DECLARATION OF JUDGE BHANDARI

1. In the present case, I have voted with the majority in respect of the first, second, third and fourth preliminary objections raised by Colombia[1]. However, with the greatest of respect to my learned colleagues, I cannot join them in rejecting Colombia's fifth preliminary objection[2], which contends that the present case brought by Nicaragua is, in effect, an improper attempt by Nicaragua to have this Court enforce one of its prior judgments. Thus, for the reasons that I shall briefly outline hereunder, I would declare Nicaragua's present claim inadmissible and thus would not allow this case to proceed to the merits phase of these proceedings.

2. As the majority correctly and succinctly observes, "Colombia's fifth preliminary objection rests on the premise that the Court is being asked to enforce its 2012 Judgment"[3]. If true, Nicaragua's claim would run afoul of Article 94, paragraph 2, of the Charter of the United Nations, which reads as follows:

> "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the [International] Court [of Justice], *the other party may have recourse to the Security Council*, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." (Emphasis added.)

3. Moreover, Article L of the Pact of Bogotá (a treaty which, I will recall, I have joined the majority in concluding grants jurisdiction in the present case[4]) provides as follows:

> "If one of the High Contracting Parties should fail to carry out the obligations imposed upon it by a decision of the International Court of Justice . . . the other party or parties concerned shall, *before resorting to the Security Council of the United Nations*, propose a Meeting of Consultation of Ministers of Foreign Affairs to agree upon appropriate measures to ensure the fulfilment of the judicial decision . . ." (emphasis added).

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[1] Judgment, para. 111 (1) *(a)–(e)*.
[2] *Ibid.*, para. 111 (1) *(f)*.
[3] *Ibid.*, para. 109.
[4] See my vote rejecting Colombia's first preliminary objection at *ibid.*, para. 111 (1) *(a)*.

4. When these two authorities are read in concert it is clear that if Nicaragua, as both a Member of the United Nations and a party to the Pact of Bogotá, seeks to enforce the 2012 Judgment of this Court in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* case ("2012 Judgment"), its ultimate avenue of recourse is the Security Council. This obligation, posited by the plain wording of these two texts, is further reinforced by a supplementary *a contrario* interpretation, in that both the United Nations Charter and the Pact of Bogotá are conspicuously silent on the ability of an aggrieved former litigant to re-approach the ICJ to seek enforcement of one of its prior judgments.

5. While the majority does not deny that Nicaragua has framed its case as a request to enforce the 2012 Judgment, it recalls that ultimately "it is for the Court, not Nicaragua, to decide the real character of the dispute before it"[5]. While this statement is true as a matter of law, I simply disagree with the majority that, based on the facts as averred at this preliminary stage of the proceedings, the Court ought to arrive at the independent conclusion that Nicaragua's present claim is anything other than a rather obvious attempt to circumvent the Security Council by asking the Court to enforce its prior Judgment.

6. While an exhaustive analysis of Nicaragua's written and oral pleadings would greatly exceed the scope of the present declaration, I draw upon several points that illustrate why I respectfully cannot accept the majority's position that Nicaragua is not presently seeking to enforce the 2012 Judgment through its present claim.

7. *First*, in its Application, Nicaragua

> "requests the Court to adjudge and declare that Colombia is in breach of . . . *its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the ICJ Judgment of 19 November 2012* as well as Nicaragua's sovereign rights and jurisdiction in these zones"[6].

8. *Second*, this plea is reiterated virtually verbatim in the prayer for relief contained in Nicaragua's Memorial[7].

9. *Third*, the pleadings reveal many instances of alleged conduct that, if true, strongly suggest that Colombia failed to heed the boundaries delimited by the 2012 Judgment, including but not limited to: the enactment on 9 September 2013 of Decree 1946, which purported to create an "Integral Contiguous Zone" asserting sovereign rights over maritime areas the Court had explicitly determined to be Nicaraguan; the encroach-

[5] Judgment, para. 109.
[6] *Ibid.*, para. 11; emphasis added.
[7] *Ibid.*, para. 12.

ment of Colombian naval vessels into waters explicitly declared to be under the sovereign jurisdiction of Nicaragua in the 2012 Judgment; the issuance of fishing licenses by the Colombian authorities for waters adjudged to belong to Nicaragua by the 2012 Judgment; and Colombia's contention that it was precluded from executing the 2012 Judgment by virtue of a domestic law impediment necessitating that any changes to its boundaries can only be effected by the conclusion of a treaty[8].

10. While not contesting these points, the rationale underpinning the majority's determination that Nicaragua is *not* asking the Court to enforce the 2012 Judgment in the face of such a compelling body of evidence to the contrary is to be found in the latter portion of paragraph 109, which, for ease of reference, I reproduce hereunder:

> "[A]s the Court has held (see paragraph 79 above), the dispute before it in the present proceedings concerns the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua. As between Nicaragua and Colombia, those rights are derived from customary international law. The 2012 Judgment of the Court is undoubtedly relevant to that dispute in that it determines the maritime boundary between the Parties and, consequently, which of the Parties possesses sovereign rights under customary international law in the maritime areas with which the present case is concerned. In the present case, however, Nicaragua asks the Court to adjudge and declare that Colombia has breached 'its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the Court['s] Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones'. . . Nicaragua [therefore] does not seek to enforce the 2012 Judgment as such."

11. I respectfully take issue with this conclusion and the analysis upon which it rests. First, the cited paragraph 79 is a rather inapposite reference, since that paragraph draws a conclusion on a separate point of law, which is based upon a different set of factual considerations. It is to be recalled that the analysis preceding paragraph 79 dealt with Colombia's *second* preliminary objection, i.e., whether there was in fact a "dispute" between the Parties at the time the Application was filed, in accordance with the requirement stipulated under Article 38 of the Statute of the Court.

12. As one might expect, the thrust of the analysis preceding paragraph 79 of the Judgment does not focus on the character of Nicaragua's claim, but rather on the critical issue of whether there existed a bona fide

[8] Judgment, paras. 54-57.

dispute between the Parties at the time Nicaragua filed its Application. To this end, the analysis was not focused on the source of Nicaragua's legal claim but rather the actions of the Parties prior to the filing of Nicaragua's Application, in order to determine whether such conduct could properly be deemed a "dispute" for the purpose of Article 38 of the Statute of the Court. After conducting such an examination, the majority determined — correctly, in my view, as my vote on this issue evinces[9] — that there was indeed a "dispute" between the Parties as contemplated by Article 38, and thus the second preliminary objection of Colombia ought to be rejected.

13. Since the analysis leading up to the conclusion at paragraph 79 of the Judgment on Colombia's second preliminary objection dealt with a separate and distinct legal issue and focused on the conduct of the Parties in the interval between the issuance of the 2012 Judgment and the filing of Nicaragua's Memorial, the majority's reliance on paragraph 79 to buttress its conclusion on the fifth preliminary objection is, to my mind, tenuous at best. Indeed, to the extent that portion of the Judgment touches upon the *legal source* of the dispute — i.e., enforcement of Nicaragua's maritime rights under customary international law *versus* enforcement of the 2012 Judgment per se — at all, this was done obliquely and often by way of examples that are either inconsistent with, or at least unhelpful to, the majority's conclusion as to the true character of Nicaragua's complaint.

14. Second, in my respectful view, the majority's analysis regarding Colombia's fifth preliminary objection simply ignores the clear, unequivocal, and repetitive assertions by both Parties — explicitly and implicitly — that the crux of the matter under consideration is, quite plainly, Colombia's alleged non-compliance with the 2012 Judgment. Such assertions are abundantly supported by the factual record available to this Court at this preliminary stage of proceedings.

15. For these reasons, I would uphold Colombia's fifth preliminary objection and consequently refuse to allow Nicaragua's claim to advance to the merits phase of this case.

(Signed) Dalveer BHANDARI.

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[9] Judgment, para. 111 (1) *(b)*.