Asymmetries in the peace process

the Liberation Tigers of Tamil Eelam

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As Clausewitz observed, war is politics by other means. Negotiations are a form of politics, but without some real or perceived symmetry of power they will be an exercise in one side imposing its will on the other. Power — i.e. the ability of one party to move the other in an intended direction — is constituted by military resources, economic leverage, international legitimacy, the moral basis of one’s position, mass support, leadership, etc. It includes ‘hard power’ such as military coercion, as well as ‘soft power’, which is defined by Joseph Nye as the ability to achieve one’s intended results through cultural or ideological ‘attraction’. Symmetry can be created between states and non-state entities by military parity, the drain on the state’s economy, persuasion or coercion by large powers, etc. The power to persuade, in large part a soft power, is perhaps the most important power at the negotiating table and can help the negotiating table be a ‘leveller’ in terms of power symmetry.

However, when the parties are competitive to the point of being unable to meet and have discussions, symmetry of power will not yield a negotiated settlement unless the international system in which the negotiation takes place forces the parties to adopt cooperative attitudes towards each other.

It is often argued that a government and non-elected non-state actor cannot be treated equally because the former is ‘democratically elected’. This argument may have merit in some cases, but it is not applicable with respect to national liberation movements fighting for self-determination. In national conflicts, liberation movements represent a ‘people’ who share attributes such as language, culture, a sense of oneness and a territorial relationship. The aggrieved people often neither voted for the ‘democratically elected’ government in power nor owe any allegiance towards it. While liberation movements are not elected through ballots, Judge Amoun of the International Court of Justice observed that, “the struggle undertaken in common, with the risks and even sacrifices it entails… is more decisive than a referendum, being absolutely sincere and authentic”.

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Unfortunately, as many scholars have rightly observed, the international climate in which most negotiations take place inherently fosters asymmetrical relations in favour of states, which have presumptive and elite legitimacy, allies (whether genuine or interest-based), membership in international organizations and the resources of a government. The Sri Lankan government’s prevention of the UN Secretary General’s visit to the areas most severely affected by the December 2004 tsunami because they were governed by the Liberation Tigers of Tamil Eelam (LTTE) is one illustration of the asymmetry between states and non-state entities in their relations with international institutions. This article will elaborate on the ways in which the asymmetrical treatment of the LTTE and the Sri Lankan government by the international system has hurt the Sri Lankan peace process.

**Negative effects of the state-based system**

The impact that international institutions can have on the peaceful resolution of conflicts between states and non-state actors such as armed liberation groups is substantially diminished by this dominant pro-state bias. The state-based composition of international institutions has negative implications for their ability to engage successfully with all the parties in a national conflict. Thus, these international institutions are increasingly becoming less relevant to peacemaking in the contemporary world in which conflict between states and armed entities ‘predominate and proliferate’ to a greater degree than conflicts between states. Both the *[Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Change]* and the UN Secretary General’s proposal entitled *In Larger Freedom: Towards Development, Security and Human Rights for All* failed to address this asymmetry between states and non-state actors.

Since the current international system is an inter-state one, states playing the role of the mediator or facilitator tend to treat the state and non-state entities in an asymmetrical manner. This third-party state is itself a member of the existing inter-state system and thus has a vested interest in preserving it. While there may be exceptions to this general statement, the 1987 *Indo-Lanka Accord* is a clear example. Besides her geopolitical interest, India treated the Sri Lankan state as an equal and entered into an agreement with her. The LTTE, though a protagonist in the conflict, was not a party to...
the *Indo-Lanka Accord*. Its exclusion resulted in failure to address the Tamil issue satisfactorily and ultimately the failure of India’s peacemaking effort.

**Proscription and anti-terrorist legislation**

Before the commencement of talks in the current peace process, the LTTE insisted that the Sri Lankan government remove its legal ban against them. Although the proscription of the LTTE did not have any tangible impact on the organization, the LTTE wanted the ban removed because both parties should perceive themselves, and be perceived by others, as equals. The LTTE viewed the de-proscription as a visible sign of power symmetry between the two. The government has historically fought any recognition of equal status vigorously, but taking into consideration the military reality on the ground, its economic capacity and the arguments of the international community, the Sri Lankan government removed the ban before the commencement of talks.

Despite the fact that ban had been removed, the peace process was ongoing and the ceasefire in effect, the US government invited only the Sri Lankan government to attend the Washington donor conference of April 2003 that was meant to address post-conflict resettlement, rehabilitation and development. The LTTE, which was governing 70 per cent of the north east, the area mostly affected by the war, was not invited. The Sri Lankan government characterized this conference as a preparatory seminar for the main Tokyo donor conference in June that year. The LTTE was upset and pointed out that the Sri Lankan government’s attendance in Washington was a breach of the parties’ commitment to seek developmental aid as joint partners. The US government’s rationale for not inviting the LTTE was not that the conference was limited to state representatives, but that the US anti-terrorism statute did not permit LTTE members to enter the US, because of their designation as a foreign terrorist organization. Yet if that were the case, the conference could have been held in a country without such a list.

The whole exercise was viewed by the LTTE as an attempt to destroy the power symmetry between the protagonists and added to growing mistrust between the Sri Lankan state and the LTTE. The LTTE’s exclusion contributed to their dismay at the lack of progress in negotiations and the Sri Lankan government’s failure to implement its obligations under the Memorandum of Understanding signed almost a year before. On 21 April 2003 the LTTE suspended its participation in the talks and decided to boycott the Tokyo conference. The LTTE’s chief negotiator and political strategist Dr. Anton Balasingham observed, “As a non-state actor caught up in the intrigue-ridden network of the international state system, the LTTE was compelled to act to free itself from the overpowering forces of containment”. By failing to engage with non-state entities, third-party states were also lessening their ability to persuade or become fair arbitrators of the conflict.

Anti-terrorism legislation is another example of how artificial and unhelpful asymmetry is created between states and non-state actors pursuing legitimate armed struggles. Anti-terrorism statutes address terrorist acts by foreign non-state actors, but not by state actors. Yet there is no moral or legal reason for state terrorism to be immune from any anti-terrorism statute. The provisions of the Additional Protocol I and II of the Geneva Conventions refer to the “party” to the conflict, not the state in conflict, and thus cover conduct of both state and non-state actors. Thus the rationale for limiting anti-terrorist legislation to non-state actors only is flawed. The unreasonableness of the anti-terrorism statute is demonstrated by the case of Sri Lankan government whose armed actions against the Tamils resulted in the mass murder of Tamils and their burial in mass graves. According to the UN Human Rights Commission, in the period from 1980 to 2000 Sri Lanka was second only to Saddam Hussein’s regime in the number of outstanding cases of disappearances. Yet the officers of the Sri Lankan military establishment were able to come to Hawaii where the US Pacific Command is situated, whereas the LTTE’s political and economic advisors were unable to enter the US as ‘members’ of a ‘foreign terrorist organization’.

As an attorney who was involved in the legal challenges to the designation and/or characterization of the LTTE as a terrorist organization in the USA and in Canada I was privy to the unclassified information in those legal proceedings. I was appalled to see that the designation or characterization was primarily based on intelligence reports from the country in which these groups operate and from reports by academics of one of the protagonist nations claiming to be objective experts. Since the intelligence agencies are part of the conflict with the non-state entities in those countries, it cannot be expected that those agencies will provide unbiased information. However, other states uncritically accept the host government’s demonization of an armed group when it suits their own geopolitical interests, and often possibly for the sake of courtesy. The above illustrates the asymmetry inherent in the international community that influences its legal systems.
Human rights violations and international instruments

It is notable that prosecutors from the newly established International Criminal Court, another multilateral initiative, have chosen to begin investigations of abuses by the Ugandan Lord’s Resistance Army but have not yet given indications that they will investigate alleged abuses committed by the Ugandan state in the north. In the Sri Lankan peace process persistent accusations about LTTE’s recruitment of underage children are made, whereas the adverse impact on Tamil children of actions taken by the government in the name of security (such as depriving Tamil fisherman of their livelihood, which contributes to the starvation of Tamil children) is not brought up in international discussions. Another example is the Sri Lankan government’s refusal to withdraw from high security zones in violation of the Memorandum of Understanding. This is a clear violation of humanitarian laws which only recognize the right to a military occupation of civilian properties for an “imperative need.” Humanitarian laws do not accept forced occupation of civilian lands and homes for the sake of maintaining the balance of military power. Given the three-year ceasefire and the peace process, the occupation of civilian land by the military in the northeast is contrary to humanitarian laws and clearly unlawful, yet the international community does not condemn this.

With respect to the resumption of talks, the LTTE presented its proposal and expressed its willingness to resume talks in October 2003. However, the present Sri Lankan government failed to resume talks from the point left off by the previous administration in November 2003, as is customary in any negotiating process. Even though the government has changed the state has not. Even in cases of the succession of states, international law mandates that the new state honours the commitment made by the previous states. It is acknowledged that in some instances when governments change, their approach to negotiations also change, but it is clear that in Sri Lanka the failure to resume talks is due to the government’s insistence on a completely new approach to the talks. Yet the government uses its access to the international media to spin the story that it was the LTTE who suspended the talks in April 2003.

The international instruments used to monitor the behaviour of states and non-state actors are also asymmetric. First of all, it must be recognized that almost all international agreements are negotiated and prepared by states. Thus, it should not be a surprise that these international agreements give primacy to state interests. Some say that the LTTE is in violation of the Optional Protocol to the Convention on the Rights of the Child. The Optional Protocol allows states to recruit individuals under 18 for their armed forces, while prohibiting armed groups from recruiting individuals under 18 for their national forces or even for political and administrative work. There is no provision in the Optional Protocol for a national liberation movement and/or a de facto government like the LTTE. Application of the Optional Protocol, which has not yet become customary international law, will favour the Sri Lankan state against the LTTE. However, there is criticism that the LTTE is violating the Optional Protocol provisions that it is not a party to, has never signed and thus is not legally bound by.

Negotiating peace

Asymmetry also characterizes the facilities for preparing negotiations between state and non-state actors. States’ resources to train their diplomatic corps professionally and academically exceed those of non-state actors. The LTTE recognizes this asymmetry and compensates for it with the resourceful Tamil diaspora’s talents and with assistance from some international NGOs and academics, a strategy manifested in the Interim Self-Governing Authority, a proposal put forwarded by the LTTE to address the urgent humanitarian needs of the people of the northeast.

The Sri Lankan government comprises various constituencies and ideologies and has to expend its resources to address various interests. For the government, the peace process is just one of many things on its agenda. The LTTE’s commitment to the peace process has helped to reduce the asymmetry between its resources and those of the government.

Conclusion

This article has tried to identify some of the asymmetries between state and non-state actors pervasive in the current international state system in light of the Sri Lankan peace process, as well as the lack of factors in that system to compel state actors to adopt a cooperative orientation towards non-state actors. The third parties who are involved in such processes must address these asymmetries for the process to work. If the international environment is not rectified to enable the non-state actor to exercise its soft power effectively, the non-state actor will be forced to conclude that only through hard power can they level the playing field and compel the state actor to reach a negotiated settlement.