

International Crimes Tribunal-1 (ICT-1)
Old High Court Building, Dhaka, Bangladesh.
ICT-BD Case No.05 OF 2013

[Charges:- Crimes against Humanity, genocide, abetment and complicity in committing such crimes as specified in section 3(2)(a)(c)(g)(h) read with section 4(1) and 4(2) of the Act No. XIX of 1973]

The Chief Prosecutor
Versus
A.T.M Azharul Islam

Present:

Mr. Justice M. Enayetur Rahim, Chairman
Mr. Justice Jahangir Hossain, Member
Mr. Justice Anwarul Haque, Member

Date of delivery of Judgment on 30th December, 2014.

Prosecutors:

Mr. Golam Arif Tipu, the Chief Prosecutor

Mr. Zead Al-Malum

Mr. Sultan Mahmud

Ms. Turin Afroz

Ms. Rezia Sultana Begum and

Mr. Taposh Kanti Baul

Defence counsels:

Mr. Md. Abdur Razzak, senior counsel

Mr. Abdus Sobhan Tarafder

Mr. Tajul Islam

Mr. Mohammad Shishir Munir

Mr. Md. Asaduddin

Judgment

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

I. Introductory Words

01. Accused A.T.M Azharul Islam son of late Dr. Nazir Hossain and late Romicha Begum of village-Batason Lohanipara, Police Station-

Badargonj, District-Rangpur and Flat No.6A, F. Tower, 91/B, Elephant Road, Boro Mogbazar, Police Station-Ramna, District-Dhaka has been put on trial before this Tribunal at the instance of the Chief Prosecutor to answer charges under section 3(2)(a)(c)(g)(h) read with section 4(1) and 4(2) of the International Crimes (Tribunals) Act, 1973.

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

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

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

"(1) A Tribunal shall have the power to try and punish any individual or group of individuals, or organisation or any member of any armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh , whether before or

after the commencement of this Act, any of the crimes mentioned in sub-section(2).

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

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

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

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

(i) killing members of the group;

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

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

- (iv) *imposing measures intended to prevent births within the group;*
- (v) *forcibly transferring children of the group to another group;*
- (d) *War Crimes: namely, violation of laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages and detainees, plunder or public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;*
- (e) *violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949;*
- (f) *any other crimes under international law;*
- (g) *attempt, abetment or conspiracy to commit any such crimes;*
- (h) *complicity in or failure to prevent commission of any such crimes."*

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

04. Crimes against Humanity can be committed even in peace time; existence of armed conflict is, by definition, not mandatory. Neither in

the preamble nor in the jurisdiction sections of the Act was it mentioned that crime against Humanity requires the existence of an armed conflict. Indiscriminate attack on civilian population based on their political, racial, ethnic or religious identity can be termed as crimes against Humanity even if it takes place after 1971. However, no one denies the fact that there was an armed conflict in 1971.

III. Consistency of the Act of 1973 with other Statutes on international crimes

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

Article-7 of the Rome Statute

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

- (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible

under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Article 3 of the ICTR

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

Article 5 of the ICTY

08. The International Criminal Tribunal for former Yugoslavia [ICTR] shall have the power to prosecute persons responsible for the (a) murder, (b) extermination, (c) enslavement, (d) deportation, (e) imprisonment, (f) torture, (g) rape, (h) persecutions on political, racial and religious grounds and (i) other inhumane acts when committed in armed conflict, whether international or internal in character, and directed against any civilian population.

09. Under the Rome Statute [Article 7] and Statute of the International Criminal Tribunal for Rwanda [Article 3] the jurisdiction of the Tribunals were given to try offences of 'crimes against humanity' such as murder, extermination, deportation, torture, rape etc. of the person/ persons when the offences committed as a **widespread or**

systematic attack directed against any civilian population or national, ethnic, racial or religious grounds. According to ICTY [Article 5] existence of armed conflict is the key element to try offences of crimes against humanity, directed against the civilian population.

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

"Whereas, under our Act, 1973 the tribunal has jurisdiction to prosecute and punish any person irrespective of his nationality who being a member of any armed, defence or auxiliary forces commits, whether before or after the commencement of the Act, Crimes against Humanity, Crimes against Peace, Genocide and other crimes connected therewith during the period of war of liberation. The offences of murder, extermination, rape or other inhumane acts committed against civilian population or persecutions on political, racial, ethnic or religious grounds are included in the offence of crimes against Humanity. "

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

National Assembly election and to deprive the fruits of the election result." [Page,241-242].

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

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

13. As per section 3(2) of the ICT Act of 1973 to constitute an offence of crimes of humanity the element of attack directed against any civilian population is required. The "*population*" element is intended to imply crimes of a collective nature and thus exclude single or isolated acts. Thus, the emphasis is not on the individual victim but rather on the collective, the individual being victimized not because of his individual attributes but rather because of his membership of a targeted civilian population. This has been interpreted to mean that the acts must occur

on a large scale basis [widespread] or, that there must be some form of a governmental, organizational or group policy to commit these acts [systematic, targeted] and that the perpetrator must know the context within which his actions are taken [knowledge and intent], and finally that attack must be committed on discriminatory grounds in case of persecution.

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

15. However, for our better understanding it is needed to know the meaning and scope of 'widespread' and 'systematic' attack. '*Widespread*' refers to the large-scale nature of the attack which is primarily reflected in the number of victims. '*Systematic*' refers to the organized nature of the acts of violence and the '*non-accidental repetition of similar criminal conduct on a regular basis.*' Widespread is quantitative while systematic is qualitative.

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

16. The proceedings before the Tribunal shall be guided by the Act of 1973 and International Crimes (Tribunal-1) Rules of Procedure, 2010 [hereinafter referred to as ROP of 2010]. Section 23 of the Act prohibits

the applicability of the Code of Criminal Procedure, 1898 and the Evidence Act, 1872. The Tribunal is authorized to take into its judicial notice of facts of common knowledge and some official documents which are not needed to be proved by adducing evidence [section 19(3) and (4) of the Act]. The Tribunal may admit any evidence without observing formality, such as reports, photographs, newspapers, books, films, tape recordings and other materials which appear to have probative value [section-19(1) of the Act]. The Tribunal shall have discretion to consider hearsay evidence too by weighing its probative value as per rule-56(2) of the ROP of 2010. The defence shall have right to cross-examine prosecution witnesses on their credibility and to take contradiction of the evidence given by them before the Tribunal as per rule-53(ii) of the ROP of 2010. The accused deserves right to conduct his own case or to have assistance of his counsel [section-17 of the Act]. The Tribunal may release an accused on bail subject to conditions as imposed by it as per rule-34(3) of the ROP of 2010. The Tribunal may, as and when necessary, direct the concerned authorities of the Government to ensure protection, privacy, and well-being of the witnesses and victims as per rule 58 A of the ROP of 2010.

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

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

19. All the aforesaid rights have been provided to the accused to ensure fair justice. In addition to observation of those elements of fair justice, the Tribunal has adopted a practice by passing an order that while an accused in custody is interrogated by the investigation officer, at that time, the defence counsel and a doctor shall be present in the adjacent room of the interrogation room, and the defence counsel is permitted to meet the accused during break time and at the end of such interrogation. The doctor is also allowed to check-up the physical condition of the accused, if necessary. All these measures are being taken by the Tribunal to ensure fair investigation as well as trial.

20. Before going into discussion and evaluation of the evidence on record, it is needed to be mentioned here that the Tribunal has already resolved some common legal issues agitated by the defence in the following cases of the Chief Prosecutor vs. Delwar Hossain Sayeedi [ICT-BD Case No. 01/2011], The Chief Prosecutor Vs. Professor Ghulam Azam [ICT-BD case No. 06/2011], the Chief Prosecutor Vs. Salauddin Quader Chowdhury [ICT-BD Case No. 02/2011] and the Chief Prosecutor Vs. Motiur Rahman Nizami [ICT-BD Case No.03 of 2011]. Apart from this, the Appellate Division of our Supreme Court in the

cases of Abdul Quader Mollah Vs Government of Bangladesh and Bangladesh Vs Abdul Quader Mollah has also decided the legal issues involved in the cases under the Act of 1973.

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

- i. Customary International Law [CIL] shall not be applied if it is contrary to the Act of 1973;
- ii. there is no rule of CIL that prohibits our domestic Tribunal to proceed with the trial as per our domestic legislation;
- iii. our domestic Tribunal has the jurisdiction to continue with the trial in any manner acting in derogation of rules of public international law;
- iv. there is nothing repugnant to CIL in the Act of 1973, rather it is consonant with the provisions of CIL;
- v. the inordinate delay in commencing any proceedings under the Act of 1973 *ipso facto* can not be a ground to doubt the truth or veracity of the prosecution case;
- vi. by the amendment of section 3(1) of the Act of 1973 through Act No.LV of 2009 the jurisdiction of the Tribunal has been extended to try and punish 'any individual,' 'organization' or 'group of individuals' besides any member of any armed, defence or auxiliary forces, irrespective of his nationality who have committed crimes against Humanity mentioned in the Act of 1973;
- vii. the Act of 1973 is a protected law and the moment, subsection 3(1) was amended by way of substitution, it became part of the Statute and it got the protection of any legal challenge to be void or unlawful or even to have become void or unlawful in view of the provisions of Article 47(3) of our Constitution;

- viii. the clemency given to the admitted prisoners of War, pursuant to the tripartite agreement of 1974, in no way, either match the Act of 1973 or any of its provisions ineffective, invalid or void;
- ix. mere failure of the successive governments to act in accordance with the Act of 1973 for last more than forty years, in no way, gave any right to the accused to be exonerated from being tried for the commission of crimes against Humanity as mentioned in section 3(2) of the Act;
- x. in the Act of 1973, no limitation has been prescribed for initiating proceedings against any individual or group of individual or organization or any member of any armed, defence or auxiliary forces irrespective of his nationality for the commission of crimes mentioned in section 3(2) of the Act of 1973;
- xi. the Collaborators Order 1972 was a different legislation aiming to prosecute the persons for the offences punishable under the Penal Code, were scheduled in the Collaborators Order 1972, while the Act of 1973 has been enacted to prosecute and try the persons for crimes against Humanity, genocide and other crimes committed in violation of customary international law [CIL] and as such there is no scope to characterize the offences indulging in the Collaborators Order 1972 to be the same offences as specified in the Act of 1973;
- xii. the Act of 1973 is a codified law, thus, it is not needed to travel to seek assistance from other trials held or being held by the tribunals/ courts either under the charter of agreements of the nations or under other arrangements under the mandate of United Nations or other International body, such as Nuremburg trial and the Balkan trials.

VI. Historical Backdrop and Context

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

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

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

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

25. The Pakistan government and the military with the help of some pro-Pakistani leaders set up a number of auxiliary forces such as the Razakar Bahini, the Al-Badr Bahini, 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. Undeniably the road to freedom for the people of Bangladesh was arduous and torturous, smeared with blood, toil and sacrifices. In the contemporary world history, perhaps no nation paid as dearly as the Bangalees did for their emancipation.

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

VII. Brief account of Accused A.T.M Azharul Islam

27. Accused A.T.M Azharul Islam was born on 28 February 1952. He took his early education in 1968 from Rangpur Zilla School. He was a student of H.S.C in Rangpur Carmichael College during 1969 to 1971. At that time, he was the president of Islami Chhatra Sangha [ICS], the student wing of Jamaat-e-Islami [JEI] Rangpur unit and also commander of Al-Badr Bahini of Rangpur district. During the War of Liberation of Bangladesh in 1971, the accused collaborated Pakistani army to execute their plan and design in committing crimes against Humanity and genocide all over Rangpur district. He being the commander of Al-Badr Bahini resisted the War of Liberation and committed atrocities in all over the district through his members of Al-Badr Bahini.

28. After independence of Bangladesh, he went into hiding for his safety as he played anti-liberation role during the War of Liberation. He obtained Masters degree in 1980 from Dhaka University. Thereafter, he joined the Jamaat-e-Islami and held its different posts since 1982 to 1990. He was the Ameer of Jamaat-e-Islami of Dhaka Metropolitan City during 1991-2002. He became the central assistant secretary general of Jamaat-e-Islami in 2005 and lastly he was in charge of general secretary of Jamaat-e-Islami. He contested the national elections for several times but he was defeated each time.

VIII. Procedural History

29. At pre-trial stage, accused A.T.M Azharul Islam was arrested and produced before the Tribunal on 23.08.2012 in pursuance of warrant of arrest issued against him by this Tribunal.

30. The Chief Prosecutor submitted formal charges on 18.07.2013 under section 9(1) of the Act on the basis of Investigation report of the Investigation Agency. It has been alleged in the formal charges that during the War of Liberation in 1971 the accused as the president of Islami Chhatra Sangha Rangpur Unit, had committed crimes against Humanity and genocide including abetting, aiding, participating and providing moral support to commit such crimes in different parts of Rangpur district. The Tribunal on perusal of formal charges, statement of witnesses and documents submitted by the prosecution took cognizance of offences as specified in section 3(2) of the Act on 25.07.2013 against the accused. The prosecution was directed to supply copies of formal charges, statement of witnesses, list of witnesses to the accused for preparation of defence case. The prison

authority was also directed to provide health friendly vehicles to the accused for his transport.

31. The Tribunal also allowed two learned lawyers of the accused to meet and consult with the accused in the custody as privileged communication.

32. Before this Tribunal, in course of hearing the charge matter, the learned prosecutor made submissions in support of framing charges against the accused in the light of the formal charges together with statements of witnesses and documents submitted therewith. While Mr. Abdur Razzak, the learned senior defence counsel by filing an application for discharge of the accused, made elaborate submissions in support of discharging the accused from the charges brought against him.

33. The Tribunal by its order dated 12.11.2013 framed as many as 6(six) charges against the accused to which he pleaded not guilty and claimed to be tried.

IX. Witnesses adduced by the parties

34. The prosecution submitted a list of 22 [twenty two] witnesses along with formal charges and documents. But at the time of the trial, the prosecution has examined in all 19 [nineteen] witnesses including the investigation officer. The prosecution has also adduced some documentary and material evidence which were duly marked as exhibits 1-27 and material exhibits I-X respectively.

35. However, the defence has examined only one witness as D.W.1. Defence has also exhibited some documents, which were duly marked as exhibits A-H.

X. Defence Case

36. It is the defence case that accused A.T.M Azharul Islam was not the commander of Al-Badr Bahini of Rangpur district during the Liberation War in 1971. He never aided, abetted, facilitated or participated in any offence of crimes against Humanity and genocide as listed in the charges. The accused has been implicated in the case by the present Government for political victimization as he had taken the charge of secretary general of Jamaat-e-Islami after the arrest of its secretary general Ali Ahsan Mohammad Muzahid.

XI. Burden of the Prosecution

37. 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 occupation army and (d) the context of carrying out of alleged atrocious crimes directed against civilian population and a particular group of population. In determining culpability of the accused prosecution is to establish too that (1) the perpetrator must know of the broader context in which the act committed and (2) the act must not have been carried out for purely personal motives of the perpetrator.

XII. Points to be determined

38. 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 leader or commander of Al-Badr Bahini at the relevant time;
- (ii) whether the accused was substantially associated with Pakistani army and his activities for facilitating the commission of offences.
- (iii) whether the accused physically participated in the commission of crimes as alleged, and
- (iv) whether the allegations against the accused constitute a serious case of 'crimes against Humanity' and 'genocide'.

XIII. Whether the accused can be prosecuted without prosecuting his accomplices

39. According to the charges it is revealed that apart from the accused, some other armed Razakars/ Al-Badrs and co-perpetrators along with Pakistani army accompanied the accused at the crime scene in committing the crimes. Excepting the 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 attack on the civilian population constituting crimes against Humanity and genocide untrue or give any immunity to the accused. 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 which states that 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.

XIV. Summing up the prosecution Case

40. Mr. Golam Arif Tipu, the learned Chief Prosecutor having narrated the historical context of Bangladesh, the long liberation movement since 1952-1971 and the barbaric atrocious acts of Pakistani occupation army with the colaboration of leaders and members of Jammata-e-Islami, Islamic Chhatra Sangha [ICS], Razakar Bahini, Al-Badr Bahini, Al-Shams Bahini and Peace Committee during the Liberation War, has submitted that those contexts and facts may be borne in mind in assessing and evaluating the evidence on record. He has further submitted that it his also to be born in mind that the trial is being held after 43 years of the atrocities occured in 1971.

41. Mr. Tapas Kanti Baul, the learned Prosecutor referring to the charges and the evidence adduced by the prosecution, has submitted that the prosecution has proved all the 6(six) charges brought against accused A.T.M Azharul Islam beyond reasonable doubt. The prosecution witnesses are most competent, credible, trust worthy and natural witnesses, some of whom are eye witnesses, victims, members of victim families and organizers of the historic Liberation War of 1971 and as such there is no scope to disbelieve or brush aside their evidence. Mr. Baul has further submitted that the minor inconsistencies or discrepancies in the evidence of a particular event, if any, has to be over looked taking into consideration that the witnesses have deposed before the Tribunal long after 43 years of the horrific events and it is quite natural that the memory of live witnesses may have been faded and invaluable documents have been destroyed by the passage of time.

42. Ms. Turin Afroz, the learned Prosecutor referring to the evidence, has submitted that the prosecution has been able to produce 'sufficient evidence' to prove the Superior Command Responsibility of accused A.T.M Azharul Islam, the leader of **ICS** and Al-Badr Bahini of Rangpur district over the perpetrators, in committing the crimes against Humanity and genocide during the Liberation War in 1971 as listed in the charges. In this connection she has cited various decisions on the issue of 'Superior and Command Responsibility' pronounced by the **ICTR** and **ICTY** [both the Trial Chambers and the Appeals Chamber] and the observations made by this Tribunal in the judgment of the **Chief Prosecutor Vs. Professor Ghulam Azam** particularly paragraph 339 of the judgment, which runs as follows:

"However, we have to bring it in our mind that knowledge is an abstract thing and there can not be any concrete proof or evidence to show that a particular thing was within someone's knowledge. Hence the Tribunal has to infer the knowledge of the accused from the facts, circumstances and from the context of the case. Especially if the Tribunal has to examine constructively as to whether the accused had reason to know of a particular fact, it has to infer it from the facts, circumstances and the context of the case. The burden is more upon the Tribunal to infer than on the prosecution to produce evidence specifically, as the knowledge requirement was primarily not mentioned in section 4(2) of the ICT Act, 1973 explicitly. This Tribunal will evaluate the produced evidence to conclude whether the accused knew or had reason to know that his subordinates were committing or were about to commit crimes

mentioned in section 3(2) of the Act in due course of time."

43. Ms. Turin referring to section 4(1) of the ICT Act, 1973 has further submitted that 'Joint Criminal Enterprise' **[JCE]** is an agreement or understanding of some persons to execute a common criminal plan and that in fact section 4(1) of the Act of 1973 refers to **[JCE]** liability, although it has not been categorized in our Statute, as evolved through judicial pronouncement in the case of **Tadic [ICTY]** and that the expression 'common purpose', 'awareness of foreseeable consequence' of act or conduct 'intent' are the key factors involved with the notion of **JCE** liability and that evidence shows that accused A.T.M Azharul Islam incurs liability under section 4(1) of the Act 1973 in the commission of offences as listed in the charges.

44. Prosecutor Ms. Rezia Sultan Begum has recalled back on the issue 'Defence case-plea of Alibi' that the documents [exhibits A-H] filed by the defence are not at all related to the horrific atrocious acts and events. No specific defence plea could be attributed from the trend of cross-examination of prosecution witnesses by the defence, rather contradictory suggestions have been put to the prosecution witnesses, in order to prove the plea of alibi. The defence has not disputed the facts as alleged. She has further submitted that D.W-01 is not a competent witness and he [D.W-01] has deposed beyond the scope of the ROP of 2010 where it has been provided that the onus of proof as to the plea of alibi or to any particular fact or information of the defence shall be relied upon the defence. She has further submitted that accused A.T.M Azharul Islam was a student of Rangpur Carmichael

College during the period of 1969-1971 and also a leader of **ICS** and Al-Badr Bahini, a killing squad, of Rangpur district.

45. Concluding the summing up of the prosecution case Mr. Zead Al-Malum, the learned prosecutor has submitted that since the prosecution has successfully proved all the 6(six) charges against accused A.T.M Azharul Islam, thus he [accused] deserves highest punishment as provided in section 2(2) of the ICT Act of 1973.

XV. Summing up the defence Case

46. Defence counsel Mr. Abdus Sobhan Tarafder in summing up the defence case has submitted that for political victimization accused A.T.M Azharul Islam has been implicated in the case. Assailing the evidence on record he has further submitted that the prosecution witnesses are not at all credible and trust worthy, rather they are partisan and interested witnesses and as such their evidence should be left out of consideration. Moreso, the witnesses have made contradictory statements on material points. Mr. Tarafder has pointed out some procedural flaws in arresting the accused and investigation process of the case and submitted that those were done in violation of relevant law and rules and thereby the accused has been prejudiced seriously. He has drawn our attention to the discrepancies existed in the documentary evidence adduced by the prosecution.

47. Mr. Shishir Mohammad Monir, another defence counsel has argued that the prosecution has failed to provide sufficient evidence to prove the command responsibility of accused A.T.M Azharul Islam in committing crimes against Humanity and genocide during the Liberation War in 1971 as listed in the charges. He has further claimed

that the accused did not hold a position of command during the Liberation War. Referring to some judgment of **ICTY** and **ICTR** he has further argued that to establish Command Responsibility of the accused in committing the crimes as listed in the charges the prosecution has failed to bring up the elements which make up the crime and thus merit punishment.

48. Mr. Monir has also argued on the admissibility of hearsay evidence, saying that the evidence lost its weight or 'probative value' when hearsay witnesses had made contradictory testimonies. He has further argued that the prosecution has also failed to fulfill the elements of Joint Criminal Enterprise [**JCE**] by adducing cogent evidence against the accused.

49. Finally, both the learned defence counsels have submitted that since the prosecution has failed to prove any of the charges beyond doubt, the accused is liable to be acquitted.

XVI. Status of the accused and the role played by accused in committing horrific atrocities during the Liberation War in 1971

50. It has become a common knowledge in the birth history of Bangladesh that during the Liberation War in 1971 Pakistani invading forces with the help of anti-liberation people organized auxiliary forces known as Rajakar Bahini, Al-Badr Bahini, Al-Shams and Peace Committee for the purpose of their operational support in implementing its atrocious activities in furtherance of common plan and design to fulfil their missions.

51. In the case in hand the defence has claimed rendering evidence through defence witness and giving suggestions to the prosecution witnesses that accused A.T.M Azharul Islam was not involved with the killing or horrific atrocious acts occurred in the areas of Rangpur district as alleged by the prosecution as a leader or a member of any auxiliary forces.

52. Now let us scrutinise and evaluate the oral and documentary evidence presented by both the parties as to the involvement of the accused in any manner as a direct perpetrator, abettor, aider or a member of the said auxiliary forces during the Liberation War in 1971. It is found from the evidence of P.W-03 Moklesur Rahman that he previously knew the accused because he [accused] used to come to their locality to campaign for the candidates of Jamaat-e-Islami [JEI] in the general election held in 1970. It has also revealed from the evidence of Md. Meser Uddin [P.W-04] that the accused was involved with the politics of student front of Jamaat-e-Islami. Accused being the student leader of JEI directly campaigned in favour of their candidates in the election of 1970. Immediately after the Liberation War the accused had gone into hiding and again became active in politics of Jamaat-e-Islami [JEI] when the change of political situation was taken place in 1975. This witness has reiterated in cross-examination that he recognized the accused as he was a HSC student of Carmichael College in 1970.

53. P.W-05 Md. Abdur Rahman has stated in his deposition that he saw accused A.T.M Azharul Islam alongwith Jamaat-e-Islami supporters and Pakistani army at Jharuar beel. P.W-06 Md. Mokbul

Hossain has testified that on 16 April, 1971 during the Liberation War the accused along with Pakistani occupation troops came to Tekshor Hut at 06 Rail Gomti by a train. Seeing their arrival he along with his mother ran towards Dhap Para. In cross-examination P.W-07 Md. Amirul Islam has told that he has come before the Tribunal to depose against the accused who was a leader of **ICS**, a student wing of anti-liberation organization named Jamaat-e-Islam. P.W-08 Md. Mujibur Rahman Master has disclosed that he himself participated in the campaign for Awami League candidates while the accused campaigned for the candidates of Jamaat-e-Islami in the election held in 1970. On 16 April, 1971 Pakistani invading forces along with followers of Jamaat-e-Islami and the accused came from Rangpur to Tekshor Hut at 06 Rail Gomti by a train and after getting down from the train they forwarded to the Mukshedpur village by firing shots. He has further testified that the accused was a student of Rangpur Carmichael College and he was the president of Islami Chhatra Sangha [**ICS**] of that college unit and was also a commander of Al-Badr Bahini in 1971.

54. P.W-09 Sova Kar has disclosed in her evidence that she could recognize the accused, a student leader of **ICS** of their college, standing beside some bangalees who aided the Pakistani forces to abduct her elder brother Professor Chittra Ranjon Roy and he [accused] was her class-mate. The accused was also identified by P.W-10 Ratan Chandra Das as Azahar among the other Bangalies who aided the Pakistani army to abduct four professors [intelligentsia] from the Rangpur Carmichael College campus.

55. P.W-11 Md. Sakhawat Hossain alias Ranga has also stated that the accused was known to him previously who used to communicate with 50cc motor bike at the relevant time and he was the commander of Al-Badr Bahini of Rangpur district. He had seen the accused driving a motor bike with a Pakistani flag. P.W-12 Md. Rafiqul Hasan alias Nannu has stated that he used to go to Carmichael College in the year 1969-70 as he had connection with the politics of Chhatra League. The accused was involved with the politics of Islami Chhatra Sangha at that time and was a HSC student of Carmichael College in science group. A.T.M Azharul Islam was not only the president of Islami Chhatra Sangha of Rangpur district but he was the commander of Al-Badr Bahini of Rangpur district unit.

56. It has also been evident by P.W-13 Advocate Rathish Chandra Bhowmik that he was intimated about the involvement of the accused, the president of **ICS** of Rangpur town unit, in the killing and torture plan of his father and others taken place at Dakhigonj crematorium through his relatives who met his injured father, who luckily survived, was admitted to Kuchbihar Hospital for treatment.

57. P.W-16 AYM Moazzem Ali heard the incident from victim Montu Dacter, who luckily survived, regarding involvement of the activists including the president of **ICS** in the torture and killing of his father and others at Dakhigonj crematorium. P.W-17 Tapan Kumar Adhikari has also echoed in the same voice like as P.W-16.

58. On the prayer of the prosecution under section 19(2) of the Act the statement of late Md. Abdul Jabber, a proposed prosecution witness who died earlier, has been received in evidence where he expressed that A.T.M Azharul Islam was a second year student of science group in Rangpur Carmichael Collage and he was the president of **ICS** of Rangpur district. During the Liberation War, members of **ICS** under the leadership of the accused joined Al-Badr Bahini at Badorgonj. Al-Badr Bahini of Rangpur district including Badorgonj was commanded and controlled by his leadership [accused]. All the aforesaid witnesses have identified the accused in the dock at the time of rendering their testimonies before the Tribunal.

59. Upon assessing the evidence as mentioned above, it is found that all the witnesses by corroborating each other have deposed against the accused particularly depicting that he was a leader of Islami Chhatra Sangha and head of the Al-Badr Bahini of Rangpur district or he directly aided, facilitated and participated in the commission of offences of atrocious acts occurred in different areas of Rangpur district during the Liberation War, 1971.

60. Moreso, in presence and assistance of P.W-18 Md. Azabuddin Miah, an assistant librarian of Bangla Academy, the investigation officer of the case collected and seized a photo copy of daily Sangram dated 13.09.1971 from Bangla Academy library, marked as Exhibit-13. This piece of document gives support to the testimonies of live witnesses, which is quoted beneath:

0.....iscj tRjv Bmj vgx QvTmstNi mfvcwZ
 Rbve Avhg Avj x I kni QvTmstNi mfvcwZ Rbve AvRnvi " j
 Bmj vgx GK weewZtZ knx` tgmevnDItbi kivr` tZ Mfvi tkvK
 cKvk Kti tOb|.....0

61. From the said news item it has emerged that the accused was the president of **ICS** of Rangpur town unit during the Liberation War. There is no doubt that this exhibit-13 is an ancient document which was published by the authority of daily Sangram on 13.09.1971. Everyone knows as a common knowledge that the then said newspaper was to publish most of the news items relating to Jamaat-e-Islami with intent to have a good relation with its numerous fellow supporters, so there is no question of ambiguity regarding the reliability of the said news item where it was stated that the accused was the president of **ICS** of Rangpur town unit. This piece of documentary evidence is enough to hold that the accused was a leader of **ICS**, a student wing of Jammat-e-Islami. Even if, in this particular event, the defence does not deny that the accused along with others, being the president of Islami Chhatra Sangha of Rangpur town unit did not make joint statement about the killing of one Mesbah Uddin by miscreants which was published in the said newspaper on 13.09.1971. Such evidence also finds support by P.W-19 SM Idris Ali, being investigation officer of the case, who seized a photo copy of the fortnightly report on political situation for the second half of October, 1971, from Special Branch, the then East Pakistan, Dacca marked as exhibit-16 of which para-21 under the caption "**Activities of Islami Chhatra Sangha [ICS]**" in which it has been stated as under:

“21. On 17.10.1971, a conference (100) of Pakistan ICS, Rangpur branch was held in Rangpur town with A.T.M Azharul Islam in the chair. Amongst others, Ali Hasan Md. Mujahid, Acting President EPICS addressed the Conference explaining the present situation of the country and urging the party workers to mobilize the youths of Islami spirit and launch strong movement against anti-Islamic activities. He also urged them to form Al-Badr Bahini at different levels for defending the country from internal and external attack.”

62. No doubt this exhibit-16 is also an old document which was prepared by the then high police officials rendering the purpose of the then Government in which at the relevant time it found the leadership of the accused as the president of **ICS**, Rangpur town unit. Although this document submitted by the prosecution but it can be presumed that it was the document of the accused because his political party supported the then Pakistan Government as well as Pakistani occupation forces for their actions in the part of this territory. So it is crystal clear that at the relevant time the accused was a leader of **ICS** of Rangpur town unit and at his instigation the horrific atrocious activities as alleged by the prosecution took place during the Liberation War in the areas of Rangpur district.

63. It is a true fact emerged from the ancient newspapers and the conduct of the members of **ICS** that they voluntarily joined Al-Badr Bahini and other auxiliary forces at the instance of its respective unit leader and JEI, the parent organization of **ICS** had also played a key

role against the Liberation War in collaboration with Pakistani invading forces which embraces the accused as a leader of **ICS** of Rangpur town unit to be involved in heinous atrocities taken place during the struggle of independence of Bangladesh. It is needless to seek direct proof of committing offences happened within the geographical areas of Rangpur district as it is undisputed history and it has become a fact of common knowledge. And there is no question of debate on commission of such horrific atrocities causing untold mayhem to the Bangalee nation.

64. In this case defence has not taken a plea of denial that the occurrences as alleged by the evidence of prosecution witnesses were not taken place in the areas of Rangpur district during the Liberation War. In that context if the prosecution can establish by evidence regarding leadership of the accused in the organization of Islami Chhatra Sangha as well as his presence at the time of occurrence then there will be of no darkness to rely upon for its inferences.

65. Defence contention is that the accused has been implicated in the instant case because of mere political grudge and supremacy in politics as he [accused] is presently the acting secretary general of Jamaat-e-Islami. This contention is not sustainable as the defence has never raised voice on cross-examination of the prosecution witnesses that the accused was not a student leader of **ICS** at the very relevant time and he was never a student of Carmichael College. Though the only defence witness, a distant relation with the accused, after closure of prosecution evidence, has come forward to state that his father-in-law's brother [accused] was not a student leader of Carmichael College from

1969 to 1974 but he has failed to narrate that the accused was not a leader of **ICS** of Rangpur town unit. So his conduct practically invites nexus with the student politics of Carmichael College as a student leader of **ICS** of Rangpur town unit was seemed to be found quite natural, rational and coherent.

66. Furthermore, the reality is that the prosecution has not brought the accused to book for his present leadership upon the Jamaat-e-Islami rather the prosecution has brought the allegations against the accused showing him as a leader of Al-Badr Bahini, death-squad, as well as leader of Islami Chhatra Sangha, a former student wing of Jamaat-e-Islami, which had played a vital role against the wilful desire and movement of ninety eight person Bangalees during the struggle of independence of the country.

67. Mr. Abdus Sobhan Tarafder, learned counsel on behalf of the accused, has contended that it is not believable and sustainable that the accused at the age of 18/19 years old having been empowered used to enter the Rangpur cantonment regularly with a view to assist the Pakistani occupation army to destroy the pro-liberation activists. On this contention it can be viewed that leadership or cute conduct of a man can be grown eventually before the attainment of 16 years age.

68. Mohiuddin Chaudhury, former President of **JEI** of greater Noakhali district unit and secretary of District Peace Committee in 1971, has been now residing in Pakistan since immediate after independence of Bangladesh, who after his son's death by an accident,

wrote a book titled "*Sunset at midday*" [Material exhibit-VIII] which was published in December, 1998 long before the inception of the Tribunal. In that book at page 119 he has stated that his brother-in-law [younger brother of his wife-Nargis], a student of class-VIII who was courageous, energetic and dynamic than his age, joined the Al-Badr Bahini. Joining Al-Badr Bahini at the age of 14 years the boy showed capability in his duty properly as disclosed by his own brother-in-law in the said book. So, the age is not a factor in such cases.

69. The position and the conducts as well as mental growth of a teenager are the main important considerations to be assessed an issue raised. There are so many instances in the birth history of Bangladesh that at the age of 14/15 years many youths joined the Liberation War in 1971. During the Liberation War Pakistani invading forces had no ideas over the identifications of the pro-liberation Bangalee people. So they [Pakistani Junta] needed to have absolute assistance by picking up reliable persons such as the accused and his cohorts to have executed their common plan and design upon eradicating the wholehearted independence seekers from the part of this territory.

70. Since the accused was a student and a leader of **ICS** of Rangpur town unit he naturally knew the teachers of the Carmichael College who belonging to a particular ideology which brought the independence of the country. Contributing his assistance as per his party's decision he along with his other associates inspired and invited Pakistani invading forces to apprehend Bangalee intellectuals from the said college campus as he knew them earlier in order to execute the missions of Pakistani

junta. So there is no way to escape by the accused for his direct involvement in abetting, aiding, facilitating with the Pakistani invading forces in the commission of abduction, torture and killing at the respective crime sites although there is no need to establish leadership of the accused in abetting and facilitating the commission of offences. The notion of authority of an accused has to be evaluated on a case by case basis considering the cumulative effect of conduct, activities and attitude of the accused together with his affiliation with the group or organization. It was held in the case of **Prosecutor -Vs- Brdanin** as under:

"In all circumstances, and especially when an accused is alleged to have been a member of collective bodies with authority shared among various members, it is appropriate to assess on a case-by-case basis the power of authority actually devolved on the accused, taking into account the cumulative effect of the accused's various functions." [Prosecutor V. Brdanin, ICTY Trial Chamber, case No. IT-99-36-T, Judgement, 1 September 2004, para 277]

71. In the case in hand some minor discrepancies may have appeared on the scanning of the evidence as to his [accused] leadership of Rangpur town branch, Rangpur district or Carmichael college branch. We have already held earlier in other cases that minor discrepancies may take place because the said horrendous incidents took place in the part of this territory around 42/43 years ago in 1971 and as such memory of live witnesses may have been faded but in reality, we have

found no significant inconsistencies in the testimony of the witnesses in proving the old incident taken place during the struggle of Liberation War. Moreover, insignificant discrepancy does not tarnish witness testimony in its entirety. And as such discrepancy needs to be contrasted with surrounding circumstances and testimony of other witnesses. Inconsistency itself should not be sole consideration to exclude the entire evidence eventually on material fact cannot be brushed aside. **ICTR Appeals Chamber** opined that-

“the presence of inconsistencies within or amongst witnesses’ testimonies does not per se require a reasonable Trial Chamber to reject the evidence as being unreasonable”

[Muhimana, (Appeals Chamber), May 21, 2007, para. 58].

72. During conflict situation leadership does not act or remain effective and disciplined following organizational hierarchy. On cumulative evaluation of testimony presented by the prosecution witnesses it inferred that accused had close, active and culpable affiliation with the local perpetrators along with Pakistani occupation troops by virtue of his political position.

73. As per evidence of said prosecution witnesses it has invited us to hold that accused A.T.M Azharul Islam had actively acted in aid of the occupation forces to the accomplishment of crime fingering chiefly pro-liberation civilians including Hindu community in Rangpur in the capacity of president as well as influential person of **ICS** and by virtue of his leadership in student politics of **ICS** he subsequently became a

commander of Al-Badr Bahini in Rangpur. The act of accompany the troops is a strong indicative regarding his authoritative capacity that he achieved by dint of leadership in the function of the student organization.

74. Upon scrutiny of the oral evidence presented by aforesaid witnesses coupled with documentary proof, it is well established that the accused was a leader and influential person of the then Islami Chhatra Sangha in Rangpur district during the Liberation War in 1971 and he actively and directly participated in various atrocious activities committed by local members of auxiliary forces in association with Pakistani blood-hungry soldiers. Therefore, the above mentioned oral and documentary evidence are enough to hold that prosecution has successfully proved the status and role of the accused as a leader or a member or an influential person of auxiliary forces as defined in section 2(a) of the Act at the time of commission of offences for which the accused has been indicted. Nevertheless, even in the capacity of an 'individual' or 'a member of group of individuals' the accused is liable to be prosecuted under section 3(1) of the Act if he is found to have committed the offences as specified under section 3(2) of the Act of 1973.

XVII. Adjudication of charges

Adjudication of charge no. 01

[Murder, abduction, confinement and torture at different places of Rangpur Sadar]

75. **Summary charge:** Accused A.T.M. Azharul Islam being the president of Islami Chhatra Sangha, Rangpur unit, along with armed members of Jamaat-e- Islami, Islami Chhatra Sangha and Pakistani army, in continuation of their planning and blue-print, on 24.03.1971 at about 5.00/5.30 P.M. abducted Durgadas Adhikari, a supporter of Awami League, and his younger son Uttom Kumar Adhikari, a S.S.C examinee, from their house, situated at Dhap Engineer Para of Rangpur Sadar; on 27.03.1971 at about 11.00 A.M. they abducted Advocate A.Y. Mahfuz Ali alias Zorrej Miah from the road of Munshipara of Rangpur Sadar, and at about 3.00 P.M. abducted Dr. Deenesh Chandra Bhowmik alias Montu Dakter, a supporter of the Liberation War, from his house situated at Babu Para Alam Nagar under Kotwali Police Station, Rangpur, and on the same day [27.03.1971] abducted Ehsanul Haque Dulal alias Dulal Miah, Md. Rafiqul Islam alias Rafique Ali and rickshaw-pullers, namely Tofzzal Hossain Mohoram alias Mohammad Moharam, Gopal Chandra Halder and Khitish Halder from above mentioned Dhap Engineer Para. Accordingly, the accused and his said accomplices having abducted unarmed 11 civilians took them to Rangpur cantonment and having confined there tortured them for seven days and, thereafter on 03.04.1971 at dead of night having brought them at the crematorium of Dokhigonj, Rangpur town killed them there by brush-firing, but Dr. Deenesh Chandra Bhowmik alias Montu Dakter was luckily escaped, though he sustained bullet injury [now he is dead]. Thus, the accused has been charged for abetting and facilitating the commission of offences of abduction, confinement, torture and murder

as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973.

Discussion and evaluation of evidence and findings:

76. To prove charge no.01, the prosecution has examined as many as five live witnesses [P.Ws-04, 08, 13, 16 and 17].

77. P.W-04. Md. Meser Uddin has deposed that since before the Liberation War, 1971, accused A.T.M. Azharul Islam was involved with the politics of student front of Jamaat-e-Islami. After Liberation War he heard about amongst other incidents that Pakistani army with the co-operation of accused A.T.M. Azharul Islam also killed Zorrej Miah, Montu Dakter and his [P.W-04] class-mate Mukter Elahi. After Liberation, accused A.T.M. Azharul Islam absconded and, in 1975 after the change of political situation the accused became active in the politics of Jamaat-e-Islami. He has identified the accused in the dock.

78. P.W-08 Md. Mojibor Rahman Master has stated that at the last part of April, 1971 he thought that he was not safe in the country and as such he went to India to participate in the Liberation War and , he stayed there for nine months during the Liberation War. During his stay in India he heard from Montu Dakter, who came to India from Rangpur, that on 03.04.1971 Pakistani army having taken eleven persons including Zorrej Miah to the crematorium, situated at Dokhiganj of Mahiganj, Rangpur, shot them of whom ten persons were killed on the spot and he [Montu Dakter] was luckily survived though he sustained bullet injuries. He has further stated that after liberation of Bangladesh he came back to Rangpur on 21.12.1971 and then Montu Dakter also

told him that along with Pakistani army accused A.T.M. Azharul Islam also had been involved with the said killing at Dokhiganj crematorium.

79. P.W-13 Advocate Rathish Chandra Bhowmik has testified that on 27.03.1971 at about 3.00 P.M. Pakistani army along with the members of Jamaat-e-Islami and Islami Chhatra Sangha having surrounded their house abducted his father Montu Dakter and took him into their vehicle waiting on the road. They saw the said incident from their house. He has further testified that thereafter the said abductors also abducted his maternal uncle Shanti Chaki from the other side of the road and also took him into the said vehicle and then they left for the city with the abductees. Thereafter, they made search at different places but could not find out his father and maternal uncle. He has also testified that on 03.04.1971 at about 2.30/3.00 at night they heard the sound of heavy firing shots coming from Dokhiganj crematorium. After about one month his family and his uncle's family went to New Jalpaiguri, India and took shelter in a railway quarter of his maternal uncle Debu Chaki where he along with others met his father Montu Dakter. At that time his father told them that Pakistani army and their accomplices having abducted took him to cantonment and confined him there where he found Durgadas Adhikari of Rangpur and his son Uttam Adhikari. His father further told them that on 24.03.1971 at about 3.00 P.M. Pakistani army and their accomplices having abducted them from their house, situated at Dhap Engineer Para of Rangpur city, took them to Rangpur cantonment and confined them there and, on 27.03.1971 they abducted one A.B.Y Mahfuz Ali Zorrej, an income tax lawyer and a leader of NAP, from his house, situated at Munshipara, and took him to

Rangpur cantonment. On the same day they also having abducted Khurrom, Mohorrom and Dulal of Dhap Engineer Para and Khitish Halder and Gopal Adhikari from a church took them to Rangpur cantonment and confined them there. P.W-13 has also testified that Pakistani army and their accomplices i.e. the leaders of Jamaat-e-Islami and its Chhatra Sangha, including the president of Rangpur district and city committee, used to torture his father Montu Dakter and other abductees in Rangpur cantonment upto 03.04.1971. At about 2.30/3.00 A.M. on 03.04.1971, his father including all other abductees were taken to Dokhiganj crematorium, five kilometres far from Rangpur cantonment, and at about 3.30 A.M. Pakistani army and their accomplices brush-fired at them and as such ten abductees were killed on the spot and his father Montu Dakter survived sustaining bullet injuries who was later on sent to India and when he was under treatment at Kuchbihar Hospital, India, told Mojibor master of Badorgonj, MNA Shah Abdur Razzaque and Anisul Haque Piyara of Peergasa , Rangpur and his [P.W-13] relatives, who went to that hospital, that accused A.T.M. Azharul Islam, the president of Islami Chhatra Sangha, Rangpur city unit , was involved with the planning and said killing and torture. His father Montu Dakter died on 29.11.1989.

80. In cross-examination he has stated that he joined legal profession in Rangpur since 01.01.1990 and, he cannot remember whether any case or G.D. Entry was lodged after liberation of Bangladesh upto 1975 or during the regime of Awami League lead government in 1996 regarding the abduction of his father.

81. P.W-16 A.Y.M Moazzem Ali has deposed that on 27.03.1971 at about 11.00 A.M. Pakistani army having abducted his father [A.Y. Mahfuz Ali alias Zorrej Miah] from infront of their house took him to Rangpur cantonment. On 03.04.1971 at dead of night Pakistani army after having severely tortured ten persons including his father in Rangpur cantonment took them to Dokhiganj crematorium and shot them dead there, but luckily Montu Dakter survived. On the following day they brought the dead body of his father from the crematorium to their house and buried the same at the north side of their house. He has further deposed that after liberation of the country he heard from Montu Dakter about the said incidents. Montu Dakter told them that many of Islami Chhatra Sangha including accused A.T.M. Azharul Islam, the president of Islami Chhatra Sangha, were involved with the said abduction, torture and killing.

82. P.W-17 Tapan Kumar Adhikari has stated that on 24.03.1971 at about 5.30 P.M. Pakistani army attacked their house and abducted his father [Durga Das Adhikhari] and younger brother Uttam Kumar Adhikari therefrom. At that time he along with other members of his family went out through the back door of their house. On 28.03.1971 Pakistani army brought his father and said younger brother to their area and having abducted Ehsanul Haque Dulal, Rafiqul Islam and Mohorrom of their locality and Khitish Halder and Gopal Halder from a church took them to cantonment. At that time Pakistani army also abducted Dinesh Chandra Bhowmik alias Montu Dakter, Zorrej Miah, Shanti Chakma and others from different places of the town and took them to cantonment on 03.04.1971 at night they took eleven abductees

to Dokhiganj crematorium and shot them to death there, but Montu Dakter luckily survived. He has also stated that thereafter he along with all other members of his family went to India and, after liberation of the country, in the month of February, 1972 they came back to Rangpur and met Montu Dakter who described them the incident of torture upon them in the cantonment and told them that the members of Islami Chhatra Sangha including the president of that Chhatra Sangha used to come to Rangpur cantonment.

83. Upon scrutiny of the evidence adduced by the aforesaid five live witnesses [P.Ws-04,08,13,16 and 17] against the accused, it appears that the learned defence counsel has cross-examined them [witnesses] thoroughly to ascertain their veracity and credibility. Now the question is whether the prosecution has been able to prove the instant charge beyond reasonable doubt.

84. From the evidence of P.W-04 Md. Meser Uddin it has revealed that after the Liberation War he heard amongst other incidents that Pakistani army with the co-operation of accused A.T.M. Azharul Islam killed Zorrej Miah, Montu Dakter and his [P.W-04] class-mate Mokter Elahi, but from whom he heard about the said alleged occurrence has not been disclosed in his evidence. P.W-08 Md. Mojibor Rahman Master is also a hearsay witness who has stated that during his stay in India he heard from Montu Dakter that on 03.04.1971 Pakistani army having taken eleven persons including Advocate Zorrej Miah to Dokhiganj crematorium shot them of whom ten persons were killed on the spot and he [Montu Dakter] luckily survived. This witness has not stated that at that time Montu Dakter told him that accused A.T.M. Azharul

Islam was involved with the said atrocities. Rather, he has stated that after liberation of Bangladesh he came back to Rangpur on 21.12.1971 and then Montu Dakter told him that along with the Pakistani army accused A.T.M. Azharul Islam was involved with alleged killing at Dokhiganj crematorium. P.W-13 Advocate Ratish Chandra Bhowmik has stated that on 27.03.1971 at about 3.00 P.M. Pakistani army along with the members of Jamaat-e-Islami and Islami Chhatra Sangha having surrounded their house abducted his father Montu Dakter and they saw the said incident from their house. But this witness has not stated in his deposition that at the time of alleged abduction of his father he saw accused A.T.M. Azharul Islam present with the Pakistani army at the place of occurrence. It has revealed from the evidence of P.W-13 that after about one month of the commission of the alleged atrocities this witness along with his family members went to New Jalpaiguri, India where they met with his father Montu Dakter who told them about the commission of alleged atrocities. It is not stated in his evidence that at that time Montu Dakter told them that accused A.T.M. Azharul Islam was involved with the alleged atrocities. In cross-examination, P.W-13 has stated that he joined legal profession in Rangpur since 01.01.1990 and, he cannot remember whether any case or G.D. Entry was lodged after liberation of Bangladesh upto 1975 or during the regime of Awami League lead government in 1996 regarding the abduction of his father. P.W-16 A.Y.M Moazzem Ali is also a hearsay witness who has deposed that after liberation of the country he heard from Montu Dakter about the alleged atrocities. P.W-17 Tapon Kumar Adhikari has said that on 24.03.1971 at about 5.30 P.M. Pakistani

army attacked their house and abducted his father [Durga Das Adhikhari] and younger brother Uttam Kumar Adhikari therefrom and at that time they went out through the back door of their house. This witness has not said that at the time of abduction of his father and brother the accused was present at the place of occurrence with the Pakistani army.

85. It appears from the evidence of the prosecution witnesses that the alleged victim Dr. Dinesh Chandra Bhowmik alias Montu Dakter [father of P.W-13] died in the year of 1989. The prosecution could not produce any eye witness in support of alleged torture and killing. On the other hand, we find some discrepancies in the hearsay evidence of the prosecution witnesses. The fundamental principle of criminal jurisprudence is that onus of proving everything essential to establishment of charge against accused lies upon the prosecution which must prove charge substantially as laid down i.e. to prove to the hilt beyond all reasonable doubt on strength of clear, cogent, credible and unimpeachable evidence. Proof of charge must depend upon judicial evaluation of totality of evidence, oral and circumstantial, and not by an isolated scrutiny. Prosecution version is, also, required to be judged taking into account overall circumstances of the case with a practical, pragmatic and reasonable approach in appreciation of evidence. It is always to be remembered that the graver the charge the greater is the standard of proof required.

86. Ms. Tureen Afroz, the learned prosecutor has argued that according to settled jurisprudence of International Law 'hearsay evidence' is not inadmissible *per se*, even when it is not corroborated by

direct evidence. The Tribunal can safely act on 'anonymous hearsay' evidence without any corroboration. It has been further submitted that in the instant case the accused is being tried long four decades after the atrocities were committed. Naturally direct witness may not be available. Thus even anonymous hearsay evidence alone may be relied upon to prove a material fact, considering the reality and context prevailing in 1971.

87. Per contra, Mr. Shishir Mohammad Monir, the learned defence counsel has contended that though hearsay evidence is not inadmissible *per se*, but it needs to be corroborated by 'other evidence' direct or circumstantial. Prosecution relies wholly upon hearsay evidence to prove the instant charge, but there has been no corroborative evidence. As a result, hearsay evidence of the prosecution witnesses on material facts deserves to be excluded. It has been further submitted that hearsay evidence may be taken into account only if it satisfies the test of relevance, credibility and probative value.

88. Both sides concede that hearsay evidence is admissible in determining the material facts related to the principal event of crimes. But mere admission of hearsay evidence does not render it carrying probative value. Such hearsay evidence is to be weighed in the context of its credibility, relevance and circumstances. Hearsay evidence is admissible and the court can act on it in arriving at decision on fact in issue, provided it carries reasonable probative value [Rule 56(2) of the ROP, 2010]. This view finds support from the principle enunciated in the case of **Muvunyi** which is as follows:

“Hearsay evidence is not per se inadmissible before the Trial Chamber. However, in certain circumstances, there may be good reason for the Trial Chamber to consider whether hearsay evidence is supported by other credible and reliable evidence adduced by the Prosecution in order to support a finding of fact beyond reasonable doubt.”

[Muvunyi, (ICTY Trial Chamber), September 12, 2006, para -12]

89. Keeping the legal position as discussed above, the Tribunal will take advantage to weigh the probative value of hearsay evidence of the witnesses [P.Ws-04, 08, 13, 16 and 17] made before the Tribunal in relation to the instant charge no. 01 framed against the accused. After careful consideration of the hearsay evidence as discussed above, it appears that the said hearsay evidence is not supported by other credible and reliable evidence adduced by the prosecution in order to support the instant charge beyond reasonable doubt. Thus the hearsay evidence as discussed above relating to alleged involvement of the accused with the atrocities as mentioned in charge no. 01 does not offer certainty about the alleged fact that the accused accompanied the Pakistani army and other armed persons at the time of the occurrence.

90. On a close scrutiny of the entire evidence and materials on record it appears that the alleged abduction, confinement, torture and murder might have been committed at different places of Rangpur Sadar as narrated in the instant charge, but the involvement of the accused with the said atrocities is doubtful and, as such, the benefit of doubt must be given to the accused.

91. Considering all the evidence and attending circumstances as discussed above, we are led to hold that the prosecution has failed to establish the instant charge beyond reasonable doubt that accused A.T.M. Azharul Islam by his act or conduct abetted or facilitated the commission of offences of abduction, confinement, torture and murder as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973.

Adjudication of charge no. 02

[Murder, plundering and arson at village Moksedpur]

92. **Summary charge:** On 16.04.1971 at about 1.00 P.M. accused A.T.M. Azharul Islam being the president of Islami Chhatra Sangha, Rangpur unit, along with armed members of Jamaat-e-Islami, Islami Chhatra Sangha and Pakistany army, in continuation of their planning and blue-print, having arrived at his area named Taxerhut Railgomti under Badorgonj Police Station by a train, proceeded towards Moksedpur Dhap Para and on the way the Pakistani army with the help of the accused and his said accomplices plundered many houses situated beside the road and then set them on fire. Thereafter, the accused and his accomplices having reached at Dhap Para area attacked the village Moksedpur and started firing indiscriminately and as a result unarmed civilians namely, (1) Jangoli Bhorosha (2) Kerad Hossain alias Bishu (3) Mst. Chini Mye (4) Ammye (5) Momtaz Uddin (6) Mowlovi Abdul Quddus Ali (7) Tamir Uddin alias Tamiz Uddin (8) Moriom Nessa Kalti Mye (9) Sarijannessa alias Sukhi Mye (10) Yusuf Ali [sustained bullet injury but died after Liberation] (11) Shadhina (12) Azizar Rahman alias Khoka (13) Zahir Uddin (14) Osman Ali and others

were killed. Thus, the accused has been charged for abetting and facilitating the commission of offences of murder, plundering and arson as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973.

Discussion and evaluation of evidence and findings:

93. To prove charge no. 02, the prosecution has examined as many as six live witnesses [P.Ws-03, 04, 05, 06, 08 and 11] and produced some documentary evidence [Exhibits. 13 and 16].

94. P.W-03 Moklesur Rahman Sarkar alias Md. Mokles Ali has deposed that on 16.04.1971 a train reached rail gate no. 06, adjacent to Taxerhut, from Rangpur and Pakistani army, accused A.T.M. Azharul Islam and other members of Jamaat-e-Islami came there by that train. The accused and his accomplices having got down from the train proceeded towards north and on the way they set fire to the houses beside the road and started firing indiscriminately. Thereafter, they came to their village Uttar Ramnathpur and then his [P.W-03] mother, two brothers and two sisters having seen the accused and his accomplices coming to their village went to Pathanerhut and he and his father Momtaz Ali Sarkar remained in their house to guard their house. When Pakistani army and their accomplices surrounded their house he went into hiding in a bush and his father was caught hold of by them when he was fleeing away. He has further deposed that then he saw from inside the bush that accused A.T.M. Azharul Islam pushed down his father when he caught his [accused] legs and then Pakistani army shot him dead. He also saw from inside the bush that they also killed Munshi Quddus of their village in the same way. After departure of

Pakistani army and their accomplices, he saw fifteen dead bodies lying at different places of their village of them the dead bodies of his father Momtaz Ali Sarkar, Quddus Munshi, Zahiruddin, Chini Mye, Ammye, Jangali Bhorosha, Bishu, Tamir Uddin, Abu, Tina, Kalti Mye, Shadhina and Yusuf Ali were there. Thereafter, when the villagers assembled there he heard from them that the baby came out from the womb of Kalti Mye when she sustained bullet injury. He heard from Aminul and Yeahya that Pakistani army also killed Yusuf. He has identified the accused in the dock.

95. In cross-examination, this witness has stated that he knows the rail gate no. 6 of Taxerhut from where 4/5 kilometres away towards north Dhap Para is situated. He is not involved with any politics. He has denied the defence suggestion that on the day of occurrence he went to Mondol Para of Radhanagar with his mother. It is further denied by this witness that on 16.04.1971 accused A.T.M. Azharul Islam did not go to rail gate no. 6 of Taxerhut with Pakistani army and the accused did not go to their locality in 1970 or before or in 1971. He has also denied the defence suggestion that he has deposed falsely.

96. P.W-04 Md. Meser Uddin has testified that on 16.04.1971 Pakistani army and accused A.T.M. Azharul Islam along with his accomplices came to rail gate no. 6 by a train and got down there therefrom and then they proceeded towards Moksedpur of Ramnath Union and on the way they set fire to the houses and shot fire indiscriminately at both sides of the road. At that time the people of the locality being afraid of started to flee away towards Uttar Moksedpur and Dhap Para area to save their lives and then Pakistani army and

accused A.T.M. Azharul Islam and his accomplices having surrounded that village killed fifteen persons of them there were Jangali Bhorosha, Bishu, Momtaz, Anu Mye, Kalti Mye and Tamir Uddin. He has further stated that at the time of said occurrence Kalti Mye was nine months pregnant and her baby came out from her womb when she was shot. Martyr Jangali Bhorosha was the father of his paternal aunt. He has also testified that he himself did not see the said occurrence, but he heard the same from Aminul [P.W-07], Mokles [P.W-03], Mokbul [P.W-06], Azmal Khan and many others. Accused A.T.M. Azharul Islam was a student leader of Jamaat-e-Islami in 1970 and after liberation of the country he absconded. He has identified the accused in the dock.

97. In cross-examination he has stated that the distance between rail gate no.6 and Taxerhut is short and the distance from Taxerhut to Dhap Para is about $2\frac{1}{2}$ kilometres. He has denied the defence suggestions that on 16.04.1971 accused A.T.M. Azharul Islam did not come to rail gate no.6 from Rangpur by a train with Pakistani army and, the accused did not come to his [P.W-04] locality before the general election held in 1996. He has also denied that Pakistani army and accused A.T.M. Azharul Islam and his accomplices did not kill fifteen persons having surrounded Uttor Moksedpur and Dhap Para area.

98. P.W-05 Md. Abdur Rahman has stated that on 16.04.1971 they went to Taxerhut to see the incident held on the previous day and at about noon when they were coming back to their house therefrom they saw a train coming to rail gate no. 6 from Rangpur and then they took shelter in a nearby pond from where they saw the train to stop at rail

gate no.6. Thereafter, Pakistani army, accused A.T.M. Azharul Islam and many supporters of Jamaat-e-Islami having got down from the train proceeded towards Taxerhut. He has further stated that they having seen the occurrence came back to his village. After sometime he saw flame of fire at Dhap Para and heard sound of firing coming from there. At about 5.00 P.M. Pakistani army and their accomplices went back by that train. Thereafter, he [P.W-5] and others went to Taxerhut and heard from the persons assembled there that many houses were set on fire and many people were killed at Dhap Para. Then they went to Dhap Para where they found many people to cry of whom one Aminul told them that fifteen people including his aunt were killed. They also found about one hundred and fifty houses in burnt condition and five dead bodies and the other dead bodies had been taken away by their relatives. He has also stated that they having seen those incidents came back to their house and heard from his elder brother and other villagers that accused A.T.M. Azharul Islam along with his accomplices and Pakistani army committed those killings at Dhap Para. He has identified the accused in the dock.

99. In cross-examination, he has stated that their house is situated beside the rail line at south side. Accused A.T.M. Azharul Islam was the president of Islami Chhatra Sangha and he was a student of Carmaichael College. The accused participated in the general elections held in 1996, 2001 and 2008. He has denied the defence suggestions that he did not know the accused in 1971 and it is tutored that on 16.04.1971 the accused was with Pakistani army. It is also denied by him that on 16.04.1971 accused A.T.M. Azharul Islam did not go to the

place of occurrence and he did not participate in the killing of Dhap Para with Pakistani army.

100. P.W-06 Md. Mokbul Hossain has deposed that on 16.04.1971 accused A.T.M. Azharul Islam along with Pakistani army came to rail gate no. 6 of Taxerhut by a train and got down there from the train and proceeded towards Taxerhut and set fire to the houses of that locality and fired shots there. When Pakistani army and the accused came to their village he [P.W-06] along with his mother started running towards Dhap Para and at one stage his mother being unable to run more told him to flee away and she would come later slowly. Then he started running through 'Ayl' [very narrow passage in paddy fields] and after sometime he heard sound of firing shots and then he saw at the back side that accused A.T.M. Azharul Islam and two Pakistani army men fired shots at his mother who fell down on the spot after making a loud cry. He has further deposed that he also saw that the accused and Pakistani army shot one Tomiz to death and then he went into hiding in a ditch for about three hours and thereafter he saw from inside the ditch by raising his head that accused A.T.M. Azharul Islam and Pakistani army set fire to different houses of Dhap Para, Mridha Para, Thonthoni Para and Molla Para and killed about 14/15 persons by firing shots. Thereafter, he and others came to Dhap Para and saw there 4/5 persons killed of whom Bhorosha , Bishu, Shukhi Mye, Kalti Mye, Chini Mye and Tomizuddin were there and then he heard from persons present there that the accused along with Pakistani army committed those killing and arson. Thereafter, they brought the dead

body of his mother to their house and buried the same there. He has identified the accused in the dock.

101. In cross-examination, he has stated that Dhap Para is situated at a quarter mile away towards north from their village. He does not know how to read and write. In 1971, he used to cultivate lands of others. His house is situated in union no. 8 and in 1970/1971 one Zahiruddin was the chairman of their union parishad and at present Jahangir is the chairman of their union parishad. He has further stated that rail gate no. 6 is situated around $3\frac{1}{2}$ kilometres away towards south from his house. He has denied the defence suggestions that on 16.04.1971 the accused did not come to rail gate no. 6 of Taxerhut by a train with Pakistani army and the accused did not go to Taxerhut and he did not set fire nor did he fire any shot . It is also denied by him that he has deposed falsely.

102. P.W-08 Md. Mojibor Rahman Master has testified that during the Liberation War he was a teacher of Shampur High School at Badorganj and he is a freedom-fighter. During the Liberation War , on 16 April he came to know that a train coming from Rangpur reached rail gate no. 6 of Taxerhut and then Pakistani army, members of Jamaat-e-Islami and accused A.T.M. Azharul Islam having got down from that train proceeded towards village Moksedpur, situated at north side, by firing shots. At that time local people being afraid of started running hither and thither and then fifteen persons were killed by gun-shots of the Pakistani army and members of Jamaat-e-Islami and out of fifteen dead persons there were women and babies also and of them one was Kalti

Mye. He has further testified that thereafter when he went to the place of occurrence he heard from Moklesur Rahman, Mokbul and Aminul Islam that accused A.T.M. Azharul Islam was involved with the commission of said atrocities. He used to know the accused since before 1971 who was a student of Rangpur Carmaichael College and the president of Islami Chhatra Sangha of that college unit and also a commander of Al-Badr Bahini in 1971. He has identified the accused in the dock.

103. In cross-examination he has stated that he passed the B.A. examination from Rangpur Carmaichael College in 1968. He was the president of Awami League, Badorgonj Thana unit since 1969 to 1990, but at present he does not hold any post of that political party. He is a member of the executive committee of the district Muktijodda Sangsad. He has further stated that Taxerhut is situated at around 10 miles away towards west from his house. In 1971, Badorgonj union was situated within the head quarter of Badorgonj police station. Taxerhut is situated at four miles away towards west from Badorgonj Bazar. On 16.04.1971 he was in the house of Abul Kashem, his brother-in-law [wife's sister's husband]. He has denied the defence suggestions that Moklesur Rahman, Mokbul and Aminul Islam did not tell him about the occurrences held on 16.04.1971 and he has deposed falsely.

104. P.W-11 Md. Shakhawat Hossain alias Ranga has stated that during the Liberation War, 1971 he was 15 years old and a student of class VIII of Rangpur Zilla School. He heard that accused A.T.M. Azharul Islam was involved with the killing in Jharoar beel, Dhap Para and other places. He has identified the accused in the dock.

105. In cross-examination he has denied the defence suggestions that in 1971 his age was much below than 15 and he was not a student of class VIII of Rangpur Zilla School in that year. He has also denied the defence suggestion that he has deposed falsely.

106. Upon scrutiny of the testimonies of said six live witnesses [P.Ws-03, 04, 05, 06, 08 and 11] as discussed above, we find that the evidence of these witnesses are very much corroborative to each other and out of said six witnesses two witnesses i.e. P.W-03 and P.W-06 are eye-witnesses and members of victim families. P.W-5 is an eye-witness of part incidents and partly hearsay witness. The rest witnesses are hearsay witnesses. P.W-03 Moklesur Rahman Sarkar alias Md. Mokles Ali having supported the instant charge i.e. charge no.02, has vividly narrated the alleged incidents that on 16.04.1971 Pakistani army, accused A.T.M. Azharul Islam and other members of Jamaat-e-Islami came to Taxerhut by a train from Rangpur and then proceeded towards north and on the way they set fire to the houses beside the road and fired shots indiscriminately. Thereafter, they came to their village Uttar Ramnathpur and when they surrounded their house he went into hiding in a bush and his father was caught hold of by them. He has further stated that thereafter he saw from inside the bush that accused A.T.M. Azharul Islam pushed down his father when he caught his [accused] legs and then Pakistani army shot him dead and, also killed Munshi Quddus of their village. After their departure he saw fifteen dead bodies lying at different places of their village including the dead body of his father Momtaz Ali Sarkar and Kalti Mye. At that time he heard from the villagers that the baby came out from the womb of said

Kalti Mye when she sustained bullet injury. P.W-06 Mokbul Hossain is also an eye-witness and a member of victim family. He has corroborated the instant charge as well as the evidence of P.W-03 stating that on 16.04.1971 accused A.T.M. Azharul Islam along with Pakistani army came to Taxerhut by a train and then set fire to the houses of that locality and fired shots. When they came to their village he [P.W-06] along with his mother were fleeing away and then accused A.T.M. Azharul Islam and two Pakistani army men shot her dead. He also saw them to kill one Tomiz and to set fire to different houses of Dhap Para, Mridha Para, Thonthoni Para and Molla Para. He has further stated that they also killed about 14/15 persons. P.W-05 Md. Abdur Rahman is also an eye-witness of part incidents and also a hearsay witness. He has given his testimonies in line with the depositions of the above mentioned eye-witness nos. 03 and 06. P.W. 04 Md. Meser Uddin, P.W-08 Md. Mojibur Rahman Master and P.W-11 Md. Shakhawat Hossain alias Ranga are hearsay witnesses and they have also corroborated the instant charge and the evidence of the eye-witnesses as discussed above. It may be mentioned here that all the above mentioned prosecution witnesses have identified the accused in the dock. All these six live witnesses have directly implicated the accused with the offences of arson and murder as narrated in the instant charge, but they have not implicated the accused with the offence of plundering as alleged in the instant charge. The learned defence counsel has cross-examined these live witnesses thoroughly, but could not shake their evidence, and as such, there is no reason to disbelieve their evidence.

107. It has been alleged in the instant charge that during the Liberation War, 1971 accused A.T.M. Azharul Islam was the president of Islami Chhatra Sangha, Rangpur unit. P.W-04 Md. Meser Uddin has stated that accused A.T.M. Azharul Islam was a student leader of Jamaat-e-Islami in 1970 and after Liberation of the country he absconded. P.W-08 Md. Mojibur Rahman Master has stated that the accused was a student of Rangpur Carmichael College and the president of Islami Chhatra Sangha of that college unit.

108. It appears from the evidence of these two witnesses along with Exhibits 13 and 16 that during the Liberation War, 1971 accused A.T.M. Azharul Islam was a leader of Islami Chhatra Sangha, the student front of Jamaat-e-Islami.

109. During scanning of the evidence we find some minor inconsistencies and contradictions among the evidence of the above mentioned prosecution witnesses but an assessment is to be made on the basis of the totality of the evidence presented in the case. The Tribunal, however, is not obliged to address insignificant inconsistencies, if occur in witnesses' testimonies. In this context, we may refer to the decision of **ICTR Appeals Chamber held in the case of Muhimana as under:**

"The Appeals Chamber reiterates that a trial chamber does not need to individually address alleged inconsistencies and contradictions and does not need to set out in detail why it accepted or rejected a particular testimony."

[ICTR Appeals Chamber, judgment May 21, 2007, para- 99]

110. It is argued by the defence that there is no evidence on record that the accused himself set fire to houses or killed any person at the time of commission of the alleged offences and as such, so-called mere presence of the accused at the crime site does not *ipso facto* mean that he abetted or facilitated the commission of the alleged offences. This argument has no leg to stand because it is now well settled that even mere presence at the scene of the crime may, under certain circumstances, be sufficient to qualify as complicity. From the evidence of the above mentioned six live witnesses, it is found that the accused by his presence in the crime site and by his culpable acts substantially encouraged and facilitated the main perpetrators in committing the crimes and also he shared the intent similar to that of the main perpetrators and thus obviously he knew the consequence of his acts which provided moral support and assistance to the principal perpetrators. Therefore, the accused cannot be relieved from criminal responsibility. In the case of **Prosecutor vs. Charles Chankay Taylor: Trial Chamber II SCSL: Judgment 26 April 2012, para-166**] it has been observed that-

"The essential mental element required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator. In cases of specific intent crimes, such as acts of terrorism, the accused must also be aware of the specific intent of the perpetrator."

111. It is evident from the evidence on record that accused A.T.M Azharul Islam hails from Badorgonj area under District Rangpur and, on the date of occurrence [16.04.1971] he along with Pakistani army and his accomplices arrived at his area named Taxerhut Railgomti [Railgate] under Badorgonj Police Station by a train and then went to Dhap Para of village Moksedpur and committed the alleged atrocities in that village. During the Liberation War in 1971, the Pakistani army hailed from the then West Pakistan who were not supposed to know the said crime sites which were very much remote areas. In the circumstances, it may be presumed that on the date of occurrence the accused himself having shown paths brought Pakistani army to his area i.e. the crime sites who were the main perpetrators of those atrocities to implement the common plan and policy of the Pakistani army.

112. In the case in hand, the evidence of the witnesses inescapably shows that the accused actively knowing the consequence of his acts accompanied the gang of perpetrators i.e. Pakistani army and members of Jamaat-e-Islami of the crime site and by his illegal acts he substantially abetted and facilitated the commission of offences of arson and murder mainly committed by the principal perpetrators. Therefore, it cannot be said at all that the accused's presence at the crime site and accompanying the principal perpetrators were devoid of guilty intent.

113. On rational appraisal of evidence, the acts done on part of accused A.T.M. Azharul Islam are not found to be isolated. These formed part of 'attack'. The Tribunal notes that even a single act constituting the offence makes an accused culpable for the offence of

crimes against Humanity. In this regard the **ICTY** has observed in the case of **Deronjic** that-

"All other conditions being met, a single or limited number of acts on [the accused's] part would qualify as crimes against humanity, unless those acts may be said to be isolated or random."

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

114. It has been found from evidence that the alleged arson and killing of a good number of unarmed civilians took place as a part of systematic attack. Crimes against Humanity are a 'group crime' and usually it happens by participation of several individuals who act in different manners. Thus, there can be several perpetrators in relation to the same crime where the conduct of each one of them forming 'attack' fulfils the requisite elements to constitute the subjunctive offence. In the instant charge it is alleged that accused A.T.M. Azharul Islam along with Pakistani army, members of Jamaat-e-Islami and Islami Chhatra Sangha committed the crimes against Humanity.

115. On totality of evidence as discussed above we arrive at a decision that the prosecution has been able to prove beyond reasonable doubt that on 16.04.1971 accused A.T.M. Azharul Islam along with the members of Jamaat-e-Islami and Islami Chhatra Sangha and Pakistani army went to Dhap Para at village Moksedpur under Badorganj Police Station and on the way they set fire to many houses situated beside the road and killed many unarmed civilians of Dhap Para. Thus, the accused is criminally liable under section 4(1) of the Act of 1973 and found him guilty for substantially abetting and facilitating the actual

commission of the offences of murder and arson [other inhuman act] as crimes against Humanity as specified in section 3(2)(a)(g) and (h) of the Act of 1973 which are punishable under section 20(2) of the Act.

Adjudication of charge no. 03

[Murder, genocide, plundering and arson in Jharuarbeel and neighbouring villages]

116. **Summary charge:** On 17.04.1971 between 12.00 noon and 5.00 P.M. accused A.T.M. Azharul Islam being the president of Islami Chhatra Sangha , Rangpur unit, along with armed members of Jamaat-e-Islami, Islami Chhatra Sangha and Pakistani army , in continuation of their planning and blue-print, with intent to destroy, in whole or in part, a Bangalee national group and a Hindu religious group, made attack widespreadly by setting fire to the villages of Jharuarbeel area namely, Hajipur, Jharuapara, Bujruk Bagbar, Ramkrishnapur, Balapara, Bujruk Hajipara, Bairagi Para, Sardar Para, Ramkrishnapur Baniapara, Ramkrishnapur Bithhipara, Jogipara, Khorda Bagbar and Khalisha Hajipur and, then the unarmed civilians of those villages being frightened took shelter at the Jharuarbeel. At that time, the accused and his said accomplices having surrounded the Jharuarbeel killed about one thousand and two hundred unarmed women, men, students, babies, etc. by firing indiscriminate shots and they also having caught hold of about more than two hundred Hindu people and students therefrom took them to unknown place and then killed them. At the time of said atrocities, many houses of that area were plundered and set on fire by them. Thus, the accused has been charged for abetting and facilitating the commission of offences of plundering, arson and murder

as crimes against Humanity and also genocide as specified in section 3(2)(a)(c)(g)(h) read with section 4(1) and 4(2) of the Act of 1973 .

Discussion and evaluation of evidence and findings:

117. To prove charge no. 03, the prosecution has examined as many as five live witnesses [P.Ws. 03,04,05,06 and 08] and some documentary evidence [Exhibits-13 and 16].

118. P.W. 03 Moklesur Rahman Sarkar alias Mokles Ali has deposed that he used to know accused A.T.M. Azharul Islam , a leader of Jamaat-e-Islami, because he came to their locality to campaign for the candidate of Jamaat-e-Islami in the general election held in 1970 . He heard from Aminul Islam and Abu Yeahya that during the Liberation War two trains arrived at Jharuarbeel from two different directions and about 1000/1200 people were killed there in a day and night. He has identified the accused in the dock.

119. In cross-examination he has stated that Jharuarbeel is situated seven kilometres away towards south-east from their house. He has denied the defence suggestions that at the time of occurrence he was very minor and he has deposed falsely.

120. P.W-04 Md. Meser Uddin has testified that on 17.04.1971 at about noon a train reached rail gate no. 6 from Parbotipur and then a non-bengalee named Bachhu Khan, Quamruzzaman MPA, Badrul, Nayeem Kazi along with many others and Pakistani army having got down from the train proceeded towards Bakshigonj ghat under Bishnupur union. Having seen them coming he and his father, uncle, brother and other members of their family went towards Jharuarbeel and then he saw that another train coming from Rangpur reached

Bairagir gate no.10 and accused A.T.M. Azharul Islam and his accomplices along with Pakistani army having got down from that train they also proceeded towards Bakshigonj. Thereafter, both the trains were brought to rail gate no.7. He has further testified that thereafter the accused and his said accomplices surrounded six villages of their union and, then the villagers of those villages were fleeing away and many of them took shelter in the Jharuarbeel and at that time he saw accused A.T.M. Azharul Islam with the Pakistani army who were setting fire to the houses of the innocent people and firing shots indiscriminately and as such about one thousand and two hundred people were killed by bullet shots around the Jharuarbeel. Among the deceaseds Pran Krishna Master, Minajul Islam BSC, Alauddin, Azadul, Faezuddin and his son Nur Islam, Asad Boksh were killed. Many dead bodies of the Hindu community were also found at the place of occurrence. The accused and his said accomplices also having chased many villagers assembled them at rail gate no.7 and thereafter, as per order of the accused A.T.M. Azharul Islam and above mentioned Bachhu Khan, more than two hundred youths, among the assembled villagers, were being taken towards Parbotipur after boarding them in a train and on the way among those persons his cousins Sambaru and Islam, Abu Bakar Siddique and two guards of railway were slaughtered and their dead bodies were thrown down from the train at south side of Ghora Doba railway Bridge. After the Liberation War the accused absconded. He has identified the accused in the dock.

121. In cross-examination, he has stated that Jharuarbeel is situated two kilometres away towards south from their house and there is a

'Para' between their house and Jharuarbeel and there were many houses in that 'Para'. There was no plenty of houses around the Jharuarbeel in 1971 and then no paddy was cultivated there. The village Ramkrishnapur is situated towards north of Jharuabeel. There were some bushes in Jharuarbeel in 1971. He has further stated that he used to know Bachhu Khan and Badrul since he [P.W-04] was a student of Intermediate in Parbotipur College. When Pakistani army and accused A.T.M. Azharul Islam and his accomplices attacked six villages of their union, most of the villagers took shelter in the Jharuarbeel for their safety and some villagers took shelter in bushes around their houses and the Jharuarbeel is situated in the middle of those six villages surrounded by the accused and his accomplices. Having seen the accused and Pakistani army to get down from the train, he and his father and others took shelter in Jharuarbeel. He has denied the defence suggestions that only Pakistani army and non-bangalees committed the murders in Jharuarbeel and accused A.T.M. Azharul Islam was not there. It is also denied by him that he has deposed falsely.

122. P.W-05 Md. Abdur Rahman has stated that on 17.04.1971 one train reached rail gate no. 10 from Rangpur and another train reached rail gate no. 6 from Parbotipur. About one hundred and fifty persons, wearing dust-coloured uniforms and civil dresses having got down from the train, which came from Parbotipur, went to Bakshigonj and surrounded Jharuarbeel. About 100/150 persons having got down from the other train, which reached rail gate no. 10, also proceeded towards Bakshigonj. Having been surrounded, the villagers started running

hither and thither and at that time many people were telling to each other that accused A.T.M. Azharul Islam, supporters of Jamaat-e-Islami and Pakistani army having come from Badargonj surrounded the Jharuarbeel. He has further stated that then the persons, who came to Bakshigonj from said two trains, having surrounded five villages started firing shots indiscriminately and then came to Jharuarbeel where 500/600 people hid themselves in bushes and at that time he [P.W. 05] saw accused A.T.M. Azharul Islam in the Jharuarbeel. Due to said indiscriminating firing shots about four hundred people were killed only in Jharuarbeel including Minazul Islam, a teacher of Badargonj High School. Thereafter, the persons, wearing dust-coloured uniforms and civil dresses, having chased about one thousand and two hundred people assembled them to rail gate no. 7 and at that time above mentioned two trains were brought to rail gate no. 7 from rail gate nos.6 and 10 and connected them to each other and steps were taken to board them in the trains. Then Shamsuddin Master, who was the then house tutor of the accused, requested the persons wearing dust-coloured uniforms, Bachhu Khan and accused A.T.M. Azharul Islam to allow him time to offer his 'Asr' prayer and he was allowed 10 minutes time for the same. After prayer, the accused, Bachhu Khan and Pakistani army having selected about two hundred youths and Hindus, among the persons assembled there, picked them up in the train and took them away. On the way, when the train stopped near at Ghoradoba Bridge, five persons of the train were killed and their dead bodies were thrown down therefrom, and among them there were Sombaro, Islam, Abu Bakkar Siddique and two railway guards and the

rest of the said persons are still missing. He has identified the accused in the dock.

123. In cross-examination, he has stated that their house is situated beside the rail line at south side. Accused A.T.M. Azharul Islam was the president of Islami Chhatra Sangha and he was a student of Carmichael College. The accused participated in the general elections held in 1996, 2001 and 2008. He has further stated that when Pakistani army were firing shots indiscriminately then he went towards Jharuarbeel. He himself did not see the occurrence taken place on 17.04.1971 at Ghoradoba Bridge, but he heard about it. Pakistani army and accused A.T.M. Azharul Islam chased him and others in the Jharuarbeel and took them towards the rail line. He has denied the defence suggestions that the accused was not present at Jharuarbeel where the occurrence took place on 17.04.1971 and he did not know the accused in 1971. It is also denied by him that he has deposed falsely.

124. P.W-06 Md. Mokbul Hossain has deposed that on 17.04.1971 one train from Rangpur and another train from Parbotipur came to their area. Accused A.T.M. Azharul Islam and Pakistani army having got down from one of the two trains went to Jharuarbeel and killed about one thousand and two hundred people there and abducted some people therefrom and he heard about the said occurrence from the local people. He has identified the accused in the dock.

125. In cross-examination, he has denied the defence suggestions that he did not know the accused since before and he has deposed falsely.

126. P.W-08 Md. Mojibur Rahman Master has testified that during the Liberation War he was a teacher of Shampur High School at Badorganj and he is a freedom-fighter. On 17.04.1971 one train coming from Parbotipur stopped at rail gate no. 6 near Korotoa Bridge and another train coming from Rangpur stopped at Bairagi railgate no. 10. Pakistani army along with non-bangalee Bachhu Khan, Quamruzzaman MPA, Nayeem Kazi and leaders of Jamaat-e-Islami were in the train which came from Parbotipur and Pakistani army along with accused A.T.M. Azharul Islam and other leaders of Jamaat-e-Islami were in the train which came from Rangpur. Thereafter, Pakistani army and their said accomplices having got down from both the trains surrounded the villages namely, Bujruk Hajipur, Kismat Ghatabeel, Ramkrishnapur and Khord Bagbar and fired shots indiscriminately and set fire to the houses of those villages. At that time the inhabitants of those villages took shelter in neighbouring Jharuarbeel and then Pakistani army and their accomplices having gone to Jharuarbeel killed more than one thousand and two hundred people who took shelter there including Minhajul BSC, Prankrishna Master and his [P.W. 08] student Nuruddin. He has further testified that they have made a monumental stone locally at the place of occurrence. When he went to Taxerhut in the afternoon he heard there from the U.P. Chairman of Badorganj Abdul Jabbar Sarkar and an organizer of freedom-fighters Professor Meser Uddin that accused A.T.M. Azharul Islam had been involved with the said atrocities. He has also testified that he used to know the accused since before 1971. The accused was a student of Rangpur Carmichael College and he was the president of Islami Chhatra Sangha of that

college unit and he was also a commander of Al-Badr Bahini. He has identified the accused in the dock.

127. In cross-examination, he has stated that he passed the B.A. examination from Rangpur Carmichael College in 1968. He was the president of Awami League, Badorganj Thana unit since 1969 to 1990, but at present he does not hold any post of that political party. He is a member of the executive committee of the district Muktijodda Sangsad. He has further stated that the villages namely, Bujruk Hajipur, Kismat Ghatabeel, Ramkrishnapur and Khord Bagbar are situated at the east; west and north side of Jharuarbeel and the southern side were vacant. He has denied the defence suggestion that U.P. Chairman of Badorganj Abdul Jabbar Sarkar and an organizer of freedom-fighters Meser Uddin did not tell him about the occurrence which took place on 17.04.1971. He has also denied that he has deposed falsely.

128. Upon scrutiny of the testimonies of said five live witnesses [P.Ws. 03, 04, 05, 06 and 08] as discussed above, we find that the evidence of these witnesses are very much corroborative to each other and out of said five witnesses two witnesses i.e. P.W-04 and P.W-05 are eye-witnesses and of them P.W-04 is also a member of a victim family. The rest witnesses are hearsay witnesses. P.W-04 Md. Meser Uddin having supported the instant charge i.e. charge no. 03, has vividly narrated the alleged incidents stating that on 17.04.1971 at about noon a train reached rail gate no. 6 from Parbotipur and then Pakistani army and their accomplices having got down from the train proceeded towards Bakshigonj ghat . Having seen them coming he and his family members proceeded towards Jharuarbeel and then he saw that another train

coming from Rangpur reached Bairagi gate no. 10 and accused A.T.M. Azharul Islam and his accomplices along with Pakistani army having got down from that train they also proceeded towards Bakshigonj. He has also narrated that thereafter, the accused and his said accomplices surrounded six villages of their union and, then the villagers were fleeing away and many of them took shelter in Jharuarbeel and then he [P.W-04] saw the accused with the Pakistani army who were setting fire to the houses and firing shots indiscriminately and as such about one thousand and two hundred people were killed by bullet shots in and around the Jharuarbeel. The accused and his accomplices also having chased many villagers assembled them at rail gate no. 7 and thereafter, as per order of the accused and Bachhu Khan, more than two hundred youths were being taken towards Parbotipur boarding them in a train and on the way among those persons his cousins Sambaru and Islam, Abu Bakar Siddique and two guards of railway were slaughtered and their dead bodies were thrown down from the train at south side Ghoradoba railway Bridge. P.W-05 Md. Abdur Rahman is another eye-witness who has also corroborated the evidence of P.W-04 stating that on 17.04.1971 one hundred and fifty persons wearing dust-coloured uniforms and civil dresses came at rail gate nos. 6 and 10 by two trains one from Rangpur and another from Parbotipur and thereafter they having got down from the trains went to Bakshiganj and surrounded Jharuarbeel and at that time many people were telling to each other that accused A.T.M. Azharul Islam, supporters of Jamaat-e-Islami and Pakistani army surrounded the Jharuarbeel and fired shots indiscriminately and as a result about four hundred people were killed

only in Jharuarbeel where they assembled. He has also stated that at the time of said occurrence he saw the accused in the Jharuarbeel. Thereafter, the perpetrators having selected about two hundred youths and Hindus from the persons assembled in Jharuarbeel picked them up in the train and when the train stopped near at Ghoradoba Bridge, five abductees were killed and their dead bodies were thrown down from the train and the rest abductees are still missing. P.W-03 Moklesur Rahman Sarkar alias Mokles Ali, P.W-06 Mokbul Hossain and P.W-08 Md. Mojibur Rahman Master are hearsay witnesses and they have also corroborated the evidence of the eye-witnesses as discussed above. It may be mentioned here that all the above mentioned prosecution witnesses have identified the accused in the dock. It has already revealed from the oral and documentary evidence as we discussed above in charge no. 02 that during the Liberation War, 1971 accused A.T.M. Azharul Islam was the president of Islami Chhatra Sangha [ICS], Rangpur unit. All these five prosecution witnesses have implicated the accused with the offences of arson and killing as narrated in the instant charge. However, we do not find any material evidence implicating the accused with the offence of plundering as alleged in the instant charge. The learned defence counsel has cross-examined these live witnesses thoroughly, but could not shake their evidence, and as such there is no reason to disbelieve their evidence. Of course, during scanning of the evidence we find some minor inconsistencies and contradictions among the evidence of the above mentioned prosecution witnesses, but an assessment is to be made on the basis of the totality of the evidence presented in the case. The Tribunal, however, is not obliged to address

insignificant inconsistencies, if occur in witnesses' testimonies. In this context, we have already quoted the decision of ICTR Appeals Chamber held in the case of **Muhimana [ICTR Appeals Chamber, judgment May 21, 2007, para-99]** when we discussed charge no. 02.

129. The accused has been indicted for abetting and facilitating the commission of the offences of crimes against Humanity and also genocide as specified in section 3(2)(a)(c)(g)(h) of the Act of 1973. It has already been evident that the accused directly abetted and facilitated the commission of the offences of arson [other inhumane act] and 'killing'. Now, the question arises whether this 'killing' would be within the purview of 'genocide' or 'murder' as 'crimes against Humanity' as specified in section 3(2)(c) or 3(2)(a) of the Act of 1973 respectively. The prosecution has argued that since the killing persons were the Bangalees and Hindus they deserve to be considered to belong to 'Bangalee national group' and a 'Hindu religious group' respectively for the purpose of constituting the offence of 'genocide'. Conversely, the defence has contended that the killing persons were not only Hindus and they were not killed targeting them as a Bangalee national group. He has also contended that the alleged killing was not committed with intent to destroy, in whole or in part, a national or religious group. It does not appear from the evidence on record that the killing persons were all Hindus. Rather we have already found that many Muslims were also killed. We do not also find any evidence on record that the alleged killing was committed with intent to destroy, in whole or in part, Bangalee national group or Hindu religious group. We are, therefore, persuaded to conclude that the killing of unarmed civilians constituted

the offence of 'murder' as crimes against Humanity, instead of the offence of 'genocide'.

130. It is argued by the defence that admittedly P.Ws-03, 06 and 08 are hearsay witnesses and as such their evidence is inadmissible and the Tribunal cannot rely wholly on it to convict the accused. It is already found that the evidence of these three hearsay witnesses have corroborated the evidence of two eye-witnesses [P.Ws-04 and 05]. If the evidence of three hearsay witnesses carries probative value, it cannot be brushed away. The hearsay evidence is to be considered together with the circumstances and relevant material facts depicted. Hearsay evidence is admissible and the court can rely on it in arriving at a decision on fact issue, provided it carries reasonable probative value **[Rule 56(2) of the ROP, 2010]** .This view finds support from the principle enunciated in the case of **Muvunyi** which is quoted as below:

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

[Muvunyi, ICTY Trial Chamber, September 12, 2006, para-12]

131. According to settled jurisprudence of International Law 'hearsay evidence is not inadmissible per se, even when it is not corroborated by direct evidence. The Tribunal may safely rely on 'anonymous hearsay' evidence even without any corroboration. This view finds support from

the case of **Lubanga** [**Lubanga-ICC Pre-Trial Chamber, January 29, 2007, para-106**].

132. In the case in hand, the accused is being tried long after four decades after the atrocities were committed. Naturally direct witness may not be available. Thus, even anonymous hearsay evidence alone may be relied upon to prove a material fact, considering the reality and the context prevailing in the country in 1971. This view finds support from a recent decision given in the case of **Ruto of the ICC** [**Ruto, ICC Pre-Trial Chamber, January 23, 2013, paras -126-130, 148-150, 187-191 and 194-195**].

133. For the sake of argument, if we brush away the evidence of the hearsay witnesses [P.Ws-03, 06 and 08], the evidence of eye-witnesses [04 and 05] remain unshaken though they were thoroughly cross-examined by the defence and the evidence of these two eye-witnesses are very much corroborative to each other and they have directly implicated the accused with the offences of arson and killing as narrated in charge no. 03. The Tribunal may arrive at a decision even on the basis of single testimony and, 'corroboration' is simply one of the factors to be considered in assessing witness's credibility. It has been held by the **ICTR** Trial Chamber that:

"There is no requirement that convictions be made only on the evidence of two or more witnesses Corroboration is simply one of potential factors in the Chamber's assessment of a witness's credibility. If the Chamber finds a witness credible, that witness's testimony may be accepted even if not corroborated.

"

[Nyiramasuhuko, ICTR Trial Chamber, 24 June 2011, para - 174]

134. It has been argued by the learned defence counsel that prosecution has not been able to establish that the accused was directly involved with the commission of the atrocities as narrated in the instant charge. No witness claims to have witnessed the accused committing the criminal acts constituting the offences alleged. Without proving direct participation of the accused in the commission of offences as listed in the instant charge, he cannot be held guilty. This contention is not true at all as we have already found that the eye-witnesses [P.Ws-04 and 05] have stated that accused A.T.M. Azharul Islam was directly involved with the commission of the atrocities of arson and killing. Besides, to incur in criminal liability, in a case of crimes against Humanity, the accused himself need not have participated in all aspects of the alleged criminal conduct **[Stakic, ICTY Trial Chamber, July 31, 2003, para-439]** *The actus reas* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated **[Blaskic, ICTY Appeals Chamber, July 29, 2004, para-48]**. 'Participation' includes both direct participation and indirect participation. It has been observed in the case of **Kvocka** that –

"It is, in general, not necessary to prove the substantial or significant nature of the contribution of an accused to the joint criminal enterprise to establish his responsibility as a co-perpetrator: it is sufficient for accused to have committed an act or an omission which contributes to the common criminal purpose."

135. In the case in hand, the accused knowingly the consequence of his act or conduct or behavior, which have been convincingly proved,

are thus qualified to be the constituent of 'participation' too to the actual accomplishment of the crimes as it substantially contributed to, or have had a substantial effect on the perpetration of the crimes for which the accused has been charged with in charge no. 03. So, material elements and ingredients have been found against the accused to qualify Joint Criminal Enterprise [JCE] under section 4(1) of the Act of 1973.

136. Considering all the facts, circumstances and the evidence on record as discussed above, we are led to arrive at a decision that the prosecution has been able to prove beyond reasonable doubt that on 17.04.1971 accused A.T.M. Azharul Islam along with his accomplices and Pakistani army set fire to the villages of Jharuarbeel area and killed numerous unarmed civilians, no doubt it was a mass-killing, in Jharuarbeel by firing indiscriminate shots and, also having caught hold of about two hundred people from the Jharuarbeel took them to unknown place and then killed them. Thus, the accused is criminally liable under section 4(1) of the Act of 1973 and found him guilty for substantially abetting and facilitating the actual commission of the offences of murder and arson [other inhumane act] as crimes against Humanity as specified in section 3(2)(a)(g) and (h) of the Act of 1973 which are punishable under section 20(2) of the Act.

Adjudication of charge no.04

[Genocide, abduction and murder of 4(four) teachers of Rangpur Carmichael College and another, wife of a teacher, who belonged to Hindu community]

137. **Summary charge:** On 30 April, 1971 between 09.00 P.M and 12.00 P.M accused A.T.M Azharul Islam, being the president of Islami Chhatra Sangha of Rangpur district branch, along with armed cadres of Jamaat-e-Islami, Islami Chhatra Sangha, accompanied by Pakistani occupation forces having entered the campus of Rangpur Carmichael College abducted Professor Chitta Ranjon Roy, Professor Sunil Baron Chakraborty, Professor Ram Krishna Adhikary, Professor Kalachand Roy of Rangpur Carmichael College and Monjusree Roy, wife of Professor Kalachand Roy from their houses situated inside the college boundary and thereafter they all were killed by the accused and his accomplices in a pre-planned manner.

138. Therefore, the accused is hereby charged for abetting or conspiracy, persecuting, complicity in or failure to prevent commission of such crimes and the offences of murder and other inhumane acts as crimes against Humanity and genocide and thereby he substantially contributed to the commission of offences of crimes against Humanity and genocide as specified under section 3(2)(a)(c)(g) and (h) read with section 4(1) and 4(2) of the International Crimes (Tribunals) Act, 1973 which are punishable under section 20(2) of the Act.

Discussion and evaluation of evidence and findings:

139. For proving charge no.04 the prosecution has examined 8[eight] live witnesses of them P.W-09 Sova Kar and P.W-10 Ratan Chandra Das are the part eye witnesses of the horrific occurrence and P.W-04 Md. Meser Uddin, P.W-08 Md. Mojibar Rahman Master, P.W-13 Advocate Rathish Chandra Bhowmik, P.W-11 Md. Sakhawat Hossain @ Ranga

and P.W-12 Md. Rafiqul Hasan @ Nannu are the hearsay witnesses of the occurrence.

140. P.W-09 Sova Kar has testified that in 1971 she was a student of class XII of science group in Rangpur Carmichael College and she used to live with her Brother Professor Chitta Ranjon Roy's house, a teacher of Mathematics Department of the said college, situated at college campus. On the fateful night, 30 April 1971, at about 10.00 P.M she was reading in her room and the south facing window of that room was open; Kanon Bala, sister-in-law of her brother, was also reading. At that time she could sense that some persons were knocking the door of their neighbour Professor Abdul Jalil's house. In between the two houses there was a door. Shukur Miah, a relative of Professor Jalil, then opened the door and thereafter 5/6 Pakistani army men with arms entered into the house of Professor Jalil, and then the Pakistani army men jumping over the bamboo fence entered their house. Three Pakistani army men having entered into her room asked her and Kanon Bala to stand up in a queue and in the meantime 2/3 other Pakistani army personnel having entered into the room of her brother Chitta Ranjon Roy captured him and took him near them. Thereafter the Pakistani army men blindfolded her brother Chitta Ranjon Roy and tied his hands behind his back, and at that time a Pakistani army man snatched away her ear rings, and then the Pakistani army men took her brother Professor Chitta Ranjon Roy in a military vehicle standing outside the house. At that time she could see through the window that some Bangalee civilian people were standing near the army vehicle, of whom she could identify accused Azharul Islam, a leader of an Islamic

student organization of their college. Accused Azharul Islam was her class-mate and she could identify him by the outer side light of their house. Thereafter his brother Chitta Ranjon Roy was loaded in the said army vehicle and then the vehicle left the place.

141. This witness has further testified that Professor Sunil Baron Chakraborty and Professor Ram Krishna Adhikary were also the teachers of Carmichael College and they used to reside in the guest house situated at college campus. When the Liberation War started they used to live in different safe places. Professor Ram Krishna Adhikary was staying in their house on the fateful night because on the following day it was scheduled to pay the salaries of the teachers; when Professor Ram Krishna tried to escape through the back side door of the house the Pakistani army also captured and loaded him in the said military vehicle. On the following morning Ratan Dash who was a cook of guest house of the college and resided in the house of Professor Kalachand Roy at the relevant time came to their house, and then she informed him about the occurrence of previous night. Then Ratan Dash also informed her that the Pakistani army also picked up Professor Kalachand Roy, his wife Monjusree Roy and another teacher Sunil Baron Chakraborty. Professor Kalachand Roy had two minor children and Ratan was with the said minor children at that house in whole night and in the morning Professor Reaz and his wife who were the neighbours of Professor Kalachand took the said minor children, and then Ratan came to their house. Ratan also informed her that when the Pakistani army were taking away Professor Kalachand he saw some Bangalee civilian people, and he could identify accused Azharul who

was a leader of a Islamic student organization. Then this witness disclosed to Ratan that she could also identify accused Azharul Islam.

142. P.W-09 Sova Kar has further deposed that she asked Ratan to make contact with Salauddin, a student of his brother, who had some connections inside the cantonment in order to get information about his brother and other teachers. Thereafter, Ratan made contact with Salauddin and then Salauddin told him that after taking information from the cantonment he would give information to them later on. After two hours, Salauddin came to their house and informed that none of the abductees were alive and they were killed near Domdoma Bridge outside the town. He also informed them that the local people having seen the dead bodies covered those by earth. In such a situation neighbours Professor Jalil and Professor Reaz advised them to go to a safe place and thereafter she, Kanon Bala, her younger brother Nitta and Ratan went to the village home of the postmaster of Carmichael College. After some days Professor Jalil and Professor Reaz sent them to Dhaka with Moslem Alam, another teacher of the college who had been transferred from there to Dhaka. In their journey to Dhaka she and Kanonbala wore 'Borkha' [a dress of a conservative Muslim woman], and after reaching Dhaka they went to her village home at Nandipara, Pirojpur by launch from Sadarghat and informed about the occurrence to the inmates of the house. After some days she went to India with other family members and joined in a camp of female freedom fighters at Kobra in India and took nursing training. P.W-09 has identified the accused A.T.M Azharul Islam present in the dock.

143. In cross-examination P.W-09 has stated that she was a HSC student of Rangpur Carmichael College and their final examination was scheduled to be held in 1971; but because of the War of Liberation she participated in the examination held in 1972. She passed SSC examination from Pirojpur Shikder High School in 1969. She has denied the defence suggestion that accused Azharul was not a student of class XII in science group in the session 1970-1971. Her sister-in-law [brother's wife] went to Nandipara, the village home, in 1971. She has further stated that the persons wearing army dress entered their house. She has also said that the pattern of their house was like the 'L' and has further asserted that there was south facing window in her room. She has denied the defence suggestion that accused Azharul Islam was not with the Pakistani army when his brother was abducted.

144. P.W-10 Ratan Dash has deposed that during the Liberation War in 1971 he resided in Carmichael College campus as a cook of both Professor Sunil Baron Chakraborty and Professor Ram Krishna Adhikary. When the Liberation War started Professor Sunil and Professor Ram Krishna leaving the college campus took shelter in a near by village and then he [P.W-10] used to stay in the house of Professor Kalachand. When it was disclosed that the salary of the teachers would be given then Professor Sunil and Professor Ram Krishna came to the college campus and Professor Sunil came to the house of Professor Kalachand and Professor Ram Krishna came to the house of Chitta Ranjon Roy and were staying in the said houses. He has further stated that possibly on 15 Baishakh, [1st Bangla month] 1971 at night after having dinner Professor Kalachand, his wife Monjusree,

Professor Sunil and he were discussing about the prevailing situation of the country. At about 9.30/10.00 P.M they heard sound of knocking door and hearing the said sound Professor Kalachand opened the door and then some Pakistani army and 4/5 Bangalee civilian people entered into the room of whom he He could identify accused Azharul Islam. The Pakistani army blindfolded Sunil Baron Chakraborty and Kalachand Roy, and at that time one of the army men asked him whether he was a 'Hindu' or 'Muslim', and then he replied that he was a Muslim, and then the said army man praised him saying that 'tum achha admi hay' that means he was a perfect man. Thereafter the Pakistani army took Sunil Babu and Kalachand Babu into the army vehicle and at that time Monjusree, the wife of Kalachand Babu, holding the legs of army personnel requested them to release her husband and then the Pakistani army also picked her up in the vehicle.

145. This witness has further stated that in the whole night he stayed at the house of Professor Kalachand with two children of him [Professor Kalachand] and in the following morning Professor Reaz, another teacher of the college and his wife took the said children to their house and thereafter he went to the house of Professor Chitta Ranjon Roy. On going there he came to learn from Sova Kar that the Pakistani army picked up his brother [Professor Chitta Ranjon] and Professor Ram Krishna. Sova inquired from him whether he saw any Bangalee with the Pakistani army, and then he replied that there were some Bangalees with the Pakistani army and he could identify accused Azharul Islam of them. Thereafter, Sova asked him to make contact with a student who had some good connections inside the cantonment to know about the

fate of the abductees and then he made contact with the said student who asked him to return to their house saying that he would inform them if he would get any information about the abductees. After two hours, the said student informed them that all the abductees were killed near Domdoma Bridge. Hearing the said news he, Kanon Bala, Nitta and Sova went to the village home of the post master of the college. After some days when one of the teachers of the college had been transferred to Dhaka they came to Dhaka with him and on their journey to Dhaka Sova and Kanon wore 'Borkha' and he and Nitta wore '*lungi*' and had a cap on the head; after reaching Dhaka the said teacher made arrangement for Sova Kar and others to go to their village home from Sadarghat by launch and thereafter they came to the village home of Sova Kar at Nandipara, Pirojpur.

146. In cross-examination this witness has denied the defence suggestion that he was not at Rangpur in 1971 and he had disclosed the name of accused Azharul Islam at the instance of others. He has further stated that he is now a day labour and he could not say who was the principal of Carmichael College in 1971. This witness has also denied various suggestions put to him by the defence.

147. P.W-04 Md. Meser Uddin, who was an organizer of the Liberation War, has testified that after the Liberation of the country he came to know that during the Liberation War accused Azharul Islam had abducted and killed four teachers of Rangpur Carmichael College namely, Chitta Ranjon Roy, Kalachand Roy, Sunil Chakrovorty and another teacher and the wife of Kalachand Roy.

148. P.W-08 Mojibar Rahman Master, another organizer of the Liberation War has testified that after the liberation of the country he met Professor Nurul Islam at Rangpur town, who was an organizer of historic language movement, from whom he came to know that on 30 April, 1971 the Pakistani army and A.T.M Azharul Islam had abducted Kalachand Babu, Sunil Baron Chakraborty, Chitta Ranjon Roy and Ram Krishna Adhikar, the teachers of Rangpur Carmichael College and wife of Kalachand Babu and eventually they all were killed by them near Domdoma Bridge by gun shots. He has further stated that he knew A.T.M Azharul Islam since before 1971 as he [accused] was a student of Rangpur Carmicheal College and president of Islami Chattra Sangha of Carmicheal College Unit and a commander of Al-Badr Bahini in 1971.

149. P.W-11 Sakhawat Hossain @ Ranga has deposed that he heard that in 1971 A.T.M Azharul Islam was involved with the killing of intellectuals.

150. P.W-13 Advocate Rathish Chandra Bhowmik has also testified that after liberation of the country he learnt that on 30 April, 1971 pursuant to the plan of accused Azharul Islam Kalachand Babu, Sunil Baron Chakraborty, Chitta Ranjon Roy and Ram Krishna Adhikary, the teachers of Rangpur Carmichael College were killed near Domdoma Bridge.

151. On scrutiny of the above evidence of the live witnesses it is crystal clear that P.W-09 Sova Kar and P.W-10 Ratan Chandra Dash are the eye witnesses of the occurrence of abduction of the victims and accused A.T.M Azharul Islam was known to them and they could identify him

[accused] who accompanied the Pakistani army at the time of abduction.

152. P.W-09 Sova Kar was a student of Carmichael College at the relevant time and she was staying at the house of her brother Professor Chitta Ranjon Roy. Accused Azharul Islam was also a student of Rangpur Carmichael College and a student leader of a Islamic student organization. It has been suggested by the defence that accused Azharul Islam was not a class-mate of P.W-09 Sovakor. But it has not been denied by the defence that the accused was never a student of Rangpur Carmichael College at the relevant time. Defence has suggested only that accused Azharul Islam was not a student of science group in Rangpur Carmichael College in the Session 1970-1971. It is evident from exhibit-21, a certificate issued by the Principal of Rangpur Carmichael College, that accused Azharul Islam was a student of Rangpur Carmichael College from 1969 to 1971 and he was a HSC student of science group. It is also revealed from exhibit 21/1, a Tabulation Sheet of HSC examination, part I, that the accused was a science student in HSC class. The defence did not challenge the authenticities of exhibit-21 and exhibit-21/1. The defence relying on exhibit-23/1, the application form filled up by accused Azharul Islam for participating in the examination of Higher Secondary Certificate [HSC] in 1971 as a private candidate has tried to convince us that from the said document it shows that accused Azharul Islam was not a student of Science group rather he was a student of Arts group having subjects namely, economics, civics and islamic history. On perusal of the exhibit-23/1 it is evident that it is nothing but an application form

for private candidate to appear in HSC examination. It has not been explained by either side why accused A.T.M Azharul Islam applied for appearing in the HSC examination as a private candidate scheduled to be held in 1971 and as such this exhibit-23/1 does not prove that he was not a student of science group in Carmichael College. Rather exhibit-21 and exhibit 21/1, two unchallenged documents, show that accused Azharul Islam was a student of HSC science group in Rangpur Carmichael College. From exhibit-C adduced by the defence it appears that in 1972 as a private candidate he passed HSC examination from Bogra. It has not been explained by the defence why the accused had appeared in HSC examination as a private candidate in 1972 from Bogra though accused Azharul Islam applied for participation in HSC examination in 1971 as a private candidate from Rangpur Carmichael College [exhibit-23/1]. In the above context we can validly infer that exhibit-C supports the prosecution claim that accused Azharul Islam left Rangpur District and went into hiding after the independence of Bangladesh due to his atrocious acts committed in 1971 in different areas of Rangpur district in order to save him from public anger. From exhibit-22/2, the tabulations sheet, for the SSC examination it is evident that accused Azharul Islam passed SSC examination from Rangpur Zilla School as a science student. P.W-09 Sova Kar categorically has stated that accused A.T.M Azharul Islam was her class-mate in HSC science group and she was acquainted with him. In view of the above positive assertion of P.W-09 on oath before the Tribunal, mere suggestion of the defence that accused Azharul Islam

was not a student of HSC science group in Rangpur Carmichael College is not enough to make the evidence of P.W-09 un-reliable.

153. In the case of **Nahimana, Barayagwiza and Nageze the ICTR Appeals Chamber**, [November 25, 2007, Para-194] has observed to the effect;

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

154. Same view has also been taken by **ICTR Appeals Chamber** in the case of **Ntagerura, Bagambiki and Imanishimwe**, [Para-388].

155. P.Ws-04, 05 and 12 have also testified that at the relevant time [1969-71] accused Azharul Islam was a student of Rangpur Carmicheal College.

156. Moreover, P.W-12 Rafiqul Islam Nannu has categorically testified that he knows accused A.T.M Azharul Islam and he was a student of science group of class XII in Carmicheal Collage during the period 1969-1971. The above testimony of P.W-12 has not been challenged by the defence. Thus, it is our considered view that accused A.T.M Azharul Islam was s student of Rangpur Carmicheal College during the period 1969-1971.

157. Having considered as above we have no hesitation to validly infer that after passing SSC examination from Rangpur Zilla School accused Azharul Islam was admitted in class XII [H.S.C] in Rangpur Carmichael College and he was a student of that college during the period of 1969-

1971 and he was a leader of **ICS** and also known to P.W-09 Sova Kar, and on the fateful night when her brother Professor Chitta Ranjon Roy and Professor Sunil were abducted from their house she could identify the accused who accompanied the Pakistani army.

158. P.W-09 Sova Kar has thoroughly corroborated the evidence of P.W-10 Ratan Chandra Dash who could also identify accused A.T.M Azharul Islam accompanying the Pakistani occupation army when they entered into the house of Professor Kalachand and abducted him, his wife Monjusree Roy and Professor Sunil.

159. P.W-10 in his cross-examination has asserted that he was a cook of Professor Sunil and Professor Ram Krishna Adhikary and accused Azharul Islam was known to him as he was a leader of a Islamic student organization.

160. It is our considered view that P.W-09 Sova Kar and P.W-10 Ratan Chandra Dash are the most natural, competent, trustworthy and credible witnesses of horrific event of abduction of the victims. The defence has failed to shake the credibility of these two eye witnesses. Thus, there is no cogent ground to discard or disbelieve the evidence of said two eye witnesses.

161. P.W-04 Md. Meser Uddin, P.W-08 Md. Mojibar Rahman Master, P.W-13 Advocate Rathish Chandra Bhowmik and P.W-11 Md. Sakhawat Hossain @ Ranga are the hearsay witnesses. It is by now settled proposition of law that when the evidence of eye witnesses are being corroborated by the hearsay witnesses, the hearsay evidence has got probative value.

162. The **ICTR** [Trial chamber] in the case of **Muvunyi** [September 12, 2006 Para-12] observed the same view, which has been already quoted in the findings, when we discussed charge no.03.

163 In the case of **Rwamakuba the ICTR [Trial Chamber]** [September 20, 2006 Para-334] has also observed:

"A Chamber has a broad discretion to admit hearsay evidence, even when it can not be examined at its source and when it is not corroborated by direct evidence."

164. Rule 56(2) of the ROP 2010 also provides that hearsay evidence is admissible and the Tribunal can rely on it if finds probative value in it.

165. The learned defence counsel has argued that the prosecution has failed to adduce an iota of evidence that accused Azharul Islam was present at the killing spot and he participated in the event of killing of abductees and as such the accused can not be held guilty of murder as crime against Humanity.

166. It has well been proven that the Pakistani occupation army with the aid of accused Azharul Islam and their other accomplices abducted the victims of the crime from their house situated at Carmichael College campus in the night of 30 April, 1971 and on the following morning their dead bodies were found out side the Rangpur town near Damdoma Bridge and the local people having seen the dead bodies covered by earth at the killing spot.

167. In view of the submission of the learned defence counsel and the proven facts, we may look into and consider some settled proposition of law of **ICTY** and **ICTR** to ascertain whether knowledge of details of the attack and presence at the scene of crime are required to be proved.

168. In the case of ***Limaj et al.***, **The Trial Chamber of ICTY** [November 30, 2005, Para. 190] has observed:

"[T]he accused need not know the details of the attack ... The accused merely needs to understand the overall context in which his or her acts took place."

In the case of ***Simic, Tadic and Zaric*** [October 17, 2003, Para. 45] has also held:

"It is well established that the accused need not know the details of the attack,

It is the attack, not the acts of the accused, which must be directed against the target population, and the accused need only know that his acts are part thereof."

169. In the case of ***Blaskic***, **ICTY [Appeals Chamber]**, [July 29, 2004, Para. 50] has observed as follow:

"The Trial Chamber [in Blaskic] agreed with the statement in the Furunzija Trial Judgment that 'it is not necessary that the aider and abettor ... know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor. The Appeals Chamber concurs with this conclusion."

170. **The ICTY (Appeals Chamber) in the case of Krnojelac** [September 17, 2003, Para. 33] also has observed:

"[I]n the Tadic Appeals Judgment, the Appeals Chamber made a clear distinction between acting in pursuance of a common purpose or design to commit a

crime and aiding and abetting the commission of a crime]".

(i) *The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.*

(ii) *In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.*

(iii) *The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose*

[Also Tadic (Appeals Chamber, July 15, 1999, Para- 229]

When an *aider* or abettor becomes a co-perpetrator-

171. *In the case of Kvočka et al., the ICTY (Trial Chamber), [November 2, 2001, Paras. 284-285] has observed that-*

"Eventually, an aider or abettor, one who assists or facilitates the criminal enterprise as an accomplice, may become a co-perpetrator, even without physically committing crimes, if their participation lasts for an extensive period or becomes more directly involved in maintaining the functioning of the enterprise. By sharing the intent of the joint criminal enterprise, the aider or abettor becomes a co-perpetrator. When an

accused participates in a crime that advances the goals of the criminal enterprise, it is often reasonable to hold that her form of involvement in the enterprise has graduated to that of a co-perpetrator."

"Once the evidence indicates that a person who substantially assists the enterprise shares the goals of the enterprise, he becomes a co-perpetrator."

172. Having considered the above proposition of law it is now well settled that even mere presence at the scene of the crime may, under certain circumstances, be sufficient to qualify as complicity. From the evidence of P.W-09 and P.W-10 the two eye witnesses, it is found that the accused by his presence in the crime site and by his culpable acts substantially encouraged and facilitated the main perpetrators, the Pakistani occupation army, in committing the crime and also he shared the intent similar to that of the main perpetrators and thus obviously he knew the consequence of his acts which provided moral support and assistance to the principal perpetrators. Therefore, the accused cannot be relieved from criminal responsibility.

173. In the case of **Prosecutor Vs. Charles 'Ghankay Taylor**: Trial Chamber II SCSL: [Judgment 26 April 2012 Paragraph 166] it has been observed to the effect:

"The essential mental element required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator. In cases of specific intent crimes, such as acts of terrorism, the accused must also be aware of the specific intent of the perpetrator."

174. Acts and conduct of accused A.T.M Azharul Islam at the crime site adequately suggested his intent and knowledge. It has been proven that at the time of the event of abduction of 4[four] Hindu teachers and another, wife of a teacher, from *the* residence of Professor Kalachand and Professor Chitta Ranjon respectively, the accused was present. The event of dragging 4[four] teachers out of their houses is patent that the accused was sufficiently aware of likelihood that his acts would assist the principals in committing crimes. Thus, the accused is found to have actively and substantially encouraged and abetted the Pakistani occupation army, in committing the crimes of abduction and killing of said four teachers and another. It is also lawfully presumed that the accused had *actus reus* in providing moral support and aid to the commission of those offences. The *actus reus* of abetting requires assistance, encouragement or moral support which has a substantial effect on the perpetration of the crimes.

175. The defence has raised a question that the principal offenders have not been identified and brought to the process of justice and thus the accused cannot be held responsible as aider and abettor. It has been held by **the Appeals Chamber of ICTY, in the case of *Krstic* that-**

"A defendant may be convicted for having aided and abetted a crime which requires specific intent even where the principal perpetrators have not been tried or identified." [April 19, 2004 Para 143 of the judgment]:

176. **ICTR [Trial chamber]** has defined '**aiding**' and '**abetting**' in the following manner:

"Aiding means assisting or helping another to commit a crime". [**Muhimana, ICTR (Trial Chamber)**, April 28, 2005, Para-507; **Akayesu, ICTR (Trial Chamber)**, September 2, 1998 Para-484]"

"Abetting would involve facilitating the commission of an act by being sympathetic thereto" [**Muvunyi, ICTR Trial Chamber** September 12, 2006, Para-471;]. **Ntakirutimana and Ntakirutimana ICTR Trial Chamber**, February 21, 2003."

177. In the case of **Muvunyi** (ICTR, Trial Chamber) it has also been held that-

"[I]ndividual criminal responsibility can be incurred where there is either aiding or abetting, but not necessarily both"[Para-4]

Same Trial Chamber in the case of Akayesu has also observed: "[E]ither aiding or abetting alone is sufficient to render the perpetrator criminally responsible." [Para-484].

178. No person of normal human prudence will come to a conclusion that at the time of incident of part of systematic attack, the accused who accompanied the principal perpetrators had a different or innocent intent. Rather, the evidence of P.W-09 and P.W-10 demonstrates that the accused and the principals made the attack with common intent to accomplish their explicit and similar intent of killing.

179. In the case of **Seromba the Trial Chamber of ICTR** [December 13, 2006, Para-307] has observed to the effect:

"[I]t is not necessary for the persons providing assistance to be present during the commission of the crime."

180. The same Trial Chamber in the case of **Kayishema** and **Razindana** [May 21 1999; Para 200] has observed that-

"It is not presupposed that scene of the crime, nor that his contribution be a direct one. Trial is to say the role of individual in the commission of the offence need not always be a tangible one. This is particularly pertinent where the accused is charged with 'aiding' or abetting of a crime."

181. It has also been observed by **ICTR [Trial Chamber] in the case of Bagilishema** that-

"[T]he Participation in the commission of crime does not require actual physical presence or physical assistance." [Para-33].

182. In the case in hand, evidence of P.W-09 and P.W-10 shows that the accused actively and knowing the consequence of his acts accompanied the Pakistani occupation army to the crime site and by his illegal acts he substantially aided and facilitated the commission of crimes committed by the principals. Therefore it cannot be said at all that the accused's presence at the time of abduction of the victims and accompanying the Pakistani army were devoid of guilty intent of killing.

183. Accompanying the perpetrators while abducting the victims is significant indicia that the accused provided substantial assistance and moral support for accomplishment of the crime, although his acts might not have actually caused the commission of the crime of killing in the crime site. In this regard, we may rely upon the decision of **the Trial Chamber of ICTR in the case of Kamubanda** [January 22, 2004, Para 597] which runs as follows:

“Such acts of assistance Need not have actually caused the commission of the crime by the actual perpetrator, but must have had a substantial effect on the commission of the crime by the actual perpetrator”.

184. Thus, we find that accused A.T.M Azharul Islam physically and having ‘awareness’ as to his acts participated and substantially aided, abetted and encouraged to the commission of the crime. The manner, time and pattern of conduct of the accused at the crime site and also prior to the commission of the crime are the best indication of his conscious option to commit a crime. Intent, coupled with affirmative action, is evidence of the highest degree of imputative responsibility. Acts on part of the accused at the crime site are thus qualified as crimes against Humanity as the same formed part of attack directing the unarmed civilian as well as on the particular community. His acts were of course culpable in nature which contributed to the commission of abduction and murder of four teachers and another one who belonged to Hindu community.

Whether the accused committed the offence of genocide

185. Targeting the group of Hindu community residing at the crime site of Carmichael College campus 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.

186. 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 abduction and killed the members of Hindu religion. The evidence of P.W-09 and P.W-10 clearly shows that on the fateful night two other Muslim teachers Professor Reaz and Professor Jalil, the neighbours of Professor Kalachand and Professor Chitta Ranjan, had been staying in their respective houses at the Carmichael College campus. The pattern of perpetration of crimes alleged in the instant charge 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.

187. 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."

188. 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 teachers belonging to Hindu community were chosen by the accused 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.

189. In the case in hand, from the evidence before us 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 perpetrators 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.

190. 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.

191. '**Genocide**' has been defined in section 3(2)(c) of the Act of 1973 and we have already quoted the said provision of law in paragraph no.03.

192. In the instant charge the accused ATM Azharul Islam has also 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**' '**in whole or in part**'.

193. However, in holding the accused criminally responsible for the offence of genocide with which he has been charged we have to arrive at a finding that he committed such a crime, as an individual and 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.

194. Determination of the targeted group is to be made on a case-by-case basis. Evidence shows 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.

195. 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. The plan to destroy in part also constitutes genocide.

196. In the case of **Prosecutor V. Kayishema and Ruzindana, the ICTR Trial Chamber held that-**

"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." [May 21, 1999, Para 94].

197. Further, the Chamber observed 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.

198. 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, the accused A.T.M Azharul Islam by dint of his position was able to accompany the Pakistani occupation army and thereby substantially aided to the author of crimes to perpetrate the attack targeting the Hindu community of the crime area. Thus the accused is guilty of committing genocide as he was present at the place of occurrence when the victims were abducted.

199. By taking the conducts and acts of the accused as a whole into account we are constrained to hold that the accused, in addition to his physical and direct participation to abduction and killing, substantially aided and assisted the Pakistani occupation 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 a potential local leader of Islami Chhatra Sangha [ICS], a student wing of Jamaat-e-Islami.

200. It is quite coherent from the facts of common knowledge involving the backdrop of the Liberation War of Bangladesh that the Pakistani occupation force, in execution of its common plan and policy with the local anti-liberation group belonging to Jammat-e-Islami [JEI] and its student wing Islami Chhatra Sangha [ICS] and other auxiliary forces

targeted unarmed Bangalee civilians, pro-liberation and Hindu religious people.

201. The Tribunal has already observed that accused ATM Azharul Islam was a potential leader of the then Islami Chhatra Sangha [ICS], at present Islami Chhatra Shibir, and also the leader of Al-Badr Bahini of Rangpur district as evident from exhibit nos.13 and 16.

202. A public meeting organized by ICS in observing the 'Badr Day' was held on 7th November 1971 at Dhaka Baitul Mukarram area, where Ali Ahsan Muhammad Mujahid, the then president of East Pakistan ICS disclosed the plan and policy of ICS and Al-Badr Bahini publicly in the context of the Liberation War of Bangalee people. Regarding the said plan and policy as declared by the ICS publicly news was published on 8 November 1971 in 'Dainik Pakistan', which runs as follows

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e`i w`em cwj Z

cwK`Zv`bi ALU`Zv I msnvZ i`qvi `p msKí tNvl Yv

MZKvj tiveevi e`i w`em cwj b Kiv ntqtQ| G Dcj t`q MZKvj we`Ktj evqZ` tgvKviig c`h`Y Xiv kni Bmj vgx QvI mstNi D`v`M GK MYRgv`qZ Abv`Z nq| Gici GK ugvQj te`ivq| MYRgv`qZ ce`cwK`Zvb Bmj vgx QvI mstNi m`fvcwZ Rbve Avj x Avnmvb tgvrv`\$ tgvRwn` GB e`i w`em Dcj t`q mstNi c`q| t`K GKw 4 `dv tNvl Yv K`i b| wZvb tNvl Yv K`i b th-

(1) 0`bqvi e`K w`y`Zv`bi tKvb gvbiP`I Avgiv wekjm Kwi bv| hZw`b chSZ `bqvi e`K t`K w`y`Zv`bi bvg g`Q bv t`qv hvte ZZw`b chSZ Avgiv wek`g tbe bv`| jvBte`f`mg`ni c`Z j`q` K`i wZvb Zvi w`Zxq `dv tNvl Yv K`i b| wZvb e`j b-

(2) 0`AvMvgx Kvj t`K w`y`Lk`i tKvb eB A`ev w`y`i `vj vj x K`i tj Lv c`y`ZKw` jvBte`f`x`Z `vb w`Z cviteb bv ev we`u ev c`v`i K`i Z cviteb bv| hw` tKD K`i b Z`te cwK`Zv`bi Av`Z`Z`i wekjm t`Qv`meKiv Rv`j`q f`\$K`i t`te`| Rbve g`Rv`nt`i evK` `w` tNvl Yv nj t

(3) cwK`Zv`bi Av`Z`Z`i wekjm t`Qv`meK`i m`c`K`e`i " c c`v`i Kiv nt`Q| hviv GB Acc`v`i K`i Q Zv`i m`c`K`e`i`u`k`qvi `vKb Ges

(4) evqZ` tgvKv`v`mt`K D`v`t`i m`S`M`g Pj`te| Rbve g`Rv`nt` GB tNvl Yv`K ev`ZemqZ Kivi Rb` QvI, K.I.K, k`g`K, RbZvi c`Z Avnevb Rivvb,

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

[Akayesu: Para 531; Musema: Para 177]

209. Section 4(1) of the Act of 1973 states that when any crimes 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 ATM Azharul Islam was a potential associate of Pakistani occupation army and also a leader of **ICS** and Al-Badr Bahini of Rangpur district, the organizations which came forward to collaborate the Pakistani occupation army to execute its various plan and design of atrocious acts. 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, he substantially provided practical assistance, encouragement and moral support to the principals i.e co-perpetrators, the Pakistani occupation army in perpetration of the offence of genocide that resulted the killing of 5 [five] persons belonging to 'Hindu Community' which is a 'distinct religious group' 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.

210. Having considered as above we have no hesitation to hold that the prosecution has successfully proved charge no.04 that on 13 April 1971 at about 9.00-11.30 P.M the accused A.T.M Azharul Islam along with the Pakistani army raided the house of Professor Chitta Ranjon Roy and Professor Kalachand Roy and abducted them with another 2 teachers

Ram Krishna Adhikary and Sunil Baron Chakraborty and thereafter they were killed near Domdoma Bridge **with intent to destroy, in part a religious group i.e Hindu religious group**. It is well proved that accused A.T.M Azharul Islam was present when the victims were abducted and he was an active accomplice of the Pakistani occupation army and he substantially provided practical assistance, encouragement and moral support to the co-perpetrators i.e the Pakistani occupation army in committing the offence of genocide as specified in section 3(2)(c)(i)(g) and (h) of the ICT Act, 1973 read with section 4(1) of the said Act.

Adjudication of charge no.05

[Abduction, confinement, torture, sexual violence and other inhumane acts]

211. **Summary Charge no.05:** During the Liberation War in 1971 i.e between 25 March and 16 December, 1971 under the leadership of accused A.T.M Azharul Islam the local Beharis [Non-Bangalees], workers and leaders of Jamaat-e-Islami and Islami Chhatra Sangha, collected locations of pro-liberation supporters and supplied the same to the Pakistani occupation force at Rangpur cantonment. In the first week of August, 1971 at the instigation of the accused, victim M K was raped at her father-in-law's house and she was taken to Rangpur town hall where she was repeatedly raped by Pakistani invading force, one after another and she was kept confined in Rangpur town hall for 19 [nineteen] days. Victim M K became pregnant and subsequently had a miscarriage followed by torture and she was released from Rangpur town hall as she fell seriously ill. During her confinement in town hall

she observed, through window, heinous offences and crimes against Humanity committed by the Al-Badr and Pakistani occupation force upon the men and women who were brought to Rangpur town hall at the instigation of the accused.

212. Therefore, the accused is hereby charged for abetting, facilitating in commission of offences of abduction, confinement, torture and rape as crimes against Humanity as specified in section 3(2)(a)(g)(h) read with section 4(1) and 4(2) of the ICT Act of 1973 which are punishable under section 20(2) of the said Act.

Discussion and evaluation of evidence and findings:

213. To prove the instant charge the prosecution has examined 6(six) live witnesses of whom P.W-01 is a victim M K.

214. P.W-01 has testified that when the Liberation War started in 1971 in the month of Bhadra [5th Bengali month] her husband left for India to join 'Mukti Bahini' [freedom fighters]; near their house there was a cigarette factory and in that factory there was a non-Bangalee guard. On coming to know that her husband went to India for joining the Liberation War as per information of the said guard on 7/8 Bhadra at about 8.00-9.00 A.M the Pakistani army, Rajakars and Al-Badr men came to their house and started firing shots. Hearing the sound of shots the village people started running here and there to save their lives. At that time she was inside the house and her father-in-law was in the courtyard. The Pakistani army, Rajakars and Al-Badr having surrounded their house apprehended her father-in-law and thereafter started beating him. Seeing the said incident she became afraid and started running towards the house of Rahman, a neighbour. At that

time 3[three] Pakistani army men and a Bangalee started to chase her; reaching the house of Rahman she found no one there as the inmates of the said house had already taken shelter elsewhere. The Pakistani army and the Bangalee having captured sexually abused her one after another despite her request that she was carrying 6(six) months pregnancy. Hearing whistle blow of another Pakistani army man the said Pakistani army men made her free and they asked the Bangalee addressing A.T.M Azharul Islam to bring her with them. Then she could understand the name of Bangalee man was A.T.M Azharul Islam. Thereafter A.T.M. Azharul Islam and Pakistani army men took her in her father-in-law's house. On coming there she found her father-in-law lying on the ground like a dead man; then the Pakistani army men, the Razakars and Al-Badrs asked about her husband's name and whereabouts of him. Then she replied that the name of her husband is Md. Mostafa but she did not know the whereabouts of her husband, and then one of the Razakars gave a blow with a '*lathi*' on her waist. Then they also asked her where she had kept bombs. In reply she said that she never saw bombs. Thereafter they plundered their house and looted the belongings of the house including gold and cash money. Presuming her father-in-law dead the Pakistani army men took him in their vehicle and she was also picked up in the army vehicle. On the way they threw down the body of her father-in-law beside a road and she was taken to Rangpur town hall. In the town hall she found 7/8 other women. The Pakistani army used to sexually abuse her and the other women confined in the town hall in every night. In the day time she used to see accused A.T.M Azharul Islam at the town hall to have

talked with the Pakistani army officers. Accused A.T.M Azharul Islam also accompanied the Pakistani army when they went out with their vehicle and returned to town hall with young boys and girls. The young boys were tortured and the women were sexually abused by the Pakistani army men. Being sexually abused she had a miscarriage and thereafter as per advice of two Banglee Razakars she was released from the town hall and thereafter she came back to her house after 19 [nineteen] days. After coming back to her house she saw that her farther-in-law was seriously ill and eventually he died while he was under treatment. After the liberation of the country her husband met her at his sister-in-law's house and after getting treatment she was taken to their house by her husband.

215. In cross-examination this witness has stated that her date of birth as mentioned in the voter list and National ID card is correct one. The name of her elder daughter is Setara and the date of birth of Setara as mentioned in the voter list and National ID card is correct. After birth of Setara Begum she blessed 3[three] daughters namely Joytun, Diljahan, Guljahan and two sons namely Dinmohammad and Monsur Ali, who were born intervening one year each.

216. She has further stated that at the time of her marriage she was about 9[nine] years old. When her husband went to India she was carrying 2[two] months pregnancy. This witness has denied various suggestions put by the defence particularly the offences as alleged did not take place and for illegal gain she has deposed making false statements implicating accused A.T.M Azharul Islam.

217. P.W-2 Md. Mostafa Miah, the husband of the victim P.W-01, has testified that he read up to class V. When the Liberation War started he went to India in the month of '*Boishakh*' for participating in the Liberation War. After independence of Bangladesh he came to his house and he saw none of his inmates in the house. His neighbour informed him that his father died due to torture of the Pakistani army and his wife was in the house of his sister Julekha. Thereafter, he went to his sister's house and met his wife and his wife narrated the whole incident to him. He has further stated that the Pakistani army did not know his house and his father. Accused A.T.M. Azharul Islam and Mostaque identified his house and they brought the Pakistani army. At this stage the witness started weeping.

218. In cross-examination he has stated that in the freedom fighters camp he served as a cook as he had some defect on his left leg and because of that reason his name was not listed in the freedom fighters' list. He has further stated that the name of her wife was not in the list of '*Birangona*' [war-heroines] but the local journalists of print and electronic Medias on several occasions took interview of his wife. He denied the defence suggestion that he has deposed falsely at the instance of interested quarter.

219. P.W-04 Md. Meser Uddin, an organizer of the Liberation War, has testified that 2[two] days after the independence of the country having returned from freedom fighters camp at India he learnt that the young boys and girls were used to take to Rangpur town hall where they were tortured in various ways. Having gone to Rangpur town hall he found so many alamats like women's 'sharis', 'blouses', 'patikots' and also

decomposed bodies of the women. He also heard that the wife of Golam Mostafa was raped by the Pakistani army and the accused A.T.M. Azharul Islam. He has further stated that accused Azharul Islam was known to him since 1970, when he came to Badorganj for election campaign in favour of Jamat-e-Islami candidate. The defence has suggested this witness that he did not disclose the above facts to any one before he deposed before the Tribunal.

220. P.W-08 Md. Mojibor Rahman Master, another organizer of the Liberation War, has deposed that after the liberation of the country he came to Rangpur on 22 December, 1971 to see the situation of Rangpur town hall and he found bloodstain 'sharis', 'blouses' and 'patikots' of women and also found bloodstain marks on the wall of town hall and many dead bodies of the women floating in a well beside the town hall. At that time Golam Kibria and Abdul Mannan two Awami League leaders and many others were also present there. They informed him that accused A.T.M. Azharul Islam aided the Pakistani army in bringing the women to town hall from various places. Then, he went to village Kamal Kasna and heard from Golam Mostafa about the torture and sexual violence on her wife by the Pakistani army and accused A.T.M. Azharul Islam and that his wife was confined for 19 days in Rangpur town hall.

221. In cross-examination he has stated that after liberation of the country he at first came to Rangpur on 22 December 1971. Thereafter he went to the house of Golam Mostafa at Kamal Kasna and heard about the occurrence from her wife and that the house of P.W-01 is 16 miles away from his house.

222. P.W-11 Md. Shakhawat Hossain Ranga has deposed that he heard that during Liberation War 1971 accused A.T.M. Azharul Islam used to go to Rangpur town hall and met the Pakistani army and he helped the Pakistani army in capturing the freedom loving people and to collect pretty women. The defence has suggested this witness that accused A.T.M. Azharul Islam never helped the Pakistani army in capturing women which was denied by the witness.

223. P.W-12 Md. Rafiqul Islam Nannu has deposed that Rangpur town hall was being used as a torture camp in 1971 during the Liberation War where the women were tortured and sexually abused by the Pakistani army and accused A.T.M. Azharul Islam used to help them in committing such crimes. He denied the defence suggestion that he deposed falsely at the instance of the interested quarter to victimize the accused.

224. On scrutiny and examination of the above evidence of live witnesses it is evident that P.W-01 has categorically deposed that on 7/8 Bhadra 1971 the Pakistani army along with accused Azharul Islam and a non-Banglee Mostaque came to their house in search of her husband, who joined '*Muktibahini*' and on coming to their house the Pakistani army started beating her father-in-law and out of fear she started running towards the house of Rahman, a neighbour, and took shelter in that house and 3[three] Pakistani army men and accused A.T.M Azharul Islam, having chased and captured her they sexually abused her in the house of Rahman, and thereafter she was taken by the Pakistani army along with the accused into Rangpur town hall which was being used as torture camp. This witness found 7/8 other

women in the said camp and each and every night the Pakistani occupation army men used to sexually abuse all of them. She has further stated that two army vehicles, which were taken to their village, used to stand in front of the town hall and sometimes the army men and accused A.T. M. Azharul Islam went out with the said vehicles and the young girls and boys were brought by the said army vehicles, and then they were kept in the town hall and the young boys were tortured and girls were sexually abused. In the said camp she was confined for 19 days and thereafter she was released from the said camp as miscarriage had taken place.

225. P.W-02 Md. Mostafa Miah, the husband of victim P.W-01, has testified that after the independence of the country having met his wife he came to know about the sexual violence committed on her by the Pakistani army men and the role of the accused. From his testimony it appears that he narrated the story in same voice as narrated by P.W-01 and there are no inconsistencies or contradictions between the evidence of the two.

226. P.Ws-04 and 08 have testified that immediately after the liberation of the country they went to Rangpur town hall to see its condition and they found there the bloodstain 'sharis', 'blouses', 'patikots' and decomposed bodies of women.

227. P.Ws-11 and 12 have also testified that they heard that the Rangpur town hall was used as a torture cell where the women were being sexually abused.

228. Above evidence has clearly proved that Rangpur town hall was used by the Pakistani army as a torture cell and in the said torture cell

the women were brought from different places and kept confined and thereafter they were sexually abused by the Pakistani army.

229. P.W-01 in her deposition though stated that she saw accused A.T.M. Azharul Islam in that place and going out with the Pakistani army men but there is no such statement that accused A.T.M Azharul Islam committed sexual violence on the victims or abductees in the said camp.

230. Defence has seriously challenged the credibility of this witness [P.W-01] referring to the evidence. It has been argued by the defence that P.W-01 in her deposition stated that in 1971 she had no children but in her cross-examination she has admitted that the date of birth of her and her elder daughter Setara mentioned in the National ID card are correct and as per the National ID card Setara was born in the year 1964 and she [P.W-01] blessed 5 [five] children who were almost born one year gap and as such this contradiction of the evidence makes P.W-01 unreliable and her evidence should be left out of consideration.

231. It is true that P.W-01 in her deposition stated that she had no children in 1971 but in her deposition she has stated that the dates of birth of her and her daughter Setara Begum mentioned in the National ID card are correct. From the evidence of P.W-19, the investigating officer, it appears that the date of birth of P.W-01 is 01.01.1945 and exhibit F shows that the date of birth of her elder daughter Setara Begum is 01.01.1964.

232. Now the question is whether these inconsistencies or contradictions of the evidence of P.W-01 make her entire evidence unreliable.

233. In deciding the above issue, before considering the relevant propositions of law, we have to keep in our mind some pertinent factums; which are that the P.W-01, the victim, has testified before this Tribunal after 43 years of the horrific event and that she is a simple, illiterate, 'pardanshil' village lady and that for the last 43 years she has been in a traumatic situation, and also the context of 1971.

234. The **ICTR [Trial Chamber]** in the case of **Nadindabahizi** [July 15,2004, Para 23] has observed to the effect:

"The chamber may consider a veracity of elements in assessing the credibility of witnesses, including contradictions between the witness's testimony and prior witness statements; inconsistencies or implausibility's when the testimony; and other features of the witness's testimony. These elements must be considered in light of other factors, including the passage of time, the horrific nature of the events described, and cultural factors which may explain apparent discrepancies."

235. The **ICTR [Trial Chamber]** in the case of **Kajelijeli** [December 1, 2003, Para-[150] has also observed:

"Trial chamber may consider social and cultural factors in assessing witness testimony," "discrepancies in testimony may occur where events took place over a decade ago," and "trauma does not prevent person from being a credible witness."

236. If we consider the social, educational, cultural background of P.W-01 and the factors of long lapse of time and traumatic situation, along with the above proposition of law we have no hesitation to hold

that the existence of said inconsistencies do not mean that the entire evidence of P.W-01 is not credible and reliable.

237. Now the question is whether the above inconsistencies are fatal to the prosecution case.

238. If we scrutinize the inconsistencies as it appears from the evidence of P.W-01, it is evident that those statements are not related to the main allegations and it does not go to root of the matter. The defence has failed to shake the basic version of the evidence of P.W-01 that Pakistani army picked her up from their village home with the aid and assistance of accused A.T.M Azharul Islam and thereafter she was taken to Rangpur town hall, where she was kept confined for 19 days and the Pakistani army men used to sexually abuse her and other women confined therein in each and every night, and that as a result of sexual violence P.W-01 had a miscarriage and that accused A.T.M Azharul Islam used to come to that torture camp and some times he moved with the Pakistani army men for capturing the young boys and girls.

239. P.W-04 and P.W-08 have corroborated the above testimony of P.W-01 that after independence they visited Rangpur town hall where they found blood stain 'sharis', 'blouses', 'patikots' and decomposed bodies of women, and that they learnt that accused A.T.M Azharul Islam aided and facilitated the Pakistani army to commit such barbaric atrocious acts.

240. In this sub-continent it is by now well settled proposition of law that the maxim '*falsus in uno, falsus in omnibus* [false in one thing, false in everything] is not a sound rule of practice and it should not be

applied mechanically. Therefore, it is the duty of the Court, in case where a witness has been found to have given unreliable evidence in regard to certain particulars, to scrutinize the rest of his evidence with care and caution. If the remaining evidence is trust worthy and substratum of the prosecution case remains in fact then the court should uphold the prosecution case to the extent it is considered safe and trust worthy. Courts have, however to attempt to separate the 'chaff from the grain' in every case. They can not abandon this attempt on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process can not be reasonably carried out. [Reference: AIR 1972 SC 2020 (Sohorab Vs. State of M.P); AIR 1980 SC 1322 (Bhimrao Vs. State of Maharashtra); 29 DLR SC 221 (Ekabbar Khan Vs. State); 8 DLR F.C 69 (Adalat Vs. The Crown).

241. In the case of **Ugar Ahir and others Vs. the State of Bihar, the Supreme Court of India** has observed to the effect:

"It is, therefore, the duty of the court to scrutinize the evidence carefully and; in terms of the felicitous metaphor, separate the grain from the chaff. But it can not obviously disbelieve the substratum of the prosecution case or the materials parts of the evidence and reconstruct a story of its own out of the rest."

[AIR 1965(SC), Page-277]

242. In the case of **Nadodi Jayaraman Vs. the State of Tamil Nadu, the India Supreme Court** has observed that-

"The fact that a witness has not told the truth in one or two particulars will not make his entire evidence unreliable." [1993 CrLJ, Page-426(SC)]

243. In the case of **Sukha and others Vs. the State of Rajasthan, the Indian Supreme Court** has opined that-

*"Where one part of the prosecution story is disbelieved, there is no bar in law to acceptance by the court of another part of that story and to base conviction there on."***[AIR 1956 SC 513]**

244. Indian Supreme Court in the case of **State of Rajasthan Vs. Smt. Kalki and another** has observed that-

"Immaterial discrepancies do not affect the conclusion one way or the other." **[AIR 1981, SC 1390]**

245. In the case of **Abdul Khaleque Vs. the State the Pakistan Supreme Court** has held that-

*"Evidence of prosecution witnesses on main story found to be truthful and of quality which could safely be relied upon."***[1983 P CrLJ 898 SC[AJ&K].**

246. The defence has suggested that for getting a better job of her son, P.W-01 has deposed before the Tribunal against the accused at the instance of the interested quarter, which was denied by the P.W-01. It is hardly to be believed that for getting a job of her son P.W-01, who is a simple, illiterate, pardanshil village-woman has come forward before the Tribunal just to make a humiliating statement against her honor and dignity such as evolved in the commission of sexual violence upon her in absence of any proof that there had been any previous enmity between the witness [P.W-01] and the accused or the P.W-01 is a lady of questionable character.

247. It is also well settled in our jurisdiction as well as **ICTR** and **ICTY** that with respect to sexual offences, it is not required corroboration of

the evidence of a victim of sexual violence, if the victims' testimony is found credible.

248. Having considered and discussed as above we are convinced that there is no legal reason to brush aside or discard the entire evidence of P.W-01 and after separating the "chaff from grain" we can accept her evidence partly which are to be found credible and trustworthy.

249. The prosecution story of Rangpur town hall that it was being used by the Pakistani occupation army as a torture cell, where many women were confined and sexually abused as narrated by P.W-01 is fully corroborated by P.W-04 and P.W-08, who immediately after liberation had gone to Rangpur town hall and found bloodstains 'sharies', 'blouses', 'paticots' of women there and decomposed dead bodies in a nearby well [Kua] and accused A.T.M Azharul Islam used to visit the said torture cell [Rangpur town hall] and met Pakistani army and some times he moved with them.

250. Thus, we can legally and validly infer that accused A.T.M Azharul Islam aided and facilitated the Pakistani occupation army in committing the offences of abduction of women, including P.W-1 M K, confinement, torture, rape and other in humane acts [sexual violence].

251. However, on assessing the evidence of P.W-01 it is very difficult to come to a definite conclusion that accused A.T.M Azharul Islam himself committed offence of sexual violence along with the Pakistani army upon her in the house of Rahman where she took shelter seeing the Pakistani army.

252. It is the fact of common knowledge that during the Liberation War in 1971 more than 2[two] lakh women were raped by the members of

cieZiKvuj GjuKvi vbxq e³ tmvevnb Lvb I Mdž mĩne AvgvK
 D×vi Ktib| Giv Lg eotjvK uQj Ges Lvbt`i m½ Pj vtdiv uQj | Lvbtmbvrv
 Mdž mĩntei mĩZ⁷xivi eimvq Gtm vKZ| GB `Rb Lvbtmbv`i KvQ t_tK
 AvgvK Qmoq vbtq Avtm GB etj th, AvgvK tQto br w`tj Avgvi tQj tqtq
 ,tjv me Qb@vov nq hvte| Gici Lvbtv AvgvK tQto t`q| tmvevnb Lvb Avi
 Mdž mĩne AvgvK Kvco w`tq vbtq Avtm| Kvib ZLb Avgvi kixi tKvb Kvco
 uQj bv|0

255. Another victim Roison of the same area has narrated her bitter experience to the effect:

0Lvbi Avgtj (civK`-vb Avgtj) GB RivMviB `vY civk fivov vKZvg|
 Avgvi vbtq nqtq ZLb ctq civQ-q eQi | Avgvi ZLb `v tQj tqtq| tqtqv
 nqtq, gvT GMvi w`b| `vix ivRuv`j thvMvj i KvR KiZ| NUBvi w`b `vix
 emotZ uQj bv| KvR KitZ tMtQ, `vixUv Avgvi civMtj i gtZv| evx Kg| kvivo
 uQj Nti | tKvb gvtm NUBv nqtqUj GUV Avgvi GLb gtb tbB| Zte NUBvUv
 NtUuQj `vjtejv| `vjtejv hLb Lvbtv Mtg XkKuj ZLb Avng gtb KtiUQ th,
 vWtgi e-vK (KvtjvevRmi) Kti hviv, Zv`i aitZ GtmQ| GLvb tm mgq
 KvjtvevRmi PjZv, vevfba vRvbtmi gta` vWgl uQj | Lvbtv Nti XkKjv
 `vjtejv| Avng gtb KtiUQ vbrv civk vWtgi e-vK aitZ GtmQ| `Rb Lvb
 XkKuj Avgvi emv| GKRB Nti XkKtQ Avi AvtiKRb t`vii KvQ `votqUj |
 I iv uQj me tvkvK civ, j vPI ov tRvqvbj tvvK Ges t`LZ dm| I iv XkKjv
 Ntii tfZi, AvgvK tKvb vKQvRtM`m KtiUv| tqtq uQj tKvtj | tqtq ZLb gvT
 GMvi w`bvi vki | tqtqK Avgvi tKvj t_tK tdtj w`j gvUvZ Ges AvgvK tUtb
 vbtq tMj Ntii tfZi | tqtqK Qvpo tdtj t`qvi ci Avgvi kvivo ZvtK tKvtj
 Ztj tbq| kvivo l`K vbtq Ni t_tK evBti Pj hvq| Gi Avtm kvivo
 Lvbtmbv`i etj uQj th, Avcbv`il tZv gv-terv AvtQ| ZLb Zviv kvivoK
 etj tQ, Pz| kvivo Avi tKvb K_v ej tZ civv| tPvLi mvgtb Avgvi teB^{3/4}vZ
 hvZ t`LZ br nq ZvB evBti Pj tMtQ|

I iv Gici Ntii tfZi vbtq Avgvi gLj tfZi MvgQv cvj w`j | Avng
 tKvtv K_v ej tZ civuQj vg bv| ftqi tPvU Avgvi gLj MvgQv vKvi Kvity Avng
 tPvUgP I KitZ civv| gLj gta` MvgQv fti w`tq hv` tZvgtK ati Zvg|
 K_v ej tZ civte bv| Gici I iv hv Kvivi ZvB Kitjv| ftq Avng ZLb KvUv
 cvZv nq tMjQ|

Avng⁶ i m½ Avgv`i Mtqi tKvtv tvvK uQj bv| Lvbtv GtmUj tntU
 tntU I civ w`tq| I civ tKvb w`K ej tZ civtev br (thv`K vbt`R w`tqUj iBmb
 Zv uQj ce⁹v K), GKRB Avgvi I ci AZ`vPvi Kitjv| Gici I iv Pj tMj |
 I iv Pj hvI qvi ci kvivo AvgvK tMvj Kvi tq w`j | KvUv vmoZ AvvZ j vMvi
 Rb` Avgvi miv Mv-MZti cPv e`v v nUQj | kvivo vK me I l`g Lvl qj | tKvtv
 Wv³vi t`Lvqv|

Livbir IB KivR Kivi mgq Avgvi Mtq tKvtr AvBo-Kigo t`qub/
Avgvi citb kmo civ wQj, Liv kmo Ltj tdjt wQj | Liv wbtRiv Dj ½ nqub, iay
c`vUvi mvgtbi w`Kuv tLvjt wQj | KZTY Liv wQj Zv Avgvi gtb tbB|Ó

256. Sad and painful experience of Birangona Ferdousi Priobhasini has narrated in the following manner:

ÓG NUbvi ci w`b wctfwm Yx Awctm tMtQb| mt½ mt½ I ci t`tK WvK Gtjv/
wRGg tWtK cwmqtQb| i "tg XktZB Dmb ej tj b, ÓAvgv`i KvQ Lei GtmtQ
Zwg cfdmi fBqvi gvWt`i i mvt_ RwoZ|Ó wctfwm Yx Pz | fveWQtj b, bZb tUvc
tdjv nt"Q| Ntj `wotq wZub Ni t`tK tei " tZ hvteb ZLb tcQb t`tK wR Gg
ej tj b, Ótkvtr, KgvÓvi `j Rwi b Avmteb, tbfvj KgvÓvi | `Zwi t`tKv|Ó
wctfwm Yx I Lt`b `i Rvi gYUvq `wotq _i_i Kti tKtc I tVb| wZub i`tbQb,
`j Rwi b mfi YvZxZKvtj i g`-eo Lwb| GLt`b IB Gj vKvq al`Kvix wntmte Zvi
bvq AvtQ| tKvtr tgq, tm my`ix wK Amy`ix tnvK, Zvi KvQ cvWtj tm Avi
wcti AvmZv bv| al`Kti tgti ZvK b`xtZ tdjt w`Z| wctfwm Yx ftq, tVtm
tRbtij g`vtrv`i i cvtqi KvQ j`wtq cotj b, Óm`vi AvgvK tKb m`vi Ó?
g`vtrv`i w`i tPrtL I i w`tK ZwmKtq axti axti ej tj b ÓKvib Zwg wcm KvgUvi
cfdmi fBqvi nZ`vi mt½ RwoZ| ZLb tZvgvK iv`-vq t`Lv tMtQ| Avgv`i
KvQ Lei AvtQ|Ó mU`vq `j Rwi b Gtjv Mmo wbtq| gvSeqmx Awg©Awcmvi |
wctfwm YxK Ztj wbtq Zvi Mmo QYtjv tbrf tnv tKvqU`i i w`tK| Zvi ci i i "
ntjv GtKi ci GK tRiv Kiv|

`j Rwi bt Ltj ej tv, cfdmi fBqv`K Kviv nZ`v Kti tQ?
wctfwm Yxt Awg Rmb bv m`vi |

`j Rwi bt I am KgvÓvi `j Rwi b| You call me only `j Rwi b|
Gevi ej tv, Zwg bKkvj t`i mt½ AvtQv| cfdmi tK Kviv nZ`v Kti tQ, Zwg Rvb|
wctfwm Yxt Awg bKkvj t`i mt½ tbB| _vKtj Pvkwi Ki tZ AvmZvg bv|

`j Rwi bt GB Kvi tYB tZv Avgv`i i m`n nt"Q| You are too nice
for this Job. You are collecting something from here. Otherwise
tZvgi gtZv tgqti Gi Kg wbi vEvnx b Ae`vq Pvkwi Ki tZ Avmvi K_v bq|

Zvi ci `j Rwi tbi tPniv v µgk cvtè thtZ j vMj | evtNi MRÓ tQto
tm weortj i QÚtek ai tj v, hv Avi I fqvem| ÓAvgvi GLt`b hviv Avtm Zviv wcti
hvq bv|Ó `j Rwi b ej tQ, ÓmKŠ` tZvgi tPrtLi th Kx kw³! Rmb Zwg cfdmi ti i
nZ`vi mt½ RwoZ| bKkvj t`i mt½ AvtQ| Zely tZvgvK Awg tQto t`e| GK
ktZ,© Let us enjoy for a moment. I am hungry for you. Ó wctfwm Yxi
`MtZw³ `vaxbZvi 26 eQi ci, ÓAvgvi kxZj cv_i t`nLmb, mfi YvZxZKvtj i
GKRb Lwb`K `vb Kijvg, tKej c`tY tetP _vKvi Rb`|Ó

nViv wctfwm Yx thb ev`-te wcti Gtj b| ej tZ _vKtj b, Ótmw`b
evÓmj iv t`tLQ Awg Awg©wRc t`tK bvgwQ| tj fvi wPd wbtR WtBF Kti Wc

ir̄ t̄q tMj | G, t̄jv cieZP̄ mḡtq gZ̄yKe i Pbr K̄ti uQj Avgvi Rb̄ | Avgvi ZLb
AZxZ-f̄iel r̄ c̄j̄i v̄c̄j̄i t̄j v̄c t̄c̄tq uM̄t̄q uQj | 0

-----|
t̄ k r̄axb n̄t̄j v | 5-6 ir̄ b ci ūc̄t̄f̄w̄l Yx Aw̄d̄t̄m t̄M̄t̄j b | GLb ūḡj KZv, ÷vd,
meivB ev̄Ōm̄j | D̄ub t̄P̄q̄īt̄i em̄t̄ZB ūḡt̄j i k̄īḡK t̄bZv t̄ s̄to Av̄t̄m | 'Av̄c̄īb GLv̄t̄b
R̄t̄q̄b K̄īt̄eb b̄v | Av̄c̄īb c̄m̄K -ūb̄t̄ i t̄K̄īj v̄ēt̄i Ūi |' Ges AK_ F̄v̄l̄v̄q M̄j̄ v̄M̄j̄
K̄īt̄Z j v̄M̄t̄j v | ūc̄t̄f̄w̄l Yx c̄k̄v̄m̄t̄b t̄d̄īb K̄t̄i c̄īt̄m̄īb̄j̄ ḡv̄t̄b R̄v̄i t̄K t̄c̄t̄j b | ūZ̄īb
Z̄v̄i cēc̄w̄i ūPZ | GB ūḡt̄j B t̄j̄ēv̄i Āv̄W̄f̄īBR̄v̄i c̄t̄ ūQ̄t̄j b | GLb c̄t̄ḡv̄k̄b
n̄t̄q̄t̄Q | ḡv̄t̄b h̄t̄x̄i b̄q ḡv̄m ūZ̄īb Aw̄d̄m K̄t̄i b̄īb | Aēv̄Ōm̄j t̄ i f̄t̄q c̄w̄īj t̄q c̄w̄īj t̄q
t̄ t̄K̄t̄Q̄b | t̄m m̄ḡq ūc̄t̄f̄w̄l Yxi m̄t̄½ Z̄v̄i ev̄i s̄t̄q̄K t̄ L̄v n̄t̄q̄t̄Q | ūR̄Ḡg ūd̄ v̄B̄t̄K
ēt̄j ūc̄t̄f̄w̄l Yx ḠK̄ēv̄i I i t̄eZ̄t̄b̄i Ūv̄K̄v̄ em̄o t̄c̄s̄t̄Q ir̄ t̄q̄i ūQ̄t̄j b | ūc̄t̄f̄w̄l Yx t̄d̄īt̄b
Z̄v̄t̄K ēj t̄j b, 'm̄v̄i, Av̄c̄īb t̄Z̄v R̄v̄t̄b̄b Aw̄g t̄K̄īj v̄ēt̄i Ūi ūK̄b̄v | Av̄c̄īb Z̄v̄t̄ i
t̄ēv̄S̄v̄b m̄v̄i |' c̄īt̄m̄īb̄j̄ ḡv̄t̄b R̄v̄i ēj t̄j b, 'Ḡm̄e K_ v̄ ḡv̄b̄y GLb ī b̄t̄Q b̄v | Z̄ūg
t̄K̄īj v̄ēt̄i Ūi ḠŪv̄B Z̄v̄i v̄ ēj t̄Q | Aw̄g GLb K̄x K̄īt̄Z c̄w̄i |' ḡv̄b̄y t̄K̄īj v̄ēt̄i Ūi
ēj t̄Q, ūc̄t̄f̄w̄l Yxi Z̄v̄B P̄v̄K̄w̄i P̄t̄j t̄M̄j | em̄o t̄Z̄ ḠK̄w̄ b̄ c̄w̄ī k̄l Ḡt̄m̄Q̄j Z̄v̄t̄K
t̄M̄d̄Z̄v̄i K̄īv̄i R̄b̄ | b̄Z̄b t̄ k̄ | b̄Z̄b m̄ī K̄v̄i | ī Ē " q̄l̄q̄x h̄t̄x̄i ḡv̄āt̄ḡ G t̄ t̄k̄i
R̄b̄t̄ n̄t̄j v | Z̄v̄i R̄b̄ ūc̄t̄f̄w̄l Yx n̄t̄j b āw̄l Z̄, b̄'ḡv̄m āt̄i h̄v̄i v̄ I t̄K̄ ūb̄h̄v̄Z̄b K̄t̄i t̄Q,
āl̄ P̄ K̄t̄i t̄Q, ūc̄t̄f̄w̄l Yxi K_ v̄ n̄t̄j v, Z̄v̄i v̄ t̄Z̄v I i ḡt̄L̄i L̄v̄ēv̄i Z̄Lb t̄K̄t̄o t̄b̄q̄īb |
r̄axb t̄ t̄k̄ ūc̄t̄f̄w̄l Yxi c̄īt̄q̄i Z̄j v t̄ t̄K̄ t̄h̄b ḡv̄m̄Ū m̄t̄i t̄M̄j | ūZ̄īb ūḡj t̄ t̄K̄
t̄ēw̄īt̄q̄ Ḡt̄j b | Ḡ ēv̄c̄v̄t̄i ūc̄t̄f̄w̄l Yxi ēĒ " ē n̄t̄Q, ūZ̄īb ēk̄f̄īv̄ Aw̄f̄ḡv̄b ūb̄t̄q̄
t̄m̄w̄ b̄ ūḡj t̄ t̄K̄ P̄t̄j Ḡt̄m̄Q̄t̄j b | P̄v̄K̄w̄i ūd̄t̄i c̄v̄l̄ q̄v̄i t̄P̄ōv̄ Z̄v̄B Av̄i K̄t̄i b̄īb |

Av̄Z̄k̄q- r̄t̄b̄i K̄v̄t̄Q Z̄v̄i c̄w̄ī P̄q̄ āw̄l Z̄ b̄v̄īx̄i | t̄m̄Ūv̄l t̄K̄īj v̄ēt̄i Ūi n̄l̄ q̄v̄i
t̄P̄t̄q̄ K̄g Ac̄īv̄t̄ai b̄q | h̄t̄x̄i c̄īc̄i ūc̄t̄f̄w̄l Yxi ḡv̄_v̄i I c̄ī āw̄l Z̄v̄ I
t̄K̄īj v̄ēt̄i Ūt̄i i s̄ȳt̄t̄v̄ LoM S̄t̄t̄Q | 0

256.

257. Another Birangona Masuda Khatun of Kushtia has narrated-

Ò̄t̄m̄w̄ b̄ N̄t̄i P̄v̄j ūQ̄j b̄v | Z̄v̄B N̄t̄i i t̄X̄ūk̄t̄Z̄ āv̄b f̄īv̄īūj̄ v̄g | t̄ēj v̄ Z̄Lb s̄k̄Ūv̄-
ḠM̄t̄īv̄Ūv̄ ev̄t̄R | Z̄Lb l̄ m̄K̄v̄t̄j̄ i L̄v̄l̄ q̄v̄ n̄q̄īb | ḡt̄b K̄īj̄ v̄g t̄h, D̄t̄W̄t̄b̄ āv̄b K̄q̄Ūv̄
t̄b̄t̄o ir̄ t̄q̄ Ḡt̄m̄ L̄v̄t̄ev̄ | c̄v̄t̄k̄ī em̄ōi ḠK̄R̄b̄ ḡv̄j̄ v̄ t̄X̄ūk̄t̄Z̄ c̄v̄o ir̄ w̄Q̄j Ges Avgvi
ḡv̄ c̄v̄t̄k̄ ēt̄m̄ t̄b̄t̄o ir̄ w̄Q̄t̄j b | Aw̄g t̄K̄v̄t̄j̄ ev̄P̄v̄ ūb̄t̄q̄ N̄t̄i t̄f̄Z̄i h̄v̄l̄ q̄v̄i R̄b̄ c̄v̄
c̄w̄ōt̄q̄ūQ̄ Ḡḡb m̄ḡq ūḡj̄j̄ Ūm̄ī N̄t̄i t̄f̄Z̄i X̄t̄K̄ c̄t̄o | t̄K̄v̄b̄w̄ K̄ ir̄ t̄q̄ t̄h Z̄v̄i v̄ Ḡt̄j̄ v̄
Avḡi v̄ t̄ L̄t̄Z̄ c̄v̄B̄īb | Z̄Lb Ni ūQ̄j Ab̄ir̄ t̄K̄ | eo ūŪt̄b̄i Ni ūQ̄j P̄v̄i P̄v̄j̄ v̄ | t̄n̄t̄k̄j̄
A_ v̄p̄ ī v̄b̄w̄Ni ūQ̄j, P̄v̄īw̄ t̄K̄ t̄ēōv̄ t̄N̄i v̄ ūQ̄j Av̄i t̄X̄ūk̄ī Ni ūQ̄j | t̄X̄ūk̄ N̄t̄i āv̄b
f̄īv̄īūQ̄, Z̄Lb t̄K̄v̄b̄w̄ K̄ t̄ t̄K̄ t̄h Ī i v̄ n̄V̄r̄ K̄t̄i X̄t̄K̄ c̄ōt̄j̄ v̄ ēS̄j̄ v̄g b̄v | Ī i v̄ Ḡt̄m̄
ēj t̄j̄ v, Ò̄Av̄Ūv̄ Av̄t̄Q̄ Av̄Ūv̄- GīK̄ḡ ēj t̄Q̄ Av̄i Aw̄g _i_ ūīt̄q̄ K̄v̄āūQ̄ | Avgvi t̄Q̄v̄Ū
t̄Q̄t̄j̄ ūt̄K̄ Z̄Lb N̄t̄i ī B̄t̄q̄ t̄īL̄ūQ̄j̄ v̄g | Ī t̄ ī t̄ t̄L̄ Avgvi ḡv̄l̄ n̄K̄P̄w̄K̄t̄q̄ t̄M̄t̄Q̄b |
c̄w̄īj̄ k̄ t̄h̄ḡb̄ t̄c̄īk̄v̄K̄ c̄t̄ī ūḡj̄j̄j̄ Ūm̄ī ī v̄ mē t̄m̄īK̄ḡ t̄c̄īk̄v̄K̄ c̄īv̄ ūQ̄j | ḠŪk̄B̄ ī āy
Avgvi ḡt̄b̄ Av̄t̄Q̄ | K̄v̄īȲ Z̄Lb Avgvi Av̄i ū̄k̄ā b̄v̄B, Avgvi ḡv̄l̄ K̄v̄āt̄Q̄b | Aw̄g
K̄v̄āūQ̄, Z̄Lb Ī i v̄ Avgvi W̄v̄b̄ c̄v̄ āīt̄j̄ v, Aw̄g K̄v̄āūQ̄ Z̄ēȳ Ī i v̄ Avgvi c̄v̄ āīt̄j̄ v |
s̄B̄R̄b̄ Ḡt̄m̄Q̄j̄ Av̄i mē ev̄B̄t̄ī ūQ̄j | Avgvi ḡv̄ Z̄Lb K̄v̄īt̄Q̄b̄ Av̄i t̄ s̄to Avgvi
K̄v̄t̄Q̄ Av̄m̄t̄Z̄ P̄v̄B̄t̄Q̄b | ūK̄s̄ ḠK̄R̄b̄ Avgvi ḡv̄t̄K̄ Av̄m̄t̄Z̄ ir̄ t̄Q̄ b̄v | ḠK̄R̄b̄ ūḡj̄j̄j̄ Ūm̄ī

Avgvi Wvb nVZ aTi tRvi Kti Nti i tFZi wbtq tMj | Nti i wePrbvq Avgvi tQvU tQtj Uv tkvqv wQj | tQtj UrTi aTi Qto tdtj w`j tWvevi tFZi | tQtj UrTi tdtj w`tj cti Awg wPrKvi Kti tKti Dw | tm mgq cvovi me tj vK cvij tq wMtqWQj | Avgvi gv wPrKvi Kti KvUfQ | Awg wPrKvi Kti KvUQ, tQtj Uv KvUfQ | ZLb AvgvK aTi tUtb Nti i tFZi wbtq Avtm | Gici Avgvi Avi tKvfbv uka-Ávb wQj bv | AvgvK tKvfbv gvai Ktimb | wKŠ GKevi Awg nVZ Qmotaq cvj vZ wMtqWQj vg, ZLb ivBtdj w`tq w`j Ki tZ wMtqWQj | Avgvi gvK Ges AvgvK I | Avgvi gv I t`i cvtq cto etj wQj, ðever tZvgvi cvtq cwo, Avgvi tqtqK tQto `vl | 0 ZLb I iv ej tj v th, h w` K_v etj v Zvtj tZvgvK w`j Kitev |

Nti gta` wbtq Gtm wK Kti wQj Avgvi ZLb uka wQj bv | AvgvK Mj vMwj Ktimb Zte Mtj i I ci e`K i bj aTi titLwQj | Awg tKvfbv K_vB ej tZ cvwib | ZLb Ggb Ae`nv wQj th, Avgvi tKvb ÁvbB wQj bv |

GKvÉti Avgvi eqm ZLb 18-19 eQi nte | `r`n` fv t j v wQj | gv wetaq w`tqWQj 10 eQi eqtm | 12 eQi eqtm Avgvi c`g mŠ-vb nq | Lg Aí eqtmB Avgvi c`g mŠ-vb nq |

Ávb nI qvi ci t`Lj vg Avgvi `v`gx KvUfQ | Lwj nVq nVq Ki tQ | ej tQ, ðnvq nVq | Avgvi wK meBvk Kij v, nVq nVq Avgvi wK meBvk ntj v | 0 ej tZ j v Mtj v, ðAvgvi gvB-mgwb meB Ptj tMj, AvgvTi wK Kti tMj | 0 w`w`K Ávbkb` ntq tm Nti i tFZi hv wQj tmBUv wbtq Avgvi gv_vq tKvc w`tZ tMj | mevB wgtj ZvK tVKvq | GB NUbri ci tm emotaZ `vK tZv bv, Lwj nVq nVq Ki tZv | Lwj Mtq c`_ c`_ cvMtj i g tZv Nxi teovtZv | emotaZ tL tZ AvmtZv bv, cvwib tL tZv bv Avgvi nrtZi | Avgvi nrtZi ivbte tL tZv bv | cvovi gjmeYiv aTi aTi GK g`v LvI qrtZv ZvK | ctq cvMtj i g tZv ntq wMtqWQj | tPvL j v j ntq wMtqWQj Avi eqm teto ešovi gZb ntq wMtqWQj | A_P ZLb Zvi tRvqvB eqm | tmi Kg `r`n` wQj, dmv wQj, t`L tZ Lg mxi wQj | GB NUbri ci ctq gvmLvBk tm c`_ c`_ Nxi tQ | LvI qv-`vl qv Ktimb wKgtZv | c`_tg tm Avgvi I ci exZk` wQj, AtbK K_v ej tZv | AvgvK wbtZ PvB tZv bv | Avgvi mt½ Avi msmvi Ki tZ Piqub, Avgvi nrtZi Lvevi cwi Z`M Kti wQj | cti cvovi Ávb, Yx gjmeYiv ZvK AtbK e`StqtQ | e`StqtQ th, ðtZvgvi eDtqi tZv tKvfbv t`vl tbB | tm tZv B`Qv Kti G KvR Ktimb | 0 Avi I AtbK wKQy e`StqtQ | AtbK tevSrtbri ci tm Avevi msmvi ntqtQ | 0

258. Experience of Birangona Duljan Nesa of Kushtia runs as follows:

ðAvgvK aTi wbtq `BRb nVvRv`vi GKRB t`vii KvUQ `wbtq `vK t j v, Avti KRb Kij v, I iv evi evi ej tZ j v Mtj v tgti tdj tev, tgti tdj tev | Awg ej j vg | tgti tdj | Avgiv wZbRb GK mmi tZ LvovB | AvgvTi w`j Kti tgti tdtj `vl, Zeygib t`tev bv | ewj, Avcbv t`i I gv, tevB bvB? 0

ðI t`i mt½ evOwj wQj Zte AvgvTi i Mtgi t j vK bv | I t`i citb tcvkV wQj, A`k`i wQj | Avi I e`y R tZv wQj meri cvtq | msL`vq eU Gtm wQj | AvgvTi i emoi tFZi c`_g X tK wQj Pvi Rb | cti `BRb evBti Ptj hvq | 0

ÒIB `YRb tjvK Avgvfi civBto aBitjv| cmo aBitj tmLvfb wK Kwi |
 I Avj -v Avgvi tZv Avi wKQybvB| Avgvi kwE" w`tq Awg I`i mvt_ cvijvg
 bv| I LvfbB, `gvtiB I iv Avgvi gvb wbtq wbj | AvgvK Nti AvbtZ civiwb|
 I Lvfb kvimo wQj | tZv kvimo wK KiE? kvimo I`i gZv ZvKtq itqtQ|
 kvimo Lwij t`vniB civotZtQ, KvbZtQ| wKŠ' kvimo tZv gvi Lv"Q| `rgxl ZLb
 emoi tfZtiB wQj | Ó `jvRvb tbmv wbtRi gyl etjwb| wKŠ' Avgiv tRtbiQ th,
 `rgxtK DtVrtb teta tiL Zvi tPrfLi mvgtbB `jvRvbK civK AwgPv alP
 KtiwQj | tgvU `YRb alP KtiwQj GtKi ci GK|

`jvRvb etjv, I iv teqtbU w`tq I i evg -b Lv"tqtQ| `jvRvtbi
 fvlvq, ÒiE" evi nBtqwQj bv, Zte RLg ntq tMtQ| GB `gUv cti tKvrbw`bl
 Awg Avi ev"Prf`i Lvl qfZ civiwb| ev"PrUv tmmgq Avgvi tKvtjB wQj | I iv
 tqtqK Avgvi cvtk dvjvtq w`j | w`tq IB Kvg Kitjv| Avgvfi KjwéZ evbvtq
 w`j | IB KvR Kivi mgq wgvj Uvni iv Avgvfi cv w`tq tVtm ati c`vU L`j IB Kvg
 Kitjv| Zviv tRvi KtiwQj| KZ wK etjwQjvg| tKD wK gvb w`tZ Pivq? gvb w`tZ
 Pivq tKD? Rxeb w`tZ i`vR AvtQ Zeygub w`tZ i`vR bq| Avgvi tkvqv jvMte bv
 KeE? KeE Avgiv hvtev bv? KZ KvKwZ-wgbwZ KtiwQjvg| wKŠ' Zeygub ivL`Z
 civiwb|

I Bme Kti I iv Pti hvq| Awg ctq givi gZv ntq wMtqwQjvg| Avgvi
 Lv Awgav ntZv cti | bmoi gta" wSij K gviZv| fwi KvR KitZ cviZvg bv|
 etK e`v KitZv| GLbl Avgvi evg mvBW w`tq etK e`v nq| Gi Kg Rxeb wbtq
 tetP AvwQ| Ó

259. Sad and painful experience of Momena Khatun of Kushtia has narrated to the following effect:

ÒfivBtqi givgy t`L`Z wMtqwQjvg| hvI qvi ci I Lvfb t`tK tMjvg| fivB gvi v
 hvI qvi wZbw`bi gv_vq wgvj Uvni Mtg GtmwQj | Awg gv-evemn Nti i tcQtB GK
 eo MwZjvq `wbtq AwQ| Ggb mgq wgvj Uvni Gtm AvgvK ati | Nti tfZi
 nvZ ati tUtB wbtq tMj | Mtg eü AwgXtKwQj Avi Avgv`i Nti XtKwQj `YRb|
 I iv me tcvkK civ wQj | c`vU, RjZv civ wQj | mt½ wQj eo eo j`st ex`K|
 mgqUv ZLb mKvj `k-GMtiUvi gZv nte|

tm mgq Avgvi eqm Lv Kg, 13-14 eQi nte| tKej wetaq ntqtQ| I iv
 nvZ ati tUtB Nti wbtq hvI qvi mgq Awg KvbwKwU KtiwQ| wKŠ' I iv tkvrbw`bl
 Gici I iv tRvi Kti Avgvi Ici AZ`vPvi Kitjv| `YRtbB Kitjv cici|
 GKRB hLb KitQ ZLb Ab`Rb mvgtbB `wbtqwQj | Avgvi citb kmw-e-vDR,
 tcvUtkvU meB wQj | I iv ex`tKi AvMvq th Qvj `vK ZvB w`tq tcvUtkvU wdtZ
 tKtU tdtjwQj | Gici I iv wbtRiv c`vUvi mvgtbi tPb L`j I Bme Kij | Avgvi
 ZLb Kg eqm| IB me Kvivi mgq Avgvi `g eÜ ntq AvwQj | cPÜ e`v_v
 tj tMwQj | cti tcvU dtj wMtqwQj | I iv Mtg XtK AtbKRb Ges ctZ`K emw 2-
 3 Rb Kti XtKwQj | Mtg Zviv bvi-x-wbhFZb Qvovl Av_b w`tqtQ, jYcvU KtiwQj|

Avgv I me Kti Ptj hvl qvi ci gv Avmtjv| Iiv hLb Avgvi Ici AZ'vPri Kiti Q ZLb Avev-gv Dtvrb `mtqQj b| Gi AvM Iiv Avgvi nvZ atij Avgvi Avev Avgvi nvZ ati titLQj b, tVKvZ MtqQj b| ZLb AvevK Lg gvti | Avevi bvg BRytkL, Kj vYcxi Avgv` i emio|

Avgv Ptj hvl qvi ci gv Gtm AvgvK tMmj Kvitq t`q| Avgvi vgtK G melqUv Rvrb| Itk ejv ntqQj th, Avgv nvZ ati tQ i'ay Avgv Gici Lg fq tcZvg| Lwj PgtK PgtK DVZvg| tgv me mivne SvovBuvovB Kti v'qtQ| Avgvi tU e`v_vq dtj MtqQj | cxi Avt`- Avt`- vK ntq hvq| IB NUbvq Avgv fxy fq tctq tMjvg| KZv`b Njgi gta`I PgtK PgtK DVZvg| Lvl qv`vl qv Kitz cri Zvg bv| gv ZLb AvgvK eSvtZv|0

260. In 'Dainik Azad' on 8 March 1972 a news was published under the caption '**evi eQti i Kp vKkvix vKsev cAvtki evv tKD cikvKZvt`tk Ae`vniZ cvqib`**

The relevant portion of the said news runs as follows:

0-----|
Gg, B, Gmi R%K KgPvix niti Q Dvib Rvrb th, 30tk gvPvZvb tcbZvi nb| 14 w`b ati K`vUbtgtUi tFZi cvK`mbvewnbxi Rj - v`iv Zvi Dci AgvbyK AZ'vPri Pjvq|
niti Q Dvib Kiv t`tk K`vUbtgtU Ae`vbi Z ZrKvjxb mvgwi K evnbxi evzijx KgPvix`i cmi evti i gvnj v`i GKvU e`x vKviti i mUvb cvl qv tMjQ| tm RmbtqtQ th, 55 bs vdi`i tivrTgtU AvUjvixi d`vvgj x tKvqvUviti evtiv t`tk cAvk eQi eqtmi `y cPbevB Rb tqtqK H mgq AvUK Kti titL cAvb`i vtz Zvt`i Dci cikvK AZ'vPri Pjv vrbv ntZv| vZvb Avtiv Rvrb th, Zvt`i tmj vU vKQv `xi nti I cAvb`i vtzB tftm AvmtZv tqtq`i Ki`Y AvZv`| tmB mvt` eeP cvK tmbv`i `ckvPK Dj - vmaVib evZvtmi mt`/2 vgtk GK gge`vix`tk`i mvo Kitzv|
cAvb`i vtzKtj R%K mje`vi Gtm GBme tqtqv tK tKv_vq hvte Zvi B GKvU Zvj Kv cU`Z Kti thZv| AZtci mU`v nti B D`3 vj o tgvZvteK vbanv Z tqtqvUtk cvvrbv ntZv| vbanv Z `vrb| KLtvb KLtvb Avcb tLqvj LjvxtZ evBti vbtq Gtm cvvivi Z Kkxi `j Dchvmi vrix al`y vj B ntZv| GKv`b GKvU tqtqK GBvte cici tPv`i Rb vbhvZb Pjv vti tqtqvU msAv nmi tq tdtj | vKs` Zely `v`iv ZvtK tinvB t`qvb| A`vZb` Ae`vqB vbtRt`i jvj mv Pvi Zv` Kiti Q| tqtqvUi cvrivq Avb vdi`i AvmtZ bvk 36 Nuv mgq tj tMjQj | Rbve niti Q etj b, tPv`i vrb ci ZvtK tK`v`vq KvivMviti cvvvtq t`qv nq| Zvi ci H gvnj v e`x vKviti i evnv`v`i cmi YvZ m`c`K vZvb vKQv ej tZ cvti b bv|
Aci GKvU gvnj v vKviti i K_vl Dti - L Ktib| 25tk tmtDv` tRj Lvrb t`tk cvrivq ZvtK K`vUbtgtU vbtq Avmv nti tm_vq Gd, AvB, BD-G Zvi Dci bZb`vte vbhvZb Kiv nq| tmLvrb vZvb 12 bs Gd, AvB, BD e`v`v`Ki 10 bs i`tg eu gvnj vK e`x Ae`vq cvb| cAvb`i vtz H Ni t`tk Zvt`i PxrKvi

ইবি তহঁতৰ। Ges GKB Dcvtq Zviv cikweK ubhvZb Pjv tZv। GBme tqtq`i
 thšeb mavi YZt Awdmvi ivB DctfM Ki tZv। G mqtU nvti Q D'xb Avt'v etj b
 e`nikwet'i gvnj vt`i mavi YZt wZb fM Kti ivLv ntZv। cŃg fvtM wQj hZx,
 wZxq fvtM ga`eqm Ges ZZxq fvtM KtqK mšZvtbi gvZv। wZwb `ç Ktj tRi
 my ix tqtq`i tc- tb Kti XvKv cvVtZI t`tLQb।

[Source: **Bngladesher Swadhinata Juddha Dalilpatra; Volum-8, Pages 461-462.**]

261. The above narration of the victims of sexual violence during the War of Liberation 1971 committed by the Pakistani army were not the isolated events; rather those were over all scenarios of the revelant time existed in the country.

262. After 1971 the Pakistan government constituted a commission headed by the formar Chief Justice of Pakistan Mr. Justice Hamoodur Rahman to inquire into the atrocities committed during the nine months of occupation in 1971 in the territory of Bangladesh to obtain credibility in the eyes of the international community. The said commission observed:

"Rapping of a large number of East Pakistani women by the officers and men of the Pakistan army as a deliberate act of revenge, retaliation and torture."

[Source: **Abdul Quader Mollah Vs. Government of Bangladesh vis-a-vis, (AD) Page 70-72**].

263. Ms. Turin Afroz reiterating the fact of common knowledge has submitted that under international law, sexual violence crimes can take different forms. It does not only include rape but also, indecent assault, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and/ or any other form of sexual violence. She has also referred to the second paragraph of article 27 of the **Fourth Geneva Convention of 1949**, which runs as:

"Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."

264. Ms. Turin Afroz has further submitted that sexual violence, in general and beyond rape, was recognized for the first time as a crime against Humanity in the case of **Prosecutor Vs. Jean Paul Akayesu by the ICTR**. In the case of **Prosecutor Vs. Dragoljub Kunarak, Radomir Kovak and Zoran Vukovice the ICTY** has observed that 'a single rape may constitute a crime against Humanity'.

265. Relying on the above convention and the cases Ms. Afroz has also submitted that Rangpur town hall was used by the Pakistani occupation army with the aid of the accused and Al-Badr men as a comfort station or a rape camp and torture cell during the Liberation War 1971 and therefore, served as an instrument of terror upon victims.

266. Having considered the above submissions of the learned Prosecutor coupled with the evidence on record it is our considered view that the prosecution has proved charge no.05 beyond reasonable doubt.

267. Therefore, accused A.T.M Azharul Islam is liable under section 4(1) of Act of 1973 and held guilty of aiding, abetting and facilitating and complicity in committing the offences of abduction, confinement, torture, sexual violence including rape and other inhumane acts as crimes against Humanity as specified in section 3(2) (a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act.

Adjudication of charge no.06

[Abduction, confinement and torture]

268. **Summary charge no.06:** In the mid of November, 1971 accused A.T.M Azharul Islam gave a hard slap on the face of victim Shawkat Hossain @ Ranga due to chanting "Joy Bangla" slogan by him and used filthy language to him. The accused was known to the victim as his brother Rafiqul Hasan @ Nannu was involved in student politics. In continuation to that effect, accused A.T.M Azharul Islam with the help of Al-Badr Bahini, abducted Rafiqul Hasan @ Nannu, from Bathpatree Mour in Rangpur Town at about 09.00 A.M and he was taken to Shahid Muslim Chhatrabas, the then Al-Badr camp, where he was kept confined and severely tortured and subsequently he was released from the camp but he became maimed due to severe torture.

269. Therefore, the accused A.T.M Azharul Islam is hereby charged for abetting, facilitating in commission of offences of abduction, confinement and torture as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) and 4(2) of the Act 1973 which are punishable under section 20(2) of the said Act.

Discussion and evaluation of evidence and findings:

270. In order to prove the instant charge the prosecution has examined two live witnesses, who are the victims of the occurrence.

271. P.W-11 Md. Shakhwat Hossain alias Ranga was a student of class VIII and aged about 15 years in 1971. His elder brother Rafiqul Islam Nannu was involved with student politics since 1969 at the time of mass movement and for that reason he knew the student leaders of different organizations of Rangpur district. In 1971 on a day of mid November when he was playing with his friends in front of their house, accused A.T.M Azharul Islam, the Chief of Al-Badr Bahini of Rangpur

district was passing by riding on a 50 CC motor cycle hoisting Pakistani flag. Accused A.T.M Azharul Islam was known to him and seeing him he chanted 'Joy Bangla' slogan. Hearing the slogan 'Joy Bangla' accused A.T.M Azharul Islam stopped the motor cycle and having got down came to the play ground and beckoned him. When he went near to him, he slapped him across the right cheek with his right hand, and the slap was so hard that he fell to the ground, flung 4-5 feet away. Accused A.T.M Azharul Islam also hurled abuses at him. Having returned to house he disclosed about the incident to the inmates of the house and showed the marks of slap on his face.

272. He has further stated that on 1 December in 1971 at about 9.00 A.M his elder brother Rafiqul Islam Nannu went to Jarin Tailors situated at Betpottree More of Rangpur Town to bring clothes of his sister-in-law. When his brother reached near the said Tailor's shop some persons wearing black clothes attacked and dragged his brother Nannu to a nearby Razakar camp. They were known to his brother and Al-Badr commander accused A.T.M Azharul Islam eventually came to the said camp. As per the instruction of accused A.T.M Azharul Islam his brother was then taken to Al-Badr camp situated at Central Road, Rangpur. In the said camp the members of Al-Badr Bahini severely tortured him under the leadership of accused A.T.M Azharul Islam and at one stage his brother lost his sense. Hearing the said incident his elder brother Sazzad Jahir went to the Al-Badr camp and requested accused A.T.M Azharul Islam to release his brother Rafiqul Islam Nannu. But the accused did not pay any heed to such request. Thereafter, his elder brother took help of Nasim Osman, a non-

Bangalee, who was a leader of Pakistan Peoples Party [PPP] and at his requests his brother, was subsequently released from the said camp and thereafter he was taken to their house and got treatment. After regaining sense his brother disclosed about the occurrence to the inmates of the house. Due to said torture his brother Nannu became a disabled person and he could not move freely.

273. In his cross-examination P.W-11 has stated that his brother Rafiqul Islam Nannu was involved in politics since 1969. He denied the defence suggestions that to victimize accused politically he deposed falsely, and that accused A.T.M Azharul Islam was not a leader of Al-Badr Bahini.

274. P.W-12 Rafiqul Hasan Nannu has testified that he was involved with the student politics, of Chhatra League, in the year 1969-1970 and at that time he used go to Rangpur Carmicheal College campus and accused A.T.M Azharul Islam was a student of science groupe of class XII of that college. He has further testified that he used to go to Rangpur press club for reading newspaper, where he met the accused with his friends. After the General Election of 1970 an altercation had taken place between him and the accused on political issues. On a day of mid November in 1971 when his younger brother Sakhawat Hossain Ranga was playing with his friends in front of their house accused A.T.M Azharul Islam was passing with a motor cycle having carried Pakistani Flag. Having seen accused A.T.M Azharul Islam his said younger brother Ranga chanted '*Joy Bangla*' slogan and then the accused having got down from the motor cycle came to his younger brother and gave a slap on his face with his right hand and having

received such slap he fell down on the ground. Thereafter, his younger brother Ranga came inside the house and narrated about the incident. He has further stated that on 1 December 1971 he went to Bathpotree area in Rangpur town and when he reached in front of Jarin tailoring shop some Rajakars captured him and dragged him to a nearby camp of Rajakars. After sometimes accused A.T.M Azharul Islam came there and as per his order he was taken to Al-Badr camp situated at Rangpur Central Road by a rickshaw covered with black cloths. In the said camp he was tied and slung from a ceiling fan. Accused A.T.M Azharul Islam and others lashed him with electric wires and he lost his sense at some point due to torture. On information his elder brother Sajjad Zahir came to the camp and requested accused A.T.M Azharul Islam to free him [P.W-12] but it was in vein. Then his brother Sajjad went to a local leader of Pakistan Peoples Party (PPP) Nasim Osman who had good relations with the victims' family. Nasim and Sajjad again went to the camp and requested accused A.T.M Azharul Islam to release him and on the request of Nasim Osman accused A.T.M Azharul Islam freed him in an unconscious condition. He was then taken to their house and after getting treatment he regained his sense. Due to torture he has become almost disabled and has been living with a miserable life due to his impairment. He has further stated that he has lost ability to work himself and needs help of another person for movement.

275. In the instant charge no.06 two incidents of torture by the accused and Al-Badrs have been brought and the charge has been framed in the way that in continuation of the 1st incident, the 2nd incident had taken place. Further from the charge it appears that in the

2nd incident no date has been mentioned. The prosecution in the midst of the trial filed an application to correct the charge inserting the date 1 December, 1971 in the 2nd incident which was opposed by the defence. The Tribunal kept the said application with the record.

276. The defence referring to the evidence of P.W-11 has submitted that it is not possible to give slap with the right hand on the right cheek and this material inconsistency makes the incident no.01 of the instant charge doubtful.

277. P.W-12 Rafiqul Islam Nannu has testified that he has become disabled due to torture of the accused and his cohorts and at present he has been living with a miserable life due to his impairment. This witness has also testified that he knows accused A.T.M Azharul Islam since 1969 as a leader of Islami Chhatra Sangha.

278. It appears from cross-examination of P.W-12 that the defence did not challenge the date of occurrence that is 1 December 1971 of the 2nd incident of the charge no.06 as narrated by P.W-11 and P.W-12 and the defence duly cross-examined the witnesses on the issue. As such it can not be said that the defence has been prejudiced in not mentioning the date of occurrence in the charge.

279. With regard to the 1st incident of the instant charge, on assessing and evaluating the evidence on record a reasonable doubt has been created that whether it is possible to give slap with the right hand on the right cheek from opposite side. Further, P.W-12, the elder brother of P.W-11 has testified that he heard about the occurrence. Thus, in absence of credible evidence we are of the view that the prosecution has

failed to prove the 1st incident of the charge no.06 that is the torture on P.W-11 beyond reasonable doubt.

280. P.W-11 Rafiqul Islam Nannu is the victim of 2nd incident of the charge. In his testimonies he has categorically and consistently stated how he was abducted and tortured by the Al-Badr men and the accused. He has denied the defence suggestions that the accused did not torture him and he has made false statements implicating the accused. However, the defence has not suggested the said victim-witness that he was not a victim of the occurrence and his impairment has caused for any other reasons than the torture as alleged. Moreso, the defence has not challenged his impairment. Thus, we do not find any cogent ground to disbelieve the evidence of the said witness who is a victim of the horrific event and till date he has been suffering. Thus we can safely rely on his sole testimony.

281. In the case of **Kupreskic, the Trial Chamber of ICTY** has observed that-

"In certain circumstances, a single act has comprised a crime against humanity when it occurred within the necessary context."

[January 14, 2001, Para-550]

282. The **Appeals Chamber of ICTY** in the case of Deronjic has opined that-

"All other conditions being met, a single or limited number of acts on the accused's part would qualify as a crime against humanity; unless those acts may be said to be isolated or random."

[July 20, 2005, Para 109]

283. Mohiuddin Chowdhury, a leader of **JEI** and the Peace Committee, Noakhali district in 1971 who left Bangladesh for Pakistan in May 1972, in his book '**Sunset at Midday**' [**Material exhibit-VIII**], has narrated to the effect:

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

[Page 97, Para 2]

284. We have already held that accused A.T.M Azharul Islam was a potential leader of **ICS** and Al-Badr of Rangpur district. If we consider the status and role of the accused during the Liberation War in 1971, and the context of 1971 coupled with the evidence of P.W-12 in that case there is no other option but to hold that the prosecution has been able to prove 2nd incident of abduction, confinement and torture of charge no.06. Thus, the charge no.06 has been proved in part that is the 2nd incident of the charge beyond reasonable doubt and as such accused A.T.M Azharul Islam is liable under section 4(1) of the Act of 1973 and held guilty of aiding, abetting, facilitating and complicity in committing the offences of abduction, confinement, torture and other

inhumane acts as specified in section 3(2)(a)(g)(h) of the Act of 1973 which is punishable under section 20(2) of the said Act.

XVIII. Whether the accused had a Superior Command Responsibility

285. To establish Superior Command Responsibility [SCR] there must have command by the person against whom the allegation is brought, upon the subordinates as to the commission of offences. It is a settled proposition of law on International Crimes that a civilian by holding an office in the capacity of his organisation can be a commander or superior officer. No matter he is not to be a man of military status, it is enough to hold an office in civilian capacity in any organisation. There are plenty of decisions given by the Tribunals at home and abroad.

286. Before establishing SCR there are some certain conditions to be set against the person concerned. In this connection we have already recorded our opinions in the case of Professor Ghulam Azam of which some are as follows,

“From the jurisprudence emanating from the international criminal Tribunals, it is generally agreed that four elements must be proven for a person to be held responsible as superior. In general terms, these are: (1) an international crime has been perpetrated by someone other than the accused; (2) there existed a superior-subordinate relationship between the accused and the perpetrator; (3) the accused as a superior knew or had reason to know that the subordinate was about to commit such crimes or had done so; and (4) the accused as a superior

failed to take the necessary and reasonable measures to prevent such crimes or punish the perpetrator."

[ICT-BD Case No. 06 of 2011, Judgment 15.07.2013, para 312]

287. Two other independent principles are to be adopted in addition to that of four conditions in establishing Superior Command Responsibility against a person. Such as (1) De-Jure: If the commander has structural authority over its subordinates and (2) De-Facto: If the commander got no lawful or structural authority over the subordinates, but in reality got actual command and influence over the subordinates.

288. In the case in hand this Tribunal has indicted the accused on six charges after a lengthy hearing by both the parties. Ms. Turin Afroz along with Mr. Tapos Kanti Paul, the learned prosecutors, having referred to many cases of foreign tribunals particularly **Prosecutor Vs. Ferdinand Nahimana, ICTR**, has tried to convince us while arguing that as per evidence adduced by the witnesses, the accused had taken the Pakistani occupation troops along with members of auxiliary forces to the crime sites during commission of offences. Such conduct of the accused obviously constituted his leadership upon the persons concerned in committing the offences. And therefore, he should be held liable for SCR.

289. Upon core scrutiny of the evidence presented by the prosecution witnesses on all charges, this Tribunal finds the accused as a leader of ICS, Rangpur town unit, who had actively played a significant role in

the actions of Pakistani occupation forces during the struggle of Liberation War. As per provision of present law and opinions held in other cases by the Tribunals [ICT-BD] as well as foreign Tribunals it may have found some materials and ingredients of Superior Command Responsibility against the accused in respect of charge no 06 but these are not sufficient to hold him liable on Superior Command Responsibility. As witness testimony has shown guidance rendered by the accused all the time to the Pakistani invading forces at the crime sites on those alleged days of occurrences no incitement speech we have found in evidence by the accused to his supporters or followers at the relevant time in commission of any offences.

290. In reality, the evidence of the present case have also spoken against the accused for his direct involvement in the commission of offences almost on all charges framed against him by way of abetting, aiding, facilitating and also direct participation. Since his direct involvement is found present in the scanning of evidence in aid of Pakistani occupation troops in the horrific atrocities taken place in the war time, we are therefore convinced to hold that there is no reliable degree of inferences to find him liable for Superior Command Responsibility under section 4(2) of the Act of 1973.

XIX. Conclusion

291. It is indeed a historical fact that the Pakistani occupation army with the aid of its auxiliary forces, pro-Pakistan political organizations mainly Jamaat-e-Islami [JEI], Muslim League, Nezam-e-Islam, Islami

Chhatra Sangha [**ICS**] implemented the commission of atrocities in 1971 in the territory of Bangladesh in furtherance of following policies:

- i. policy was to target the self-determined Bangalee civilian population;
- ii. high level political and military authorities were involved to implement the policy;
- iii. auxiliary forces were established in aiding the implementation of the policy; and
- iv. the regular and continuous horrific pattern of atrocities perpetrated against the targeted non-combatant civilian population.

292. 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.

293. It is quite coherent from the facts of common knowledge involving the backdrop of our War of Liberation in 1971 for the cause of self-determination that the Pakistani armed forces, in execution of its plan and policy in collaboration with the local anti liberation section belonging to Jamaat-e-Islami [**JEI**] and its student wing Islami Chhatra Sangha [**ICS**] and auxiliary forces, had to deploy public and private resources and target of such policy and plan was the unarmed Bangalee civilians, 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 the Liberation War. 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.

294. 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)(a) of the Act of 1973 in furtherance of policy and plan with the aim of frustrating the result of general election of 1970 and to deprive of the fruits of election result.

295. 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 against civilian population' formed part of 'systematic attack'. Section 3(2) (a) of the Act of 1973 enumerates the offences of crimes against Humanity. If any of such offences is committed 'against any civilian population' shall fall within purview of crimes against Humanity.

296. Despite lapse of long 43 years time the testimonies of PWs most of whom are live witnesses to the incidents of atrocities narrated in the charges do not appear to have been suffered from any material infirmity. Besides, no significant inconsistencies appear between their examination in chief made before the Tribunal and the cross-examination.

297. It has been proved from the testimonies of witnesses that the accused had directly participated and facilitated in the commission of

crimes as listed in charge nos.02, 03, 04, 05 and 06 [in part] as a potential leader of **ICS** and Al-Badr bahini. According to section 3(1) of the Act of 1973 it is manifested that any person [**individual or a member of group of individuals**] is liable to be prosecuted if he is found to have committed any of the offences specified in section 3(2) of the Act of 1973. Thus, accused A.T.M Azharul Islam in the capacity of an 'individual' or a member of 'group of individuals' comes within the jurisdiction of the Tribunal as per provision of section 3(1) of the Act of 1973.

298. In assessing and evaluating the evidence on record both orally and documentary we have always kept in mind that the alleged incidents took place 43 years back in 1971 and as such memory of live witnesses may have been faded. Invaluable documents might have been destroyed by the passage of time. To procure old evidence was a real challenge for prosecution. Therefore, in adjudicating the charges brought against the accused, we, in addition, are to depend upon the provision of 19 of the Act, such as (i) facts of common knowledge (ii) available old documents (iii) reporting of old news papers, photographs, tape recording, and books (iv) hearsay evidence having probative value (v) fixing up individual and superior command responsibility at the relevant time, and (vi) may receive decisions of International Tribunals to supplement provisions of ICT Act 1973, if deemed it necessary.

299. Upon scrutiny of oral, documentary and circumstantial evidence led both the prosecution and the defence, we are fully convinced that during the War of Liberation of Bangladesh accused A.T.M Azharul Islam as one of the potential leaders of Islami Chhatra Sangha [now

Chhatra Shibir] as well as the leader of Al-Badr Bahini actively participated in the commission of offences of atrocities charge nos.02, 03, 04, 05 and 06 [in part] in collaboration with Pakistan occupation force.

300. Defence has argued that the accused has been charged in the case for political victimization. But we do not find any material in the record to show that the prosecution is at present for political purpose. It is true that accused A.T.M Azharul Islam is one of the central leaders of a political party i.e. Jamaat-e-Islami Bangladesh; but the mere fact that a politician perpetrator for an offence does not mean his trial is to be treated as one of the political purposes. Law does not and can not provide impunity to politicians for committing criminal offences particularly the crimes against Humanity. A person can obviously not claim impunity if he advances his political belief by resorting to criminal activities and if he does so; he can not allege that his trial is of political purpose.

301. Moreover, accused A.T.M Azharul Islam has been facing trial for the offences as crimes against Humanity committed in 1971 during the Liberation War of Bangladesh. Present status and position of the accused is not same and similar to 1971. We have already observed that in 1971 accused A.T.M Azharul Islam was a potential leader of **ICS** and also a leader of Al-Badr Bahini, a 'death squad', of Rangpur district. Thus, we have no hesitation to hold that instant trial of the accused is not being held for political purpose.

302. Drawing attention to the Tribunal Mr. Abdus Sobhan Tarafder, the learned counsel for the accused, has pointed out that at clause

7(Ga) of the exhibit-25 series in which the role of the accused in committing genocide, rape, arson and plundering during the Liberation War was found totally absent. So, the subsequent report of the Investigating Officer was prepared after thought.

303. On perusal of the said exhibit series it has revealed from clause 7(Kha) of personal profile, the political role of the accused in 1971 that the accused played various role in torturing, plundering and humiliating the pro-liberation supporters in and around the Carmichael College in Rangpur district. It has also revealed from clause-8 of the personal profile of the accused exhibit-25 series that 6(six) proposed witnesses stated against the accused elaborately for his involvement in the commission of atrocious activities at the crime sites as alleged by the prosecution. Though it is found absent regarding his involvement at clause-7(Ga) of exhibits-25 series because of non-application of mind by the investigating authority but subsequent oral and documentary evidence presented in the Tribunal by the prosecution in no way discarded his involvement in the commission of offences.

304. The Joint Criminal Responsibility or commonly known as, Joint Criminal Enterprise [**JCE**] is a widely used 'liability doctrine' that has been playing a vital role in the allocation of guilt in international criminal tribunals. It is to be noted that section 4(1) of the Act,1973 refers to the concept of **JCE** that 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. Fundamentally the **JCE** requires that a group of individuals had a common plan, design, or purpose to commit a crime, that the accused

participated in some way in the plan and that the accused intended the accomplishment of common plan or purpose. For **JCE** liability an accused can participate in a Joint Criminal Enterprise by passive, rather than active conduct.

305. From the discussions made earlier in relation to charges the Tribunal is convinced to record its finding that accused A.T.M Azharul Islam, for his acts, conduct and culpable association with Pakistan occupation army and Al-Badr is criminally responsible for the offences as listed in charge nos.02, 03, 04, 05 and 06 [in part] resulting from their common criminal design and shall be punished as if he himself committed those offences, irrespective of whether and in what manner he himself directly participated in the commission of any of those offences. This view is in conformity with the provisions in respect of liability contained in section 4(1) of the Act, 1973. Accused A.T.M Azharul Islam by his acts, conducts and act of common 'understanding' abetted and facilitated the commission of such crimes. Therefore, the accused who was a part of collective criminality incurs liability under section 4(1) of the Act, 1973 for the offences genocide and as crimes against Humanity as mentioned in charge nos.02, 03, 04, 05 and 06 [in part] as discussed earlier.

306. However, we are convinced that accused A.T.M Azharul Islam has not incurred any liability of 'superior command responsibility' as contemplated in section 4(2) of the Act of 1973 in committing the offences as proven in the above charges.

XX. Verdict on conviction

307. For the reasons set out in the judgment and having considered all evidence and arguments advanced by both the parties, this Tribunal unanimously finds accused A.T.M Azharul Islam guilty and not guilty in the following charges framed against him.

Charge no.01:

308. The accused is found **NOT GUILTY** of the offences of abduction, confinement, torture and murder as crimes against Humanity as specified in section 3(2)(a) of the Act of 1973 and thus he be acquitted of the said charge.

Charge no.02:

309. The accused is found **GUILTY** of the offences of murder and arson [other inhumane act] as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge no.03:

310. The accused is found **GUILTY** of the offences of murder and arson [other inhumane act] as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge no.04:

311. The accused is found **GUILTY** of the offence of genocide as specified in section 3(2)(c)(i)(g) and (h) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge no.05:

312. The accused is found **GUILTY** of the offences of abduction, confinement, torture, rape and other inhumane acts as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge no.06:

313. The accused is found **GUILTY** of the offences, in part, of abduction, confinement and torture as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

XXI. Verdict on sentence

314. Mr. Zead Al-Malum and Ms. Turin Afroz, the learned prosecutors have submitted that accused A.T.M Azharul Islam should face the highest sentence, being a sentence of death, as he is proved to have participated in the commission of barbaric criminal acts constituting the offences of genocide and crimes against Humanity. The intrinsic gravity and extent and pattern of criminal acts constituting the offences of genocide and crimes against Humanity deserve to be considered as an 'aggravating factor' in awarding the highest sentence. They have also submitted that only such sentence would be just and appropriate to punish, deter those crimes at a level that corresponds to their overall magnitude and reflect the extent of the suffering inflicted upon the million of victims.

315. Besides, Ms. Turin Afroz, the learned prosecutor has also submitted that victims of sexual violence committed during the War of

Liberation in 1971 should be adequately compensated. Such victim compensation schemes are available under the Statute of the International Criminal Tribunal for Rwanda [ICTR], 1994, the Statute of the International Criminal Tribunal for the Former Yugoslavia [ICTY], 1993 and the Statute of the Special Court for Sierra Leone [SCSL], 2002. Collective and moral reparations are also available to victims under the law on the Establishment of the Extraordinary Chambers of the Courts of Cambodia [ECCC]. Ms. Turin Afroz has further submitted that the International Criminal Court formed under the Rome Statute may also make an order directly against a convicted person specifying reparations to victims, including restitution, compensation and rehabilitation. Under general principles of both law and equity, a court or tribunal may adequately award compensation to the victims who have suffered any kind of loss.

316. Per contra, Mr. Abdus Sobhan Tarafder and Mr. Shishir Mohammad Monir, the learned defence counsels have sought for acquittal of the accused as the prosecution has failed to prove his culpability with any of the events of atrocities. They have also submitted that the concept of 'Reparation' is foreign to the criminal jurisprudence of Bangladesh as there is no such provisions available in the International Crimes (Tribunals) Act, 1973 and also in the Penal Code and as such this Tribunal has no jurisdiction to make an order against an accused for reparations to victims.

317. As a cursory review of the history of punishment reveals that the forms of punishment reflect norms and values and aspiration of a particular society at a given time. Distressed victims may legitimately

insist appropriate and highest sentence while the defence may demand acquittal, in a criminal trial. But either of such demands is never considered as a catalyst in deciding the sentence to be inflicted upon the person found guilty of a criminal charge, in a court of law. Undeniably, the punishment must reflect both the calls for justice from the persons who have directly or indirectly been victims and sufferers of the crimes, as well as respond to the call from the nation as a whole to end impunity for massive human rights violations and crimes committed during the War of Liberation in 1971.

318. We have taken due notice of the intrinsic magnitude of the offences of genocide and crimes against Humanity which are predominantly shocking to the conscience of mankind. We have also carefully considered the mode of participation of the accused to the commission of crimes proved beyond reasonable doubt and the proportionate to the gravity of offences.

319. We have already found in our foregoing discussions that the accused is guilty of the offences mentioned in 05 [five] charges being charge nos.02, 03, 04, 05 and 06 [in part] in the commission of those offences as specified in section 3(2) of the Act of 1973.

320. On perusal of both oral and documentary evidence as discussed earlier it is found in charge no.02 that on 16.04.1971 accused A.T.M Azharul Islam along with the members of Jamaat-e-Islami and Islami Chhatra Sangha and Pakistani army went to Dhap Para at village Moksedpur under Badorganj Police Station and on the way they set fire to many houses situated beside the road and killed many unarmed civilians of Dhap Para. The accused substantially abetted and facilitated

the actual commission of the said offences of mass killing and arson as crimes against Humanity.

321. As regards crimes narrated in charge no.03, it is proved beyond reasonable doubt that on 17.04.1971 accused A.T.M Azharul Islam along with his accomplices and Pakistani army set fire to the villages of Jharuarbeel area and killed numerous unarmed civilians, no doubt it was a mass-killing, in Jharuarbeel by firing indiscriminate shots and, also having caught hold of about two hundred innocent people from the Jharuarbeel took them to unknown place and then killed all of them. The accused had direct complicity with the commission of those mass-killing and arson as crimes against Humanity.

322. Charge no.04 relates to genocide. On 13.04.1971 at about 9.00/ 11.30 P.M accused A.T.M Azharul Islam along with his accomplices and Pakistani army raided the houses of Professor Chitta Ranjon Roy and Professor Kalachand Roy and abducted them with other two teachers namely, Ram Krishna Adhikary and Sunil Baron Chakraborty and thereafter they were all killed near Domdama Bridge with intent to destroy in part a Hindu religious group. It is well proved beyond reasonable doubt that accused A.T.M Azharul Islam was physically present at crime site when the said victims were abducted and the accused was an active accomplice of Pakistani occupation army and he substantially provided practical assistance, encouragement and moral support to the perpetrators i.e. Pakistani occupation army in committing the offence of genocide.

323. All the crimes mentioned in the said three charges [charge nos.02, 03 and 04] relating to genocide and crimes against Humanity

were massive human rights violations committed during the War of Liberation in 1971. The fierceness of the events of genocide and crimes against Humanity were extremely detrimental to basic humanness. It deserves to be evaluated as 'crimes of serious gravity' intending to demean the human civilization. Designed plan and pattern of such heinous crimes inescapably aggravate the magnitude of the criminal acts and liability of the accused as well.

324. The Appellate Division of the Supreme Court of Bangladesh in interpreting section 20(2) of the Act of 1973 relating to sentencing has recently observed in the Criminal Review Petitions of ***Abdul Quader Mollah Vs. The Chief Prosecutor***, International Crimes Tribunal, Dhaka that-

"The language is so clear that in convicting the accused person death sentence is the proper one, and if the Tribunal feels that a lesser sentence is to be awarded, it shall assign reasons therefor and in such case, it shall consider the gravity of the crime and the culpability of such accused person."

325. In the said Criminal Review Petitions the Appellate Division has also observed as follows:

"while deciding just and appropriate sentence to be awarded for any of the offences to any accused person, the aggravating and mitigating factors and circumstances in which the crimes have been committed are to be balanced in a proportionate manner. The petitioner, it was observed, has committed worst and barbarous types of crimes against Humanity. He took active role in the killing of almost the entire role in the killing of almost the entire

family except one, and participated in the incident of rape of innocent victims. His acts are comparable to none. Entire world raised voice against the barbaric Crimes against Humanity perpetrated in Bangladesh. Justice demands that it should impose a sentence befitting to the perpetration of the crime so that it reflects public abhorrence of crime. Cases of murders in a cold and calculated manner without provocation cannot but shock the conscience of the society which must abhor such heinous crime committed on helpless innocent persons. More so, the accused expressed no repentance for his conduct at any stage. His direct participation in the incident was cruel and brutal. Considering the nature of the offence, this Division by majority was of the view that the sentence of death was just and proper proportionate to the gravity of the crime.

It was further observed that while considering the punishment to be given to an accused person, the court should be alive not only to the right of the perpetrator, but also rights of the victims of the crimes and the society's reasonable expectation from the court for the proportionate deterrent punishment conforming to the gravity of the offence and consistent with the public abhorrence for the heinous crime committed by the accused persons."[Italic supplied]

326. We have weighed up the gravity of offences proportionately which had been committed by the accused during the War of Liberation of Bangladesh in 1971 as discussed earlier. All the crimes, particularly listed in charge nos.02, 03 and 04 relating to genocide, murder of numerous un-armed innocent civilians and other inhumane acts as crimes against Humanity were worst and barbarous types of crimes and

are particularly shocking to the conscience of mankind. It is well proved that accused A.T.M Azharul Islam had direct complicity and substantially contributed and facilitated in the commission of such barbarous types of crimes and as such no punishment other than death will be equal to the said horrendous crimes for which the accused has been found guilty beyond reasonable doubt in the above mentioned three charges. It may be mentioned here that the accused expressed no repentance for his such conduct at any stage and we do not find any mitigating factors to award lesser sentence to the accused other than death.

327. Considering all the factors, circumstances and the observations made by our Apex court as mentioned above we are of agreed view that justice would be met if for the crimes as listed in charge nos. 02, 03 and 04 accused A.T.M Azharul Islam who has been found guilty beyond reasonable doubt is sentenced to death for each of the said three charges under section 20(2) of the Act of 1973.

328. Now the next point for determination before us is that whether this Tribunal should/ may make an order against the accused for reparations to victims particularly P.W-1, a victim of sexual violence during the War of Liberation in 1971. It may be mentioned here that section 20(2) of the Act of 1973 deals with punishment, which a Tribunal can award to an accused. The said provision is as under:

"Upon conviction of an accused person, the Tribunal shall award sentence of death or such other punishment proportionate to the gravity of the crime as appears to the Tribunal to be just and proper."

329. As per provisions of section 20(2) of the Act of 1973, a Tribunal shall award sentence of death or 'such other punishment' proportionate to the gravity of the crime, but which are 'such other punishment' have not been defined or explained in the said Act. Section 53 of the Penal Code provides the punishments to which offenders are liable under the provisions of that Code which are as follows:

"Firstly- Death;

Secondly- Imprisonment for life;

Thirdly- Omitted;

Fourthly- Imprisonment, which is of two descriptions, namely-

(1) Rigorous, that is, with hard labour;

(2) Simple;

Fifthly- Forfeiture of property;

Sixthly- fine

Explanation- In the punishment of imprisonment for life, the imprisonment shall be rigorous."

330. Now, the question will arise whether a Tribunal may take the Penal Code in aid in the dispensation of justice. The answer is in the affirmative form because the Appellate Division of the Supreme Court of Bangladesh very recently has observed the same view in the cases of **Chief Prosecutor Vs. Abdul Quader Mollah** vis-a-vis that-

"The offences of murder and rape mentioned in the Act have been defined in our Penal Code and the definition of those offences given in the Penal Code may be taken in aid since this Code has not been excluded by the Act. Besides, almost all laws prevailing in our country are codified laws, these laws have been promulgated following the concepts, principles, rules and traditions of English common law, or in the alternative, it may be

said that the concepts, principles, rules and traditions of English common law, have penetrated into our jurisprudence and the fabric of our judicial system. The definitions given in respect of these offences in those laws are identical. Therefore, there is no bar to taking the definitions of those laws mentioned in the Act, 1973."[Italic supplied]

331. In the light of the above observations made by the Appellate Division a Tribunal may take the Penal Code in aid in the dispensation of justice. Thus, section 20(2) of the Act of 1973 shall be construed in the light of the provisions of section 53 of the Penal Code. Accordingly, a Tribunal may award any punishment i.e. sentence of death, imprisonment for life, rigorous or simple imprisonment, forfeiture of property or fine. We do not find any provision relating to 'Reparation' in the Act of 1973 nor in the Penal Code. Ms. Turin Afroz, the learned prosecutor herself has also conceded that there is no provision of victim compensation i.e. 'Reparation' in the Act of 1973 nor in the Penal Code as discussed above. As such the Tribunal cannot make an order against accused A.T.M Azharul Islam for reparations to P.W-01, a victim of sexual violence. But we feel that all the victims including P.W-01, of sexual violence committed during the War of Liberation, 1971 should be adequately compensated and rehabilitated by the State itself without further delay, because they are the 'Beerangona' [War Heroines] as declared and honoured by the Father of the Nation Bangabandhu Sheikh Mujibur Rahman. It is also the moral obligation of the nation to come forward to accept, recognise and honour the 'Beerangona' in the

society. They are the pride of the whole nation like as '**freedom fighters**' and '**martyrs**'.

332. Considering the sacrifices of the 'Beerangona' as mentioned above, the government should take necessary measures to include in the curriculum of both school and college level about their sacrifices and painful experiences in 1971 during the Liberation War so that the generation to generation can know the real history of the Liberation War of 1971, the sacrifices of 'Beerangona' and the barbaric atrocities including sexual violence committed by the Pakistani occupation army and their local collaborators like the Rajakars, Al-Badrs, Al-Shams and the members of the Peace Committee.

333. It may be mentioned here that the process of giving compensations and rehabilitations to the 'Beerangona' started after liberation of Bangladesh at the instance of Father of the Nation Bangabandhu Sheikh Mujibur Rahman and continued till 1975. But surprisingly it discontinued after the assassination of him in 1975 and the process of rehabilitation, both socially and politically, of the collaborators of Pakistani Junta started in the country by the Military rulers.

334. Considering the proportionate to the gravity of the offences, accused A.T.M Azharul Islam deserves imprisonment i.e. lesser punishment for convictions relating to the remaining offences as crimes against Humanity as listed in charge nos.05 and 06. Accordingly, we do hereby render the following **ORDER ON SENTENCE**.

Hence, it is
ORDERED

That accused A.T.M Azharul Islam son of late Dr. Nazir Hossain and late Romicha Begum of village-Batason Lohanipara, Police Station-Badorgonj, District-Rangpur and Flat No.6A, F. Tower, 91/B, Elephant Road, Boro Mogbazar, Police Station-Ramna, Dhaka is held guilty of the offences of '*genocide*' and '*crimes against Humanity*' enumerated in section 3(2)(a)(c)(i)(g) and (h) of the International Crimes (Tribunals) Act, 1973 as listed in charge nos. 02, 03, and 04 and he be convicted accordingly and sentenced to death for each of the said three charges mentioned above and be hanged by the neck till he is dead under section 20(2) of the said Act of 1973.

The accused A.T.M Azharul Islam is held guilty of the offences of crimes against Humanity enumerated in section 3(2)(a)(g) and (h) of the International Crimes (Tribunals) Act, 1973 as listed in charge no.05 and he be convicted accordingly and sentenced to suffer rigorous imprisonment for 25 [twenty five] years thereunder for the said charge [charge no.05] under section 20(2) of the said Act of 1973.

The accused A.T.M Azharul Islam is also held guilty of the offences of crimes against Humanity enumerated in section 3(2)(a)(g) and (h) of the International Crimes (Tribunals) Act, 1973 as listed in charge no.06 and he be convicted accordingly and sentenced to suffer rigorous imprisonment for 5[five] years thereunder for the said charge [charge no.06] under section 20(2) of the said Act of 1973.

The accused A.T.M Azharul Islam is held not guilty of the offences of crimes against Humanity enumerated in section 3(2)(a) of the International Crimes (Tribunals) Act, 1973 as listed in charge no.01 and he be acquitted of the said charge [charge no.01].

However, as and when any one of the three 'sentences to death' will be executed, the other two 'sentences to death' and the sentences to rigorous imprisonments would naturally get merged into the sentence to death first executed.

The sentences of death and rigorous imprisonments awarded as mentioned above under section 20(2) of the International Crimes (Tribunals) Act, 1973 shall be carried out and executed in accordance with the order of the Government as required under section 20(3) of the said Act of 1973.

The convict is at liberty to prefer an appeal to the Appellate Division of the Supreme Court of Bangladesh against the conviction and sentence within 30[thirty] days of the date of order of conviction and sentence as per provisions of section 21 of the said Act of 1973.

The convict be sent to the prison with a conviction warrant accordingly.

Let a certified copy of the judgment be provided to the prosecution and the convict free of cost, at once.

Let a copy of the judgment be also sent to the District Magistrate, Dhaka for information and necessary action.

(M. Enayetur Rahim, Chairman)

(Jahangir Hossain, Member)

(Anwarul Haque, Member)