LIVING LAW

The Arias Peace Plan, International Law and Conflict Resolution in Central America: An Interview With U.N. Ambassador Carlos José Gutiérrez

Editor's Note

The Living Law section attempts to bridge the gap between the "official" law as codified and the law as it actually is implemented. For a complete explanation of the theory behind the Living Law section, see Kozolchyk, *Living Law*, 1 Ariz. J. Int'l & Comp. L. 85 (1982); Kozolchyk, *Introduction By The Faculty Advisor*, 2 Ariz. J. Int'l & Comp. L. 2, 3-7 (1984).

The following interview was conducted by Professor Boris Kozolchyk [BK] on September 9, 1988 at the University of Arizona College of Law. The Honorable Carlos José Gutiérrez [CG] is presently the Costa Rican Ambassador to the United Nations and has held that position since September 1986. Ambassador Gutiérrez was Costa Rica's Minister of Foreign Relations from 1983 to 1986 and the Dean of the University of Costa Rica law school in Costa Rica from 1966 to 1972. Ambassador Gutiérrez is the author of *El Funcionamiento Del Sistema Juridico* (1979) [*The Functioning of the Legal System*] as well as *El Pensamiento Político Costarricense: La Social Democracia* (1986) [*The Costa Rican Political Thought: The Social Democracy*] and *Neutralidad y Democracia Combativa* (1987) [*Neutrality and Fighting Democracy*].

I. THE ROLE OF COSTA RICA IN CENTRAL AMERICA

BK: How do you assess the Central American conflict, as seen through your eyes as minister of foreign relations, not just a professor of law, but as a policy maker in your country?

CG: The present Central American crisis started in 1978. When you look into a crisis you have to look first at what the balance of power was before the crisis. That gives you an explanation of what the crisis is all about. The balance of power before 1978 was one democracy in Costa Rica, and dictatorships in four other countries. The most powerful dictator in Central America at the time was Anastasio Somoza. When Somoza fell, the crisis really started.

Somoza fell as the result of a revolution made by different sectors of the Nicaraguan people. Only one sector that participated in the revolution, the Sandinistas, ultimately took power. Furthermore, the Sandinistas decided to get very close to Cuba, and from Cuba, to the Soviet Union. Third, the Sandinistas started supporting a similar revolution to the one the Sandinistas had in Nicaragua, in El Salvador. That led to the suspension of United States aid to Nicaragua and the decision to support the government of El Salvador against the guerrillas.

We consider that Costa Rica is more immune to this kind of problem because we are preparing to celebrate, in 1989, the centennial of our democracy. The problem in Costa Rica was what to do with the challenge presented by the Sandinista government, as a revolutionary force in Nicaragua, and as a promoter of revolution in the other countries. That started the active participation of the United States government. When Fidel Castro took power in Cuba, the U.S. reaction to that was to strengthen the military of the countries of Latin America. This led to the military taking power in Latin America. At the beginning of the 1970s, there was a moment in which only Costa Rica, Mexico and Colombia could be considered democratic. In Central America the goal was not to repeat what occurred in Latin America. That created the process of Contadora. When Contadora stalled, the Arias Peace Plan was developed.[1] The position of Costa Rica was to emphasize the need of democratization as the solution to the crisis. At the same time our goal was to keep Costa Rica out of any conflict and to avoid Costa Rica being used as a base against Nicaragua. President Monge made a declaration of neutrality.[2] The main purpose of declaring neutrality was that Costa Rica should not be used as a base for attacking Nicaragua. There were some incidents with Nicaragua where some Costa Rican policemen were killed on the border. There was a dispute in the OAS about the incident. Then President Arias came into office in 1986 and presented the peace plan which is now the basis for Central America.

BK: The Costa Rican people are strongly opposed to the Sandinistas?

CG: Yes.

BK: The Costa Ricans dislike the Sandinista government, yet a highly democratic government, like that of Costa Rica, found it necessary to articulate and implement a policy that seemed to go

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[1]The progress of Contadora ended in July, 1985.

[2]President Luis Alberto Monge declared neutrality at the National Theater in San Jose, Costa Rica on November 17, 1983.

against the grain of national opinion in Costa Rica. What were the higher goals that you had in mind when you articulated that policy?

CG: This national feeling was very important in the 1986 election. At the same time that the people of Costa Rica dislike the Sandinistas, there is no support for Costa Rica getting involved in an armed conflict with Nicaragua. This was very important because there is nobody as unpopular in Costa Rica as the Sandinistas. The two main presidential candidates took a different approach to the problem in the political campaign. Rafael Angel Calderon said Costa Rica must get involved in trying to topple the Sandinista government. Oscar Arias took the position that we should be completely neutral about what is happening in Nicaragua. Oscar Arias got fifty-six percent of the vote. The Arias victory proved that even if everybody disliked the Sandinistas, dislike of the Sandinistas does not mean "let's go fight them with guns."

BK: But it could have meant "let's support the Contras in Honduras?"

CG: That was also one of the issues of the presidential campaign in 1986. The two main candidates also took completely different positions. Oscar Arias won.

BK: What other aspects of Costa Rican policy, during your tenure, do you feel particularly proud of?

CG: I started my term by trying to improve the Costa Rican diplomatic service and by restructuring the ministry to be more aware of international realities. Costa Rica had a very isolationist position. Foreign relations had very little importance in Costa Rica for many years. No matter what was formally said, foreign relations had a very low priority. Then Costa Rica became involved in a situation in which foreign relations became a vital issue. Now we have to prepare the structure and the people of Costa Rica so that those new in charge can continue with what was started. Foreign relations is now considered the most important ministry in government.

II. THE ARIAS PEACE PLAN FOR CENTRAL AMERICA

Mark Wayne: What do you think is the future of the Arias Peace Plan?

CG: I consider the Arias Peace Plan stalled now. It cannot start moving until two things happen: (1) the United States presidential election in November and (2) the election in El Salvador in March. I have confidence that the idea of the peace plan has already taken root. Any real solution of the Central American crisis has to be a peaceful solution. It has to take the goals stated in the Arias Peace Plan as a basis: peace, democracy, and economic and social development.

The possibility of a military solution has to be ruled out. Nothing is really happening now until we find out what the policy of the new administration in the United States is and who is going to be the next president of El Salvador.

BK: What is the incentive for the Sandinistas to give up power peacefully, assuming that the will of the Nicaraguan people is to replace them with another government?

CG: First, the Sandinistas do not have any intention of leaving power, that is my honest belief. Daniel Ortega has benefitted from this situation because before the current process, the ultimate power of the Nicaraguan government was in the hands of nine people, the *Direcion Nacional del Frente Sandinista.* Daniel Ortega has become more and more "the president," a Latin American strongman. On the other hand, there are two things which make it necessary for the Sandinista government to play along in the democratization process. First, the economic situation in Nicaragua is an absolute disaster. They need international help. It becomes less possible for Nicaragua to receive economic help if they do not continue with the democratization process. Second, in their confrontation with the United States, Nicaragua is out of step with the Soviet Union. The Soviet Union has started an accommodation process with the United States. A client of the Soviet Union, trying to fight to the end against the United States, does not now serve the purposes of the Soviet Union.

BK: The Arias Plan is predicated on democratization and the fact that if the Nicaraguan people effectively exercise their will, then the Sandinistas will have to leave?

CG: Let me be realistic about the situation. The opposition to the Sandinista government is not organized at all. It is necessary to have some time in order to organize a political movement that could defeat the Sandinista government. What we would see, even in a free election in Nicaragua, is the Sandinista party being opposed by five or six opposition parties which would give them a chance to win by a plurality. There is no unifying political organization or movement.

BK: The best scenario for Costa Rica, and the other democracies of the world, would be to encourage the Sandinista government to engage in the democratization process and allow the opposition to exercise a voice. Then, somewhere down the line, years from now, those forces that could not coalesce now could coalesce then and get the Sandinistas out of power that way. Is that the more realistic option?

CG: To me it is the only realistic solution. If you look into the Nicaraguan opposition, you find all kind of fractional forces operating. The Sandinistas took some people from the government after the peace

plan was signed and put them in charge of organizing the party. Now they have to improve the political organization because there will be elections. Complete fraud or a complete emasculation of the opposition is not going to be tolerated.

Having dealt with the Sandinistas before, I know that they will try to democratize as little as they can. Every time I was in charge of problems with the Sandinistas, I noticed that they will try everything possible to delay. They are adamant in trying to keep as much power as they can. They are not democratic, they do not believe in democracy. But if they have to accept democracy as a way of survival, they will. Only because they are pragmatic enough in that respect.

BK: How was the Arias Peace Plan conceived in relation to the Contadora agreement?

CG: In trying to obtain a peaceful solution to the Central American crisis, there have been two processes of negotiations that have taken place. The first one was called Contadora, named after a Panamanian island where it was started. This negotiation process started in 1983 with a meeting of the foreign ministers of Panama, Venezuela, Colombia and Mexico, with Mexico offering to mediate the Central American crisis. The first joint meeting took place in April of 1983. Just to show how difficult the situation was, that meeting lasted one day. The basic point of contention was whether everyone could agree to sit around the same table. The answer was "no."

We started at nine o'clock in the morning and went to six in the afternoon, going from one room of the hotel to another. We discussed the problem of just meeting in one room with each one of the representatives of the Central American countries. There was no chance of a meeting together until the evening when a dinner was offered by the Panamanian government with the proviso that nobody was supposed to talk politics. This showed the lack of confidence that existed there. A draft treaty was prepared with four versions. The treaty contained 144 articles covering security, peace, human rights protection, political rights, inspection, the problems of refugees and so on. Then in July of 1985, the government of Nicaragua decided that it was not going to continue with the discussion of the treaty. Nicaragua considered the treaty to encompass issues that were considered domestic affairs and limitations of sovereignty. This was true because the treaty created a whole system for settling the problems between the Central American countries.

In January 1987, the President of Costa Rica asked the presidents of El Salvador, Honduras, and Guatemala to discuss a proposal to be made to Nicaragua. On the sixth and seventh of August there was

a meeting of the presidents of Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica in Guatemala City, Guatemala. They approved the Arias Peace Plan.[3] A comparison of the two treaties indicates that everything that is in the Arias Plan was in the draft of the Contadora Treaty; only the Arias Peace Plan had twelve articles and the Contadora had 144.

Contadora was conceived as a formal international treaty that needed to be ratified according to the constitution of each one of the Central American countries. Conversely, there was nothing said in the Arias Plan about ratification. The agreement was considered final and it was executed. From August 1987 to January of 1988 a lot of steps were taken pursuant to the agreement. That agreement by the presidents changed the whole frame of reference of the conflict. Everybody began to discuss peace and not whether there was going to be a war.

This agreement produced some very good results, like a general amnesty in Guatemala for political prisoners. A partial amnesty was granted in Nicaragua and a restoration of human rights in Nicaragua as well as a lifting of the state of emergency in all countries. The operation of Contadora was based on a traditional way of operating in international negotiations, trying to reach a formal treaty which would be ratified in the respective countries. In the case of the Arias Peace Plan, what we have is an executive agreement or what European doctrine calls "simplified treaties." These agreements have a less compulsory character and represent moral and social obligations accepted by the parties with no resort to the International Court of Justice. By choosing the less formal approach, the result was a success.

BK: You indicated that President Reagan was very popular in Costa Rica.

CG: There is a great admiration for President Reagan with most Costa Ricans. But at the same time, people are not willing to support an armed action against Nicaragua. Although Costa Ricans dislike the Sandinistas and sympathize with President Reagan, that does not mean that they would like to have an American intervention to Nicaragua using Costa Rica as a base. Dean Roger Henderson, of the University of Arizona, asked me whether I thought the action taken by the United States in Nicaragua was right or wrong.

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[3]The legal name of the Arias Peace Plan is "The Procedure for Establishing Firm and Lasting Peace in Central America." The key provisions of the Arias Peace Plan include: general amnesty for political and politically related offenses, free elections, reduction of the current stock of weapons and number of troops under arms, democratization, and dialogue between each government and its respective political opposition.

No matter if it is wrong or right, the important thing is that it does not work. For eight years of effort, the Reagan Administration's policy in Nicaragua has very little to show. The goal of trying to isolate Nicaragua did not work. What was obtained in Central America was basically a lot of misery, a lot of people being injured and a lot of death. For every rifle that the United States supplied to the Contras, the Soviet Union supplied a machine gun to the Sandinistas. If you try a policy for eight years and do not obtain any results you should change the policy. New ways should be tried to obtain the result of establishing a democracy in Nicaragua. Even if this means keeping the Sandinista party participating in politics, even with a majority, but with the restoration of rights.

I could not support the policy of hiring former Somoza National Guardsmen. We suffered a lot with Somoza and we have not forgotten what Somoza was and what those people in the National Guard were and what they did in Central America.

BK: Just to be the devil's advocate and give a different perspective, foreign policy advisors in the United States might say the following thing: "Costa Rica has its natural interest and we, the U.S., also have our national interests but, let us not forget that the ultimate guarantor of Costa Rica's security is the United States." From your standpoint, Costa Rica is doing the right thing, but let us do what we think we have to do from the standpoint of our own interests, which extends to Mexico and which involves issues of security for the region. If it becomes a pressing security problem, why not allow the United States to remove the threat by means of a surrogate force such as the Contras?

CG: First, the United States has no unified position in Central America. When I was foreign minister, every fortnight, I used to see a group of U.S. Congressmen. They would ask me the standard question "what do you think of the policies of the United States?" I took the line of asking them "which policy of the United States? The one of the Administration or the one of Congress?" I said, "as far as I knew, when the United States has a policy supported by the Administration and by Congress, it works. But when there is a division, it does not work."

Second, I have had a lot of discussions of how the United States should deal with Nicaragua. I heard so many different versions from the same officials that I did not believe there was a clearly defined policy. I remember in 1985 Jeanne Kirkpatrick told me that "anybody in Central America who is thinking that the Sandinista problem will be solved by an American intervention is absolutely wrong." She was

supposed to be an American hard liner! I have not been convinced that the Reagan Administration had a coherent, well articulated and detailed policy with regard to Nicaragua.

The support given by the Reagan Administration to the Monge government in 1982 and 1983 was basic in the sense that it helped Costa Rica in getting out of a depression, a situation that was a complete economic disaster. We had a lot of severe price adjustments. Costa Rica could not have gotten started without the support the United States. I consider it necessary not to forget this fact. But the policy of the Reagan Administration in reference to the Sandinistas just went overboard and became the kind of operation that was represented by the mining of the harbors, conduct which was not just trying to topple the government but trying to block international waterways.

Mark Wayne: President Bush indicated that support for the Contras in the United States Congress may have seen its last days. He suggested, as an alternative position, a build up of the countries around Nicaragua both economically, and militarily. Is there any support within Costa Rica to build a military force?

CG: In Costa Rica there is no army. The majority of the people, according to public opinion polls, do not favor any establishment of an army. In 1982 Jeanne Kirkpatrick said Costa Rica needed an army. My reply was "hell no." Nobody accepted that. Maybe we reject starting a military knowing that the ultimate guarantor of the security of Costa Rica is the United States. On the other hand, the other Central American countries, which have the same guarantee from the United States, consider it essential to have an army. The important factor here is when you compare the social differences.

In Costa Rica we have a ninety-four percent rate of literacy. We have a life expectancy of seventy-four years, we have health insurance covering almost all Costa Ricans. These social expenditures could not be possible if we had to finance armed forces. Building up the other countries economically could be a good thing. But you have to consider at the same time building up the political forces of each country.

BK: You indicated that a very broad power spectrum was taken over after the revolution by the Sandinistas. The other forces were left out. So in effect, what happened is that all the other forces that coalesced against Somoza are now trying to coalesce without having a common cause?

CG: When I was foreign minister I used to receive a lot of visits by the Nicaraguan groups. I could see very clearly that there was nothing organized as a national movement. So it is not merely a matter

of asking the Sandinistas to have an election. They could have honest elections and they may win honestly because the opposition to them will be divided. I consider it necessary, and maybe this should be done through the international political movements and organizations based in Europe, to keep up real political parties in Nicaragua. I think that a movement to organize real political parties in Nicaragua should be an absolute priority especially considering that the other alternative is to use American soldiers. Once I was asked by a United States Congressman "would you favor having American soldiers in Costa Rica." My answer was that I did not favor having any soldiers in Costa Rica. I do not consider a show of force a way of solving the problem. To me that is not the solution. The problem was that the Reagan Administration was not flexible enough to accommodate the situation.

III. THE DEVELOPMENT OF LAW IN CENTRAL AMERICA

BK: Ambassador Guitiérrez, you were involved in one of the earliest, and to this day the most influential, law and development projects in Latin America. This project, the ILANUD Project,[4] not only influenced the teaching of law in Costa Rica but also in other South American countries. What is your assessment of where it is now?

CG: For some years in Latin America, we maintained a law and development association.[5] I was president of the association for a while but, since 1982, it has been inactive. There have been, however, some projects connected with that association. For instance, there is a project at the Central University of Venezuela in Caracas, focusing on the social history of the law in Latin America and written from the point of view of the enactment of the written law. We are trying to do studies from the point of view the social history of the regions.

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[4]ILANUD is the acronym for *Instituto Latino Americano de Naciones Unidas para la Prevencion del Delito y Tratamiento del Delincuente* [United Nations Latin American Institute for Prevention of Crime and Treatment of Delinquents]. The project was conceived in 1983 and started in 1984. The goal of the ILANUD Project is to reform the administration of justice and improve the efficiency of the courts in Latin America. The project is currently underway in Costa Rica, El Salvador, Honduras, Guatemala and the Dominican Republic, with Colombia, Ecuador, Bolivia and Uruguay soon to join. It is financed by USAID. Florida International University is in charge of the factual studies of the judiciary in each one of the countries. The first study of the ILANUD Project has just been published. The title is *La Justicia Penal en Costa Rica* [The Criminal Justice in Costa Rica] and is written by Jose Maria Rico, Luis Salas, Enrique Gutiérrez and Carlos Cruz.

[5]*Consejo Latino Americano de Derecho y Desarrollo* [Latin American Council of Law and Development]. The Law and Development Association was started in Lima, Peru in 1973. Its main purpose was to study law as a social science.

BK: Can you give some examples?

CG: I have started to make a comparison of how the development of constitutional law in Costa Rica relates to the constitutional law in the other four countries of Central America. My idea is to emphasize the nineteenth century formation of the state in each one of the countries. My thesis, taken from my study in Costa Rica, is that the first problem that existed in those countries was trying to form governmental systems to coordinate and integrate a new state that were before provinces of the Spanish Empire. What was the Empire of Brazil became the Republic of Brazil. But in the case of Spanish America, what were once provinces later divided among themselves into sovereign countries. There were continuous divisions until sometime in the nineteenth century each one of those divisions started to define itself as a state, integrated by itself, and having the different characteristics of that state.

BK: Is it fair to say the model of government that you are seeing in your historical analysis is one of powers ascribed to the viceroy or to the old powerful governor of the province, as opposed to a more decentralized system of government, republican in nature?

CG: No. In the case of Central America, the division of five republics that now exist follows exactly the line of the provinces that formed the Kingdom of Guatemala. Only with one exception however, which is the area of Chiapas which formed part of the Kingdom of Guatemala and integrated itself into Mexico. The first country that integrated itself as an independent government was Costa Rica. It took Costa Rica less time to build up its own system of government than the other parts of Central America. My idea is that it took place because Costa Rica spent most of the nineteenth century in peace while the other parts of Central America were still at war between themselves or engaged in civil war.

BK: Then is it fair to say that the focus of your social history analysis, for legal purposes, is one with a political center of gravity as opposed to an economic center of gravity?

CG: No. The economic factor plays a role. The formation of stable legal institutions is dependant on economic stability. In the period 1821 to 1871, Costa Rica had eleven constitutions. Some of them lasted just two or three years. Finally, in 1871, a model of government was created based on the reality that the country had an economic basis to develop. That constitution lasted for sixty-nine years. So there is a relationship between social factors, political factors and economic factors that influence legal development.

BK: What else needs to be done to develop the law in Central America?

CG: There are a lot of people who see law as a social science. I believe that number continues to grow. It is no coincidence in the case of the ILANUD Project, which is probably the most ambitious one going on in Latin America, that we have found it necessary to get people who have previous experience in law and development to work on the ILANUD Project. The ILANUD Project is financed by USAID and has to do with the reform of the administration of justice. The first study determined what is the real situation in the administration of justice currently. It was an empirical study done by researchers from Florida International University and local people. The Costa Rican study, which was the first one, was influenced by my book on the functioning of the legal system.[6] I wrote the book as a result of a law and development project based at Stanford University. Now we have five empirical studies of the administration of justice: in Costa Rica, in the Dominican Republic, in Honduras, in Guatemala, and much discussion, but no final form study, of Panama. When they studied Panama, which was done two years ago, the country started to show pressures of the military. There was pressure to stop that study. The studies will continue, however, using some other countries.

IV. THE USE OF CASE LAW UNDER COSTA RICA'S CIVIL LAW SYSTEM: LEGAL EDUCATION AND PRACTICE

BK: Is there something that the University of Costa Rica, other universities, or the law gained by the development projects that you got going?

CG: In the case of Costa Rica, there are institutions that received the initiative or the spark from those projects. First, the creation of the index of case law,[7] that is now about twenty years old, continues working and is now being computerized. There are a lot of publications having to do with doctrine based on case law. The Supreme Court of Costa Rica publishes a judicial bulletin that includes important decisions. There is a new magazine called *Justitia* which also includes doctrine from cases. The use of doctrine from cases, both for law practice and for teaching has expanded. Utilization of case doctrine was not done in previous times. Now it has become a

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[6] *EL FUNCIONAMIENTO DEL SISTEMA JURIDICO* (1979) [The Functioning of the Legal System].

[7] *See*, B. KOZOLCHYK, JURISPRUDENCIA MERCHANTIL 1900-1966, (1970); DIGESTO JURISPRUDENCIA, Rev. Del Collego, Abogadus (1972).

complete practice. The case index from the ILANUD Project probably will be the definitive one as it computerizes everything on that matter.

Thomas Van Flein: Are you saying there is now a change in the civil law system or an evolution of common law in Costa Rica?

CG: No, it is not common law. It could be considered a variation of the common law. When I went to law school, many years ago, professors used to say "decisions of the courts are not relevant and do not establish legal doctrine." That is now completely discredited. The use of case doctrine has become important for teaching and for practice before the courts. One could consider this a common law development or you could consider it a realization that what has been decided is a prophesy on what could be decided next.

BK: One clarification. The reason why it is not like a common law development, is because in the common law, courts are very keen to draw a distinction between the holding of a case and the facts of a case. The case will only be applicable to the next case if the same facts could be said to have appeared in both cases and the same statement could be said to apply to both cases. Costa Rican decisions, and civil law decisions generally, do not pay that much attention to facts. You could be reading a supreme court decision in Costa Rica for pages and pages where they discuss rules of law, doctrine and commentaries, and you do not know factually what happened in that controversy. You have to read between the lines. The Costa Rican Supreme Court decisions that may be cited by practitioners are embodiments of general principles of the law, regardless of the facts. In the United States what you look for most is the statement of the facts and how that tracks with the facts of your cases. It is not the same approach of using "holding" and "dicta." The dichotomy of "holding" and "dicta" does not exist in Costa Rican law. Ambassador Guitiérrez is not saying that the common law is developing. Instead what has happened is that the decisions themselves are cited more often and have become a part of legal practice and legal education.

CG: Annotated editions of the law have become very popular. I participated in the preparation of an annotated constitution of Costa Rica in 1972. Now the National Assembly publishes an annotated constitution every one or two years.

BK: And the annotations are by cases?

CG: Yes. Annotations are by case reference. The annotated constitution allows me to teach constitutional law and discuss cases with the students. That is a substantial improvement on the Costa Rican legal education system.

The second great development in our system was the transformation of the property registry. Formerly, land registration was done in big books, by hand. Now it is done by a system called the *Folio.*

BK: This is a track index or an estate index. Everything that pertains to a given piece of property is assembled under the name of that piece of property in the land registry.

CG: It is now computerized. This has had the effect of centralizing all the property registration in Costa Rica, but excludes civil registration of births, marriages, and deaths. There is now a single entity, the national registry, and that allows real estate, chattel and chattel mortgages, cars and trademarks to be recorded. It is indexed in relation to economic activity under a single entity. The registration system serves as a model to a lot of other Latin American countries that are modernizing their systems of recording property.

BK: I should add that the state of Sonora, Mexico was considering the Costa Rican model of land registration. When *Lic.* E. Estrella was the lieutenant governor he wanted to get a copy of the Costa Rican system so that they could do that in the state of Sonora as well.

V. COSTA RICAN CONSTITUTIONAL LAW

BK: Could you comment on the recent study of yours on the living constitutional law in Costa Rica?

CG: This study culminated in my article *La Constitución Norteamericana como Ley Importada* [*The United States Constitution As Imported Law*].[8] I started this article in conjunction with the Bicentennial of the United States Constitution. In Latin America, there has been a lot of what we call "imported law." Most countries in Latin America imported the French Civil Code. Most of the Latin American countries have imported their criminal codes from laws made in Europe, and in a few cases, from the United States. The imported laws are then applied in Latin American countries. The two most interesting cases are the U.S. Constitution and the French Civil Code. The Costa Rican Civil Code is already 100 years old. Costa Rican constitutional law has two original influences: the United States Constitution and the Spanish Constitution of 1812, the Cadiz Constitution. From then on, however, the development of our political institutions has become uniquely our own development.

In my article, I wanted to look at the influence of the Unites States Constitution. My idea was that there were three important situations

[8]Gutiérrez, *La Constitución Norteamericana Como Ley Model Importada,* REVISTA DE CIENCIAS JURIDICAS, Sept.-Dec. 1988, at 12-61.

to contemplate. One issue was the model of the Federation when Central America became independent in 1821. First, it joined the Mexican Empire of Agustin Iturbide and then in 1824, when the Iturbide Empire fell, the Federal Republic of Central America was organized. The Constitution of the United States was used as a model for the Constitution of the Federal Republic of Central America. There has been a lot of writing claiming that because of the imported constitutional model, the Federation failed. But if you look into what really happened, you find that the constitution was never applied between 1824 to 1838, the period of time in which the Federation lasted. You cannot attribute the deficiencies to the law although the constitution was on the books, it was not applied in fact. What was occurring was civil war and a lot of small wars during those years. The constitution was simply not applied. You can criticize the constitution that was designed by the Central Americas and the errors therein, but that law had nothing to do with what happened in fact.

The second influence, and to me the greatest influence of the United States Constitution in all of Latin America, is the figure of the president. The presidency in the United States Constitution was something completely new. There was nothing like that before. In Latin America there was a lot of discussions that a monarchy had to be established. In the beginning, for instance, Simon Bolivar was offered a crown like Iturbide got.[9] Simon Bolivar was offered a crown but he rejected it. In other instances, there were discussions about forming kingdoms and establishing constitutional monarchies. This was debated, but finally everybody accepted the republican form of government.

The principle of separation of powers, however, did not operate in Central America as it did in the United States. When the United States started its federal system, it had all the different commonwealths or states. The United States had some practice at self-government which was established during British colonial times. In Spanish America, there was no previous practice of self-government.

Looking into the United States constitutional history, each state had a state legislature. Those colonial assemblies had taken legislative powers. In contrast, in the administrative organization of the Spanish Empire, the governor or viceroy had all the powers by himself. The viceroy in Mexico, the general captain in Guatemala, or the governor in Costa Rica, were in charge of all administrative matters, judicial matters, and military matters. That dominant figure of the Spanish governor transformed itself into the presidencies of Latin America.

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[9]Jose Antonio Paez, one of Iturbide's generals and later a President of Venezuela, offered the crown to Simon Bolivar in 1825.

BK: To this day the Mexican Constitution says that the President of Mexico is the supreme authority in agrarian matters. This is the most important political area in Mexico.

CG: The presidency in Latin America is derived from the presidency of the United States. But the presidency in the United States Constitution was not planted in ground were there was a concentration of power. It has taken a long time for many Spanish American countries to develop the other branches of government. For the other branches to grow, they must take away some of the powers of the presidency of the republic.

BK: Why continue to look at the United States Constitution as a model of constitutional government?

CG: When the Latin American countries became independent, the only other country that had become independent from Europe was the United States. The liberation of Spanish America took place between 1810 and 1830. It took place at the time when the United States had already consolidated itself. The documents and statements of the time reflected that everybody had read the United States Constitution. The influence of the United States model was demonstrated in the Constitutional Assembly for the Central American Federation when the members put a portrait of Simon Bolivar in the hall of meetings, and in the presidential hall there was a portrait of George Washington.

BK: In other words he was the figure of a liberator?

CG: Yes. The figure of the liberator had a great impact. But the text of the Constitution had greater influence. In theory, everybody bought the idea of separation of powers.

VI. THE COSTA RICAN JUDICIARY

BK: Describe the decentralized court system in Costa Rica where courts, even at the superior court level, can declare a statute unconstitutional.

CG: The concept of judicial review was not imported along with the rest of the United States Constitution. The reason for that is because it was not in the text of the Constitution. The interesting situation began in 1888 when the Organic Law[10] for the judiciary was enacted. The Organic Law stated that the courts will not apply any law contrary to the constitution. By using the term "courts," it applied to all courts, not merely the supreme court.

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[10]*Ley Organica de Tribunales*, art. 8, ¶1 (1988).

There was a case handed down immediately after the Civil Code of Costa Rica was enacted in 1888.[11] The case dealt with the property of one of the parties. One party claimed that a provision of the Civil Code, which had been in effect for only two years, was against the constitution. The issue was addressed in the court of appeals and the supreme court. The supreme court rejected the claim and held that the article was not against the constitution.

BK: So the courts found that it was within their province to examine the constitutionality of statutes?

CG: Yes. Another important case was decided in 1915.[12] It was a matter of deciding if a document had to be recorded in the property registry. Like *Marbury v. Madison*,[13] the issue was minor; just if a judge had to receive his commissions. The Supreme Court of Costa Rica ruled that the document could be registered because the law that prevented registration was against the constitution. You have, more or less, the same situation as in *Marbury v. Madison*, but in a completely different cultural set-up. Like *Marbury v. Madison*, this ruling created a sensitive political situation because the statute had been enacted by the president of the republic.

BK: I read in your book on Costa Rica's legal system about the high respect and influence of the judiciary in Costa Rica. Would you care to comment on the living law elements that have made the Costa Rican judiciary so highly respected?

CG: The presence of the judiciary in Costa Rica, at the level it is now, is a phenomenon that started with the current constitution of 1949. In the nineteenth century it was very difficult to organize the judiciary. When it finally was organized, the lack of lawyers created continual difficulties on the technical side. Judicial independence was established slowly. The first provision insuring judicial independence is the system of elections. The members of the supreme court in Costa Rica are elected by the assembly. The judges are elected for a period of eight years, with a proviso saying that after eight years, in order not to be reelected, it is necessary that Congress take a vote against them by a majority of two-thirds. That has resulted in the situation now where members of the supreme court, once elected, continue in office until they apply for a pension.

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[11]Chinchilla v. Utena. Judgment rendered by the Chamber of Casacion on March 10, 1890.

[12]Rolando Alfaro Corrales v. Registrar. Judgment rendered by the Chamber of Casacion on March 2, 1915.

[13]1 Cranch 137 (1803).

BK: What made the drafters of the 1949 Costa Rican Constitution give such power to the supreme court? I understand that they have such powers and that they have exercised them wisely. But why would Costa Rica choose to vest so much power? Compare that to what happened in Mexico where the supreme court is powerless in many ways.

CG: The basic idea of the 1949 Costa Rican Constitutional Assembly was to weaken presidential powers. They sought to establish a balance between legislative power and judicial power. The powers given to the judiciary made for a very strong judiciary. Later, in 1957, a constitutional provision was adopted that gave the judiciary five percent of the national budget.[14] This gave the judiciary financial independence. Those provisions have been the basis of developing an independent judiciary and resulting in complete independence from political influence of the other branches of government.

VII. THE UNITED NATIONS: USE OF THE "NON-PAPER"

BK: How do you see your role as Ambassador to the United Nations in shaping the United Nations' law, the living law, and could you explain the use of the "non-paper?"

CG: The main efforts of the Security Council and General Assembly are to try to build a consensus. There are some committees that must particularly work on that basis, for instance, the committee of the General Assembly that works on disarmament and the committee that deals with economic matters.

The basic effort on any specific issue is to try to build a consensus. There are a lot of procedures used in the United Nations which try to get a consensus. The purpose of dividing the United Nations by regions is to try to build a consensus within those regions. The distribution of the positions in the United Nations by regions is done with the purpose that it is the regional caucus that will present a single candidate who is automatically elected.

BK: Can you comment on what you refer to as a "non-paper?"

CG: The "non-paper" is when there is an issue in a committee and there are at least two, and sometimes four or five, different draft resolutions. Consultations begin. Consultations are meetings off the record, unrecorded. When the issue is very complicated, somebody presents what is called a "non-paper". A "non-paper" is a solution that is not presented officially by anybody, but could serve as a basis

[14]COSTA RICA CONST. art. 177 (amended by Law N 2122, May 22, 1957).

for discussion. It is a trial balloon, a child without a father, there is no official sponsor. This trial balloon or "non-paper" can be originated by the president of the committee. The president of the commission can also organize what is called "a group of friends of the president" with whom the president will discuss the possibilities. Of those non-official conversations, a formula is presented. The "non-paper" is just for the purpose of trying to see where the consensus will go. The "non-paper" could be transformed several times until there is a formula which is accepted by enough delegations in order to become official.

The most difficult situation which was worked that way was at the end of the 1986 General Assembly Session. The United States requested financial changes in the United Nations. On that issue there were at least three different regional groups. There were a lot of "non-papers." I remember the Brazilian representative characterized the final solution as "very conveniently ambivalent." After the resolution was passed, there were at least ten delegations interpreting the resolution completely differently.

You have to take into consideration that the United Nations has 156 members and those members represent the whole world, different types of cultures, different types of political regimes, different types of legal systems, different aspirations. In the United Nations, east versus west is not always the most important division. The most important division in the United Nations is north versus south, developed countries versus underdeveloped countries.