DECLARATION OF JUDGE BHANDARI

1. In the present case, I have joined Vice-President Yusuf, as well as Judges Cançado Trindade, Xue, Gaja and Robinson in issuing a joint dissenting opinion that concludes the Court ought to have allowed Colombia's *third* preliminary objection in the instant case, in so far as Nicaragua's continental shelf claim is clearly barred by *res judicata*. The rationales underpinning that conclusion are fully canvassed in that joint dissenting opinion and therefore I shall not reference them herein.

2. However, I also wish to take the present opportunity to provide some brief comments with respect to Colombia's *fifth* preliminary objection, namely, that Nicaragua's failure to obtain a binding recommendation from the Commission on the Limits of the Continental Shelf (CLCS") prior to seeking relief before this Court in the present matter renders Nicaragua's claim inadmissible. While this conclusion may be somewhat moot in view of the position I have taken with my fellow dissenting colleagues regarding the doctrine of *res judicata*, I nevertheless feel compelled to explain why, in my view, Nicaragua's case should not proceed to the merits phase without receiving the recommendations of the Commission under the United Nations Convention on the Law of the Sea (UNCLOS).

3. Paragraph 8 of Article 76 of UNCLOS states:

> "Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. *The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding*." (Emphasis added.)

4. Moreover, in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* case, at paragraph 126 of the Judgment rendered 19 November 2012, this Court stated in relevant part as follows:

> "In the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Hondu-*

ras), the Court stated that 'any claim of continental shelf rights beyond 200 miles [by a State party to UNCLOS] *must be in accordance with Article 76 of UNCLOS and reviewed by the [CLCS] established thereunder*' (*I.C.J. Reports 2007 (II)*, p. 759, para. 319). The Court recalls that UNCLOS, according to its Preamble, is intended to establish 'a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources'. . . Given the object and purpose of UNCLOS, as stipulated in its Preamble, *the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76 of that Convention.*" (*I.C.J. Reports 2012 (II)*, pp. 668-669, emphasis added.)

Nicaragua's Case Should not Proceed Mainly for the Following Reasons

5. *First*, as I understand the present state of affairs, there is no *proof* on record in these proceedings that Nicaragua has in fact furnished complete and sufficient information and documentation to the CLCS to issue its recommendation. Thus, the possibility remains that at a future time the CLCS could request Nicaragua to supply additional or complementary evidence in support of its claim. Were this to be the case, the entire premise of the majority's conclusion that Nicaragua has now fully and faithfully complied with its obligations for receiving a CLCS recommendation would fail.

6. *Second*, even if I were to accept, *arguendo*, that the information supplied by Nicaragua to the CLCS is suitable for that Commission to eventually issue a recommendation, it is a plain and uncontested fact that the CLCS has not, as of yet, issued any such recommendation and we as a Court are not in a position to speculate as to when it might be in a position to do so.

7. *Third*, I would recall that the CLCS is a United Nations body that is specifically tasked with making binding recommendations on the very issue that has been put before us. Therefore, *as a matter of principle* and in keeping with my staunch belief in the need for interinstitutional comity between United Nations institutions, I believe it would be imprudent and disrespectful toward the CLCS to proceed toward the merits phase of Nicaragua's continental shelf claim without its recommendation.

8. *Fourth*, it is to be recalled that the CLCS is a specialized agency with a specific mandate to investigate and pronounce upon continental shelf

claims. The Commission consists of 21 members who are world-renowned experts in such relevant fields as geology, geophysics and hydrology. By contrast, the judges of this Court can lay claim to no such expertise, and consequently the Court would necessarily have to rely on the testimony of expert witnesses in order to resolve Nicaragua's continental shelf claim at the merits phase of these proceedings. Not only would this constitute a regrettably inefficient use of valuable Court resources, but the nature of the adversarial process dictates that the Parties would bring witnesses most likely to advance their respective and competing claims, whose opinions could very well be at odds with those of the expert members of the CLCS. This, in turn, could potentially lead to the uneasy situation wherein the CLCS and the Court reach incompatible conclusions regarding Nicaragua's continental shelf claim. Thus, *from a practical standpoint*, I am of the opinion that to allow Nicaragua's claim to proceed to the merits under these circumstances would be highly imprudent.

9. *Fifth*, recalling the dictum contained at paragraph 126 of the 2012 *Nicaragua* v. *Colombia* Judgment that "any claim of continental shelf rights beyond 200 miles . . . must be in accordance with Article 76 of UNCLOS *and reviewed by the [CLCS] thereunder*" (emphasis added), it is my considered opinion that for a claim to be "reviewed" by the CLCS under Article 76 of UNCLOS in the manner intended by this Court in that Judgment, the Commission must have issued its binding opinion. To conclude otherwise would allow for a rather loose reading of the requirement that claims be "reviewed" by the CLCS whereunder a party could satisfy this criterion by merely completing the perfunctory act of submitting certain paperwork to the CLCS before filing an application before this Court. In my respectful view, such a superficial standard would deprive the 2012 precedent that claims be "reviewed" by the CLCS of its intended meaning and violate the spirit of this process as intended by Article 76 (8) of UNCLOS.

10. *Sixth*, it is to be recalled that Nicaragua is signatory of the Convention on the Law of the Sea, and thus bound by Article 76 (8) of that treaty.

11. *Seventh*, it is to be recalled that under Article 60 of the Statute of the ICJ, "[t]he judgment [of the Court] is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party." Moreover, Article 61 (1) of the Statute of the ICJ states that

> "[a]n application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given,

unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence".

Also, Article 61 (4) imposes the further procedural requirement that "[t]he application for revision must be made at latest within six months of the discovery of the new fact". By attempting to relitigate the same claim regarding its continental shelf entitlement that was denied by this Court in the 2012 Judgment, Nicaragua is attempting to conduct a *de facto* appeal or revision of that Judgment, contrary to the express terms of Articles 60 and 61 of the Statute of the ICJ, which are intended to ensure that judgments of this Court are binding and not susceptible to disruption by being constantly reopened. I regret that the majority's decision to allow Nicaragua to attempt a *de facto* appeal or revision of the Court's 2012 Judgment threatens the credibility of the World Court and hence diminishes the sanctity and respect that will be afforded to its judgments in the years to come. Once a court with competent jurisdiction, such as the ICJ, decides a contentious matter, the principle of *res judicata* requires, as a matter of public policy, that the proceedings must be deemed to be finally resolved between the parties.

12. *Eighth*, allowing Nicaragua to approach this Court without a binding recommendation from the CLCS would render that Commission superfluous and without any true authority. Thus Nicaragua should be required to wait for the outcome that is pending before the CLCS before seising the Court. Only *after* receiving such an outcome should Nicaragua be allowed to approach this Court in search of the relief it seeks.

13. In sum, I see no good reason to allow Nicaragua to circumvent the review process of the CLCS that it is bound to comply with under UNCLOS. Setting aside momentarily my strong opposition to the majority's reasoning on the issue of *res judicata* as it pertains to Colombia's *third* preliminary objection, Nicaragua's claim should in any event be deemed inadmissible for failure to adhere to its treaty obligations and I would consequently find that Colombia's *fifth* preliminary objection ought to be upheld.

(*Signed*) Dalveer BHANDARI.