To: M. Meselson
From: C. Leman
Re: Divergent "understanding" of a multilateral treaty

I have as yet been unable to find a case where a narrow understanding by the United States of a treaty led to its invalidation by other countries involved. I have come to further conclusions which seem to reduce the importance of this question. If you wish, however, I will keep looking.

The Problem

The International Court of Justice, in an opinion regarding reservations to the 1948 Convention on Genocide, established two criteria for their evaluation. The ICJ saw a humanitarian treaty as aimed at setting standards, but also in assuring their universality. Thus, a reservation should not be dismissed out of hand, if it means that the party will pull out of the agreement entirely. Reservations were sanctioned if they seemed "compatible with the purpose" of the Convention.

How strictly will nations view the compatibility of an interpretation? Usually pretty broadly, according to Prof. Chayes. Especially in the case of a treaty with a humanitarian goal, they will settle for "half a loaf" if the alternative is no agreement. Thus, it is not surprising to find such a dearth of cases where the agreement degenerated, or even one party withdrew. If there are few cases of this direct effect, there are some interesting analogies we can draw with previous U.S. experience.

The Reservation Process

The U.S. has supported the principle of a party's right to reserve itself on certain aspects of a multilateral agreement. The legal process by which this is incorporated into the agreement is difficult, and it is not surprising to find nations sometimes resorting to informal "understandings" to get their way. However, as George Ball says in a hearing that we could quote, there is no sharp distinction between the two methods. It is mainly a matter of degree.

The U.S. has not, however, always supported other parties' resort to reservations. Indeed, we vociferously attacked the legitimacy of a certain reservation by the Soviet Union, North Vietnam, and other Communist countries, to Article 85 of the 1948 Geneva Convention Relative to the Treatment of Prisoners of War. The section provides that all POWs will be subject to the same judicial principles as the captor's own servicemen; the reservation exempted those "charged with and convicted of war crimes." North Vietnam's position was that U.S. soldiers caught were a priori war criminals. Interestingly, this stand was based on a strained interpretation of the original reservation they had made in 1948; the argument was that the "and" in the text was disjunctive rather than conjunctive. (this is rather like the tortured U.S. manipulation of "similaires"). This episode is significant in that it demonstrates that the U.S. itself protested the "misuse" of the power to reserve. (from Harvard Law Review, Feb, 1967)

One small point we might make is that it seems traditional for the U.S. to consult with the other nations before it makes unilateral revisions. For instance, in a May 17, 1960 hearing before the Senate Foreign Relations Comm., the Assistant Chief of the Shipping Div., Dept. of State, stated: "They will not object to our reservations,"

because they had "been discussed informally with all of them." The treaty at issue was the International Convention for the Prevention of Pollution of the Sea by Oil.

Response to Reservations

Although there are few significant cases of destructive reservations, the U.S. position itself graphically demonstrates the possibility of invalidation. The U.S. has continually asserted its right to withdraw from a treaty. The opinion of the State Dept.'s Legal Advisor (Chayes) regarding the applicability of the Nuclear Test Ban Treaty in the event of a violation states:

> In the case of multilateral treaties creating obligations necessarily dependent on the corresponding performance of other parties, a breach by one party justifies withdrawal by any other party...The undertaking of each party to refrain from testing nuclear weapons is given in return for a similar undertaking by each of the other parties.
>
> (from Digest of Int'l Law, State Dept., Vol. 14, p. 475)

In this case, Chayes was assuring the Senate that we could withdraw if the treaty was violated. But even when it was not, the U.S. at times has withdrawn from an agreement. In preparation for the war, the U.S. unilaterally suspended its recognition of the 1930 International Load Line Convention. (Digest of Int'l Law). We also unilaterally withdrew from the International Air Transport Agreement, after the war (but joined again when our withdrawal failed to spur a new agreement).

Although none of these can be traced to another country's reservation, they demonstrate the tenuous nature of the agreement.

The Possibility of Wholesale Invalidation

Despite the lack of credible precedents, we could imagine a convincing scenario for the fate of the Protocol. Interestingly, the most striking dissolutions of agreements were initiated by Nazi Germany. Although we can't argue that German repudiation of alliances and arms limitations was a result of a changed Allied legal "understanding" of the original terms of surrender, it was clear that the presence of a demonstrably self-serving interpretation provided the pretext or even the provocation for belligerence. As the Protocol is so unusual in having virtually all states in agreement, a U.S. unilateral compromise of a humanitarian standard might make us vulnerable to such action.

Conclusion

I am afraid that history shows that parties to an agreement usually ended up being satisfied with "half a loaf." This does not mean that they would be today. But the strongest arguments for a comprehensive reading still remain the strategic and the moral.