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32. It has been further submitted that the Act of 1973 and first amendment of the constitution will go to show that intention of the framers of the legislation was to prosecute and try the 195 listed war criminals of Pakistan armed force and not the civilians.

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

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

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

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

36. It has been argued by the learned senior defence counsel that pursuant to the 'tripartite agreement' dated 09.4.1974 195 listed war criminals belonging to Pakistani

armed force have been given clemency. Thus the matter of prosecuting and trying them under the Act of 1973 ended with this agreement. As regard local perpetrators who allegedly aided and abetted the Pakistani occupation armed force in committing atrocities including murder, rape, arson the government enacted the Collaborators Order 1972. Thus the Collaborator Order 1972 was the only legal instrument to bring the local perpetrators to book.

37. Having regard to above submission and careful look to the Act of 1973 and the Collaborators Order 1972 we are constrained to hold that it is not good enough to say that no 'individual' or member of 'auxiliary force' as stated in section 3(1) of the Act of 1973 can be brought to justice under the Act for the offence(s) enumerated therein for the reason that 195 Pakistani war criminals belonging to Pak armed force were allowed to evade justice on the strength of 'tripartite agreement' of 1974.

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

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

40. Amnesty shown to 195 listed war criminals are opposed to peremptory norms of international law. It is to be noted that any agreement and treaty amongst states in derogation of this principle stands void as per the provisions of international treaty law convention [Article 53 of the Vienna Convention on the Law of the Treaties, 1969] .

41. Despite the immunity given to 195 listed war criminals belonging to Pakistani armed force on the strength of 'tripartite agreement' the provisions as contained in section 3(1) of the Act of 1973 has kept the entrance still unbolt to prosecute, try and punish them for shocking and barbaric atrocities committed in 1971 in the territory of Bangladesh. It is to be noted that the perpetrators of crimes against humanity and genocide are the enemies of mankind. Therefore, we are of the view that the 'tripartite agreement' is not at all a barrier to prosecute local civilian perpetrators under the Act of 1973.

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

42. The learned defence counsel has attempted to submit that the accused could have been prosecuted, tried and punished under the Collaborators Order 1972, if actually he had committed any act of aiding or abetting to the commission of crimes alleged.

43. The Collaborators Order 1972 was a different legislation aiming to prosecute the persons responsible for the offences enumerated in the schedule thereof. It will appear that the offences punishable under the Penal Code were scheduled in the Collaborators Order 1972. While the 1973 Act was enacted to prosecute and try the 'crimes against humanity', 'genocide' and other system crimes committed in violation of customary international law. There is no scope to characterize the offences underlying in the Collaborators Order 1972 to be the same offences as specified in the Act of 1973. Therefore, we are disinclined to accept the argument that merely for the reason that since the accused was not brought to justice under the Collaborators Order 1972 now he is immune from being prosecuted under the Act of 1973.

(v) Whether the accused can be prosecuted as an aider or abettor without prosecuting the Principals and his accomplices

44. It has been argued that the accused has been charged with for the offence of 'murder' the event of which will appear to be isolated and as such for such isolated crimes he could have been prosecuted and tried under the Collaborators Order 1972 which was meant to try the offences as scheduled therein i.e the offences punishable

under the Penal Code. On this score as well the charges brought against the accused cannot be sustainable in law.

45. First, let us have a look to the case of Charles Taylor (SCSL). On 26 April 2012, a Trial Chamber of the Special Court for Sierra Leone (SCSL), with Justice Richard Lussick presiding, convicted former Liberian President Charles Taylor for **'aiding and abetting'** war crimes and crimes against humanity. Charles Taylor was indicted by the Prosecutor in 2003 when he was a sitting president and Head of State of Liberia. He was not prosecuted and tried together with any other offender or principal perpetrator. Therefore, we find that in law, either 'aiding' or 'abetting' alone is ample to render the perpetrator criminally liable.

46. On this legal issue we may recall the principle enunciated by the ICTR Trial Chamber that

"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,*** (Trial Chamber), September 2, 1998, para. 531 and ***Musema*** (Trial Chamber), January 27, 2000, para.174].

47. The Act of 1973 has enumerated 'abetting' and 'aiding' as distinct offence and punishable there under. From the jurisprudence evolved in the ICTR and SCSL it is now settled that even only the abettor and aider to perpetration of crimes underlying in the statutes can be prosecuted. The above international references also consistently supplement our own view that 'abetting' or 'aiding' being distinct offence in the Act of 1973 the persons responsible for any of these unlawful acts that substantially facilitated the commission of offence enumerated in section 3(2)(a)(c) can lawfully be brought to justice.

(vi) Definition and Elements of Crime

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

49. The learned defence counsel has argued that the offences specified in section 3(2) are not well defined and the same lack of elements. Section 3(2) of the ICTA 1973 does not explicitly contain the 'widespread or systematic' element for constituting the crimes against humanity. In this regard this Tribunal may borrow the elements and definition of crimes as contained in the Rome Statute. It has been further argued that an 'attack' may be termed as 'systematic' or 'widespread' if it was in furtherance of policy and plan. Thus the offence if actually happened, in absence of context and policy and plan the same cannot be characterized as crimes against humanity.

50. Tribunal notes that 'policy' and 'plan' are not the elements to constitute the offence of crimes against humanity. It is true that the common denominator of a systematic attack is that it is carried out pursuant to a preconceived policy or plan. But these may be considered as factors only and not as elements. This view finds support from the observation made in paragraph 98 of the judgment in the case of ***prosecutor v. Kunarac*** [Case No. IT-96-23/1-A: ICTY Appeal Chamber 12 June 2002] which is as below:

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

51. It is further submitted that the ICTY Statute does not contain the 'widespread' or 'systematic' element but it has developed jurisprudence by its judgment in the case of *Tadic* (Appeal Chamber: ICTY) that for qualifying the offences as crimes against humanity it must be committed as part of 'widespread' or 'systematic' attack. But the

prosecution has utterly failed to show by evidence that the offences for which the accused has been charged with were part of the 'widespread' or 'systematic' attack.

52. We are of patent view that section 3(2)(a) of the Act is self contained and fairly compatible with the international jurisprudence. If we make a closer look to the contemporary standards of definition of 'Crimes against Humanity' in various Statutes, first this observation can be made that there is no 'consistency' among definitions. The definition of 'Crimes against humanity' as contemplated in Article 5 of the ICTY Statute 1993 neither requires the presence of 'Widespread and Systematic Attack' nor the presence of 'knowledge' thereto as conditions for establishing the liability for 'Crimes against Humanity'. True, the Rome Statute definition differs from that of both ICTY and ICTR Statutes.

53. It is now settled that the expression **'committed against any civilian population'** as contained in section**3(2) (a) of the Act of 1973** is an expression which specifies that in the context of a crime against humanity the civilian population is the primary object of the attack. The definition of 'Crimes against humanity' as contemplated in **Article 5** of the ICTY Statute 1993 neither requires the presence of 'Widespread and Systematic Attack' nor the presence of 'knowledge' thereto as conditions for establishing the liability for 'Crimes against Humanity'. It is the jurisprudence developed in ICTY that identified the 'widespread' or 'systematic' requirement.

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

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

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

(vii) Mens rea or Knowledge

57. The learned senior counsel reiterated that the mens rea element is absent in this case as there has been no facts and circumstances that could validly lead to inference that the accused acted knowing the consequence of the attack and context thereof.

58. It appears that only one paragraph in the ***Tadic*** judgment refers to this question, and it summarily considers existing case law on whether or not the perpetrator of crimes against humanity must have knowledge of the context within which the acts are committed. [***Prosecutor v. Tadic***, Case No. IT-94-1-T, opinion and judgment, 7 May 1997, para 657]. The *mens rea* of the offences was not considered, most likely because *Dusko Tadic* offered an *alibi* defence, which does not raise questions about intent, and simply denies that the accused was present or involved when the crime was committed.

59. It is not alleged that accused himself directly participated in the actual commission of the crimes alleged. In alternative, he has been charged for aiding or abetting or having complicity to the crimes committed. That is to say, the accused had acted as a 'secondary perpetrator' or 'accomplice'. In such case the acts of assistance and providing encouragement and moral support to the principals is to be presumed from relevant facts and acts of accused either before or at the time of commission of crime or even after the commission thereof.

60. The *mens rea* of the accused for abetting or aiding need not be explicit, it may be inferred from the circumstances. Indeed, as *mens rea* is a state of mind, its proof is typically a matter of inference. In the case in our hand, we are to perceive that the accused acted having 'awareness' coupled with his conscious decision to accompany the principals to the crime site.

61. However, in light of above observations and settled jurisprudence the matter of *mens rea* or knowledge or intent may be well determined while adjudicating the charges independently.

XIII. Relevant and Decisive Factual Aspects

(i) Facts relevant to establish the role and association of the accused with the gang of perpetrators consisting of local Biharis namely Aktar goonda, Hakka goonda, Abbas chairman, Hasib Hasmi, Nehal

62. The unshaken relevant fact of his close and culpable association with the gang of local Biharis including Aktar goonda Nehal, Hasib Hashmi, Abbas Chairman adds further assurance to the role of the accused at the relevant time.

63. P.W.1 Mozaffar Ahmed Khan, a valiant freedom fighter who was the President of Keraniganj thana Chatra League in 1969 stated that during the war of liberation in the month of November he came to Mohammadpur, Dhaka in disguise and on the way of his return to home he found accused Abdul Quader Molla being accompanied by his accomplices standing in front of Mohammadpur Physical Training center which was known as the 'torture cell' of Al-Badar having rifle in hand.

64. In cross-examination, in reply to question put to him by the defence P.W.1 has re-affirmed it by saying that he found the accused standing in front of Physical training Centre's gate having a Chinese rifle in hand.

65. We have also found from the **Exhibit-2** a book titled **'Sunset at Midday'** wherein the seventh line of paragraph two at page 97 that **"The workers belonging to purely Islami Chatra Sangha were called Al-Badar".** Besides, from the above unshaken and re-affirmed version it is quite evident too that accused Abdul Qauder Molla was a potential member of armed Al-Badar force and had been in Dhaka during the period of war of liberation in 1971.

66. Besides, accused Abdul Quader Molla while deposing as D.W.1 has admitted in cross-examination that he was elected President of Islami Chatra Sangha (ICS) of Shahidullah Hall unit of the University of Dhaka and he in 1977 was appointed as the private secretary of Professor Ghulam Azam pursuant to decision of Jamat E Islami.

67. For the reason of conduct , role and culpable association of the accused with the gang of local Bihari hooligans who were quite antagonistic to the local Bengali people particularly who were in favour of self-determination movement of Bengali nation it is validly inferred without any doubt that accused Abdul Qauder Molla had accompanied , encouraged, aided and provided moral support to them to the actual commission of atrocious activities perpetrated in the area of Mirpur that happened during the early part of the war of liberation, in furtherance of 'operation search light' on 25 March 1971. Accordingly, the hearsay evidence of prosecution witnesses have to be viewed, valued and weighed together with the above pertinent relevant facts.

XIV. Adjudication of Charges

68. With regard to the factual findings, the Tribunal is required only to make findings of those facts which are indispensable to the determination of guilt on a particular charge. The Tribunal, according to settled jurisprudence, is in no way obliged to refer to every phrase pronounced by a witness during his testimony but it may, where it deems appropriate, stress the main parts of the testimony relied upon in support of a finding. Keeping it in mind we are going to adjudicate the charges through providing 'reasoned opinion' on rigorous evaluation of the facts in question by referring the relevant piece of evidence.

Adjudication Charge No.01
[Pallab Murder]

69. On cumulative evaluation of testimony and relevant facts and circumstances we have found that accused Abdul Qauder Molla and his Bihari accomplices masterminded and executed the killing of Pallab, a civilian, as a part of attack.

70. It is thus validly inferred that the accused having 'awareness' as to the consequences of acts and conduct of those Bihari perpetrators continued his association with them. It was not necessary that the accused must remain present at the crime site when the murder of Pallab was actually committed. In this regard the Tribunal also notes that *"actual physical presence when the crime is committed is not necessary . . . an accused can be considered to have participated in the commission of a crime . . . if he is found to be 'concerned with the killing."* [***Tadic,*** (Trial Chamber), May 7, 1997, para. 691].

71. The accused Abdul Quader Molla is thus found to have had 'complicity' to the actual commission of killing Pallab in the manner by bringing him forcibly from Nababpur. The reason of targeting Pallab was that he was in favour of pro-liberation activities and as such it may be unambiguously presumed that killing him was in furtherance of systematic attack directed against civilian population. As a result, the accused incurs criminal liability for having his 'complicity' to the commission of the murder of Pallab constituting the offence of crime against humanity as specified in section 3(2)(a)(h) of the Act of 1973 which is punishable under section 20(2) of the Act.

Adjudication of Charge No.2
[Meherunnesa and her inmates killing]

72. The act of leading the gang of actual perpetrators is indeed an act forming part of the attack that substantially contributed and provided 'moral support' and 'encouragement' to the actual commission of the crime. Merely for the reason that the accused had no physical participation to the perpetration he cannot be relieved from

liability as his act of leading the gang of course provided substantial moral support and encouragement to the principals.

73. Complicity encompasses 'culpable association' with the principals, and providing 'moral support', 'encouragement' to them. An accused can be considered to have participated in the commission of a crime if he is found to be 'concerned with the killing. By the act of leading the gang of perpetrators the accused is thus found to have provided moral support and encouragement to the principals to the actual commission of the crime. It is to be noted that a single or relatively limited number of acts on part of the accused would qualify as a crime against humanity, unless those acts may be said to be isolated. Leading the gang of perpetrators to the crime site was of course not an isolated act.

74. It may be lawfully inferred that the accused knew or had reason to know that the principals were acting with intent to commit the offence of murder. The circumstances and facts insist to believe that the accused, as he led the gang of perpetrators, knew the intent of the principals. Thus, it has been proved that the accused Abdul Quader Molla had, with knowledge and *mens rea*, conscious complicity to the commission of the offence murder as crimes against humanity as listed in charge no.2 and thereby he incurs criminal liability for 'complicity' in commission of the murder of Meherunnesa and her inmates constituting the offence of crimes against humanity as specified in section 3(2)(a)(h) of the Act of 1973 which are punishable under section 20(2) read with section 3(1) of the said Act.

Adjudication of Charge No.3
[Khandoker Abu Taleb Killing]

75. Ccumulative effect of evidence and relevant facts and circumstances may have a decisive role in determining the culpability of the accused. Circumstantial evidence is not considered to be of less probative value than direct evidence. The act of culpable association of the accused with the principals and the evidence as discussed above inevitably proves that the accused Abdul Quader Molla was involved with the commission of the alleged brutal killing.

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