96. THE REGISTRAR TO THE AGENT OF HONDURAS

7 July 1988.

I have the honour to refer to the questions put to the Parties by Members of the Court during the oral hearings in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)*, and to recall that at the hearing held on 13 June 1988, Your Excellency stated that written replies of the Government of Honduras to these questions would be deposited with the Registrar (*supra*, p. 148).

Article 61 of the Rules of Court provides that when questions are put to the agents, counsel or advocates of the parties during the hearings, they "may either answer immediately or within a time-limit fixed by the President". No such time-limit was set during the hearings; in view however of the fact that the Court has now to deliberate on the case in accordance with Article 54, paragraph 2, of the Statute, and therefore requires to be fully informed, the Vice-President of the Court, Acting President, has decided to fix 15 July 1988 as the time-limit for replies to the questions put during the hearings.

A similar letter is today being addressed to the Agent of Nicaragua.

97. THE AGENT OF NICARAGUA TO THE REGISTRAR

8 July 1988.

I have the honour to refer to the questions put to the parties by Members of the Court during the oral hearings in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)*.

The answers to the questions in reference are included herein. Please note, that the answer to Judge Guillaume's questions includes as an annex a Statement made by the Contadora Group and the Support Group on 27 June 1988.

I would like to bring to the Court's attention the fact that, at present, Prof. Chayes, Counsel for Nicaragua is in the hospital undergoing surgery. Prof. Chayes had been charged in particular with investigating fully the answers to the first questions posed by Judges Guillaume and Shahabuddeen. Therefore, at present, the answers to those questions do not have the full benefit of Prof. Chayes' investigations. If Prof. Chayes has any further comments to the questions after his recovery, I will forward them to the Court if they are made within a time-limit acceptable to the Court.

QUESTION POSED BY JUDGE NI [1]

Distinguished Agents and counsel and advocates, I think it might be a convenient time to address a question to both Parties. The point on which I wish to have a clarification is whether any step or steps have been taken as a matter of recorded fact within the framework of the Contadora Process towards the solution of the border disputes between Honduras and Nicaragua. This is the question. I am not referring to the efforts for the solution of the matters of general

[1] See also p. 70, *supra*. *[Note by the Registry.]*

interest to the States of the American continent. I do not expect an instant reply or replies so that there will be time for reflection.

REPLY

The answer to this question is very firmly in the negative. The Group of Contadora has not played a role in the solution of the bilateral disputes between Nicaragua and Honduras.

In a general manner, it is convenient to point out that the Declaration of Contadora of January 1983 that originated this process, does not include among its aims the solution of bilateral disputes (see Annex 9 of the Honduran Memorial).

Furthermore, as was clearly evinced in the oral hearings, Honduras has never accepted the creation of mechanisms that could have permitted the reaching of solutions to the bilateral problems.

As a point of comparison, we note that in the case of the bilateral relations between Nicaragua and Costa Rica — mentioned by the Honduran Government at the oral hearings — the situation was different. A solution to the bilateral problems was sought by different means including, at one point, the friendly co-operation of the French Government in 1984.

QUESTIONS POSED BY JUDGE SHAHABUDDEEN [1]

First Question:

I gather that neither side adopts what I may refer to as a third view, to the effect that Article XXXI of the Pact by itself constitutes a self-sufficient declaration by each member of the Pact of acceptance of the Court's compulsory jurisdiction under Article 36, paragraph 2, of the Statute. According to Nicaragua, Article XXXI of the Pact is indeed a self-sufficient acceptance of the Court's jurisdiction, but this is a conventional jurisdiction under Article 36, paragraph 1, of the Statute, and not a compulsory jurisdiction under Article 36, paragraph 2.

By contrast, according to Honduras, Article XXXI of the Pact does look to Article 36, paragraph 2, of the Statute, but separate declarations have to be made under the latter to complete a grant of jurisdiction.

However, from the material presented by the Parties, it appears that there is a body of opinion supportive of what I have referred to as the third view. See in particular the Honduran Memorial *(I)* at pages 14, 49, 66, 68, 69 and 75.

My question then is this, can the Court competently consider this third view? And, if it can, and if it accepts this third view, how, if at all, would this affect the arguments?

Second Question:

Are there any ratifying members of the Pact who have not had any declarations in force under Article 36, paragraph 2, of the Statute? I really do not know myself the answer to that, but, if it is so, has this situation ever been criticized by other members, or by qualified commentators, as constituting a breach of an understanding given in Article XXXI of the Pact to deposit declarations under Article 36, paragraph 2, of the Statute?

[1] See also pp. 70-71, *supra. [Note by the Registry.]*

REPLY TO THE TWO QUESTIONS QUOTED ABOVE

Nicaragua considers that these questions were answered in the public sittings held on June 9 and 10 of 1988 and in particular that of Wednesday 15 June 1988 in the intervention of Professor Chayes (*supra*, pp. 205-212).

RÉPONSES AUX AUTRES QUESTIONS POSÉES PAR LE JUGE SHAHABUDDEEN[1] LORS DE L'AUDIENCE DU MARDI 7 JUIN 1988

Troisième question:

Même s'il peut être établi qu'un Etat entendait en fait que sa déclaration soit irrévocable, peut-il encore y mettre fin unilatéralement dans l'exercice d'un pouvoir souverain absolu de définir les termes sur la base desquels il admet de se soumettre à la juridiction de la Cour?

RÉPONSE

La République du Nicaragua est passionnément attachée au principe de la souveraineté de l'Etat, dont la violation par le Honduras constitue précisément l'un des fondements de la requête. Toutefois, loin d'être incompatible avec celui du respect dû aux obligations internationales, le principe de la souveraineté l'implique au contraire, et il est significatif que la résolution 2625 (XXV) de l'Assemblée générale des Nations Unies, portant déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre Etats, conformément à la Charte des Nations Unies, fasse du devoir qu'a chaque Etat «de s'aquitter pleinement et de bonne foi de ses obligations internationales» l'un des «éléments» du principe de l'égalité souveraine des Etats.

En application de ce principe, la Cour permanente de Justice internationale s'est refusée

> «à voir dans la conclusion d'un traité quelconque, par lequel un Etat s'engage à faire ou à ne pas faire quelque chose, un abandon de sa souveraineté. Sans doute, toute convention engendrant une obligation de ce genre apporte une restriction à l'exercice des droits souverains de l'Etat, en ce sens qu'elle imprime à cet exercice une direction déterminée. Mais la faculté de contracter des engagements internationaux est précisément un attribut de la souveraineté de l'Etat.» (*Vapeur* Wimbledon, *arrêts, 1923, C.P.J.I. série A n° 1*, p. 25).

C'est que, comme l'a rappelé Anzilotti,

> «les limitations de la liberté d'un Etat, qu'elles dérivent du droit international commun, ou d'engagements contractés, n'affectent, aucunement, en tant que telles, son indépendance.» (*Régime douanier entre l'Allemagne et l'Autriche*, opinion individuelle, *1931, C.P.J.I. série I A/B n° 41*, p. 58).

Ce qui vaut pour les traités vaut tout autant pour les déclarations facultatives faites en application de l'article 36, paragraphe 2, du Statut. Quelle que puisse être la nature exacte de ces instruments, il ne fait aucun doute qu'elles constituent des engagements internationaux et créent des obligations juridiques à la charge de leurs auteurs, «l'Etat intéressé étant désormais tenu en droit de suivre une ligne de conduite conforme à sa déclaration» (*Essais*

[1] Voir aussi ci-dessus p. 71. *[Note du Greffe.]*

nucléaires, C.I.J. Recueil 1974, p. 267 et 472), sans que cela soit, d'une manière quelconque, incompatible avec sa souveraineté.

La Cour elle-même a du reste considéré, de la manière la plus claire, que:

> «Les déclarations d'acceptation de la juridiction obligatoire de la Cour sont des engagements facultatifs, de caractère unilatéral, que les Etats ont toute liberté de souscrire ou de ne pas souscrire. L'Etat est libre en outre soit de faire une déclaration sans condition et sans limite de durée, soit de l'assortir de conditions ou de réserves. Il peut en particulier en limiter l'effet aux différends survenant après une certaine date, ou spécifier la durée pour laquelle la déclaration elle-même reste en vigueur ou le préavis qu'il faudra éventuellement donner pour y mettre fin. Le caractère unilatéral des déclarations n'implique pourtant pas que l'Etat déclarant soit libre de modifier à son gré l'étendue et la teneur de ses engagements solennels.» (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 418).

Dès lors, c'est en vertu de son pouvoir souverain que l'Etat s'engage mais, ayant ainsi librement accepté certaines obligations à l'égard d'autres Etats, il ne peut y mettre fin unilatéralement à son gré; il ne lui est possible de s'en dégager que de deux manières: soit en application des limites dont il a lui-même assorti sa déclaration soit en vertu des règles du droit international général applicables.

Quatrième question:

Il me semble ressortir du contre-mémoire de Nicaragua, à la page 33, que, dans sa protestation de 1974, le Honduras avait dit que la notification de dénonciations immédiate d'El Salvador «était totalement dénuée de validité». En employant ces termes, le Honduras adoptait-il une position au sujet de la question de savoir si la notification de dénonciation d'El Salvador était ou non totalement contraire au droit et, en conséquence, si cette notification pourrait ou non devenir effective après un certain délai?

RÉPONSE

Le texte anglais intégral de la lettre du ministre des affaires étrangères du Honduras en date du 21 juin 1974 figure dans Shabtai Rosenne, *Documents on the International Court of Justice* (Alphen aan den Rijn, 1979, pp. 361-366).

Il résulte clairement des termes mêmes de cette lettre que le Honduras estime, pour des raisons générales de principe, qu'il n'est possible ni de dénoncer ni de modifier une déclaration facultative d'acceptation de la juridiction obligatoire de la Cour faite sans limitation de durée. Cela résulte en particulier des passages suivants, reproduits également dans le contre-mémoire du Nicaragua (**I**, p. 303):

> "Leading authorities on international law take the position that a declaration not containing a time-limit cannot be denounced, modified or broadened unless the right to do so is expressly reserved in the original declaration and that, accordingly, new reservations cannot be made unless this requirement has been fulfilled.
>
> To say otherwise would mean accepting the notion that a state can unilaterally terminate its obligation to submit to the jurisdiction of the Court whenever that suits its interests, thus denying other states the right

> to summon it before the Court to seek a settlement of disputes to which they are parties. This could well undermine the universally applicable principle of respect for treaties and for the principles of international law . . .
>
> For the reasons stated above, my Government challenges the declaration by which El Salvador seeks to revoke and replace its original declaration accepting the jurisdiction of the Court since the new declaration is improperly made, hence completely lacking in validity, and would set a precedent prejudicial to the stability of the legal institutions established by the international community and to the effective exercise of the right of States to settle their disputes under the guarantee provided by the highest judicial body so far conceived by man."

Et le Honduras d'ajouter que l'invocation d'une modification du droit constitutionnel de l'Etat auteur de la déclaration pour justifier une modification de celle-ci

> "is contrary to the universally accepted principle that the sacred treaty obligation will continue to be the basic rule of international law".

Les termes particulièrement catégoriques ou absolus utilisés par le Honduras montrent bien que cet Etat considère que, non seulement la notification de dénonciation d'El Salvador, mais encore toute dénonciation ou modification d'une déclaration faite sans limitations de durée, est totalement contraire au droit et ne peut devenir effective même après un certain délai.

Comme le Nicaragua l'a montré dans son contre-mémoire (**I**, pp. 297-304), cette position n'est pas dénuée de fondement. Toutefois, il n'est sans doute pas utile de prendre une position tranchée sur ce point en l'espèce; il suffit bien plutôt de constater que, de toutes manières, la «nouvelle déclaration» du Honduras n'était pas opposable au Nicaragua au moment ou celui-ci a introduit sa requête.

La position de principe très ferme adoptée en 1974 par le Honduras n'est pas sans pertinence en la présente espèce: ce pays ne peut faire aujourd'hui ce qu'il contestait catégoriquement naguère. Comme la Cour l'a rappelé dans un *dictum* invoqué à plusieurs reprises en plaidoire par le Honduras:

> «Il est reconnu que des déclarations revêtant la forme d'actes unilatéraux et concernant des situations de droit ou de fait peuvent avoir pour effet de créer des obligations juridiques. ... Quand l'Etat auteur de la déclaration entend être lié conformément à ses termes, cette intention confère à sa prise de position le caractère d'un engagement juridique, l'Etat intéressé étant désormais tenu en droit de suivre une ligne de conduite conforme à sa déclaration.» (*Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 267).

Quel que puisse être le bien-fondé de l'interprétation donnée par le Honduras au regard des règles générales applicables, celui-ci est «désormais tenu en droit de suivre une ligne de conduite conforme à sa déclaration».

Cinquième question :

Je crois savoir que le Honduras prétend qu'une relation consensuelle ne prend naissance en vertu de l'article 36, paragraphe 2, du Statut qu'à la date du dépôt d'une requête. L'opinion selon laquelle une requête est introduite sur la base d'une relation consensuelle est-elle fondée? Si oui, la requête peut-elle faire naître la relation et reposer sur elle?

RÉPONSE

De l'avis de la République du Nicaragua, il n'est pas exact qu'une relation consensuelle ne prenne naissance en vertu de l'article 36, paragraphe 2, du Statut qu'à la date du dépôt de la requête. C'est au jour de la notification elle-même que cette relation s'établit entre l'Etat déclarant et les autres parties au système de la clause facultative:

> «C'est en effet ce jour-là que le lien consensuel qui constitue la base de la disposition facultative prend naissance entre les Etats intéressés.» (*Droit de passage sur territoire indien, exceptions préliminaires, arrêt, C.I.J. Recueil 1957*, p. 146.)

Dès lors, il apparaît que c'est bien sur la base d'une relation consensuelle qu'une requête est introduite, mais cette relation est fondée non par la requête elle-même, mais bien par la déclaration, qui «contractualise» le système de la clause facultative entre les Etats parties.

Il serait d'ailleurs totalement illogique d'admettre que, comme le prétend le Honduras, la requête fait naître cette relation consensuelle et, en même temps, repose sur celle-ci: elle ne peut en être à fois son propre fondement et sa propre conséquence.

QUESTIONS POSED BY JUDGE GUILLAUME [1]

1. Article XXXI of the Pact of Bogotá

First Question: At the signature, the ratification or the coming into force of the Pact of Bogotá, or at the time of accession to the Pact — did the Contracting States which had previously made the declaration recognizing the jurisdiction of the Court as compulsory under Article 36 of the Statute of the Court (with or without reservations), notify the Pan-American Union or the Organization of American States of that declaration? And, at the same time of signature, ratification or coming into force, or at the same of accession, did the Contracting States which had not previously made the declaration recognizing the jurisdiction of the Court as compulsory under Article 36 of the Statute of the Court, make a special declaration in pursuance of Article XXXI of the Pact of Bogotá?

REPLY

The answer is negative for both parts of the question.

Second Question: When certain States parties to the Pact of Bogotá withdrew their acceptance of the declaration recognizing the jurisdiction of the Court as compulsory under Article 36 of the Statute, did they notify the Organization of American States of that withdrawal? Did they state clearly at the time what their situation would be in relation to Article XXXI?

[1] The answer to this set of questions was consulted by the Nicaraguan Mission before the Organization of American States with Dr. Domingo Acevedo, the chief legal adviser of the Under Secretary of the OAS for juridical matters.

See also p. 137, *supra. [Note by the Registry.]*

REPLY

The answer to this question is also negative. The only examples were those considered by Nicaragua in the public sitting held 15 June 1988 (*supra*, pp. 205-212). There have been no notifications of withdrawal of acceptance. The only country to notify a "modification" of its declaration has been Honduras. No mention has been made as to their relation to Article XXXI.

Third Question: Was El Salvador's withdrawal from the Pact of Bogotá accompanied by a declaration concerning Article XXXI?

REPLY

This question was addressed at the public sitting held 15 June 1988 (*supra*, pp. 205-212).

Fourth Question: Were the notifications effected by the States for these various purposes communicated in turn by the Organization of American States to the States parties to the Pact of Bogotá? Did they provoke reactions such as acknowledgements, acquiescences or protests?

REPLY

The answer to the first part of the question is no, because no such notifications were effected by the States, with the exception of the "modification" notified by Honduras and the denunciation of the Pact made by El Salvador.

The answer to the second part of the question is that only Nicaragua has entered a protest for Honduras's attempt to enter reservations to the Pact, 40 years after it was ratified. This point was addressed also in the public sitting on 9 June 1988 (*supra*, p. 88).

2. Article XXXII of the Pact of Bogotá

Question: The final sentence of Article XXXII reads: "The Court shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of the said Statute." I would like to know how the Parties interpret this text, bearing in mind at the same time how it is drafted in French and in the other languages.

REPLY

The reply to this point was made in the public sitting held on 15 June 1988 (*supra*, pp. 209-212).

3. Contadora and Esquipulas II Process

First Question: Has the Contadora process been definitely abandoned? Is it merely suspended? Is it continuing in any form?

REPLY

The Contadora process has not been abandoned or suspended at any moment. When the Esquipulas II Agreement was signed by the Central American nations, the Group of Contadora together with the Group of Support of Contadora remained in existence and its relations with the Central American peace procedures was recognized in the same Esquipulas II Agreement by giving the Contadora Group specific responsibilities.

The permanence of the Contadora process has been ratified in the meeting held in Tlateloco, Mexico, by the countries members of the Contadora Group and the Group of Support. When this meeting ended on 27 June 1988, the members made public a statement which is attached to this answer.

On the other hand, it must be pointed out that the faculties of mediation of Contadora in the region rest on the political will of the five Central American nations. When this will is lacking, even if it be in one of the countries, the work of Contadora is hindered — if not frustrated — as was the case cited by Nicaragua at the public sitting held on 9 June 1988 (*supra*, pp. 73-74) and in the public hearing on 15 June 1988 (*supra*, pp. 177-178).

Second Question: What role did the Contadora Group play and what role does it still play in the implementation of the Guatemala Declaration (Esquipulas II)?

REPLY

In the Guatemala Declaration, the Group of Contadora was given two main functions:

1. The first one is contained in point 7 of the Guatemala Agreement and it refers to the continuation of "negotiations in matters of security, verification, control and limitation of armaments".

2. The second role that the Guatemala Agreement gave to Contadora is in point 10 of the Accord in which the Commission of Verification was created. In accordance with the Agreement, this Commission would be composed of the Contadora Group and the Support Group together with the Secretary-General of the United Nations and the Secretary General of the OAS. The way this second role of Contadora was frustrated by Honduras was recounted at the public sittings (*supra*, pp. 73-74 and 177-178).

Finally, it must be said that the recent Statement of the Contadora Group and the Contadora Support Group, annexed hereto, indicates precisely what the Group itself thinks its role to be[1].

Third Question: According to the 7th paragraph of the declaration adopted on 16 January 1988 by the five Presidents of Central America at San José an

> "Executive Committee, made up of the Ministers of External Relations of the Central American States, is to exercise the principal function of verification, control and monitoring of all undertakings contained in the Guatemala Procedure and in the present declaration".

The San José declaration adds that to that effect, it will promote the co-operation of certain outside bodies. Lastly, the same Committee will be responsible for examining the general report of the International Verification and Monitoring Commission which was submitted at San José.

I would like to know how this text has been implemented, what outside co-operation has been sought and obtained, and, more generally, what progress has the Executive Committee made in its work?

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[1] In passing, notice should be taken that this statement of Contadora — very complete in its subject-matter — does not mention or even hint at any recommendation on the present case. It must be recalled that Honduras has suggested that the withdrawal of these procedures was part of the Esquipulas Agreement. Also, and quite obviously, Contadora does not consider these procedures incompatible with its continued existence and role.

REPLY

During the Fifth Meeting of the Executive Committee, held in Guatemala on 7 April 1988, it was agreed that a formal petition should be addressed to the Secretary-General of the United Nations in order to request the "collaboration of an auxiliary technical group comprised of specialized personnel from the Governments of Canada, Spain and the Federal Republic of Germany". This group would integrate the mechanism of verification, control and follow up. This formal petition was to be made in writing by means of a letter signed by the five Ministers of Foreign Affairs of Central America.

Nonetheless, Honduras refused to sign that letter in both the meeting in Guatemala and the following meeting held in Honduras on 22 June 1988. The result has been that up to the moment no formal request has been made in order to obtain the external co-operation for the Esquipulas procedure.

The Honduran refusal to sign the request to the Secretary-General of the United Nations — on both occasions — has been attempted to be justified by saying that if Nicaragua did not withdraw the present case against Honduras before this Court, it was not possible to proceed. This position was upheld by the Minister of Foreign Affairs of Honduras in the meeting held in Tegucigalpa, notwithstanding the fact that the President of Honduras himself, at a meeting with the Executive Committee, said that the case before the Court was a bilateral matter that was not related to the Esquipulas procedure and that he was instructing his Minister of Foreign Affairs — this was said in front of the other Ministers of Foreign Affairs of Central America — to disassociate the case before the Court from the process of negotiation. The President of Honduras also said that the document he had signed with the President of Nicaragua agreeing to a postponement of the oral hearings, had no bearing with Esquipulas II.

In any case Honduras continued to refuse to sign any petition to the Secretary-General of the United Nations. Therefore, up to the moment, the Executive Committee is *de facto* not in operation.

STATEMENT BY THE CONTADORA GROUP AND CONTADORA SUPPORT GROUP

Tlatelolco, d.f.,
Mexico.

27 June 1988.

(Translation)

The foreign ministers of Colombia, Mexico, Panama and Venezuela who constitute the Contadora Group — and the foreign ministers of Argentina, Peru, Uruguay and Brazil who compose the Contadora Support Group — meeting in Mexico City today, expressed concern regarding the impasse in the peace process and sharpened tensions in Central America. They pointed out that this concern arises from fraternal solidarity with the Central American

peoples, as well as the possible adverse effects on legitimate national interests of their countries.

Esquipulas II opened an era of significant advances in the Central American crisis. Negative signs now surfacing should not be allowed to obscure that fact. The reality is that the past year, since the peace accord was signed by the Central American presidents, has proven that negotiation and not force or threat of force is the only road to peace.

The ministers stressed the importance of establishing a mechanism to verify compliance with security accords, in keeping with agreements made in the *Vth Meeting of the Executive Commission held in Guatemala City on* 7 April 1988. There, the Central American foreign ministers stated their desire to request assistance from three extra-regional governments to carry out the task of verification, with support from the United Nations and other specialized organizations.

The freezing of talks on implementing the Sapoá Accords has added a new element of tension not only for Nicaragua, but for the entire region.

In general, the implementation of one of the most important commitments of Esquipulas II, the national political dialogue for reconciliation and peace, was interrupted in the majority of countries shortly after its start, and there are no clear indications of quick renewal.

The foreign ministers repeated the urgency of implementing the agreement contained in numeral (7) of the Guatemala Procedure. This was an agreement to continue negotiation of security issues pending from the peace proposal.

On other matters, political instability and a sharp economic crisis has aggravated the already dramatic situation of thousands of Central American refugees and persons displaced by the war. Meanwhile, actions and mechanisms established to protect them have had little effect.

In this situation, governments that are members of the Contadora Group and Contadora Support Group, urgently call on the governments of Central American countries to establish a political dialogue for peace, suspend all form of support to irregular forces, not allow use of their territory for threats or attacks against neighbouring countries, and form appropriate verification mechanisms in keeping with the accords signed on 7 August.

In addition, the foreign ministers repeated their call to governments with an interest in or ties to the region to contribute to the pressing cause of peace. Today, it is obvious that the use of force, support for confrontation, a climate of threats of military intervention in the region, and the arms race only hamper the logic of negotiation and the effort for peace.

They stated their willingness to broaden, as much as possible, co-operation of each one of their countries with Central America. They also stated their desire to co-ordinate action within the framework of the special plan for economic co-operation with the region, recently approved by the General Assembly of the United Nations. The ministers said they would support projects carried out by the Action Committee in Support of Economic and Social Development of Central America (CADESCA), a Committee of the Latin American Economic System (SELA). They renewed their invitation to the international community to deepen its assistance in Central American economic and social development.

Finally, they reaffirmed their ongoing willingness to support and contribute to the Central American peace process and they called on the five Governments of the region to give peace efforts undertaken in Esquipulas II another push.