constitute the offence of crimes against humanity. To constitute the offence of 'genocide' any of acts specified in section 3(2)(C) (i) of the Act is to be committed with intent to destroy, either whole or in part. Intent is a mental factor which is hard, even impracticable, to determine and as such, it can only be inferred from a certain number of presumptions of fact. However, 'intent' may be fairly inferred from (a) the scale and pattern of atrocities, (b) the fact of systematically targeting the individuals belonging to a group (c) political dogma of the perpetrators of the crime and (d) extent and repetition of the destructive and discriminatory acts.

162. The testimony of P.W.16 and P.W.19 paints a picture of shattered lives and livelihoods, and of tremendous ongoing pain and trauma caused to the civilian residents belonging to Hindu community of the crime village. Considering the pattern of the organized attack launched by the accused Abul Kalam Azad @ Bachchu and his armed accomplices and Pakistani army we arrive at an unerring finding that the killings, together with the forced deportation of the remaining members of the targeted group i.e individuals belonging to Hindu religion, and the destruction of their homes by torching and looting, constituted a single operation which was executed with intent to destroy a group in whole or in part.

163.The phrase "in whole or in part" implies that in the event that the plan to destroy all members of the group fails, the successful destruction of part of the group also constitutes genocide. In that case all members of the group or part of it who suffered are counted as victims of genocide. For example, although Hitler failed to exterminate all Jews under his plan, he still committed genocide. We have found from evidence that after the destruction and massacre almost all the members belonging to Hindu community deported to India as all of them felt sufferer with the

destructive atrocities. In addition, the plan to destroy in part also constitutes genocide.

164. *Raphael Lemkin*, the scholar who first proposed the concept of genocide in his book *Axis Rule in Occupied Europe*, spoke regularly of a plan as if this was *sine qua non* for the crime of genocide. In the case of *Prosecutor v. Kayishema*, the ICTR Trial Chamber wrote: “*Although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out genocide without a plan or organization.*” [*Prosecutor v. Kayishema* , Case No. ICTR 95-1-T, Judgement, 94 (May 21, 1999)] .Furthermore, the Chamber said that existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide. Thus, we see that existence of a plan or policy is not a legal ingredient of the crime of genocide. However, in the context of proving specific intent, the existence of a plan or policy may play an important factor in most cases.

165. Therefore, the acts of killing, torturing, confining of Hindu civilians and destruction, looting and torching of their properties were part of attack designed on certain policy and plan of Pakistani government and its occupation army. All the four P.W.s who have testified in support of the charge of genocide as listed in charge no.7 have proved that accused Abul Kalam Azad @ Bachchu , at the time of commission of the crimes, was accompanied by his armed accomplices and Pakistani army. It is not claimed that accused alone himself committed the crimes. The pattern and extent of horrendousness of atrocities adequately demonstrates that the accused joined the gang of perpetrators with *actus reus* of aiding and substantially contributing to the accomplishment of crimes.

166. Accused Abul Kalam Azad @ Bachchu was a member of the militia organization comprised of armed civilians (Razakers). It is proved. It is to be noted that dictionary definitions consider an ‘organization’ to comprise any organized group of people. Further, the *actus reus* of aiding may occur before, during or after the principal crime. Aiding

means providing assistance or help to another to the commission of a crime. Prosecution has been able to establish close affiliation of accused Abul Kalam Azad @ Bachchu with the Pakistani army since it rolled into Faridpur town on 21 April, 1971.

167. We have found from evidence of P.W.16, P.W 17, P.W 19 and P.W. 20 that at the time of commission of crimes narrated in charge no.7 Pakistani army and some armed civilian accomplices were also with the accused Abul Kalam Azad @ Bachchu. It is also found that the accused had rendered, apart from his physical participation as found from testimony of P.W.16 and P.W.19, assistance, encouragement and moral support which had substantial effect on the perpetration of the massive crimes as has been listed in charge no.7. It is proved that the accused accompanied the armed perpetrators and he was physically present at the crime scenes and thus he is deemed to have rendered 'tacit approval' to the accomplishment of the event of massacre. Besides, in conjunction of the commission of the event of massacre, accused Abul Kalam Azda @ Bachchu himself too actively and directly participated to the commission of the acts of killings.

168. Naturally the Pakistani army was not at all familiar with the communications and locations of villages or the information as to where a particular group of civilians used to reside. Therefore, by dint of his position that the accused was able to establish, accompanied the Pakistani army and his armed accomplices and thereby substantially urged to the author of crimes to perpetrate the attack targeting the Hindu community of the crime village. The accused even by being present during the attack and participating through shooting is thus guilty of committing genocide.

169. By taking the conducts and acts of the accused as a whole into account we are constrained to imprint our valid inference that the accused, in addition to his physical and direct participation to killing, substantially aided and assisted the Pakistani army not only by accompanying them at the time of commission of crimes but also before or after such

commission, as one of their close associates and local Razakars. On this score as well, accused Abul Kalam Azad @ Bachchu is held criminally responsible for the crime of genocide. The accused himself need not have participated in all aspects of the alleged criminal event. The acts of providing assistance, encouragement and moral support need not be tangible, but the same have to be inferred from the totality of the event and conduct of the accused who accompanied the gang of perpetrators.

170.Section 4(1) of the Act of 1973 states: “*When any crime as specified in section 3 is committed by several persons, each of such person is liable for that crime in the same manner as if it were done by him alone.*” It has been established that accused Abul Kalam Azad @ Bachchu was a potential associate of Pakistani army and also was a significant armed member of volunteer Razakar force which was organized after the Pakistani army struck Faridpur on 21 April 1971. This being the status that the accused was holding at relevant time, his presence at the crime site as an active accomplice of the principals inevitably prompts us to infer that, in addition to his direct participation of killing at the time of commission of the event of massacre, he substantially provided practical assistance, encouragement and moral support to the principals i.e co-perpetrators in perpetration of the offence of genocide that resulted in mass killing of individuals belonging to ‘Hindu Community’ which is a ‘distinct religious group’ and mass destruction and thereby he incurs liability under section 4(1) of the Act for the offence of genocide as specified in section 3(2)(c) (i) of the Act of 1973.

XIX. Adjudication of Charges relating to crimes against Humanity

171.Charge nos. 1,2,3,4, 5,6 and 8 relate to the acts of murder, rape, abduction, confinement and torture constituting the offence of crimes against humanity. Now, we are going to make successive discussion for adjudicating these seven charges based on alleged independent event of criminal acts.

Adjudication of Charge No. 01

[Abduction, confinement and torture of Ranjit Nath @ Babu Nath

172.Summary Charge: Abul Kalam Azad @ Bachchu(absconded) a member of Razaker Force and subsequently the local commander of Al-Badar Bahini and or as a member of group of individuals being accompanied by accomplices is alleged to have abducted , tortured and confined Ranjit Nath @ Babu Nath , during the first week of June ,1971 as narrated in the charge no.01 and thereby he has been charged for the physical participation and also for substantially contributing to the actual commission of offence of **‘abduction, confinement and torture as crime against humanity’** by directing attack against the Hindu civilian population as specified in section 3(2) (a) of the Act which are punishable under section 20(2) read with section 3(1) of the Act

Witnesses

173.Prosecution examined only one live witness (**P.W.5 Ranjit Kumar Nath**) in support of this charge. He is the victim of the offence of abduction, confinement and torture caused to him. He has narrated some relevant facts as well while deposing on dock. P.W.15 Probodh Kumar Sarker is a hearsay witness who has corroborated P.W.5 relating to the fact of his (P.W.5) confinement and torture at the army camp.

Discussion of Evidence

174.P.W.5 Ranjit Kumar Nath, the victim, as alleged in the charge no. 01, at the out set, stated how the Pakistani army was welcomed by the accused and his accomplices in April 1971 and how the accused used to maintain association with the Pakistani army staying at camps set up at different places in Faridpur town. He also stated how in association with the accused, the Pakistani army used to apprehend and bring pro-liberation people from the town and villages and tortured and killed them at the camp set up at Faridpur stadium.

175. P.W.5 stated further that Jamat Secretary General Mujahid, Bachchu Razakar (accused) and some Biharis (Urdu speaking people) welcomed the Pakistani army when they arrived in Faridpur on April 21, 1971. They [accused and his accomplices] took the army to *Prabhu Jagatbandhu Ashram* (temple) where the Pakistani army men shoot eight priests dead while Mujahid and Bachchu (accused) were with them, added the 62-year-old witness P.W.5 from Faridpur.

176.P.W.5 Ranjit Kumar Nath has narrated the incident of his confinement and torture caused to him in Pakistani army camp. In stating it, P.W.5 has testified that during the first week of June 1971 when he was approaching the town, one Habi Matabbar, terming him a freedom fighter, handed him over to Abul Kalam Azad (accused), Abul Mia and Kalu Bihari at East Khabashpur. After beating him up, they took him to Faridpur Circuit House by a rickshaw and he saw Major Akram Koraishi, a Pakistani army official, Mujahid, Afzal and other Razakars were holding a meeting there, P.W.5 added. On seeing him Mujahid had told “ *he is a freedom fighter, he is a Hindu*” and asked Azad (accused) to take him away and then Azad (accused) and his associates blindfolded him (P.W.5 Ranjit) and took him to Faridpur Zilla School ground and put him under a palm tree. After a few minutes a jeep went there and someone in the jeep said in Urdu:”*Don't shoot him. Hand him over to the Biharis and slaughter him in the morning*”. He was then taken near a Bihari colony of Mollah Bari Road.

177.P.W.5 Ranjit Kumar Nath has further narrated that thereafter, hanging him up side down from a *kadama* tree, they [Azad and others] had beaten him up for one hour and one of his teeth and a bone of his nose were broken. Later, they confined him in a house inside the Bihari colony and around midnight he (P.W.5 Ranjit) somehow escaped breaking through a window.

178.Defence could not controvert what has been deposed by P.W.5 on material particular incriminating the accused with the acts related to ‘abduction, confinement and torture’ caused to him. In cross-examination, P.W.5 in reply to question put to him stated that since prior to the War of Liberation he knew accused Abul Kalam Azad @ Bachchu as he had attended anti Awami League meetings and processions and at that time he was a student of Faridpur Rajendra College. It is the reason why P.W.5 could recognize the accused Abul Kalam Azad@ Bachchu at the army camp at Faridpur circuit house,

after he was taken there. Thus his testimony involving the accused with the acts constituting the offence of inspires credence.

179.In cross-examination, it has been confirmed that the P.W.5 was a freedom fighter and he participated in many operations and had fought under Major Manzur of sector no. 8. P.W.5 has also stated in reply to a question elicited in cross-examination that accused Bachchu had actively participated in the process of formation of 'Razakar' in Faridpur and in 1971 he used to stay in Faridpur town and subsequently he was the head of Al-badar of Faridpur town.

180.P.W.15 Probodh Kumar Sarker has testified that Bachchu Razakar (accused) apprehending Ranjit Kumar Nath (P.W.5, the victim of charge no.1) from Khabashpur area brought him to circuit house and afterwards, he was kept confined at the house of one Rashid Mia which was nearer to his(P.W.15) own house and eventually he (P.W.5) managed to escape there from. In his cross-examination, it is neither denied nor refuted by the defence. Rather, it is established from evidence of the victim P.W.5 that the accused and his accomplices after causing inhuman torture kept him confined in a house of one Rashid Mia inside the Bihari colony and around midnight he (P.W.5 Ranjit Kumar Nath) escaped breaking through a window. Thus, from the version made by the P.W.15 Probodh Kumar Sarker it is presumed that he, as a neighbour of Rashid Mia, had opportunity to know about the fact of confining P.W.5 Ranjit Kumar Nath in his (Rashid Mia) house. Therefore, the version of P.W.15 is considered to be corroborative in nature, on material particular. Furthermore, in cross-examination of both the P.W.s it has been confirmed that the accused was earlier acquainted to these P.W.s and P.W.15 leaving no occasion to taint the identification of the accused even though the accused has been absconding.

Evaluation of Evidence and Finding

181. It has been argued by the learned state defence counsel that for corroborating the version in relation to the event of crimes narrated in charge no.1 made by P.W.5 no other direct witness has been examined

by the prosecution and as such evidence of a single witness does not qualify the charge proved. Evidence of P.W.15 Probodh Kumar Sarker is not adequate to corroborate the narration of P.W.5 Ranjit Kumar Nath, the victim.

182. We are not with what has been argued by the learned state defence counsel. First, evidence even of a single witness is enough to prove the accusation if it inspires credence and acceptance of and reliance upon uncorroborated evidence, *per se*, does not constitute an error in law. Second, P.W.5 himself is the victim of wrongs caused to him. Third, considering the context, the offence was not an isolated one and it happened in organized manner by the Pakistani army and its local accomplices including the accused and as such it was not possible and natural for else one to experience the fact of abduction, confinement and torture done to P.W.5. Fourth, testimony of P.W.15 carries reasonable probative value as he had opportunity to know what he has deposed relating to the fact of torturing and confining P.W.5 Ranjit Kumar Nath by the accused in the house of Rashid Mia at Bihari colony. Finally, we do not find any earthly reason to disbelieve P.W.5 who himself is the victim of the offence alleged in charge no.1 and thus his testimony does not appear to have been stained by any flaw.

183. From the evidence of P.W.5 , the victim of the offence of abduction, confinement and torture and P.W.15, it is proved that after apprehending him(P.W.5) he was brought to the Pakistan army camp at Faridpur circuit house where he found accused Abul Kalam Azad @ Bachchu holding a meeting with Major Koraishi. Mujahid , Afzal and others and there from, on direction of Mujahid the accused Abul Kalam Azad @ Bachchu and his associates blindfolded him (P.W.5 Ranjit) and took him to Faridpur Zilla School ground and put him under a palm tree and had beaten him up for one hour and then he was kept confined in a house inside the Bihari colony and around midnight he (P.W.5 Ranjit) escaped breaking through a window. Defence could not dislodge this incriminating version in any manner.

184.Therefore, it has been proved beyond reasonable doubt that accused Abul Kalam Azad @ Bachchu a close associate of the Pakistani army and a member of Razakar force was not only much more pro-active in encouraging the wrongs caused to him (P.W.5) but he himself physically participated to the commission of offence of torture, confinement, and inhuman acts caused to Ranjit Nath (P.W.5). Why P.W.5 was targeted? The answer is simple. At the army camp at Faridpur circuit house, according to P.W.5, he found Mujahid (a potential leader and the President of the then East Pakistan Islami Chatra Sangha), on seeing him, had told “*he is a freedom fighter, he is a Hindu*” and then handed him over to accused Abul Kalam Azad @ Bachchu.

185.We have got it confirmed in his (P.W.15) cross-examination that he was a freedom fighter. It is a fact of common knowledge that Pro-liberation Bengali civilians, Hindu Community, were the main target of the perpetrators in 1971. This was the reason of atrocious acts of accused forming part of attack targeting P.W.5 Ranjit Kumar Nath.

186.We have already given our view that the context itself as reflected from policies adopted by the Pakistani army and its local pro-Pakistan political organization , chiefly the Jamat E Islami (JEI) and ‘auxiliary forces’ is sufficient to prove the existence of the notion of ‘systematic attack’ on Bangladeshi self-determined population in 1971, during the War of Liberation. This context unerringly prompts us in arriving at decision that the atrocities committed upon P.W.5 Ranjit Kumar Nath was a part of systematic attack constituting the offences of crimes against humanity as specified in section 3(2)(a) of the Act of 1973.

187.Accused Abul Kalam Azad @ Bachchu is thus criminally liable under section 4(1) of the Act of 1973 for physical participation and also for providing substantial contribution to the commission of offence of **abduction, confinement and torture as crime against humanity as specified in section 3(2)(a)** of the Act which are punishable under section 20(2) read with section 3(1) of the Act

Adjudication of Charge No. 02

[Abduction, confinement and torture on Abu Yusuf Pakhi]

188.Summary Charge : Abul Kalam Azad @ Bachchu(absconded) a member of Razaker Force and subsequently the local commander of Al-Badar Bahini and or as a member of group of individuals being accompanied by accomplices is alleged to have abducted , tortured and confined Abu Yusuf Pakhi , on 26 July 1971 during the war of liberation, as narrated in the charge no.02 and thereby he has been charged for the physical participation and also for substantially contributing to the actual commission of offence of **‘abduction, confinement and torture as crime against humanity’** by directing attack against the Hindu civilian population as specified in section 3(2) (a) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

189.Prosecution examined three witnesses including one live witness P.W.18 **Abu Yusuf Siddique @ Pakhi** in support of this charge. **P.W.18** is the victim of torture and inhuman treatment caused to him. He has also narrated some facts relevant to focus the role of accused and atrocious feature prevailing in Faridpur in 1971, while deposing on dock. P.W.7 Md. Amir Hossain and P.W.15 Probodh Kumar Sarker have testified corroborating the fact of confining P.W.18, the victim. Of them P.W.7 was, at the relevant time, one of detainees at the crime camp and P.W. 15 later on, learnt the event from the victims (detainees of the camp) including P.W.18

Discussion of Evidence

190.Before narrating the event and facts relevant to the event as listed in the charge no.2, P.W.18 a war-wounded freedom fighter Abu Yusuf Siddique @ Pakhi has testified on some related facts. He stated that Abul Kalam Azad used to select detainees of a torture centre in Faridpur for Pakistani army to kill them during the Liberation War. He stated that Azad, also known as Bachchu Razakar who used to accompany the Pakistani army all the time and also used their vehicles.

Abu Yusuf Siddique *alias* Pakhi is one of the detainees of the army camp established at Faridpur Stadium during 1971.

191.The 61-year-old P.W.18 Abu Yusuf Pakhi has narrated the description of the torture he endured during his 43-day detention at the Pakistani army camp at Fairdpur Stadium. He deposed that the Pakistani army entered Faridpur town on April 21 and on their way they killed eight priests of Prabhu Jagatbandhu Ashram [temple].

192.P.W.18 in narrating the fact of his abduction has stated that on April 22, 1971, Kamaruzzaman Jasu, cousin of Azad (accused), picked him (P.W.18) and his brother from the intersection of Bhanga Road and handed them to the army. And then they were produced before Pakistani Major Akram Koreshi at Faridpur Circuit House where he saw Pakistani army shooting a few people to death on the east side of the Circuit House. They were then brought to Major Akram Koraishi of the camp and his brother (who was apprehended with P.W.18) had talk with Major Koraishi in English and then they were released from the camp by another Pakistan army's Baluch Major and then he joined the war of liberation, P.W.18 Yusuf added. This fact, as stated by P.W.18, is not related to the charge no.2.

193.The above incident happened prior to the event narrated in the charge. However, from the above description we have got that Pakistani army had set up a camp at circuit house which was in fact a 'torture and killing camp' and their pet civilian accomplices aided them to the accomplishment of atrocities. This pertinent fact remains undisputed in cross-examination.

194.Now let us come to the event as narrated in charge no.2. P.W.18 while deposing on the event related to the charge, has narrated that he sustained bullet injury on July 24 when they attacked Razakars who were in position at a bridge at *Arpara* in Jessore. Razakars later apprehended him from Chandra High School area of Alfadanga of Faridpur on July 26 and handed him over to the Pakistani army camp at

Faridpur Stadium. On the following morning Major Akram Koreshi went there along with Abul Kalam Azad *alias* Bachchu. P.W.18 Yusuf further stated that he was tortured in a 'torture cell' where he saw many persons [detainees] were slaughtered. His hand and ribs were broken resulting from torture caused to him. He cannot narrate the torture in words, said P.W.18 Yusuf as tears rolled down his cheeks.

195. Thus, we have found that 'Razakars' apprehended P.W.18 from a place near the Chandra High School of Alfadanga of Faridpur on July 26 and handed him over to the Pakistani army camp at Faridpur Stadium. It has not been claimed by this P.W.18, the victim that accused Abul Kalam Azad @ Bachchu was involved with the act of apprehending and handing him (P.W.18) over to the Pakistani army camp at Faridpur Stadium or he (accused) accompanied the gang who committed alleged abduction. P.W.7 Md. Amir Hossain and P.W.15 Probodh Kumar Sarker also do not claim so and they have testified merely corroborating the fact of confining P.W.18, the victim at the camp.

196. Prosecution could not prove that the accused had effective control over the gang of Razakars who allegedly abducted the victim (P.W.18) or the accused had any substantial link with the act of abducting the victim or the accused substantially acted, facilitated or contributed to the commission of the offence of abduction.

197. In cross-examination, in reply to question put to him P.W.18 stated that in 1971 he was first year student of Faridpur Rajendra College and accused Abul Kalam Azad @ Bachchu was also student of that college and he was one year senior to him and he was associated with Islami Chatra Snagha (ICS) [the student wing of the Jamat E Islam (JEI)]. This is the reason why P.W.18 could recognize the accused at the army camp at Faridpur. Thus, recognition of accused Abul Kalam Azad @ Bachchu by the P.W.18 at the camp remains unaffected.

198. P.W.7 Md. Amir Hossain has narrated the incident how he was apprehended and then kept confined at the 'army camp' of Faridpur

stadium. In addition to this fact, P.W. 7 has stated, corroborating P.W.18, that during his confinement for long one month he found Abu Yusuf Pakhi (P.W.18) and others were brought there. It remains unshaken. Thus, this unimpeachable version goes to corroborate the fact of keeping P.W.18 confined at the 'army camp'.

199.Next, it has been corroborated by the P.W.15 Probodh Kumar Sarker that he later on, learnt the event of confinement and torture caused to the detainees at the army camp set up at Faridpur stadium from the victims including P.W.18 Abu Yusuf Pakhi. Defence could not shatter this version, though hearsay in nature. The source of learning the fact of alleged confinement and torture was one of victims detained at the camp. Thus, the hearsay testimony of P.W.15 on this material particular carries probative value and lends corroboration to what has been deposed by the P.W. 18, the victim of confinement and torture.

200.But we do not find any indication from the evidence of P.W.15 that the accused Abul Kalam Azad @ Bachchu actively facilitated or contributed to the commission of offence of such confinement and torture. We have just found from corroborative version of P.W.15 that Abu Yusuf Pakhi was kept confined and tortured at the army camp.

201.P.W.18 stated that Advocate Afzal, Mainuddin, Alauddin Khan and Abul Kalam Azad, leaders of Peace Committee, another anti-liberation force, used to be present with the army during the brutal torture of the detainees. One day, Azad (accused) brought some women and handed them to the Major Akram, said P.W.18 Yusuf, adding that the women were tortured and abused beside their cell. From this version we have got a picture that the accused used to remain present at the time of causing torture to the detainees at the camp. This version reflects adequately that the accused had association with the crime camp.

Evaluation of Evidence and Finding

202.The learned state defence counsel reiterated his argument that the evidence of P.W.18 lacks of corroboration and as such it is not safe to act solely on it. He further argued that P.W.18 does not claim that the

accused himself abducted, kept him confined and caused torture to him in the camp. P.W.15 is a hearsay witness and thus his evidence does not carry value. Mere testimony of P.W.7 that he, during his confinement period at the camp, found there P.W.18 Abu Yusuf Pakhi is not the proof of the fact of his alleged abduction and torture caused to him. Therefore, the accused cannot be held responsible for the event of crime brought in charge no.02. Prosecution has not been able to prove complicity of accused, in any manner, with the commission of offences narrated in charge no.02.

203.The fact of abducting and handing P.W.18 over to the Pakistani army camp at Faridpur Stadium; that on the following morning Major Akram Koreshi went there along with Abul Kalam Azad *alias* Bachchu and he was tortured in a torture cell and he was kept confined there for 43 days remain unshaken in his cross-examination. P.W.7 Md. Amir Hossain, during his own confinement at the same camp, found that Abu Yusuf Pakhi (P.W.18) and some other persons were brought there. Now the question comes forward how he acted to the accomplishment of the crimes alleged.

204.Since it could not be established that accused himself had involvement with the alleged act of abducting and handing him (P.W.18) over to the army camp the mere fact revealed from evidence of P.W.18 that the accused used to visit the camp and remained present while torture was caused to other detainees does not give rise to an irresistible inference that the accused himself was involved with the act of confining and causing torture to P.W.18, the victim.

205.Mere infrequent visit of the accused at the army camp does not establish it beyond reasonable doubt that the accused substantially contributed or facilitated the act of confinement and causing torture to P.W.18, particularly in absence of any specific and substantial criminal act or conduct to the accomplishment of the offence of alleged confinement and torture. Admittedly, the crime site was an 'army camp' set up at Faridpur stadium. Prosecution has not come up with a case that the

accused had effective control and command over the alleged 'army camp', the crime site.

206.Evidence of P.W.15 Probodh Kumar Sarker , though hearsay, cannot be excluded as according to him later on, he learnt the event of confinement and torture caused to the detainees at the Faridpur stadium camp from the victims including P.W.18 Abu Yusuf Pakhi, the victim of charge no.2.

207.Evidence on the fact of confinement need not even be visible by any one else, considering the context and nature of the crime site. The offence of confinement as alleged has been established. The event and sufferings caused by torture may only be testified by the victim. Evidence of P.W.15 Probodh Kumar Sarker , though hearsay, cannot be excluded as according to him later on, he learnt the event of confinement and torture caused to the detainees at the Faridpur stadium camp from the victims including P.W.18 Abu Yusuf Pakhi, the victim of charge no.2.

208.We thus unerringly believe that P.W.18 was subjected to torture and degrading treatment at the camp. It is quite impractical to think that it was really possible to see such event by any one else. P.W.7 Md. Amir Hossain who was one of detainees of the camp had occasion only to see P.W.18 detained there. But P.W.7 has not stated that he saw the accused causing torture to P.W.18 or encouraging or facilitating in any manner to the accomplishment of the offence of torture upon P.W.18 by the principals.

209.P.W.18 the victim does not claim that at the time of causing torture to him too accused remained present with the Pakistani army and thereby encouraged or facilitated the commission of the offence of torture to him. Indubitably it has been proved that P.W.18 was a victim of torture during his confinement of the Pakistani army camp at Faridpur Stadium and perpetrators were Pakistani army of the crime camp. But for holding the accused criminally liable for the crimes alleged it has to be

established that he participated or substantially contributed or facilitated to the commission of the offence of confinement and causing torture. The mere fact that the accused had close association with the Pakistani army of the 'army camp' and he used to make visit to it does not *ipso facto* prove his liability.

210. From the testimony of both P.W.18 and P.W.7 it could not be found that torture, causing mental or physical harm, was done to P.W.18 by the accused himself or the accused substantially contributed or facilitated to cause any kind of torture to him. On the strength of proved fact that the accused Abul Kalam Azad @ Bachchu almost all the time used to accompany the Major of the camp by his visit and used to avail the vehicle of Major, at best it can be held that the accused used to maintain close link and association with the army of the 'crime camp' and encouraged and provided moral support for committing offences directing to other persons brought to the camp.

211. However, the mere presence at and frequent visit to the 'army camp', the crime site, of the accused Abul Kalam Azad @ Bachchu, as testified by P.W.18, itself may however, be well perceived as a significant *indicium* of his close association with the army of the camp which is not sufficient to prove that the accused provided substantial encouragement or support and contribution to the accomplishment of the offence of confinement and torture done to P.W.18.

212. The victim P.W.18 stated that after remaining confined at the army camp at circuit house, prior to the event narrated in charge no.2, he was eventually released there from by another Pakistan army's Baluch Major. Thus, it may be justifiably inferred that the accused had no role and control in keeping P.W.18 confined at an 'army camp' and to influence his release there from.

213. We are thus, on careful evaluation of evidence adduced in support of the charge no.2, persuaded that the offence of abducting, keeping confined at the army camp and causing torture to P.W.18 has been believably proved. But

prosecution, as we have found, has been failed to establish it beyond reasonable doubt that the accused Abul Kalam Azad @ Bachchu by his act or conduct contributed or facilitated to the commission of the offence of abduction, confinement and torture as crimes against humanity as specified in section 3(2) (a) of the Act and therefore, he is not found to have incurred criminally liability under section 4(1) of the Act for the offences as listed in the charge no.2.

Adjudication of Charge No.03

[Sudhangsu Mohon Roy Killing]

214. Summary Charge: Abul Kalam Azad @ Bachchu(absconded) a member of Razaker Force and subsequently the local commander of Al-Badar Bahini and or as a member of group of individuals being accompanied by 10/12 armed Razakers attacked the village *Kolaron* (কালারন) under police station Boalmari district Faridpur, and then the accused is alleged to have killed Sudhangsu Mohon Roy of village *Kolaron* on 14 May 1971 at about 15:00 hrs. during the War of Liberation and thereby he has been charged for the physical participation and also for substantially contributing to the actual commission of offence of ‘**murder as crime against humanity**’ by directing attack against the Hindu civilian population as specified in section 3(2) (a) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

215.Accused Abul Kalam Azad @ Bachchu is alleged to have physically participated to the commission of the crime. Prosecution has examined two witnesses (P.W.1 and P.W.3) in support of this charge. Both the witnesses are live witnesses. Now let us see what they have stated on dock.

216.The event relates to killing of Sudhangshu Mohon Roy, a local influential member of Hindu community of village *Kolaron* under police station Boalmari district Faridpur. The event took place in broad day light. Pattern of the attack that resulted in such killing and atrocious

acts signifies that it was in furtherance of part of attack against civilian population implemented through out the country in 1971. Now let us see what the P.W.1 and P.W.3 have testified.

Discussion of Evidence

217.P.W.1 Freedom fighter Nepal Chandra Pathak testified before the Tribunal that accused Azad killed Sudhangshu Mohan Roy of Kolaran of Faridpur on May 14, 1971. He claims to have witnessed the incident which relates to charge no. 02. P.W.1 Nepal Chandra Pathak, has testified that he saw accused Bachchu Razakar shooting Sudhangshu Babu.

218.PW1 stated that on 14 May 1971 at 10:00 am he had gone to the residence of Jaminder Sudhangsa Mohon Roy to meet his elder brother Haran Chandra Pathak who used to work there as '*Nitya Pujari*' (daily worshiper). He found Sudhangsa Mohon Roy, his wife Nani Bala Roy, his son Moni Moy Roy and his wife Minoti Rani Roy available there. At about 03:00 pm when he was talking with his brother, Abul Kalam Azad @ Bachchu Razaker being accompanied by 10-12 armed persons entered the house and accused Bachchu dragged Sudhangsu Mohon Roy out of his house despite request to leave him, P.W.1 added.

219.In cross-examination P.W.1 stated that he knew accused Bachchu as he was a resident of his neighboring village and used to come to '*haat*' where he had occasion to see him(accused) and he also knew him personally and also had talk with him. Thus P.W.1 was familiar with accused since prior to the incident and as such he could recognize him when the armed gang led by accused launched the attack on the house of Sudhanshu Mohon Roy. Thus, it is established that at the relevant time the gang of 10-12 armed men led by accused Abul Kalam Azad @ Bachchu dragged Sudhanshu Mohon Roy out of his house as it remains unshaken even in cross-examination.

220.P.W.1 further stated that he and others started following them (the gang of perpetrators) but accused Bachchu threatened not to follow them and

with this they remained stood on the road. Monimoy Roy @ Keshto, son of Sudhangsu Mohon Roy was also taken out with his father.

221. Thereafter, P.W.1 saw Bachchu Razaker snatching the precious stone-rings from Sudhangsu Mohon Roy's fingers and signaled them to go back home. With this when Sudhangsu Mohon Roy and Moni Moy Roy were approaching the house, accused Bachchu shoot Sudhangsu Mohon Roy from behind and with this he fell down. On seeing it Monimoy Roy started crying and then one of accomplices of Bachchu shoot him too causing injuries on his legs and with this he fell down. Thereafter, Bachchu and his accomplice disappeared towards eastern side road. P.W.1 next stated that they brought the dead body of Sudhangsu Mohon Roy and his funeral was done beside the pond adjacent to their residence and treatment was given to Moni Moy Roy @ Keshto, injured son of Sudhangsu Mohon Roy by a village doctor.

222. The description of the incident as depicted from evidence of P.W.1 could not be dislodged by the defence. Rather, it has been confirmed in cross-examination as P.W.1 in reply to question put to him stated that he himself saw accused Bachchu shooting Sudhangsu Mohon Roy to death and his (accused) father-in-law Chan Kazi also accompanied the gang to the crime site.

223. P.W.1 finally stated that afterwards, accused Bachchu along with Pakistani army also attacked Hasamdia and Moindia Bazar, looted valuables, burned houses and shops and killed a number of civilians there. This version remains undisputed in cross-examination. Rather it is found that P.W.1 saw the incident of burning Hasamdia and Moindia bazar from his own house, as stated in cross-examination.

224. Defence suggested that the alleged incident was perpetrated by the Pakistani army and not by the accused and his accomplices. P.W.1 denied the suggestion. However, the incident of killing as narrated in charge no.3 appears to have been proved beyond reasonable doubt.

225.The fact that P.W.1 went to the residence of victim Sudhangsu Mohon Roy to meet his brother who used to work there as a '*pujari*'(priest) on the date and time alleged remains totally unchallenged and thus we do not find any reason to disbelieve P.W.1 and what he has stated before the Tribunal. Rather, P.W.1 seems to be a natural and competent live witness. It has thus been proved that the armed accused accompanied by his 10-12 armed accomplices physically perpetrated the crime of killing and destructive atrocities.

226.P.W.3 Md. Mojaher Sikder is another live witness who has been examined to substantiate the commission of crimes and complicity of accused Abul Kalam Azad @ Bachchu thereof.

227.P.W.3 Md. Mojaher Sikder stated that he and accused Abul Kalam Azad @ Bachchu had studied together in '*Bahirdia Kowmi Madrasa*' in their boyhood and thus he knew him well. At the relevant time P.W.3 was a resident of the crime village. Additionally, P.W.3, in his cross-examination, in reply to question put to him stated that he and the accused Abul Kalam Azad @ Bachchu studied together for one year at '*Bahirdia Kowmi Madrasa*'. Thus, we are persuaded to infer that naturally it was quite possible for P.W.3 to recognize the accused at the crime site committing crime alleged.

228.P.W.3 stated that on 14 may 1971 at about 02:30- 03:00 noon he found some 10/12 armed men were approaching towards east through the road adjacent to his house. Of them he could recognize only one and it was Abul Kalam Azad *alias* Bachchu who was his classmate in '*Bahirdia Qaumi Madrasa*'. P.W.3 quoted accused Azad as saying, "*I have come from Faridpur after receiving training. Now I will govern the country.*" P.W.3 Mojaher then started following them when they were going towards Sudhangshu's house and he saw them bringing Sudhangshu and his son Monimoy Roy out and took them 200 yards east of their home, added P.W.3.

229.P.W.3 further stated that he was standing at a bit distance along with Binoy Roy, another son of Sudhangshu Mohon Roy and Nepal Pathak (P.W.1). Nani Bala Roy, wife of Shudhangshu Mohon Roy and Minoti Rani Roy wife of Kesto were watching the incident. At a stage, Shudhangshu Mohon Roy and his son Keshto started returning back home and then accused Bachchu gunned Sudhanshu Mohon Roy down to death on seeing which Keshto started crying and instantly one of accomplices of accused Bachchu shoot him too causing injuries on his legs and with this he fell down. Afterwards, accused Bachchu and his gang left the crime site.

230.The above evidence of P.W.3, a live witness, seems to have corroborated what has been deposed by P.W.1, another live witness on the fact of commission of crime and physical complicity of the accused with it. Defence failed to controvert what has been narrated by P.W.3. Rather, in cross-examination it has been confirmed that they were on road outside of house of Sudhangshu Mohon Roy when the perpetrators dragged him out of his house.

Evaluation of Evidence and Finding

231.The learned Prosecutor while summing up its case has submitted that two live witnesses have proved this charge beyond reasonable doubt. From there evidence it would appear to be proved that the an armed group of Razakars led by the accused Abul Kalam Azad @ Bachchu attacking the house of Sudhangshu Mohon Roy dragged him out of his house then accused himself gunned down him to death and thereby he physically participated to the actual crimes which was a part of attack directed against civilian population constituting the offence of murder as crime against humanity as mentioned in section 3(2) (a) of the Act.

232.The learned state defence counsel reiterated his argument made by him in relation to charge nos. 1 and 2. He argued that P.W.1 and P.W.3 are not credible witnesses and had no opportunity to see the event of alleged killing; that the prosecution has been failed to prove that

accused belonged to Razakar force and was associated with the Pakistani army.

233. We have found from the corroborative and unimpeachable evidence of P.W.1 and P.W.3 that at the time of commission of the crime alleged the accused having fire arms with him led the armed gang of 10-12 accomplices. It may be validly inferred too that the accused on having training received rifle for the purpose of accomplishment of attack in furtherance of policy of Pakistani army and the pro-Pakistani political organization collaborating them in 1971. Both the P.W.1 and P.W.3 are the live witnesses and we do not see any reasonable ground to discard their testimony made before us.

234. Defence could not impeach credibility of P.W.1 and P.W.3. They are natural and live witnesses. Their version as to the commission of crime and physical complicity of the accused with it is quite corroborative to each other. They had natural reason to identify and recognize the accused who led the armed gang to the accomplishment of crime. Their corroborative and credible evidence sufficiently demonstrates that accused Abul Kalam Azad @ Bachchu physically participated in killing of Sudhangshu Mohan Roy. Therefore, the argument extended by the learned state defence counsel does not fit to the claim of innocence of the accused. The unimpeachable evidence and relevant circumstances do not seem to have been tainted in any manner to cast reasonable doubt as to the guilt of the accused.

235. Thus the manner date and time of the horrific event of killing and looting and physical participation of accused Abul Kalam Azad @ Bachchu accompanied by 10-12 armed accomplices to the commission thereof have been proved beyond reasonable doubt by the unimpeachable evidence of P.W.1 and P.W.3. We have got from evidence of P.W.1 victim Sudhangshu Mohon Roy was a local *Zaminder* i.e a member of local Hindu community having distinguished status in the community and thus it is lawfully presumed that this is the reason as to why he was targeted by the perpetrators. P.W.3 quoted

accused Azad as saying, “*I have come from Faridpur after receiving training. Now I will govern the country.*” It is thus once again proved that accused was a close associate of Pakistani army and he acted as a member of Razakars in furtherance of the policy of annihilation of Hindu group and pro-liberation civilian population.

236.The killing of Sudhangshu Mohan Roy and the criminal acts committed in conjunction of the event by the accused and his accomplices were not isolated for which the accused Abul Kalam Azad @ Bachchu is found criminally responsible under section 4(1) of the Act of 1973. The criminal acts on part of the accused and his accomplices was certainly a part of attack against civilian population which qualifies the offence alleged as murder as crime against humanity as specified in section 3(2) (a) of the Act of 1973 which are punishable under section 20(2) read with section 3(1) of the Act.

Adjudication of Charge 04

[Madhab Chandra killing]

237.Summary Charge: Abul Kalam Azad @ Bachchu(absconded) a member of Razaker Force and subsequently the local commander of Al-Badar Bahini or as a member of group of individuals being accompanied by 10/12 armed Razakers is alleged to have killed Madhab Chandra Biswas at village ‘*Purura Nampara*’ under police station Nagarkanda district Faridpur by dragging him out of his house , on 16 May 1971 at about 15:00 , during the War of Liberation and thereby he has been charged for the physical participation and also for substantially contributing to the actual commission of the offence of ‘**murder as crime against humanity**’ by directing attack targeting the civilian Hindu population as specified in section 3(2) (a) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

238.Prosecution, in support of this charge, has adduced and examined as many as three witnesses as P.W.6, P.W.8 and P.W.10. They are live

witnesses who by deposing on dock have incriminated the accused with the commission of the offence of killing Madhab Chandra Biswas and Gyanendra. All the witnesses are from the crime village. Of them P.W.6 Bhakta Ranjan Biswas is the son of victim Madhab Chandra Biswas. The alleged offence of murder took place in broad day light and by dragging the victim out of his house. P.W.6 Bhakta Ranjan Biswas, 65 year old and son of victim Madhab Chandra Biswas has testified about his experience of killing his father, the event as narrated in charge no.04. In narrating the event he stated that he had seen the incidents [killings] and his neighbours Prafulla Kumar Mandol (P.W.8), Tusto Kumar Mondol (P.W.10), Sunil Kumar Mondal and many others witnessed it too.

Discussion of Evidence

239. P.W.6 Vokto Ranjan Biswas stated that the Pakistani army established camps in Faridpur and since then accused Abul Kalam Azad @ Bachchu and his 10-12 armed accomplices started looting and destructing houses of Awami League supporters and Hindu community.

240.The above unshaken version has proved that the accused after having established his link with the Pakistani army had started committing atrocities particularly targeting Hindu community in the areas of Faridpur district and it also indicates that by committing such atrocious activities he intended, with conscious knowledge of consequence of his acts and conducts, to collaborate and provide substantial support to the Pakistani army, in implementation of its plan and policy.

241. In respect of the event of murder narrated in charge no.4, P.W. 6 stated that on 16 May 1971 corresponding to 01 Jaistha at about 13:00 hrs Abul Kalam Azad (accused) being accompanied by Mohammad Kazi and others raided their house at village *Purura* under police station Saltha district Faridpur. His father was a supporter of Awami League. His father, on seeing the armed gang coming attempted to escape but the perpetrators caught him hold, had looted ornaments, money from their house and afterwards they brought his father dragging to 300 yards

west to the house of Tushta Master's pond and then Abul Kalam Azad @ Bachchu shoot his father to death with the rifle in his hand. The fact of looting ornaments and households as stated in examination-in-chief appears to have been confirmed as P.W.6 in reply to question elicited by the defence in cross-examination that Bachchu Razakar(accused) and his accomplices looted ornaments from their house.

242.The event of killing of Madhab Chandra Biswas as narrated by P.W.6 remains undisputed and defence could not however controvert it in any manner. We find no reason to infer that testimony of P.W.6 is tainted by any doubt. In addition to the event of killing his father P.W.6 further stated that afterwards accused Abul Kalam Azad @ Bachchu also shoot one Gayanendra Mondol to death at the southern part of their house with the rifle in his hand. He (P.W.6), his neighbours Prafulla Kumar Mondol (P.W.8), Tushta Kumar Mondol(P.W.10), Sunil Kumar Mondol, Monindra Nath Mondol and many others had witnessed the incident of killing. After the event of killings and attack they including 500-600 Hindu residents of their village deported to India, in fear of Bachchu Razakar, P.W.6 added.

243. P.W.8 Prafulla Kumar Mandol , a 63-year-old retired school headmaster, a resident of the crime village and a live witness has stated that around 1:00pm on May 16, 1971, he came out of his house hearing a hue and cry and saw 10 to 12 armed men dragging Madhab out of his house. Taking him [Madhab] by the bank of Tusto Master's [P.W.9] pond, about 300 yards west of their house, Abul Kalam Azad alias Bachchu gunned down Madhab Chandra Biswas to death. He saw the incident in his own eyes from a jute field where he remained in hiding, P.W.8 added. Even in cross-examination, P.W.8, in reply to question put to him stated that remaining in hiding at a jute field he witnessed the event. Defence could not however shake what has been stated by P.W.8 regarding the commission of the crime and direct participation of accused to the actual commission thereof.

244.P.W.8 further testified that afterwards, Gyannedra Mondol a relative of their neighbours Duari Sarder, on seeing accused Bachchu and his accomplices, attempted to escape but he could not as they apprehended him and then Bachchu Razakar (accused) himself had also gunned down Gyanendra Mondal to death at the same spot. In cross-examination, in reply to question put to him by the defence P.W.8 stated that on 16 May 1971 at about 13:00 hrs the gang of armed Razakars led by Bachchu (accused) raided their village.

245.P.W. 10 Tusto Kumar Mondol, a 54-year-old school teacher and a resident of the crime village who is a live witness too has made almost a similar and corroborative description of the killings of Madhab Chandra Biswas and Gyanendra Mondol. He narrated that on 16 may 1971 at about 13:00 hrs armed Abul Kalam Azad @ Bachchu and his 10-12 armed accomplices, entering into their village, first raided the house of Madhab Chandra Biswas. On hearing it the villagers started to escape. After looting Madhab's house the gang dragged Madhab out of his house and brought him to the east bank of his (P.W.10) pond and remaining in hiding inside a jute field he saw that Bachchu Razakar himself gunned down Madhab Chandra Biswas to death. Defence could not refute the fact of commission of killing and direct participation of the accused with the criminal act of murdering Madhab Chandra Biswas and thereafter Gyanendra was brought there by the co-perpetrators and accused Bachchu himself also shoot him to death by rifle with him.

246.P.W.10 stated further that Abul Kalam Azad was a Razakar commander and his aim was to wipe out the Hindu community and Awami League supporters. P.W.10 stated that as part of the plan of the Pakistani army, killings, rapes, loot and arsons were carried out by the perpetrators led by Bachchu Razakar in Faridpur like everywhere else. This version patently reflects the context of committing crimes targeting the civilian population belonging to Hindu community.

Evaluation of Evidence and Finding

247.The learned Prosecutor while arguing on this charge has submitted that the witnesses who deposed in support of this charge are live witnesses and they had opportunity to witness the event of attack followed by looting and killing of Madhab Chandra Biswas and Gyannedra Mondol. They are natural witnesses and they explained the reason why and how they could recognize the accused at the crime site. Accused had directly participated to the actual commission of the criminal act of murder and the armed gang was led by him to the crime site. Defence failed to dislodge what the witnesses have narrated in their examination-in-chief, on material particulars.

248.Conversely, the learned state defence counsel, refuting the above argument, has submitted that the accused was not involved with the commission of crimes alleged in the charge no.4; that the prosecution failed to prove that the accused was an armed member of Razakar force; that the witnesses examined by the prosecution are not credible and it is not possible to memorize the event accurately.

249.It is true that for the reason of long passage of time human memory may be faded. We have found that the witnesses examined in support of the charge no.4 are live witnesses one of whom is the son (P.W.6) of victim Madhab Chandra Biswas. The trauma and nature of suffering he experienced relate to long term memory which naturally still remains imprinted in his memory and such horrific event never erases from human memory. For similar reason the corroborative version of P.W.8 and P.W.10 cannot be questioned and excluded from consideration.

250.The fact that P.W.6 had occasion to witness the event of atrocious murder of his father remains unshaken. As regard reason as to how he knew the accused, P.W.6, in cross-examination, has stated that he knew Abul Kalam Azad @ Bachchu who had a jute godown at *Moindia haat* and he had association with Muslim League politics and used to attend meetings at different areas of Saltha and Nagarkanda. He (accused) studied in Faridpur Rajendra College and '*Bahirdia Madrasa*'. Thus, naturally as a resident of same locality P.W.6 had reason to know the

accused from earlier. The event took place in broad day light and at a place adjacent to the house of Madhab Chandra Biswas and thus it is quite believable that P.W.6 had opportunity to see the accused shooting his father to death by remaining in hiding inside an adjacent jute field.

251.The corroborative testimony of P.W.8 on the event of murder of Madhab Chandra Biswas and Gyannedra Mondol does not appear to have been tainted by any doubt. Defence, by cross-examining him could not shake what he has narrated as regard commission of the killings and mode of participation of the accused to it. P.W.8 has also corroborated that after the incident 400-500 Hindu residents of the crime village became compelled to deport to India, in fear of Bachchu Razakar and his accomplices.

252.How P.W.8 could recognize the accused at the crime site? This pertinent question needs to be answered. In this regard, P.W.8 stated in his examination-in-chief that accused Abul Kalam Azad @ Bachchu was a student junior to him in Faridpur Rajendra College and he saw him attending numerous meetings of Jamat E Islami and that is why he was acquitted with him. It has been confirmed even in his cross-examination. That is to say, P.W.8 naturally could recognize the accused committing the killings alleged. Thus his testimony inevitably inspires credence.

253.P.W.8 also testified that accused Abul Kalam Azad @ Bachchu and his cohorts committed killings, torture, loot, and arsons during the nine-month-long war to uproot the Hindu community, Awami League supporters, pro-liberation unarmed Bangalees. This version adequately portrays the atrocious activities of the accused and intent to commit such acts during the War of Liberation in Faridpur. This portrayal is a crucial relevant fact in determining culpability of the accused.

254. Defence has not been able to tarnish creditability of P.W.10 in any manner by cross-examining him. Rather, he seems to be a natural

witness. P.W.10 knew the accused from earlier as he saw him attending electoral meetings in support of the candidate of the symbol 'scale'.

255.Concatenation of incriminating facts narrated by the P.W.6, P.W.8 and P.W.10 coupled with relevant facts are suffice to prove the commission of the event of the offence of murder of Madhab Chandra Biswas and Gyannedra Mondol as crimes against humanity and mode of participation of the accused therewith. We have found that it has been established beyond reasonable doubt from the evidence of P.W.6 and P.W.8 and P.W.10 the residents of the crime village and live witnesses that on the date , time and in the manner an armed gang of Razakars led by accused Abul Kalam Azad @ Bachchu had launched attack to the house of Madhab Chandra Biswas who was a supporter of Awami League and after looting the ornaments and households etc., they dragged Madhab Chandra Biswas out of his house and took him to east bank of a pond of P.W.10 where accused Abul Kalam Azad @ Bachchu himself gunned down him to death and afterwards the accused also killed Gyanendra Mondol at the same spot. Attack targeting the Hindu village and killing of Awami League supporter indicates that the criminal acts of looting and murders were part of 'systematic attack' in furtherance of policy and plan directed against civilian population.

256.Thus, the criminal acts to the accomplishment of murder are characterized as the offence of crimes against humanity as specified in section 3(2) (a) of the Act as it was directed against civilian population. The accused, as has been proved, had directly participated to the commission of offence of murder as described in the charge no.4 and thus he incurs individual criminal liability under section 4(1) of the Act and he is found guilty for perpetration of the offence as listed in charge no. 04 which is punishable under section 20(2) read with section 3(1) of the Act.

Adjudication of Charge No.05

[Committing Rape upon Devi Rani and Shova Rani]

257.Summary Charge: Abul Kalam Azad @ Bachchu(absconded) a member of Razaker Force and subsequently the local commander of Al-Badar Bahini and or as a member of group of individuals being accompanied by 10/12 armed Razakers is alleged to have attacked the house of Sudhir Biswas @ Gosai Pada Biswas of village 'Natibodia' (নাটিবদিয়া) under police station Boalmari district Faridpur on 08 June 1971 at about 12:00 hrs , during the War of Liberation and then allegedly committed rape upon Devi Rani and Shova Rani and thereby he has been charged for the physical participation and also for substantially contributing to the actual commission of offence of '**rape as crime against humanity**' by directing attack targeting the Hindu civilian population as specified in section 3(2) (a) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

258.Prosecution adduced and examined two witnesses as P.W.13 and P.W. 14 in support of this charge. P.W.13 Surabala Biswas, now 70-71 years old is the wife of brother of victims' husbands. P.W.14 Binod Chandra Biswas is the brother of P.W.13's husband. They have narrated the criminal acts perpetrated by accused Abul Kalam Azad @ Bachchu and his accomplices.

Discussion of Evidence

259.P.W.13 Surabala Biswas stated that at the end of *Jaistha* in 1971 at about 12:00 hrs Bachchu Razakar and his 10-12 armed accomplices attacked their house with frequent gun firing from the end of southern part of their village. On hearing gun firing the male inmates of their houses remained in hiding inside a jute field nearer to their house. Bachchu Razakar and his accomplices then entering into their house apprehended Devi Rani the wife of Nagen and Shova Rani the wife of Gosai. 2-3 accomplices of Bachchu Razakar had kept them guarded and looted gold ornaments while Bachchu Razakar and his 7-8 accomplices dragged Shova Rani and Devi Rani to the dwelling room of Shova Rani where they keeping them confined for about one and half hour to two hours committed rape upon them, P.W.13 added. After the

gang of Razakars had left the place they and the male inmates of the family entering into Shova Rani's room found her (Shova Rani) and Devi Rani in subconscious condition having biting stain on their face and saw the lower part of their wearing apparel blood stained. They tried to get them settled by pouring water on their heads. Thereafter, Shova and Devi started crying and had told that Bachchu and their accomplices committed rape upon them and they would not be able to expose their face and would not remain in this country.

260.P.W.13 further stated that thereafter, they along with Shova Rani and Devi Rani deported to India and at present Shova and Devi have been residing in India. At the time of incident Shova was 15-16 years of age and Devi Rani was 17-18 years old.

261. P.W.14 Binod Chandra Biswas (62) is a live witness as to some facts crucially related to the charge of alleged rape. He is one of male inmates of victims' family. P.W.14 corroborating P.W.13 has stated that probably on 08 June 1971(last part of *jaistha*) Bachchu Razakar and his 8-10 accomplices were approaching toward their village with frequent gun firing and attacked their house. With this he and other male inmates of the family remained in hiding inside a jute field adjacent to their house. Bachchu and his accomplices entering into their house encircled the female members of their family including his boudi Shova Rani, boudi Devi Rani, boudi Surabala(P.W.13) and his mother and afterwards, Bachchu and his 4-5 accomplices forcibly dragged Shova Rani and Devi Rani to the dwelling hut of Shova Rani where they kept them confined for half an hour and then they left the crime site after looting ornaments and households.

262.Ten minutes after the gang left, they the male members of the family entered into house and his mother and *boudi* Surabala (P.W.13) entering into the room of Shova Rani found her and Devi Rani in subconscious, almost unclothed and bleeding condition, P.W.14 added. They poured water on their heads and thus they regained their sense and had told '*our chastity has been lost, we do not want to survive, and our*

everything has been finished'. Shova Rani was wedded 4 months prior to the event and Devi Rani was married only 6 months before the incident took place. P.W.14 further stated that they thought it not wise to stay further in country and thus on the following morning they along with surrounding Hindu people of 20 other families deported to India. Defence could not shake the testimony of P.W.14 made on material particulars.

263.In cross-examination, P.W.14 stated in reply to questions put to him that he could not say when the local peace committee was formed in Fairpdur in 1971; that whether it was not possible to organize the Razakar force in Faridpur till the gazette notification dated 02 August 1971. In our view, P.W.14 is not supposed to be familiar with all these information which are not at all decisive factors, particularly in relation to charge no.5.

Evaluation of Evidence and Finding

264.The learned prosecutor has argued that P.W.13 and P.W. 14 are live witnesses who have testified how the attack was launched and how the gang led by accused Abul kalam Azad @ Bachchu acted to the accomplishment of the offence of rape. P.W.13 a female member of victims' family had opportunity to see accused and some of his accomplices dragging the victims to Shova Rani's room where they kept them detained for one and half hour which together with victims' version as portrayed by P.W.13 and P.W.14 adequately signify that Shova Rani and Devi Rani were raped and sexually ravished.

265.The learned state defence counsel has argued that the prosecution has not been able to prove that the accused was with the gang to pursue the attack and thus he was not involved with the commission of rape alleged in any manner. P.W.13 a female member of the victims' family had no prior knowledge about Abul Kalam Azad@ Bachchu and for P.W.14 it was not possible to see as to what was happening inside their house by remaining hiding in jute field and thus the version that P.W.14 that he saw the accused accompanying the gang to the crime site and

dragging the victims to Shova Rani's room is not believable. The charge is tainted by reasonable doubt.

266.Defence, as we find, could not shake what the P.W.13 has stated on material particulars. Rather, the evidence of P.W.13 remains undisputed as well. In cross-examination, P.W.13 in reply to question put to her by the defence stated that she did not know accused Bachchu Razakar but she learnt it from the male inmates of the family that Bachchu Razakar was with the gang of armed perpetrators. The reason why this witness knew that one of members of the gang was Bachchu Razakar is quite natural as it has been corroborated by P.W.14 Binod Chandra Biswas one of male inmates of their family who knew accused Abul Kalam Azad since 1969 as he saw him (accused) attending meetings held in the office of jamat E Islami at Niltuli, Faridpur, as he deposed.

267.In reply to question put by court P.W.14 stated that he knew accused Bachchu from earlier as he saw him attending meetings of jamat E Islami and at the time of alleged event he saw the accused at the crime site. Even in cross-examination P.W.14 has stated that he knew accused Abul Kalam Azad @ Bachchu since 1969 and he saw him attending processions and meetings of Jamat E Islami held in its office at Niltuli, Faridpur. Thus, the reason of knowing the accused even from earlier has been confirmed. In cross-examination, P.W.14 stated that nobody could see them from outside when they were in hiding inside the jute field. Defence however did not suggest that even it was not possible too to see the outside in hiding position inside the jute field. Thus, and common sense suggest us to infer that it was possible to see the outside even in hiding condition inside the adjacent jute field.

268.The matters which appear to have been proved from corroborative evidence of P.W.13 and P.W.14 are that on the date, time and in the manner accused Abul Kalam Azad @ Bachchu and his 10-12 accomplices attacked their village which was predominantly Hindu populated with frequent gun firing and with this the male members of their family remained in hiding inside a jute field adjacent to their

house and then the gang attacking their house kept the female members encircled and from them Shova Rani and Devi Rani were segregated and the accused and some of his accomplices dragged them to the dwelling hut of Shova Rani and detained them for one and half hour (as deposed by P.W.13). The other female members were kept guarded by some of accomplices of accused Bachchu. The charge relates to commit rape upon Shova Rani and Devi Rani.

269.None of two witnesses has claimed to have witnessed the alleged rape or sexual abuse upon the victims. The offence of alleged rape is not an isolated crime. The context also is to be viewed together with the criminal acts done. The offence of committing rape particularly if it happened as a part of systematic attack in furtherance of policy and plan is not expected to have taken place in presence of anybody else. Besides, offence of rape or sexual abuse happens in sly. The situation as revealed also speaks sufficiently that it was not possible to see what was happening inside the room of Shova Rani. Thus the criminal acts of accused and his accomplices done to Shova Rani and Devi Rani have to be perceived from the entire facts and circumstance.

270.P.W.14 has proved that ten minutes after the gang left the crime site they the male members of the family entered into house and his mother and *boudi* Surabala (P.W.13) entering into the room of Shova Rani found her and Devi Rani in subconscious, almost unclothed and bleeding condition. The victims regained their sense as they poured water on their heads and then the victims had told - '*our chastity has been lost, we do not want to survive, and our everything has been finished*'. This pertinent extra-judicial version of victims instantly narrated to P.W.14 a female inmate of victims' family who had opportunity to see the attack and bringing the victims to Shova Rani's room by the accused and his accomplices could not be shaken in any manner. P.W.14 further stated that they thought it not wise to stay further at their home village and thus on the following morning they along with Hindu members of surrounding 20 other families deported to India.

271. We consider it improbable that the family members would ever invent a false story of sexual ravishment by inviting dishonour and disgrace on two newly wedded girls and on their family. No sane person would adopt such a course even out of any vengeance. Finding Shova Rani and Devi Rani in subconscious, almost unclothed and bleeding condition after the gang led by accused Abul Kalam Azad @ Bachchu left the crime site and the utterance of victims to P.W.14 a female member of the crime house that *'our chastity has been lost, we do not want to survive, and our everything has been finished'* are strong and material circumstances which prompt us with no dubiety that Shova Rani and Devi Rani were raped and sexually ravished at their own house in furtherance of a part of systematic attack launched by the gang of armed Razakars led by accused Abul Kalam Azad @ Bachchu.

272. 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. The act of accompanying the gang of armed perpetrators in attacking the house of the victims and keeping them detained in the room of Shova Rani are sufficient to qualify the constitution of the offence of rape as crime against humanity. It is to be borne in mind that in certain circumstances even a single act comprises a crime against humanity when it occurs within the necessary context.

273. The context speaks that it was not possible for civilians to resist the armed perpetrators led by the accused who were actually meant to execute the policy and plan of the Pakistani army and the pro-Pakistan political organization which had acted as its key auxiliary organisation. The pattern of the attack and acts indicates that the gang targeted the house of the victims belonging to Hindu community, a part of civilian population and the accused and his co-perpetrators finding no male inmates at the crime site, approached to cause harm to female members of the family in furtherance of which accused Abul Kalam Azad @ Bachchu and some of his accomplices dragged the victims to Shova Rani's room where they were kept detained and at that time the other

female members were kept guarded by other accomplices outside the room. We thus inescapably consider it just to pen our view that the victims were sexually ravished and the accused cannot be exonerated from criminal liability of committing the offence of rape as crime against humanity as specified in section 3(2) (a) of the Act .

274.The accused Abul Kalam Azad @ Bachchu, as has been proved, had directly participated to the commission of the offence of rape as described in the charge no.4 and thus he incurs individual criminal liability under section 4(1) of the Act and is found guilty for perpetration of the offence listed in charge no.05 which is punishable under section 20(2) read with section 3(1) of the Act.

Adjudication of Charge No 06

[Killing of Chitta Ranjan Das]

275.Summary Charge: On 03 June 1971, during the War of Liberation you, Moulana Abul Kalam Azad @ Bachchu a member of Razaker Force and subsequently the local commander of Al-Badar Bahini and or as a member of group of individuals being accompanied by 10/12 armed Razakers launched an attack targeting the Hindu community of village '*Fulbaria*' under police station Nagarkanda district Faridpur and started looting the house of civilians. In the course of the event, you and your 7/8 accomplices entering inside the house of Chitta Ranjan Das dragged him out and then you, by the rifle with you, gunned down him to death and thereby the accused has been charged for the physical participation and also for substantially contributing to the actual commission of offence of '**murder as crime against humanity**' by directing attack targeting the Hindu civilian population as specified in section 3(2) (a) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

276.Three witnesses have been adduced and examined in support of this charge. All the three witnesses i.e P.W.2 Jotsna Rani Das, P.W.4 Dhala Matabbar and P.W.9 Nagen Chandra Mondol are the live witnesses. Of

them P.W.2 is the wife of victim of the offence of murder. P.W.4 and P.W. 9 are from the crime village and claim to have witnessed the accused accompanying the armed gang of Razakars at the crime site and have corroborated the version of P.W.2, as regard commission of the event of crime and participation of the accused therewith. Now let us see what the witnesses have narrated.

Discussion of Evidence

277.P.W.2 Jotsna Rani Das (60) , the wife of victim of the crime of murder has stated that on 19 Jaistha in 1971 Bachchu Razakar and his 20-25 armed accomplices came to their village by boat and of them accused Bachchu and his 8-9 accomplices attacked their house and the rest of the gang started looting neighboring houses. Entering into their house accused Bachchu apprehended her husband Chitta Ranjan Das and tying him up started beating him by the rifle and then they had looted ornaments and other households. P.W.2 further stated that she attempted to rescue her husband from the clutch of accused Bachchu but he (accused) pushing her down on ground had brought her husband dragging one hundred and fifty yards east to their house where beneath a tree the accused gunned down him to death. Half an hour later, Bachchu Razakar had shot one Badal Debnath to death at a place western side of their house, P.W.2 added. Afterwards, Bachchu Razakar and his accomplices threw the dead bodies of her husband and Badal Debnath by tying legs with a rope to 'Kumar River'. She could not have trace of her husband's dead body. 3-4 days after the event she along with her three minor children took shelter at the house of one Malek Bepari and 10-15 days after staying here she and many other Hindu civilians of the locality deported to India. At that time she was pregnant, P.W/2 added. Her three children died at '*Kalyani*' camp in India and she gave birth of her fourth child on 28 December 1971 and after independence she returned back to home with her new born baby.

278.P.W.4 Dhala Matabbar (61) stated that on 19 Jaistha in 1971 at about 11:00 hrs on hearing crying from the house of Chitta Ranjan when he was on the way to Phulbaria Bazar approached to the crime site and

found Bachchu Razakar and his 3 accomplices thrashing Chitta Ranjan. Afterwards, the gang brought Chitta Ranjan out of his house to a place at north side of their house and then Bachchu Razakar shoot him to death with rifle in his hand. Being frightened he (P.W.4) had left the site.

279.P.W.4 has made hearsay testimony as regard killing of Badal Debnath and some relevant destructive acts. He heard from people that Bachchu Razakar and his accomplices looted the house of Chitta Ranjan and the gang of perpetrators, dragging the dead body of Chitta Ranjan tying his legs with a rope threw it to Kumar River. P.W.4 also stated that he heard that Bachchu Razakar and his accomplices committed looting in the crime locality and Bachchu had also shoot Badal Debnath to death.

280.P.W.9 Nagen Chandra Mondol (72) was a resident of the crime village at the relevant time. He stated that he had business of betel leaf in 1971 and he owned a '*pan baroj*'. On 19 jaistha in 1971 at about 11:00 hrs accused Bachchu Razkar of Baro Khardia and his accomplices came to their village by boat and he was accompanied by about 30 accomplices and of them 8-10 members of the gang attacked the house of Chitta Ranjan and the rest of the gang remained scattered around the village. Bachchu Razakar had a rifle with him. Afterwards, the members of the gang led by accused Bachchu committed looting of ornaments and house holds attacking the house of Chitta Ranjan and brought those to their boat. At the time of their exit from the crime site, Chitta Ranjan and his wife (P.W.2) had been in the courtyard of their house and he (P.W.9) remained in hiding inside a '*pan baroj*' wherefrom he could hear Chitta Ranjan appealing accused Bachchu by saying ' Dada you have taken everything, how would I feed my children'. With this accused Bachchu inquired whether the house owned by Chitta Ranjan. Instantly after admission, Chitta Ranjan was tied up and Jotsna Rani Das (P.W.2) appealed to leave him but accused pushing her down started taking Chitta Ranjan out of his house by dragging and he (accused) took him (Chitta Ranjan Das) to the east-

north side of their house beneath a tree and then accused Bachchu Razakar gunned down him to death by a rifle with him.

281.P.W.9 stated that he witnessed the event of killing Chitta Ranjan. P.W.9 also stated that after killing Chitta Ranjan when the gang was moving toward south accused Bachchu Razakar also had shoot one Badal Debnath to death which he (P.W.9) witnessed . P.W.9 further stated that they could not trace the dead body of Chitta Ranjan as it was thrown to Kumar River and the gang led by accused Bachchu committed destruction and looting of houses of most of the residents of the crime village, in conjunction of the event.

Evaluation of Evidence and Finding

282.P.W.2 denied the suggestion put to her during cross-examination that accused Abul Kalam Azda@ Bachchu did not accompany the armed gang at the time of committing the attack and crimes alleged and that she did not know the accused. But the commission of event of crimes remains unshaken. How the P.W.2 could recognize the accused? In cross-examination, P.W.2, in reply to question elicited to her has stated that accused Bachchu was a resident of their neighboring village Khardia and he (accused) used to move around the locality and thus she could recognize him at the time of committing the crimes. The reason as stated by P.W.2 is naturally believable. We do not find any reason to exclude her testimony.

283.From the above evidence of P.W.4 it reveals that he witnessed the act of beating Chitta Ranjan Das including the act of shooting him to death by accused Abul Kalam Azad @ Bachchu by a rifle with him. It remains unshaken. Rather, in cross-examination P.W.4 stated that apart from him, wife of Chitta Ranjan (P.W.2), Harun Molla, Nagen Mondol (P.W.9), Jaku Kazi had witnessed the event of killing Chitta Ranjan by the accused. Witnessing the house of Chitta Ranjan Das in destructed condition, as stated by P.W.4 in his cross-examination has confirmed that the attack was launched targeting the house of Chitta Ranjan Das in conjunction of which accused Abul Kalam Azad @ Bachchu gunned

down Chitta Ranjan Das to death by a rifle with him. Thus, the event of criminal acts done by the accused at the crime site resulted in murder of Chitta Ranjan Das and looting of their house is well established.

284. Was P.W.4 competent to recognize the accused at the crime site? Was it possible to see the event? P.W.4 in his cross-examination has stated that he knew Abul Kalam Azad @ Bachchu from earlier as his (accused) house was about four kilo meters far from his house and he (P.W.4) saw him (accused) attending electoral meetings in 1970 at Phulbaria Bazar. It was thus probable to recognize a person of neighboring locality who was seen attending public meetings at the locality. Thus, the testimony of P.W.4, particularly in respect of seeing the accused beating and afterwards killing Chitta Ranjan Das carries value and it adds corroboration to the testimony of P.W.2 the wife of victim Chitta Ranjan Das.

285. We have found from first part of testimony of P.W.4 that on seeing the event of killing Chitta Ranjan Das he (P.W.4) became frightened and had left the crime site. Thus, it was naturally not possible to witness the killing of Badal Debnath that took place after the event of killing Chitta Ranjan Das. P.W.2 Jotsna Rani Das the eye witness of the event of killing her husband including the killing of Badal Debnath has stated that, Bachchu Razakar and his accomplices dragging the dead body of her husband and Badal Debnath tying their legs with a rope threw to Kumar River. Thus, the hearsay version of P.W.4 so far it relates to killing of Badal Debnath and throwing the dead body of Chitta Ranjan Das to Kumar River carries much probative value which adds corroboration to what has been stated by P.W.2.

286. Testimony of P.W.9, a live witness has sufficiently and believably corroborated P.W.2 the wife of victim Chitta Ranjan Das and has narrated the event incriminating the accused with the commission of the offence of alleged murder. As regard reason of recognizing the accused P.W.9 stated that he knew accused Abul Kalam Azad @ Bachchu as during 1970-71 he (P.W.9) used to purchase straw for his own 'pan

baroj' from the house of accused's uncle. Even in cross-examination he stated that he knew the accused since prior to the War of Liberation and during the war of Liberation he saw him (accused) committing atrocity of looting and at that time he was not bearded. Next, it has been confirmed too in cross-examination that the event alleged was committed on the date time and in the manner and P.W.9 had occasion to witness the event and he witnessed the accused as the actual perpetrator of the criminal act of killing Chitta Ranjan Das and Badal Debnath. Defence has however been failed to shake what has been testified by P.W.9 on material particulars.

287. Having regard to the evidence of P.W.2, P.W.4 and P.W.9 we are thus convinced in arriving at decision that the atrocious event of attack launched directing the crime village Phulbaria by the gang of armed Razakars led by accused Abul Kalam Azad @ Bachchu on the date time and in the manner has been proved beyond reasonable doubt. It is inferred unerringly too that intent of acts forming such attack was to cause destructive wrongs to the civilian population. It has also been established that the destructive and atrocious acts that resulted in killing of Chitta Ranjan and Badal Debnath and looting of numerous houses eventually compelled the victims and sufferers of the crime village including the P.W.2 to deport to India leaving their houses and properties. We have found how as a leader of the armed gang of Razakars the accused acted directly in committing the crimes. The event was simply horrific and was done in grave breaches of Humanitarian law and Geneva Convention too.

288. The accused Abul Kalam Azad @ Bachchu being accompanied by his armed accomplices, as has been proved, had directly participated to the commission of the offence of murder and the gang of co-perpetrators led by the accused indubitably had committed the criminal acts as part of the attack directing the civilians belonging to Hindu community and thereby the accused Abul Kalam Azad @ Bachchu is found to have incurred individual criminal liability under section 4(1) of the Act and found guilty for committing the offence of murder as crime against

humanity as specified in section 3(2) (a) of the Act which is punishable under section 20(2) read with section 3(1) of the Act .

Adjudication of Charge No. 08
[Anjali Das abduction and torture]

289.Abul Kalam Azad @ Bachchu(absconded) a member of Razaker Force and subsequently the local commander of Al-Badar Bahini and or as a member of group of individuals, being accompanied by 7/8 armed Razakers entering inside the house of Guru Das, a civilian village dweller of village ‘*Ujirpur Bazarpara*’ (উজিরপুর বাজারপাড়া) under police station Saltha district Faridpur s is alleged to have abducted Anjali Das (18) Rani of the crime village on 18 May 1971 at about 10:00 hrs, during the War of Liberation and kept her confined and tortured and thereby the accused has been charged for the physical participation and also for substantially contributing to the actual commission of offence of ‘**abduction, confinement and torture as crimes against humanity**’ by directing attack targeting the Hindu civilian population as specified in section 3(2) (a) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

290.Prosecution examined three witnesses in support of this charge.P.W.11 Deb Kumar Das is the brother of victim Anjali Das and P.W.12 was a neighbour of victim at the relevant time. P.W.16 is a hearsay witness and not from the crime village Ujirpur, Faridpur. They have testified as to who and how abducted Anjali Das and finally what happened to her.

291.PW11 53-year-old Dev Kumar Das, brother of victim Anjali Das stated that around 3:00 pm on May 18, 1971 Bachchu Razakar along with seven to eight armed men had come to their house and told his (P.W.11) father to hand over his sister Anjali Das to him (accused). But his father turned the proposal down and then Bachchu (accused) and his cohorts took away his sister forcibly. P.W.11 further stated that his father humbly requested the local Muslim leaders of their village to take initiative for her (Anjali Das) release. The matter was then conveyed to Chan Kazi the father-in-law of accused Abul Kalam Azad@ Bachchu

and then Bachchu released his sister after seven to eight days and thus his sister returned home in one morning, but her condition was not well. Around 2:30 pm on the same day, cohorts of Bachchu Razakar attacked their house for abducting his sister again. His sister realised that they would take her away again, and then she committed suicide by taking poison to save her honour, P.W.11 added.

292.P.W.11 further stated that after hearing the news of Anjali's suicide, Bachchu's cohorts left the place and afterwards Bachchu came to their house in evening and asked his father to burry Anjali. But his father refused to do it, as they were Hindu and then her (victim) body was cremated accordingly. Nine to ten days after the incident, Bachchu Razakar and his men looted their house and took away even the tin sheets of the roof. Afterwards, they deported to India, P.W.11 added. This pertinent version could not be shaken in any manner by the defence.

293.In cross-examination P.W.11 replied to a question put to him that from his boyhood he knew Abul Kalam Azad @ Bachchu who was a resident of village about 01 kilo meter far from their house and he (accused) was known as Bachchu and he was a class mate of his (P.W.11) brother in Faridpur Rajendra College. This is the reason why he could recognize the accused at the time of abducting his sister Anjali Das. Defence could not impeach the fact of abducting Anjali Das by the accused and his cohorts on the date and in the manner from the house of the victim. It remains undisputed too that the accused came to their house after the victim committed suicide in the wake of a second attack to abduct her (Anjali Das) from their house. P.W.11 stated in cross-examination that he could not say where his sister Anjalai Das was kept confined.

294. P.W.12 Rawshan Ali Biswas(60) a neighbour of the victim stated that on 18 May 1971 on hearing cry he moved toward the house of Deb Kumar Das (P.W.11) and saw the accused Bachchu Razakar and his 10-12 armed accomplices taking Anjali Das, sister of Deb Kumar Das forcibly. Afterwards, he became aware that Anajali Das was kept confined at the house of Chan Kazi(father-in-law of the accused).

Mohammad Kazi was the son of Chan Kazi. After six to seven days, Anjali Das returned home alone and he at about 09:00-10:00 hrs went their house and found Anjali Das ruthlessly sick and she could not even talk, P.W.12 added.

295.In cross-examination too P.W.12 has stated that at the time of abducting Anjali Das he along with Chandu Matabbar, Barkat Chowdhury, Abdul Haque Fakir and some other persons were present at the crime site but they could not resist or protest the gang in fear of gun with them. That is to say, even in cross-examination the fact of abducting Anjali Das by the accused and his armed cohorts has been rather confirmed.

296.How P.W.12 could recognize the accused Abul Kalam Azad @ Bachchu at the time of committing the act of taking away the victim forcibly? It appears that in cross-examination, P.W.12 stated that Bachchu was a Razakar and he used to assist the Pakistani army in identifying the localities and he (P.W.12) saw him (accused) accompanying the Pakistani army. P.W.12 further stated that he knew the accused since earlier and he heard that he (accused) studied in Faridpur Rajendra College. Thus, P.W.12 cannot be said to be incompetent in recognizing the accused at the time of alleged act of abducting Anjali Das. His testimony that he witnessed the incident is quite credible as he was a close neighbour of the victim which remains undisputed.

297.P.W.12, as regard the second part of the event, has stated that on the day victim Anjali Das returned back home Mohammad Kazi and his accomplices came for taking Anjali Das forcibly again and on sensing it Anjali Das committed suicide by taking poison at room of first floor of their house. This fact also remains undisputed. Rather in cross-examination P.W.12 stated that he heard from parents of Anjali Das that Mohammad Kazi (brother-in-law of the accused) was accompanied by Rizu kazi, Mona Kazi and other accomplices made the second attempt of taking away Anjali Das forcibly.

298.P.W.12 stated that 10-12 days after Anjali had died accused Bachchu and his 20-30 armed accomplices attacked the house of Anjali Das and looted and destructed their house and he (P.W.12) himself witnessed it. This post event fact could not be dislodged by the defence and it adequately indicates the intent and reason of launching repeated attack directing the family of the victim belonging to Hindu community, a part of civilian population.

299.P.W.16 Abdul Mannan (56) from village Moindia under police station Boalmari district Faridpur is a hearsay witness. In fact he has testified in support of charge no.7 as a live witness. However, in respect of the event of the offence narrated in charge no.8 P.W.16 has just corroborated P.W.11 and P.W.12 on material particulars.

Evaluation of Evidence and Finding

300.The learned prosecutor has argued that P.W.11 the brother of victim and P.W.12 neighbour of the victim had occasion to witness the event of abducting Anjali Das by the accused and his armed accomplices and it has been proved too that the victim was kept confined for 7-8 days. The fact of confining itself is a proof of causing torture upon the victim.

301.The learned state defence counsel has argued that the accused was not involved with the event alleged and there has been no evidence that Anjali Das was kept confined and tortured by the accused and thus the accused cannot be held criminally responsible for the alleged acts constituting the offence, even if it is taken to be proved.

302.From evidence of P.W.11 and P.W. 12 we have found it proved that on the date time and in the manner accused Abul Kalam Azad @ Bachchu being accompanied by armed accomplices launched attack to the house of Anjali Das and defying oral confrontation they forcibly took away Anjali Das with them. That is to say, the accused is found to have directly participated to the act of abduction alleged. It remains unshaken too.

303.It is also proved that with the intervention of local Muslim elites eventually 7-8 days after abduction the victim was released. Where she was kept confined? P.W.12 stated in cross-examination that later on he heard that the victim was kept confined at the house of Chan Kazi. According to P.W.11, request was made to said Chan Kazi by the local Muslim elites for releasing Anjali Das. Who is this Chan Kazi? Admittedly he is the father-in-law of the accused. It sufficiently indicates that the accused had substantially contributed and facilitated to the act of confinement of the victim Anjali Das with full knowledge.

304. How Anjali Das was tortured? In reality and considering the context of such attack and circumstances revealed it was not possible to know it. But since it is proved that Anjali Das was forcibly abducted and taken away by the accused and his cohorts from their house defying oral resistance, it may be lawfully presumed that the accused substantially contributed in keeping the victim confined at a place selected by him. At the same time it may also be validly presumed that the purpose of keeping the victim under such confinement for 7-8 days was not of course anything lawful and certainly mental and physical harm including sexual abuse was caused to her that resulted in her severe sickness as stated by P.W.12.

305.The fact that on the very day of her release victim Anjali Das committed suicide as Mohammad Kazi and his accomplices attacked their house to abduct her again is proved. Obviously such second attempt of abducting the traumatized victim Anjali Das made her panicked and frightened which eventually forced her to commit suicide. Who is this Mohammad Kazi? As it is found, he was the brother-in-law of the accused. That is to say, the second attempt to take away the victim forcibly was not done without the knowledge of the accused. Rather, the accused may be presumed to have substantially contributed and abetted in launching such second attack.

306.We have found that accused Abul Kalam Azad @ Bachchu was a potential armed member of Razakar force. He is found to have launched attack being

accompanied by his armed cohorts with intent to commit criminal acts constituting the offence of crimes against humanity. The accused, in furtherance of policy and plan of the Pakistani army and the organization collaborating it launched such attack directing the Hindu community, a part of civilian population and the criminal acts were done in context of the war of liberation in 1971. Therefore, the accused Abul Kalam Azad @ Bachchu is found to have incurred criminal liability under section 4(1) of the Act and found guilty for committing the offence of abduction, confinement and torture as crimes against humanity as specified in section 3(2) (a) of the Act which is punishable under section 20(2) read with section 3(1) of the Act .

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

307.Defence argued that crimes were isolated in nature apart from the fact that accused had no involvement with the commission of any of alleged crimes, in any manner.

308.From the second segment of our discussion on adjudication of charges relating to crimes against humanity(charge nos. 1,2,3,4,5,6 and 8) we have found the events of atrocities constituting crimes against humanity were perpetrated directing the unarmed civilians belonging to Hindu community. We have also found it proved from evidence as discussed above that the accused Abul Kalam Azad @ Bachchu physically participated and acted with knowledge and common intent to the commission of those atrocities and he (accused) committed all the wrongs and criminal acts in the capacity of an armed member of Razakars being accompanied by Pakistani army and his accomplices Razakars. Under what context the accused committed such acts forming part of attack directed against civilian population? We need to have look to the contextual backdrop of perpetration of such crimes in furtherance of ‘operation search light ‘on 25 March 1971.

309.It is essential to be established that the crimes for which the accused has been found criminally liable and guilty, as discussed above, were not isolated in nature and the same were committed under a different context and pattern in implementation of organizational policy and plan,

although policy or plan are not considered as elements of the offence of crime against humanity.

310.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;'

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

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

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

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

Context prevailing in 1971 in the territory of Bangladesh

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

- Policy was to target the self-determined Bangladeshi civilian population
- High level political or military authorities, resources military or other were involved to implement the policy
- Auxiliary forces were established in aiding the implementation of the policy
- The regular and continuous horrific pattern of atrocities perpetrated against the targeted non combatant civilian population.

315.The above facts in relation to policies are not only widely known but also beyond reasonable dispute. The context itself reflected from above

policies is sufficient to prove that the offences of crimes against humanity as specified in section 3(2)(a) of the Act of 1973 were the inevitable effect of part of systematic attack directed against civilian population. This view finds support from the observation made by the Trial Chamber of ICTY in the case of *Blaskic* as mentioned above.

316. It is quite coherent from the facts of common knowledge involving the backdrop of our war of liberation for the cause of self determination that the Pakistani armed force, in execution of government's plan and policy in collaboration with the local anti liberation section belonging to JEI and its student wing ICS and auxiliary forces, 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 and pursuant to such plan and policy atrocities were committed to them as a 'part of a regular pattern basis' through out the long nine months of war of liberation. It may be legitimately inferred from the phrase "**directed against any civilian population**" as contained in the Act of 1973 that the acts of the accused comprise part of a pattern of 'systematic' crimes directed against civilian population.

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

"SO THE ARMY is not going to pull out. The Government's policy for East Bengal was spelled out to me in the Eastern Command headquarters at Dacca. It has three elements:-

- (1) The Bengalis have proved themselves "unreliable" and must be ruled by West Pakistanis;
- (2) The Bengalis will have to be re-educated along proper Islamic lines. The "Islamisation of the masses" – this is the official jargon – is intended to eliminate secessionist tendencies and provide a strong religious bond with West Pakistan;
- (3) When the Hindus have been eliminated by death and flight, their property will be used as a golden carrot to win over the under-privileged Muslim."

[Source: http://www.docstrangelove.com/uploads/1971/foreign/19710613_tst_genocide_center_page.pdf]

318.Therefore, the crimes for which the accused has been charged and found guilty were not isolated crimes, rather these were part of organized and planned attack intended to commit the offence of crimes against humanity as enumerated in section 3(2) of the Act, in furtherance of policy and plan.

319.Further, **Section 3(2) (c)(i) of the Act of 1973** defines ‘Genocide’ as an act committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as, killing members of the group. From the charge no.7 framed we find that the criminal acts narrated therein were directed against the Hindu community which falls within the meaning of ‘religious group’ or a particular ‘members of the group’, with intent to destroy it, either whole or in part. From testimony of most of witnesses it has been established that almost instantly after accomplishment of crimes targeting the Hindu community, the members of this community who were residents of the crime villages deported to India, in fear of further fatality and harms. This amply indicates the ‘genocidal intent’ of causing massive destruction and killing of civilians belonging to the Hindu community, as has been narrated in charge no. 7.

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

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

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

XXI. Conclusion

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

324. It has been proved from testimony of witnesses that the accused had directly participated to the commission of crimes as an armed member of Razakar force. Besides, we have found that for the reason of his atrocious acts in the locality the accused was widely known as ‘Razaker’. According to Section 3(1) of the Act of 1973 it is manifested that even any person (**individual or a member of group of individuals**) is liable to be prosecuted if he is found to have committed the offences specified in section 3(2) of the Act. That is to say, accused Abul Kalam Azad @ Bachchu, even in the capacity of an ‘individual’ or member of ‘group of individuals’ comes within the jurisdiction of the Tribunal if he is alleged to have committed crimes specified in section 3(1) of the Act.

325.We are convinced from the evidence, oral and documentary, led by the prosecution that accused Abul Kalam Azad was a potential member of Razakar (volunteer) force in Faridpur, otherwise he would not have carried rifle with him when he led the armed gang to the crime sites for committing crimes. He, at that time, was widely and generally known as 'Bachchu Razakar'. Already we have got from evidence of P.W.5, P.W.8, P.W.10 and P.W.15 that at the relevant time of commission of alleged crimes accused was a potential Razakar who received training and a rifle. It is found that before formal formation of Razakar force pursuant to a gazette notification dated 02 August 1971 the then Pakistani government and Pakistani army in the then East Pakistan organized 'Razakar' (Volunteer) force almost instantly after they took the territory under their armed control. The purpose was to have aid and assistance to carry out their atrocious operations against the Bengali civilian population including the Hindu group, intellectuals, pro-liberation civilians. As a result, we may legitimately infer that the accused Abul Kalam Azad @ Bachchu committed the offences for which he has been charged in the capacity of Razakar i.e as a member of 'auxiliary force' as specified in section 2(a) of the Act of 1973.

326.According to section 4(1) of the Act of 1973 an individual incurs criminal liability for the direct commission of a crime, whether as an individual or jointly. In the case in hand, in dealing with the charges we have found that the accused Abul Kalam Azad @ Bachchu himself had physically participated being accompanied by his armed accomplices to the commission of crimes and as such he held criminally responsible for the direct commission of crimes proved.

327.Now, another question comes forward as to whether the accused can be brought within the jurisdiction of the Tribunal if we consider that the prosecution has not been able to prove that the accused committed the crimes proved as a member of Razakar, an auxiliary force? The answer is 'yes'. Section 3(1) provides jurisdiction of trying and punishing even any 'individual' or 'group of individuals' who commits or has committed, in the territory of Bangladesh any of crimes mentioned in

section 3(2) of the Act. We have resolved the issue on incorporating the phrase 'individual' or 'group of individuals' by way of amending the statute in 2009 together with the relevant Article of our Constitution. On this score as well, the accused cannot be relieved from being prosecuted and tried under the Act of 1973.

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

329. '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****]

330. In the case in hand, it is abundantly clear that the accused absconded to evade the process of justice. Had the accused was not involved in the crime he would have certainly prepared to face the trial. But not only he has absconded instantly after issuance of warrant of arrest by this Tribunal but he has even left the country as reported by the enforcement or executing authority. The accused cannot be considered merely as an absentee accused. He is an absconded accused. Evading trial for the offences of which he has been charged with signifies his culpability too.

The accused deliberately waived his right to be present at trial. This conduct adds further to his culpability.

331. Such deliberate absence as a material incriminating circumstance lends further assurance as to the guilt of the accused who has been found criminally liable in relation to charges proved, excepting the charge no.2. Therefore, the fact of absconding of the accused can also be taken as an adverse and material incriminating circumstance to reinforce the evidence and circumstances available in the case.

XXII. VERDICT ON CONVICTION

332. For the reasons set out in this Judgement and having considered all evidence and arguments, the Tribunal unanimously finds the accused Abul Kalam Azad @ Bachchu

Charge No.1: GUILTY of the offence of abduction, confinement and torture as '**crimes against humanity**' as specified in section 3(2)(a) of the Act and he be convicted and sentenced under section 20(2) of the Act.

Charge No.2: NOT GUILTY of the offence of abduction, confinement and torture as '**crimes against humanity**' as specified in section 3(2)(a) of the Act and thus he be acquitted.

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

Charge No.4: GUILTY of offence of murder as '**crimes against humanity**' as specified in section 3(2)(a) of the Act he be convicted and sentenced under section 20(2) of the Act.

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

Charge No.6: GUILTY of offence of murder as ‘**crimes against humanity**’ as specified in section 3(2)(a) of the Act he be convicted and sentenced under section 20(2) of the Act.

Charge No.7: GUILTY of offence of ‘genocide’ for ‘killing the members of Hindu community as specified in section 3(2)(c)(i) of the Act he be convicted and sentenced under section 20(2) of the Act.

Charge No.8: GUILTY of offence of abduction, confinement and torture as ‘**crimes against humanity**’ as specified in section 3(2)(a) of the Act he be convicted and sentenced under section 20(2) of the Act.

XXIII. VERDICT ON SENTENCE

333. We have taken due notice of the intrinsic gravity of the offence of ‘genocide’ and murders as ‘crimes against humanity’ being offences which are particularly shocking to the conscience of mankind. We are of agreed view that justice be met with if a single ‘sentence of death’ under section 20(2) of the Act of 1973 is awarded to accused Abul Kalam Azad @ Bachchu for convictions relating to the offences of murder as ‘crimes against humanity’ (**listed in charge no.s 3, 4 and 6**) and for the offence of ‘genocide’ (**listed in charge no.7**) of which he has been found guilty beyond reasonable doubt.

334. However, we are of further view that considering the proportionate to the gravity of offences the accused Abul Kalam Azad @ Bachchu deserves imprisonment i.e. lesser punishment for convictions relating to the remaining offences as crimes against humanity (**listed in charge no.s 1, 5 and 8**). Accordingly, we do hereby render the following ORDER on SENTENCE.

Hence, it is

ORDERED

That the accused **Moulana Abul Kalam Azad @ Abul Kalam Azad @ Bachchu** son of late Abdus Salam Mia & late Magfura Khatun of village-*Barakhardia (Choi ani)*, Police Station- Saltha, District-Faridpur

at present sector no. 07, road no. 33, house no. 06, Police Station–Uttara, DMP, Dhaka and ‘Azad Villa’, 279/6 Chan Para, Uttarkhan, Dhaka is found guilty of the offences of ‘**crimes against humanity**’ (**listed in charge no.s 3,4 and 6**) and for the offence of ‘**genocide**’(**listed in charge no.7**) and he be convicted and sentenced to death and be hanged by the neck till he is dead under section 20(2) of the International Crimes (Tribunals) Act, 1973.

No separate sentence of imprisonment is being awarded to the accused Moulana Abul Kalam Azad @ Abul Kalam Azad @ Bachchu for convictions relating to the offences of crimes against humanity as listed in charge nos. 1, 5 and 8 of which too he has been found guilty as the ‘sentence of death’ has been awarded to him in respect of four other charges as mentioned above.

The accused Moulana Abul Kalam Azad @ Abul Kalam Azad @ Bachchu is however found not guilty of offence of crimes against humanity as listed in charge no.2 and he be acquitted thereof.

Since the convicted accused has been absconding the ‘sentence of death’ as awarded above shall be executed after causing his arrest or when he surrenders before the Tribunal, whichever is earlier. The sentence of death awarded as above under section 20(2) of the International Crimes (Tribunals) Act , 1973 [The Act No.XIX of 1973] shall be carried out and executed in accordance with the order of the government as required under section 20(3) of the said Act.

Issue conviction warrant. Let a copy of the Judgment be transmitted together with the conviction warrant to the Inspector General of Police, Bangladesh Police, Police Head Quarters, Dhaka for information and necessary action and compliance. Let a copy of the judgement be transmitted also to the District Magistrate, Dhaka for information and necessary compliance.

Justice Obaidul Hassan, Chairman

Justice Md. Mozibur Rahman Miah, Member

Judge Md. Shahinur Islam, Member