

Ravi Nair

The European Union (EU) did not need a crystal ball to predict that its resolution at the special session of the United Nations Human Rights Council (UNHRC) convened on 28 May 2009 to discuss the human rights situation in Sri Lanka had as much chance of success as the cow had of jumping over the moon.

A few hopeful Tamils across the world, clueless about the Byzantine ways of the UN, thought the world's premier human rights body would soon send in the blue helmets to save Tamils in distress. In fact, the UN cannot, on its own, send even its independent experts, the Special Procedures, to Sri Lanka since Colombo has not issued a standing invitation to any of them.

If the EU and its allies failed, the non-governmental community did no better. In view of the fact that all the dirty dozen countries in the regional blocs of Asia, Africa and Latin America were expected to gang up and shout down calls for accountability, NGOs should have sent a clear, forthright signal and proposed a sound strategy for the road ahead. But all they had to show for was non-representative discussions. Certain Asian NGOs, even those that call themselves 'regional' organisations, on the other hand opted for profound silence.

The road to hell

The EU resolution failed, as the EU might have expected. It was not even a moral victory, as the EU might have been hoping. The Czech opening statement in the debate on behalf of the EU was indifferently drafted and delivered, and was not about to stir a leaf, let alone the consciences of the majority of the diplomats, most of whom have long smothered any altruistic stirrings in their individual hearts at the altar of their nations' geopolitical priorities.

The debate started with a forceful statement by the UN High Commissioner for Human Rights, Navi Pillay. It was rebutted with a stout but disingenuous statement by Mr Mahinda Samarasinghe who heads Sri Lanka's aptly named Ministry of Disaster Management and Human Rights. The Cubans speaking on behalf of that cold war relic that they have appropriated, the Non Aligned Movement (NAM), launched their usual diatribe. The Indian statement did little credit to a country that is democratic. This once again underscores the need for the Indian Parliament and citizens to exercise scrutiny over what Indian diplomats get away with at forums like the UN, purporting to interpret the sovereign will of the Indian people.

The statement by Canada was uplifting. It made specific demands of the Sri Lankan government. It sought to emphasise international scrutiny and the need to strengthen key national protection mechanisms in Sri Lanka. Also, the US would have taken its place as a member of the Human Rights Council in another fortnight. Why did the EU not wait until the US brought its force multiplier effect to the Council? Old Europe has much to learn from the world across the Atlantic.

It would also have been a quantum leap if the EU resolution had sought an adequately staffed and resourced field presence of the office of the UN High Commissioner for Human Rights in Jaffna and Colombo. The current presence in Colombo consists of a solitary UN Human Rights advisor to the UN system in that country assisted by two junior colleagues.

Let's do it, but how

But the EU's biggest failure has been its ambiguity on investigations of possible war crimes and other violations of international humanitarian law. During a meeting on 18 May 2009, the EU council called for alleged war crimes in Sri Lanka to be investigated through an independent inquiry. "Those accountable must be brought to justice," it stated. It did not specify who or what would carry out these investigations. But briefing the media subsequently, Czech foreign minister Jan Kohout stated that "in principle, the inquiry should be carried out by Sri Lankan authorities but it could also involve non-government and UN bodies." Smoke and



mirrors, if you know what it means.

And schooled in the best British tradition, British Foreign Secretary David Miliband did not forget the importance of being earnest. There have been "very grave allegations" of war crimes on both sides of the conflict and "they

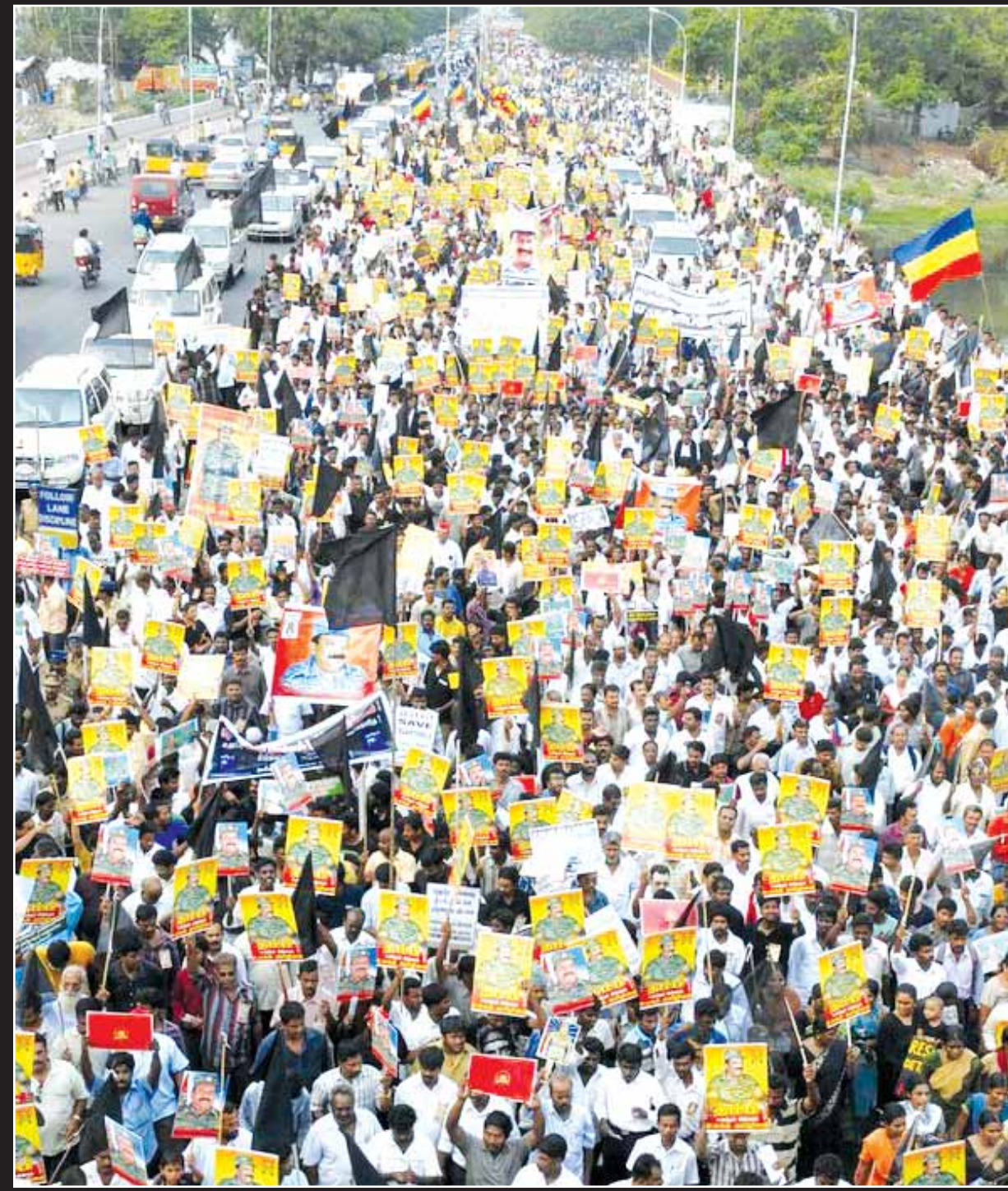
should be properly investigated," he stated.

Balderdash and fiddlesticks. What is more important is what these worthy European gentlemen did not

In continuation of the series of articles on the latest situation of Tamils in the island nation, in this exclusive piece, the renowned human rights activist presents the harsh and bitter truth about the working of UN bodies. He also outlines the road ahead for the United Nations, the European Union and other human rights and humanitarian organizations.

As we observe 25 years of the tragic events of June 1984, it is still not too late for Sikh human rights organizations to learn the meticulousness and methodology required to engage international bodies to highlight concerns and human rights violations.

Investigating War Crimes in Sri Lanka ILLUSION & REALITY



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say Over the past few weeks, Europe has seen anger on the streets, and its calls for accountability are intended merely to assuage those sentiments. The disingenuousness of European countries, however, lies in the fact that they have not explicitly proposed making use of a robust mechanism that is to be found within their own jurisdictions, one that might actually lead to accountability and eventual justice for the horrendous crimes committed in Sri Lanka.

The national prosecution option

It might be useful for the EU to recall its report on the 10th and 11th meetings of the African Union (AU)-EU Ministerial Troika, which observed as follows:

"..... Certain EU Member States provide for the exercise of universal jurisdiction in criminal matters only where such exercise is envisaged or rendered mandatory by international treaties to which the relevant state is party. An example of such a state is Ireland. Many of these states have adapted their national laws to provide for universal jurisdiction over grave breaches of the 1949 Geneva Conventions and of 1977 Additional Protocol I, over the crime of torture recognised in the Convention against Torture 1984 and over the crimes recognized in some or all of the various conventions dealing with terrorist acts."

Further, "Other EU Member States grant universal jurisdiction over international

crimes on the basis of customary international law as well. Such countries include Belgium (universal jurisdiction over genocide, crimes against humanity and war crimes), the Czech Republic (universal jurisdiction over genocide, certain war crimes and crimes against peace), Denmark (universal jurisdiction over genocide, crimes against humanity and war crimes), Finland (universal jurisdiction over genocide, crimes against humanity and war crimes), France (universal jurisdiction over the crimes within the respective jurisdictions of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)), Germany (universal jurisdiction over genocide. These states also

provide for universal jurisdiction where such exercise is envisaged or rendered mandatory by international treaties to which the relevant state is party."

The good Mr. Miliband might also wish to recall his own observation that "United Kingdom law explicitly provides for universal jurisdiction over the crimes of torture, hostage taking, participating in the slave trade, offences against United Nations personnel, piracy and certain war crimes, including grave breaches of the 1949 Geneva Conventions and its first additional Protocol."

EU policy does state that "[i]n prosecuting serious crimes of international concern, states should, as a matter of policy, accord priority to territoriality as a basis of jurisdiction, since such crimes, while offending against the international community as a



whole by infringing universal values, primarily injure the community where they have been perpetrated and violate not only the rights of the victims but also the general demand for order and security in that community. In addition, it is within the territory of the state of alleged commission that the bulk of the evidence will usually be found."

However, surely the EU cannot be unaware of the fact that the Sri Lankan judiciary is not only grossly ill equipped to handle such an onerous task, but that it also judicially abdicated its responsibilities on accountability and fighting impunity a long time ago.

In fact, as early as 2007, the EU had asked the Sri Lankan Government to investigate violations of international humanitarian and human rights law, adding its weight to calls by Louise Arbour, the then UN High Commissioner for Human Rights, and Manfred Novak, the UN Special Rapporteur on Torture, who had requested international monitoring in that country.

In March 2007, the International Commission of Jurists (ICJ) addressing the UN Human Rights Council said that domestic human rights mechanisms were, "insufficient to protect civilians in the escalating conflict and human rights crisis in Sri Lanka." The ICJ added:

"An international human rights field operation is especially needed when, as in Sri Lanka, justice and human rights mechanisms of the state are struggling to function effectively and independently, and when an armed opposition group such as the LTTE has prevented any independent and effective human rights mechanism developing in territory it controls."

As far back as 2003, when it was still relatively independent, the Sri Lankan Human Rights Commission (HRC), a statutory body, had concluded as follows:

"It is the Commission's belief that no national or regional human rights entity will be able to effectively monitor and implement human rights standards in the north and the east. No organisation or individual enjoys that kind of universal authority and legitimacy."

The Sri Lankan Human Rights Commission has since become little more than a joke, and even the super cautious International Coordinating Committee of National Human Rights Institutions has downgraded the Commission from 'member' to 'observer' status for not being fully compliant with the Paris Principles, a UN standard that is the lowest common denominator for national human rights institutions.

The ICJ also asserts that confidence in the judiciary has declined in recent years, and that members of the judiciary and legal community who seek to uphold the law and protect rights are often threatened.

Is it this wholly inadequate judicial system in Sri Lanka that is being trusted by the EU to deliver



Instead of pursuing pies in the sky, it would be more fruitful to look at national mechanisms that can try violations of international human rights and humanitarian law, as outlined above. For a start, the large Tamil diaspora in the United States should enter into negotiations with credible human rights NGOs and law firms to assess the possibility of seeking civil damages and bringing prosecutions. The Alien Tort Statute (ATS) and the Torture Victim Protection Act are two options in the United States. Similar assessments must be carried out in all countries of Europe and elsewhere in the world.

justice? The principle of territoriality apparently did not apply to Sudan. Why must it apply to Sri Lanka?

Get real

The international human rights community and particularly the Tamil diaspora in Europe and North America need a reality check. A Paris-based international human rights organisation, clearly not having drawn any lessons from the abject rout in Geneva, has now urged that "alternative mechanisms...must be activated for an international commission of inquiry". Shades of Don Quixote, one might say. Any new tribunal of an international nature would need UN Security Council approval. And since Beijing and Moscow are standard bearers of human rights, can we expect that remarkable agenda to find a place on the table? If on the other hand a non-governmental body of experts is being sought here, it might be useful to bear in mind that no

such body will get past immigration at Katunayake airport.

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Caution, meticulous legal work, and collaborations with credible human rights organisations and law firms, is what will win the day, and eventually win the peace.

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