Law and Our Rights

"All citizens are equal before law and are entitled to equal protection of law"-Article 27 of the Constitution of the People's Republic of Bangladesh

Judicial Accountability

Only Seperation from Executive Can Ensure It

by Dr Shahdeen Malik

If we take the attitude that a court is a good one if it decides in my favour and a bad one if the decision goes against me, then we are on the verge of absolute lawlessness. Such an attitude surely undermines the core notion of the independence of judiciary.

POLITICIANS perhaps need to generate stories to capture newspaper headlines. After all, even a negative coverage in the media is better than no coverage at all. And more absurd the comments, the bigger are the headlines.

Newspapers, in recent weeks, have reported that there were suggestions from very high quarters that since the executive and the parliament are accountable, there was no reason why the judiciary and the press should not also be similarly accountable. The positing of the issue in such a manner have raised the question of 'judicial accountability.'

This write up is an exercise in speculation. The issue of 'judicial accountability' can not but be discussed only in the realm of speculation because within the four-corners of our Constitution, as far as I understand it, there is no such thing as 'judicial accountability' in the recently projected understanding of the term. But then one could possibly retort that there was no such thing as a 'Caretaker Government' in the Constitution. That is true. Soon after the notion of the Caretaker Government was floated back in 1994, I did write in the columns of this newspaper that for the notion of a Caretaker Government to take shape we needed to amend our Constitution. The resignation of the 147 members of the parliament of AL deprived the Parliament of the constitutional requirement of a minimum of 221 sitting members to vote for an amendment. The election of the 15th February, 1996 did replenish the Parliament and after the election there were sufficient members of Parliament to adopt an amendment of the Constitution, though the election was very questionable and dubious. Nevertheless, at least formally, constitutionality was maintained.

I mention the above because it seems to me that the recent issue of 'judicial accountability' can not possibly be explained with the conventional rationality of constitutionalism. That, obviously, does not mean that there can not be a novel concept of 'judicial accountability.' There can be, but to accommodate a novel concept 'judicial accountability we might have to discard our present notions of legality, constitutionalism and the rule of law.

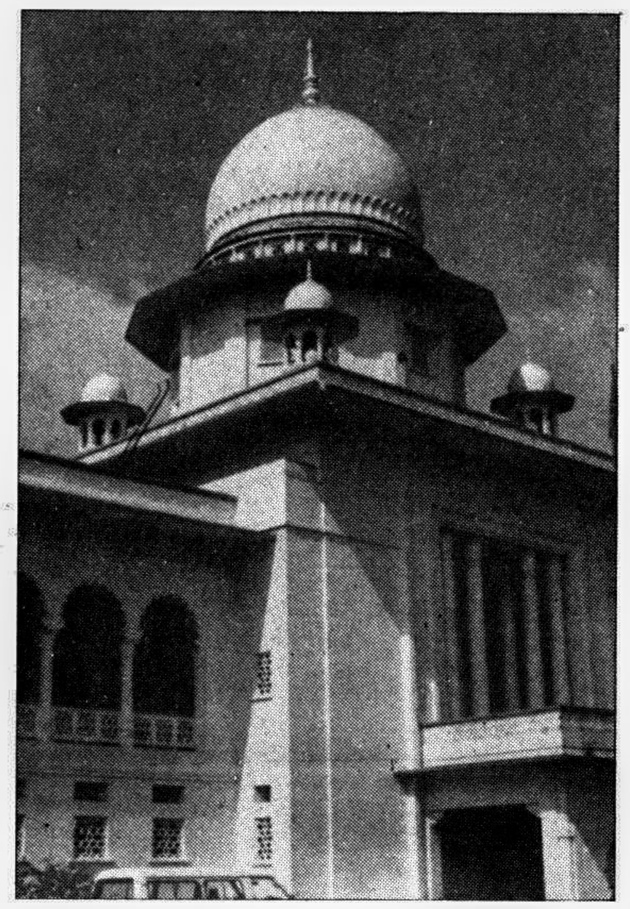
The judiciary, in the constitutional scheme, does have it's own mechanism of accountability as appropriate for this organ of the state. Any deviation or even tinkering with the present and existing concept of such accountability can be achieved only at the cost of the rule of law.

Now, what does 'judicial accountability' mean? And accountable to whom?

At the conventional level, the answer is pretty obvious. Judges, like most of us, are not absolutely infallible. They are human beings, after all. Hence, like all human beings, they do and will make mistakes.

However, like any other institution, be it public or private, the judiciary is also subject to it's rules and procedures of administration and accountability. A Judge of the subordinate court is recruited by the Public Service Commission, following the standard procedure in such matters. During his tenure, a Judge is subject to all the rules and procedures applicable for a public servant. Therefore, if a Judge of the subordinate judiciary acts in a manner which is contrary to the applicable law and rules, he/she is subject to appropriate steps and measures, like any other public servant. To put it bluntly, if there is an allegation of corruption against a Judge, there is a proper system and procedure for lodging complaint, of investigation of the complaint and further steps as appropriate.

Now, if the highest executive of the country feels that a Judge is tainted by credible allegations of malpractice or is abusing his/her power for undue considerations, there is the well known process of initiating steps to look into such complaints, including the Anti Corruption Act. This, as every one surely knows, is the conventional mechanism of 'accountability.' The Constitution provides, in article 116A that *"The control (Including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service including magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court."*



Judiciary — accountable to whom?

So, if there is any allegation against any judicial official, is any one preventing the government from initiating appropriate measures for investigation into such allegations? If not, then is it wise for the chief executive of the country to imply such allegations instead of actually doing any thing concrete and specific about it? Though the above Article 116A mentions the President, yet it has to be remembered that the President is under a constitutional obligation to act on the advice of the Prime Minister, i.e. the government. In fact in all matters except two (appointments of the Prime Minister and the Chief Justice) the President is obliged to follow the advise/recommendation of the government.

Similarly, if there is any complaint of wrong doing by a Judge of the Supreme Court, the Constitution provides, in Article 96, for a Supreme Judicial Council, *"to inquire into the capacity or conduct of a Judge."* If the President has reason to believe a Judge *"may have been guilty of gross misconduct"* the President may direct the Judicial Council to *"inquire into the matter and report its finding...."* So, if there is any specific and concrete allegation, let the Supreme Judicial Council be activated.

What else can the complaints be about, which have prompted this hoopla about 'judicial accountability'? Is it about judgements, orders or decrees passed by courts? Well, isn't there provisions for appeal and revision? If any one is unsatisfied with any decision of a court, the law of the land provides for opportunities for appeal and revision. In most litigation, one side does lose and the losing side, it can be safely assumed, is usually unhappy with the outcome. If the government is the losing party in any litigation, there is nothing to prevent it from filing an appeal (including an appeal against granting of a bail) to the next higher court. At the end of the day, however, all the parties must accept the final order of judgement of the highest court. That is the foundation of the rule of law, of constitutionalism and, in fact, of the very basis of an orderly society. This is reflected in Article 112 of the Constitution which specifically provides *"All authorities, executive and judicial, in the Republic shall act in aid of the Supreme Court."*

Now the most dangerous implication of the recent clamour about 'judicial accountability' could be that the executive authorities are not pleased with some of the judgements of the Court, particularly the Highest Court. If we take the attitude that a court is a good one if it decides in my favour and a bad one if the decision goes against me, then we are on the verge of absolute lawlessness. Such an attitude surely undermines the core notion of the independence of judiciary.

If the judiciary is not in a position to take decisions, based on fact and law alone, then do we need a judiciary at all? Let the executive take all the decisions in all the disputes and ensure that all these decisions are to it's liking. Lets forget law and let the arbitrary power prevail! Let the concerned Ministry decide who is guilty and who is not.

We should desist from such exercises if we want to preserve an orderly society whose primary pre-condition is the non-interference of the executive in judicial matters, in any pretext whatsoever. One has to understand that if the judiciary is prevented from taking decisions which are unpalatable to the executive, there is not much point in having a judiciary at all. If we want and need to have an independent judiciary, it must, at all cost, be free to be accountable only to the applicable laws and the Constitution. In fact, to ensure proper accountability which only complete separation of the judiciary from the executive can ensure, the government must take steps, including amendment of the Constitution, to make the judiciary independent from the executive.

The writer is an advocate and Adviser, Bangladesh Legal Aid and Services Trust (BLAST).

Investigation and Trial of Criminal Offences:

In Quest of Capacity Enhancement

by A. K. Roy

The Court distribution system in our country somewhat is faulty. The number of courts must be proportionate to the number of pending cases. The causes should be sorted out and despite some complexities, some standard based on practical analysis must be evolved to bring reasonable equilibrium in the hierarchy of our court system.

Continued from last week

THE often cited axiom "Justice delayed is justice denied" sufficiently reflects the essence of speedy and prompt trial. If the trial is delayed, there is a danger that the real culprit may escape justice due to the scattered evidence and that the innocent must suffer unnecessary pains. If the defendant is under detention, the damge is more irrecoverable. Furthermore, delayed trial will 'deprive the criminal judgment of the deterrent effects on the offender. The sense of retribution loses its' significance when the judgement is delivered after a long passage of time. Additionally, delayed trial will increase the number of remand prisoners and cause overcrowding.

It may not be so difficult to seek only the speed of the criminal proceedings. However, slipshod proceedings will not attain the purpose of administering justice. The difficulty lies in the fact that the expeditious trial should be secured without compromising the quality of judgment and the fairness in the process. It goes without saying that delayed trial diminishes largely the attributes of fair justice. In our legal system the delay in the dispensation of justice has been a chronic problem. The back-log of cases in almost all tiers of the judiciary among others is the main causes of delay in the disposal of cases.

The cause of justice many times is defeated or frustrated due to inordinate delay. When justice looses its savour people looses confidence in the judiciary and that is the point where lies the peril of the civilisation. To get speedy trial under the legal dispensation is the constitutional right of the people. It is the foremost duty of the state in democracy to ensure speedy trial and fair justice. Broadly speaking the causes of delay may be summarised under two heads such as court's delay and law's delay.

The reasons and causes of delay are manifold which mainly include heavy caseload on the judges, insufficient number of prosecutors, inappropriate case management, split trial dates, non appearance of witnesses, non co-operation of dilatory tactics of defence counsel, absence of specialised courts system, lack of proper co-ordinations among different sections of prosecution, absence of effective mechanism of judging the judges and above all criminal justice system itself. The judges' caseload will decrease if the number of cases is reduced.

Some practical measures can be adopted for functioning quite effectively to reduce burden of the courts. The measures are — (a) Conciliation or mediation — For proper consideration to utilize the Conciliation or Mediation in the criminal proceedings, 'Court Mediation Centre' as Exists in Singapore may be established. Under the supervision of the Court Mediation Centre, mediation may be conducted to deal with minor criminal offences where there is a relationship between parties, and where it is desirable to preserve that relationship; (b) Alternatives to prosecution — like Japan and the Republic of Korea, Bangladesh may have a system called 'Suspension of Prosecution' whereby under particular circumstances, the public prosecutors have the discretion not to institute prosecution even if there is sufficient evidence to sustain prosecution. This system may be introduced to alleviate the over-crowding problems in prisons. It may function as a rehabilitation measures for a suspect to facilitiate his reintegration into society; (c) Traffic infractions — minor traffic violations may proceed under the traffic infraction system. A person who commits a traffic offence may be given a notice by the police to pay a non-penal administrative fine. Failure to pay the infraction money may be a pre-requisite for criminal prosecution.

Summary procedure may help relieve the courts' workload and possible burden on the parties if their cases are brought to trial and if fines are imposed as punishment in minor crimes. Pre-trial Conference may be adopted in criminal proceedings where prosecution and defence may be urged to disclose their respective cases as well as evidences and may be urged to agree on facts which are not in dispute. In this way, the courts as well as both the parties can identify real factual and legal issues and will have reasonable prospect for the trial and there is also a likelihood that in the course of the process, the accused may plead guilty when faced with the prosecution's case and evidence. Moreover, the last minute proposal for a witness examination may be avoided.

Time limit also plays effective role to avoid the delay of criminal trial. A restriction of the detention period serves considerably to avoid delay of criminal proceeding. In this regard section 167(5) of the Code of Criminal Procedure, 1898 is an effective provision. Providing a time limit for completing trial is a more straightforward method to a speedy trial and in this respect repealed provisions of section 339C of the Code of Criminal Procedure, 1898 may be restored with necessary amendments. Modification of rules of evidence may be done. Strict rules of evidence may be amended to widen the admissibility to some kinds of evidence in the trial process. For instance, under the current Code of Criminal Procedure, 1898, in Bangladesh the confession of an accused before an investigator is not admissible in court; Similarly, finger prints and blood samples obtained at the investigation stage are not admissible in trial proceedings.

Nonetheless, in the light of the technological advancement, such evidence is quite useful exonerating suspicious but innocent person and confirming the identification of a suspect. It seems quite clear that if such evidence acquires the qualification to be proffered in the court-room, the trial process would be expedited to a considerable decree.

The Court distribution system in our country somewhat is faulty. The number of courts must be proportionate to the number of pending cases. The causes should be sorted out and despite of some complexities, yet some standard based on practical analysis must be evolved so to bring reasonable equilibrium in the hierarchy of our court system. To visualise the unequal situation the numbers of pending sessions cases in Dhaka Courts are shown in the following table as a sample.

Year	No. of Sessions Courts including Asstt. Sessions' Judges.	Number of cases disposed of	Number of pending cases at the end of the year
1995	20	806	4915
1996	23	775	6400
1997	23	875	8430

From 1995 to 1997 only three courts were created raising the number of courts trying sessions and original special cases from 20 to 23 at Dhaka. Number of pending cases increased from 4915 of the year 1995 to 8430 at the end of 1997. The increase in the number of courts was 15% and that of pending cases was more than 80%. In 1996 the disposal came down to 775 from 806 of the previous year and in 1997 the disposal however increased to 875. The disposal did not increase proportionately with the increase in the pending figures. On average each court disposed of 38 sessions cases in 1997 that means each court disposed of roughly 4 cases in each month. As the courts enjoy one month vacation in a year the calculation has been sown on 11 months a year basis. If the number of disposal goes in this proportion 23 courts of sessions will require 10 years to dispose of this 8430 pending cases not to speak about the new cases coming to the scenario. This is the position only with Dhaka.

To overcome the prevailing situation the Supreme Court may take initiative in concert with the government efforts and undertake comprehensive programme for updating the judiciary, raising efficiency and improving judicial skill to ensure fair and speedy justice. The judges, magistrates and prosecutors must be given proper training about judicial norms and standard untrammelled by unnecessary time consuming exercise and rigid technicalities.

Frequent adjournments of hearings granted by the courts and. Non-production of witness are among other causes of delay.

In most cases lawyers are in the habit of dragging the cases by taking adjournment after adjournment. Some courts are over burdened by case-load. Sometimes hearings are unnecessarily prolonged mostly by irrelevant talks and arguments. The task of the judges is undoubtedly arduous requiring deep concentration and application of judicial mind by proper appreciation of law and facts.

Law does not approve of taking irrelevant lengthy evidence and writing of unnecessary lengthy judgment. Similarly improper recording of evidence and writing slip-shod judgments are also not permissible. The whole adjudicatory process requires adequate knowledge of law, strong sense of proportion, and dutifulness, integrity, skill in the art of writing judgment on the part of the judges. Keeping regard to all these aspects, the process of recruitment of judges in all tiers of our legal system must be fairly sound.

In a country of 120 million people, the question of decentralisation, restructuring, and remodelling the judiciary is not a mere slogan but a dire necessity. We must think in the practical concept of the things keeping in view regard to the question of welfare of the people. As regards the composition of our Supreme Court with Appellate and High Court Division some positive thoughts may be given on the question whether a full fledged separate Supreme Court and three or four separate High Courts located at Dhaka, Chittagong, Jessore and Rangpur with more number of judges to cope with the back-log of cases can be setup. Obviously such a move may ease the congestion in the judicial arena.

Similarly subordinate court system may be restructured for trying original cases and appeals by separate courts. District and Sessions Judges try original criminal cases and also hear civil and criminal appeals and criminal revisions. The position of the subordinate judge is much more precarious as he apart from above categories of cases has to try original civil suits/cases.

Although independence of judiciary is guaranteed under the Constitution, the question of accountability of those engaged in the functioning of the judiciary whether they are investigators, prosecutors, lawyers, judges or magistrates, of late, has gained momentum because all of them have important share in making the judiciary fairly and effectively workable. Politicians must have political will to update the judiciary. Government have to provide adequate logistics including proportionate judicial infrastructures. When most countries entered into computer world our judiciary is still in the old system of taking evidence and writing judgments by hands of the judges. Our system needs thorough overhauling and a pragmatic and realistic programme for its reforms and improvements.

As provided under Article 116 of the Constitution the Supreme Court has the power of control and supervision over the subordinate judiciary. Inspite of constitutional commitment under Article 22, Magistracy has not yet been separated from the executive organ of the state. This situation is standing as an impediment on the way of full and effective supervision over the subordinate courts. With a view to ensuring sound judiciary all the impediments must be removed. Unless effective supervision with accountability is put in constant operational process we cannot expect anything better than the existing ones.

To overcome the prevailing situation the Supreme Court may take initiative in concert with the government efforts and undertake comprehensive programme for updating the judiciary, raising efficiency and improving judicial skill to ensure fair and speedy justice. The judges, magistrates and prosecutors must be given proper training about judicial norms and standard untrammelled by unnecessary time consuming exercise and rigid technicalities.

Furthermore, steps may be taken to encadre the public prosecutors like other existing cadre service in order to avoid ruling party allegiance as, in most of the cases, they are appointed public prosecutors on consideration of their obedience to the party in power. Accountability and strict supervision, control and constant monitoring over the subordinate courts by the Supreme Court shall have to be ensured. Both quality and quantity of justice must be maintained. The present government of Bangladesh have established Judicial Administration Training Institute, set up Permanent Law Commission and have undertaken a comprehensive programme for judicial capacity enhancement with the support of the World Bank which hopefully may bring radical changes with salutary results.

Whatever system we may have, criminal justice officials must explore the better administration of criminal justice. Of course, it is not easy to reform a legal system or practice since there are always counteracting interests which have to be taken into consideration. Therefore, such interests should also be duly respected. However, the criminal justice officials have a clear responsibility to the accused, to the victim and the general public to guarantee a fair and speedy trial.

The writer is the First Additional Metropolitan Sessions Judge, Dhaka. This article is based on his earlier works.

law watch

Violence in Dighinala

An Investigative Report

Ain-O-Salish Kendra and Odhikar

ON the afternoon of 16 October 1999, a group of Hill students grievously assaulted one Mahbub, quartermaster of the Bangladesh Army, for allegedly molesting Miti Rani Chakma (17), a native of the Chittagong Hill Tracts, at Babu Chara Bazaar in Dighinala area of the Chittagong Hill Tracts. These students were restrained by the Banagli population present at the bazaar at that time. The incident caused the ultimate clash between Hill (Pahari) people on one side and the Bangali population and the army on the other. The situation was finally brought under control by the police. More than one hundred people were hurt in the riot and three Hill people and one Bangali succumbed to their injuries.

Ain-O-Salish Kendra and Odhikar sent two investigators, Sheikh Nasir Ahmed and Azam Iqbal, to delve into the cause of the recent violence at Dighinala and to also investigate the following incident of the burning of several Bangali homes on 18 October and the reaction of various political leaders at a meeting held on 19 October 1999. The two investigators talked to a total of ten witnesses — both Pahari and Bangali - including the assault victim, Miti Rani Chakma.

The victim of the alleged act of molestation, Miti Rani Chakma, was admitted to the Khagrachhari District General Hospital as a victim of assault (as shown in the hospital register). At first she was reluctant to speak to the investigators. However, urged by the Hill people present and the Pahari nurse, she spoke through a translator, Shuvro Joti Chakma, and told the investigators that on the day of the incident, she was returning from the bazaar when a soldier caught hold of her from behind and pressed her intimately. She retaliated by biting his hand, whereupon he beat her till she fell senseless. According to a Pahari witness, Sunil Kanti, the Babu Chara Bazaar area was calm and business was going on as usual, till a woman's scream were heard and the violence began. He was unable to identify Miti Rani Chakma as the person assaulted, but said that the woman seemed only confused and shaky. Apparently, his statement did not corroborate with what Miti Rani Chakma told the investigators from her hospital bed.

Apparently, many people witnessed the clashes, but few were present when the alleged assault on Miti Rani Chakma occurred. Two Bangali eye witnesses of the incident claim that when the soldier was passing the girl in a crowded part of the bazaar, his badge pin got caught on her *orna* (scarf). Since he was carrying bags in both hands, he could not walk freely in the crowd and thus avoid the incident. However, he managed freed the *orna* and while doing so, some Hill youths attacked him with sharp knives and sticks from behind and caused serious injuries to his person. Army personnel and Bangalis present joined together and began to assault the Hill youth in order to rescue the soldier. Finally the police arrived to disperse the people.

Two or three hundred Bangali families live near the Babu Chara Bazaar, surrounded by Pahari families. The Bazaar is in the Bangali area and a great majority of the shops belong to Bangali people. On the night of 18 October, seventeen or eighteen Bangali homes in the area were burnt down. On seeing the flames, the army came to the rescue. Needless to say, the Bangali settlers were in a panic and army patrol was increased.

On 19 October, at noon, a meeting of Paharis and Bangalis was held in front of the Babuchora school. The meeting was addressed by both Bangali and Pahari leaders, including Minister Kalpa Ranjan Chakma, Zahidul Islam, General Secretary of Khagrachhari District Awami League and Minister Mosharraf Hossain. The Pahari speakers spoke against army atrocities and said that Paharis and Bangalis were brothers. The Bangali speakers said that they were aware of and sensitive to the Hill people's problems. On hearing their speeches, the Bangalis left the meeting. The reaction of the Bangalis was that if the Hill people were successful in removing the army camp, then the Bangalis would leave the area, as their lives would then be at stake without army protection.

On investigating the incidences on 16, 17, 18 and 19 October 1999, and by talking to witnesses, the investigators concluded that due to the crowded situation of the bazaar it could not be possible for the soldier, Mahbub, to assault Miti Rani Chakma. Furthermore, the contradiction between the statements given by Miti Rani Chakma to the investigators and the statement of eye witness Sunil Kanti, seems as if the incident on 16 October was partially, if not wholly, pre-arranged.

The investigators further concluded that a section of the Hill Student's Federation (Pahari Chatra Parishad) and Hill Women's Federation planned the incident which took place in Babu Chara Bazaar on 16 October in order to strengthen their demands for the withdrawal of the army camp in the area. There is apparently a rumour in the area that the Bangalis will leave if the army withdraw — and that is why they protested and left the meeting which took place on 19 October.

World Must Put its Hangmen in the Dock

by Mark Latimer

ONLY tough judicial action can halt the torturers' roll call of abuse, Amnesty's Mark Lattimer insists

The world is rent by horrors. By evil beyond imagining. But what can be done? The thousands of human rights abuses that lie behind the chill statistics of The Observer 's Human Rights Index are shocking and overpowering. Can we really start to erase that grim catalogue?

Improving the human rights of people around the world almost always means influencing their governments. Yet those governments, while continuing to repress, torture and murder their own people, hide behind the doctrine of state sovereignty to rebuff outside interference. What they do to their people is 'necessary for security', they say.

Amnesty International recognises that the situation in each country is different, just as the tragedy of each individual victim is unique. But the right to life, the right not to be tortured, they are universal. The Observer 's recent Index serves to highlight the fact, from mass atrocity in Europe to carnage in Central Africa, that those rights can only be protected by action by the international community.

Contrary to what cynics say about the UK's 'ethical foreign policy', many examples of positive action have come from our own Government. It has supplied diplomatic and financial support for conflict prevention and reconstruction in Central Africa, funded mine-clearance programmes, lobbied for the abolition of the death penalty abroad, and taken a leading role in the development of a system of international criminal justice to bring to book those who commit war crimes and crimes against humanity.

The Government's active efforts to incorporate human rights principles in its foreign policy have been sadly let down by its trade policy. This was illustrated again last week during President Jiang Zemin's visit by Tony Blair's refusal to make any public statement of support for the hundreds of thousands suffering grave human rights abuses in China. And in Labour's first year in office, 64 separate arms export licences were approved to Indonesia, 84 to Pakistan, 336 to India, 38 to Saudi Arabia, 42 to Sri Lanka and 105 to Turkey.

Throughout history, it is ordinary people who have been made to suffer for the actions of their leaders. It is time now to hold leaders individually accountable for what they do to their people. This is the legacy of Nuremberg.

A shudder passed through the torturers of the world when extradition proceedings went ahead against Augusto Pinochet in London. The treaty signed at Rome last year to establish a permanent international criminal court with jurisdiction over war crimes and crimes against humanity will help to realise what could be a new era for human rights. The UK Government played an important role in concluding that treaty, but it now needs to be persuaded to introduce legislation urgently to ratify it.

Recognising that whose who govern by torture and murder are not statesmen but criminals can be what starts to erase the terrible list of global human rights abuses that sickens us all.

The writer is Amnesty International's director of communications