[Translation by the Registry]

DECLARATION OF JUDGE GÓMEZ-ROBLEDO

1. The reason I consider it necessary to make this declaration is that I feel that the judgment should have developed further the section on evidence in international law and that, as a result of this failing, the question of the reparation claimed by the Republic of Panama cannot be fully understood.

2. The esteemed scholar Paul Foulquié noted that “although all proof can be called evidence, not all evidence constitutes proof. … In some cases, in order to establish proof a fact is simply adduced which dispels any doubt: that is evidence which is not proof.”

3. In international law, as is well known, in order to establish responsibility it must always be proved that the act which caused damage is itself imputable to the State and, in addition, it must be wrongful under international law.

4. It is clear that there can be reparation only if there is damage but, at the same time, only damage connected to the wrongful act by what is known as a “causal link” is eligible for reparation; that is to say, if there is to be reparation for damage, that damage must genuinely be a consequence of the wrongful act (Bollecker-Stern).

5. International jurisprudence has shown that a causal link must clearly exist between the wrongful act and the damage caused; in other words, it must be sufficiently proven.

6. Where a certain act would normally be the result of another act, there is a presumption of causality whereby the second act is connected to the first act by a causal link.

7. The use of presumptions of causality thus relies on experience, making it possible to identify what is normally the result of a certain act and what is the logical outcome of an event in the normal course of things (*M/V “Virginia G” (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, paras 435-446).

8. According to jurisprudence, the mere possibility that one act might be the cause of another act, that is, a mere eventuality, is not therefore sufficient. On the contrary, it is only where there is a “serious likelihood” that a causal link exists that such a link can be considered genuinely to be proven.

9. If the wrongful act causes the destruction of a vessel, the damage inevitably resulting is the loss of the value of the vessel (*damnum emergens*) (*Dickson Car Wheel Comp. (USA)* v. *Mexico, R.I.A.A. IV.*, p. 669-691, July 1931), but also profits which would “possibly” have been obtained if there had been no wrongful act (*lucrum cessans*).

10. It is thus evident that a wrongful act may either directly give rise to a loss of value in the assets or directly prevent value from “possibly” being added to the assets; in other words, in such a case there is a simple, conventional relationship of causality (ILC Draft Articles on State Responsibility, ACDI 1993, Vol. II, Part Two).

11. It is also widely recognized that a ruling of an international court or tribunal is made on a normative basis and on a factual basis; to put it another way, the facts proven in support of the legal claims asserted in the course of the proceedings.

12. However, in fact, as is noted in jurisprudence, the court or tribunal does not have regard solely to the materiality of the fact at issue, but to its significance within the legal system itself (J. Salmon).

13. If we take the word “proof” in its ordinary meaning, proof is what shows the truth of a proposition or the reality of a fact, or demonstrates or establishes the truth of something.

14. It would seem *prima facie* that the probative force of various means of evidence allows the court or tribunal to accept the truth of the facts established by certain evidence. However, the parties are in reality free to choose, as there does not appear to be a hierarchy between different evidential procedures.

15. “Known” facts are sometimes presented as objective facts but, according to State practice, where a fact is purportedly known, this does not dispense with the need for proof in the event of disagreement by the party against which it is invoked (see, to this effect, *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 3/65.)

16. If serious doubts remain over what can be considered to be true, these arguments will be rejected; if the party that bears the burden of proof fails to prove its argument, in most cases the other party’s position will be considered to be true.

17. The ICJ asserts to this effect that “in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, p. 437).

18. There is no doubt that each party must prove the facts and arguments on which it relies in support of its claims (*onus probandi incumbit actori*).

19. In its judgment of 6 November 2003, the Court had to “determine whether the United States has demonstrated that it was the victim of an armed attack … such as to justify it using armed force in self-defence; and the burden of proof of the facts showing the existence of such an attack rests on the United States” (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003,* p. 161, para. 57).

20. The obligation to furnish proof thus covers the demonstration of the existence of a fact and, moreover, its wrongful character, its imputability to the State whose responsibility is at issue and the causal link (J. Charpentier).

21. It should nevertheless be noted that

> the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself … which is a “question of law to be resolved in the

> light of the relevant facts" … . That being so, there is no burden of proof to be discharged in the matter of jurisdiction.
> (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, paras 37-38).

22. Generally speaking, international courts and tribunals may not admit evidence whose authenticity cannot be verified and which simply pertains to the relevant facts of the case at issue. It is the substance of the allegations that must be proved to the court or tribunal.

23. In the "*Monte Confurco"* Case, the International Tribunal for the Law of the Sea held that no limitation was imposed "on the extent to which the Tribunal could take cognizance of the facts in dispute and seek evidence in support of the allegations made by the parties" (*"Monte Confurco" (Seychelles* v. *France), Prompt Release, Judgment, ITLOS Reports 2000*, p. 86, para. 74.).

24. It is also clear that in international courts and tribunals where the probative force of a submission depends largely, but not only, on the context of the allegations made by the parties, it must also be ascertained what evidence put forward must be considered relevant.

25. The International Court of Justice stated in the case concerning *Armed Activities on the Territory of the Congo* that:

> [t]he Court has not only the task of deciding which of those materials must be considered relevant, but also the duty to determine which of them have probative value with regard to the alleged facts … . In so doing, it will identify the documents relied on and make its own clear assessment of their weight, reliability and value.
> (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 168, paras 58 and 59)

26. That being said, the value in law of evidence may depend on a number of factors, but in my view, and going beyond its relevance, its primary value will depend on the "degree of certainty" that it brings to the proceedings and, almost in parallel to this, on what can be termed its "reliability".

27. In the *Case concerning the Factory at Chorzów (Merits, Judgment No 13, 1928, P.C.I.J. Series A, No. 17*), the Polish Counter-Memorial states, with regard to the compensation claimed by the German Government:

> It is a generally recognized rule, established as a fundamental principle by numerous decisions, that in international relations States are required to make reparation only for actual damage arising as a direct and inevitable consequence of the act giving rise to responsibility. Accordingly, responsibility does not cover indirect damages that are consequential or far removed, which Anglo-Saxon legal literature and case-law describes as "consequential damages", and, moreover, prejudice to which other causes have contributed.
> (Counter-Memorial of Poland, p. 156, P.C.I.J., Jurisdiction, compensation and merits,16/12/1927; 13/9/1928) *[Translation by the Registry]*

28. In the *Corfu Channel* Case, the International Court of Justice took the view that proof that Albania had knowledge of mine-laying could "be drawn from inferences of fact, provided that they leave no room for reasonable doubt" (*Corfu Channel case (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 4, para. 18).

29. It is not disputed that if the reliability of evidence is lacking, it will not be admitted by the court or tribunal.

30. In the *Case concerning the Land*, *Island and Maritime Frontier Dispute* in 1992, the International Court of Justice rejected any probative force for a map on the ground that it did not have the required precision and technical quality, as its scale was too small to prove what it purported to establish (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 351, para. 550).

31. In the specific circumstances of the case at issue, the Republic of Panama claimed inter alia damages for *lucrum cessans*, that is to say, for lost profit related to the initial term of the charter party; lost profit related to the renewal option (one-year, second one-year and after the second one-year) and the calculation of the amount with interest at an annual rate of 8%; 6% and 3%; reimbursement of the payment of wages as an additional loss, plus interest; compensation for damages arising from the legal costs of various legal firms; payment due for fees and taxes to the Panama

Maritime Authority and to the Palma de Majorca Port Authority; loss and damage compensation for the cargo; loss and damage for loss of revenue by the charterer (*lucrum cessans*); material and non-material damage to natural persons; compensation for damage caused by suffering and psychological stress (*pretium doloris*).

32. The total damages claimed by the Republic of Panama by way of reparation for damage caused was USD 27,009,266.22, plus interest of USD 24,873,091.82, and EUR 170,368.10, plus interest of EUR 26,320.31.

33. However, it is precisely in this area that almost the entire evidentiary system in international law has significant shortcomings. With the exception of the loss of the *M/V* "*Norstar*", the Republic of Panama has not been able to produce evidence going beyond simple reasonable proof. The damage alleged by Panama did not have any clear, precise and sufficiently established causal link.

34. It also has not been possible to review the authenticity of a number of documents submitted, and thus the reliability of the information contained therein.

35. Documents were also presented by Panama which not did have the reliability and the value required in any evidentiary system in law.

36. The Tribunal simply held that the allegations concerning damage and reparation had not been reliably established from the point of view of international law or, in other words, that the Republic of Panama had failed to satisfy the burden of proof placed on it.

(signed) Alonso Gómez-Robledo