

New Delhi, 7th January 1972.



A i d e - m é m o i r e

The competent authorities of the Federal Political Department of the Swiss Government examined anew the question of applicability of the Geneva Conventions in relation to the present conflict between India and Pakistan and particularly the question of the obligations deriving from these Conventions for Switzerland as Protecting Power and for India having agreed to Switzerland's mandate. They advance the following :

1. Article 8 of the third Geneva Convention provides that the Convention shall be applied "with the cooperation and under the scrutiny" of the Protecting Power. It results from the preparatory work and the most authoritative commentaries, that this article of the Convention confers expressly upon the Protecting Power a direct responsibility and a right of initiative of its own. The moment the Protecting Power has accepted the mandate and has been agreed upon as a mandatory Power by the State of Residence, it automatically assumes all duties irrespective of the intent of the requesting Power (or Power of origin) and without further agreement with the Power in which the mandate is to be carried out (State of Residence). The members of the diplomatic and consular staff of the Protecting Power are ipso facto entitled, in virtue of their capacity as official representatives of their Government, to engage in the activities arising out of the Convention.

2. Specifically, Article 126 of the third Geneva Convention confers upon the representatives or delegates of the Protecting Power the right and the duty of visits to and the inspection of all places where prisoners of war may be held, particularly places of internment. The right of access to such places of internment and of the visits to prisoners of war by those representatives of the Protecting Power may not be prohibited "except for reasons of imperative military necessity, and then only as an exceptional and temporary measure".

3. From what precedes, it derives that under the third Geneva Convention the prerogatives of the Protecting Power are granted automatically from the very moment this Power did accept the mandate and has been agreed upon as Protecting Power by the State towards which it exercises the said mandate.

4. By recognizing Bangladesh, India performed an act of national policy determining her bilateral relationship with that entity. It is not up to Switzerland to express judgement neither on the sovereign decision of India nor on the effects which may be born out of this recognition on the bilateral level. However, the said decision by the Government of India cannot have on the other hand any legal effects, for the time being, regarding third States and among them in respect to the Swiss Confederation in the exercise of her duties to safeguard the interests of the parties to the conflict and to supervise the application of the Geneva Conventions as conferred upon her by Article 8 of the third Convention, Article 9 of the fourth Convention and by implication by Article 1 of both Conventions.

5. It has further to be considered that Bangladesh does not, for the time being, fulfil the requirements for recognition under international law since their authorities have been installed only a short time ago and Pakistan has not relinquished any of her sovereign rights on East Pakistan territory. Besides, as long as the Indian armed forces continue to remain in Bangladesh it is not possible to judge whether the authorities governing this entity would be able to maintain an administration sufficiently stable over the major part of the territory and population which constitutes precisely a prerequisite for attaining international recognition. It appears finally that this position is shared by the members of the international community which so far neither as a whole nor by a majority has been able to recognise Bangladesh as a sovereign State.

6. While Switzerland does not intend to express any judgement on the effects which the recognition of Bangladesh by India may have on bilateral relations between India and that entity, India cannot either on her part attribute to this act of recognition an international effect. Specifically, India cannot invoke the fact of having recognized Bangladesh with the view of renouncing - wholly or partly - her obligations which she undertook to respect by signing a multilateral worldwide instrument namely the Geneva Conventions. With regard to these Conventions, whatever the relations between India and Bangladesh may be, the Indian army is to be considered an occupying force in the technical sense of the term and therefore bound by all the obligations which derive from such function.

7. Even if India's argument that she has recognized Bangladesh already on December 6th, 1971, i.e. before the surrender of the Pakistan armed Forces, was to be accepted as the basis of legal considerations one would arrive at the same conclusion; namely, the fact remains that the act of recognition did not precede the moment at which Indian armed Forces entered the Eastern Province of Pakistan. Thus, even under this hypothesis at least until December 6th, 1971, a state of military occupation in technical sense did partly exist.

8. India having signed the fourth Geneva Convention, it follows from the above that Article 47 of the fourth Convention does apply. This article stipulates that the rights of protected persons and consequently the duties of the Occupying Power are not being modified by any subsequent agreement that may be concluded between the Occupying Power and the authorities of the occupied territory.

9. Concerning the particular question of the transfer of protected persons, be it prisoners of war or interned (protected) civilians, Article 12 of the third Convention and Article 45 of the fourth Convention prohibit such transfer to a Power which is not a Contracting Party to the Conventions. Quite independently of the question of being a recognized State or not, Bangladesh is in fact not a party to the Geneva Conventions. The responsibility for the treatment of prisoners of war and of interned civilians remains unquestionably with the Detaining Power.