

Supreme Court Order to Implement Geneva Conventions of 1949: A Helping Hand for Those Who Least Need It?

By BIPIN ADHIKARI

The Supreme Court on January 10 quashed a writ petition filed against the government for alleged violation of the Geneva Conventions of 1949 in the current conflict with the Maoists. A joint bench of judges Hari Prasad Sharma and Khila Raj Regmi decided against the petition saying that the Geneva Conventions were not applicable in an internal conflict, and can only be brought into effect in the case of war between two countries. The court, meanwhile, issued a directive to the government to formulate a separate law, if it feels the need, and in case the government wants to make provisions of the Conventions applicable to its conflict with the Maoists. The ruling which is kind in several ways came in response to a year-old writ petition filed by two advocates. The petition had charged both the government and the Maoists of violating the Geneva Conventions by killing hundreds of innocent people. The order is not mandatory, but it certainly gives an opportunity to the government to improve its public image.

The two documents that symbolized the moral aspirations of the international community after the World War II are: the 1948 Universal Declaration of Human Rights, and the 1949 Geneva Conventions for the protection of war victims. While the Declaration promised universal human rights in peacetime, the Conventions established the basic rules for humanitarian behaviour in war. The Common Article 3 of the Geneva Conventions dealt with the armed

conflict within the state. It provided international law and standards governing the conduct of parties in an internal armed conflict, including government forces and insurgents. The issue, however, is not the international humanitarian laws only, but also the international human rights law which prohibits the arbitrary deprivation of life under any circumstances. The government of Nepal is a party to the International Covenant on Civil and Political Rights (ICCPR). Article 6 of the ICCPR expressly prohibits derogation from the right to life. Thus, even during time of emergency, "[n]o one shall be arbitrarily deprived of his life." The ICCPR also prohibits torture and other forms of cruel, inhuman and degrading treatment. Articles 4 and 7 of the ICCPR explicitly ban torture, even in times of national emergency or when the security of the state is threatened. The security forces being mobilized in Nepal to suppress Maoist rebels have systematically violated these fundamental norms of international human rights law. The armed conflict has primarily effected the country's civilian population because security authorities have directed extreme military force at the civilian population rather than against Maoist rebel units. Under international law, Nepal's state-sponsored militias are state agents and therefore must abide by international human rights and humanitarian law. The government of Nepal is ultimately responsible for their actions.

However, Common Article 3 in no way precludes the government of Nepal from punishing persons for crimes under its domestic laws. Indeed, it is the government's duty to do so. Thus, Maoists militants may

be tried for murder, kidnapping or other crimes, so long as they are afforded the rights of due process. Persons protected by Common Article 3 of the Geneva Conventions include all noncombatants, even if they have provided food, shelter or other partisan support to one side or the other, and members of the armed forces of either side who are in custody, are wounded or are otherwise *hors de combat*. If under these circumstances, such persons are summarily executed or die as a result of torture, their deaths are tantamount to murder. Torture, hostage taking, and rape have all been prominent abuses in the conflict, and it is evident that Common Article 3 forbids each of them. Rape also violates the ICCPR and Common Article 3 prohibitions on torture.

With a view to facilitating implementation of the rules of international humanitarian law at the national level, the ICRC's Advisory

Service on International Humanitarian Law has proposed model laws and offered advice on drafting legislation. Nepal can also make use of the model Geneva Conventions Act which give effect to certain Conventions done at Geneva on 12 August 1949 and to the Protocols additional to those Conventions done at Geneva on 8 June 1977, and for related purposes.

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In UK, for example, the Geneva Conventions Act of 1957 implements specific provisions of the 1949 Geneva Conventions such as those concerning grave breaches and obli-

gations concerning certain legal proceedings (e.g. those relating to protected prisoners of war) and preventing misuse of the red cross and other emblems. Although the Geneva Conventions Act 1957 includes in its four schedules each of the four Conventions, the whole of these Conventions are not generally incorporated into English law. The Act was amended by the Geneva Conventions (Amendment) Act 1995 to enable the United Kingdom to ratify the two Protocols Additional to the Geneva Conventions of 1949. The Geneva Conventions (Amendment) Act 1995 amends the 1957 Act by adding each of the 1977 Additional Protocols as schedules to the latter. It specifically incorporates into the law of the United Kingdom the grave breach provisions of Additional Protocol I, Articles 11(4) and 85 (2, 3, and 4). It also amends section 6 of the 1957 Act dealing with the protection of the Red Cross and other emblems, in addition to amendments to the interpretation section (7) of the 1957 Act. Since the Act was passed before British ratification of the two Additional Protocols, section 7 of the 1995 Act requires that the Protocols "shall for the purposes of this Act be construed subject to and in accordance with any reservation or declaration [made]." Upon ratification, declarations were made relating to Additional Protocol I (28 January 1998) and these are set out in the Geneva Conventions Act (First Protocol) Order 1998, Statutory Instrument No. 1754. Why should not Nepal give a try? ■

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