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Nicaragua's U.S. Lawyers

At the Hague, Nicaragua's case against the United States' government continues to display some unusual characteristics.

It is the first time—old hands say—that lawyers and witnesses have opposed their own country in the World Court. The court, after all, deals with issues between governments, not persons. Heretofore, governments have relied on their own nationals to represent them and citizens have supported their governments. Now, Managua is accusing the United States of major violation of international law for organizing, funding and directing the anti-Sandinista forces (the contras), and for mining Nicaragua's ports.

To press its case against the United States government inside the International Court of Justice, the government of Nicaragua has retained an international team headed by Americans and has called American witnesses to support its case. This development is the more interesting because of the issues involved and because one of the Americans representing Nicaragua is Abram Chayes, a Harvard law professor who served as top legal adviser to the State Department during the Kennedy administration, and one of the American witnesses, David MacMichael, held a top-secret clearance as a contract employee of the CIA as recently as 1983. The other American witness is Michael J. Glennon, a professor of law at the University of Cincinnati.

The United States is refusing to participate in the proceedings on grounds that the issue before the court is not a narrow or technical legal question but U.S. policy toward Central America and more specifically toward Nicaragua. Such political questions are not deemed justiciable by United States courts and have heretofore not been seen as falling within the jurisdiction of the World Court. The issue, U.S. attorneys insisted, "is an inherently political problem that is not appropriate for judicial resolution." This gives the unprecedented role of the American lawyers and witnesses on the Nicaraguan team an additional political dimension. What are they doing there?

Prof. Glennon claims that he is "acting in the highest tradition of the American people" and that he had "a responsibility to make available relevant information in his possession." However, he does not explain how he acquired the responsibility or to whom it is owed.

It is possible that the attorneys believe that representing Nicaragua before the World Court is no different from representing an accused criminal before an American court. But it seems unlikely given the broadly political character of the issues involved.

It is also possible that the Americans' involvement on Nicaragua's team is simply one more affirmation of the American faith that political problems between nations can be settled by supranational judicial means. However, this too is unlikely.

Real naiveté is required to believe that the International Court is today a nonpolitical body. Its judges loosely "represent" the world's various political and regional groups.

They are nominated by the U.N. Security Council and are elected by one of the world's most political bodies, the General Assembly of the United Nations. Fewer than one-third of the nations of the world accept the court's jurisdiction. Almost all of that one-third have filed reservations limiting jurisdiction. On nontechnical questions, the court's views broadly reflect the politics of the General Assembly.

But if Chayes and his colleagues do not believe that the World Court can be counted on to function nonpolitically, what then are they doing?

I believe that they along with the Nicaraguan government are seeking to change U.S. policy and that they regard their appearance before the court as a legitimate act to that end. Chayes said as much when he noted that U.S. policy toward the Sandinistas is "under continuous discussion" and that an "authoritative statement" by the court could affect the debate (The Washington Post, Sept. 8, 1985). What should the rest of us think of this form of political action?

We regard it as legitimate for Americans to represent a foreign government's interests in Washington, provided that they register as agents and otherwise obey our laws. But the Washington lobbyist for a foreign government seeks to influence American policy directly as it is being made, while counsel and witnesses for Nicaragua cooperate with a foreign government to undermine the legitimacy of existing U.S. government policies. They do this in the name of "higher" loyalties that presumably override a citizen's obligation to support decisions made through normal democratic processes. Glennon invokes these "higher" values when he claims to act in the "highest tradition of the American people."

Does such a tradition exist?

We may be in the process of forging one. Traditionally, citizens of a democracy have a right to participate in making policy and an obligation to accept the resulting decision. Acceptable political behavior in a democracy has not featured collaboration with foreign powers in the policy process. However, the boundaries of acceptable political action and of dissent were stretched during the Vietnam war by those who marched under the Viet Cong flag and worked on North Vietnam's behalf. Boundaries are being stretched again in the Hague. And elsewhere.

More and more actual and potential adversaries are invited into our political process—Hezbollah hijackers, Sandinista ministers, Soviet spokesmen, whomever. We have put our foot firmly down on a slippery slope where distinctions between one's country and its adversaries, citizen and alien, loyalty and disloyalty fade and disappear. And any side is made to seem roughly equivalent to any other. It is all relative.

Or is it?

In the effort now under way at the Hague, the government of Nicaragua seeks to deprive the United States of control over important aspects of its foreign policy. It is curious that such a course would appeal to Americans.

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