DECLARATION OF JUDGE TOMKA

1. I agree with the overall conclusions of the Court. Climate change presents a global challenge to the international community. It can be addressed only through co-operation. Treaties may provide the most promising mechanism for securing co-operation at scale, as exemplified by the United Nations Framework Convention on Climate Change and the Paris Agreement; what matters now is that these (and any future) treaties be complied with and fulfilled in good faith. I hope that this Opinion will lend strength to States' efforts to meet the challenge. Still, I maintain some concerns about the way the Court has gone about its task, particularly its light-handed approach to the identification and confirmation of customary international law. In the subsequent lines I will briefly touch upon only one such aspect, the continuity of statehood.

2. The Court expresses the view that "once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood" (Advisory Opinion, para. 363). This view is expressed, *ex cathedra*, in the section of the Opinion addressing obligations of States in relation to sea-level rise. Though it does not say so explicitly, the Court no doubt has in mind the disappearance of the territory of a State in case it becomes completely submerged as a result of sea-level rise. Let us hope — and do whatever we can to ensure — that this scenario will never materialize. That said, the Court's manner of addressing the issue is itself troubling, and warrants attention for its ambiguous and potentially far-reaching implications. The Court's formulation can be read either as suggesting that international law does not "necessarily" preclude the possibility of continuity in one context, climate change–induced sea-level rise; or alternatively, as something more radical, if unintended: a quasi-endorsement of the deconstruction of the conditions of statehood as such.

3. The classical notion of statehood is virtually inseparable from a land and a people. By way of example, Article 1 of the Montevideo Convention on the Rights and Duties of States, which reflects customary international law on this issue, provides that "[t]he State as a person of international law should possess" certain enumerated characteristics. "Should possess" is a modal construction which conveys an ongoing normative condition: a State is a State only so long as it has *(a)* a permanent population, *(b)* defined territory, *(c)* government, and *(d)* the capacity to enter into relations with other States. The last criterion, the capacity to engage in inter-State relations, is the subject of extensive theoretical dispute given the fluid boundary between law and political will in matters of recognition.

4. Even if such criteria did not, strictly speaking, address also the *maintenance* of statehood, only its initial establishment, in paragraph 363 the Court makes a precocious leap of legal reasoning against the backdrop of silence from many, if not most, States. But the role of the Court, all the more so in the context of an advisory opinion, is to clarify the law, not to "anticipate the law before the legislator has laid it down" (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, pp. 23-24, para. 53). The legislator for the international community of States are the States themselves. It is therefore prudent that this question, not to mention the myriad second- and third-order issues which it implicates, be addressed by States through agreement and in a co-operative spirit.

5. Regarding State practice on this issue: on a narrow view, there is none, in the sense of actual conduct in response to a manifested event; on a broader view, commitments by some States to

recognize other States notwithstanding future sea-level rise[1] qualify as practice, although such practice is very limited. This is not surprising, given both the unprecedented nature of the problem and, perhaps, States' reticence to contemplate the legal parameters of their extinction (or develop an exhaustive body of law around it). The temptation therefore arises to transpose State practice from other contexts. For instance, international practice has evidently accepted the continued existence of States whose governments were exiled when their lands were under foreign control[2]. But in those cases, the territory still exists, even if it sometimes undergoes substantial change; the "true" sovereign merely lacks effective control, for a discrete and ultimately finite time. In contrast, when all the territory of a State disappears into the sea, the land is not "occupied"; it has ceased to be land at all. Any analogy to such cases is therefore a category error.

6. Many States have, however, expressed legal views, including on statehood in relation to sea-level rise. The International Law Commission's Study Group on sea-level rise in relation to international law documents a recent tendency, shared by a growing number of States, favouring the view that statehood may survive even in the case of the total disappearance of territory. These developments are significant. They do not, however, permit a full-throated, unqualified conclusion that a customary rule has crystallized around this point, at least not yet. It is not for nothing that several States have emphasized a distinction between the partial and total loss of territory, while many others have maintained studied silence, if not formally reserving their positions. This may indicate that there is still some way to go before a collective *opinio juris* reflecting a new rule of custom is judicially cognizable. It seems fair to say that many States, perhaps a majority, have not taken a firm and public position on this issue, either in these advisory proceedings or in other fora. The authors of the ILC Study Group's reports themselves suggest that States consider new "binding or non-binding instruments" in order to "specifically address the legal issues"[3] — actions that would hardly be necessary if the case were so clear-cut.

7. In short, the Court stands in the midst of a great normative contestation. Vulnerable and other like-minded States believe the mechanisms of international law must be marshalled, and if necessary repurposed, to respond to a looming injustice — the deleterious effects of sea-level rise — which are to be disproportionately borne by those least responsible for its causes. Some States have argued for a legal requirement of continued recognition. Others have invoked various interrelated principles and rights, among others the right to defend a State's territorial integrity and the right of self-determination, along with equitable or climate–justice policy considerations[4]. The latter represent a plea for creativity, a reimagining of categories in response to a novel and existential challenge.

8. The essential difficulty for these efforts lies in the fact that the relevant legal frameworks are heavily tied to territory. The right to self-determination, in the absence of an internationally agreed definition of "peoples", is understood and applied by reference to territorial units; the African Court on Human and Peoples' Rights (AfCHPR) is instructive in this regard[5]. As for the right of each

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[1] See, for example, Article 2 of the Australia–Tuvalu Falepili Union Treaty, signed in Rarotonga on 9 November 2023 and published in the *Australian Treaty Series*, 2024, p. 10.

[2] James Crawford, *The Creation of States in International Law* (2nd ed. 2006), pp. 688-95, 700 *et seq*.

[3] Final report of the Study Group on sea-level rise in relation to international law, para. 59, in *Report of the International Law Commission: Seventy-sixth session (28 April-30 May 2025)*, UN doc. A/80/10 (advance copy of 9 June 2025).

[4] *Ibid.*, para. 38.

[5] *Mornah* v. *Benin et al. (Application No. 028/2018)*, [2022] AfCHPR 22 (Judgment of 22 September 2022), p. 84, para. 301: "The Court observes that the right to self-determination is essentially related to peoples' right to ownership over a particular territory and their political status over that territory. It is inconceivable to materialise the free enjoyment of the right to self-determination in the absence of any territory that peoples could call their homeland."

State to defend its territorial integrity, the notion of "territorial integrity" presupposes the existence of a territory. States themselves are a sociolegal construct, permitting the exercise of an exclusive authority — sovereignty — over *land* and the inhabitants *thereof*. Traditionally, therefore, territory has been indispensable to the concept of a State. On this view, the inexistence of land — or of a permanent population for that matter — would tend to result in the demise of that State as a subject of international law. Such an answer is understandably unacceptable to those urging that the law be reconceptualized.

9. Statehood is among the most fundamental questions for international law, namely the identification of its own subjects. The community of States finds itself engaged in a profound self-inquiry, touching upon its own identity, continuity, and extinction. This conversation is in response to a gradual loss of territory that threatens to erase the homelands of small island State–dwelling peoples. As yet more States, including those that have thus far been silent, further consider the matter, efforts in the direction of a new law may well gather momentum in the years ahead. With the greatest respect, it is not for the Court to direct, much less pre-empt, this process. The Court is bound to set out the law as it is, not as it thinks it should be.

10. I believe the Court could have taken a more prudent approach by avoiding this delicate and somewhat under-appreciated issue. Moreover, because the Court had not been asked by the General Assembly to do so, to pronounce itself upon statehood as such was not only unwise, but also unnecessary[6].

11. Once it had made a decision to address the matter *sua sponte*, the Court should have given the General Assembly the courtesy of a thorough, rigorous, and well-reasoned exposition. The Court should have explained exactly what it meant by the continuity of statehood — indeed, by statehood itself —; its conditions; and its theoretical limits, even taking additional time, if necessary, to develop its Opinion for this purpose. Instead, we have descended upon the Great Hall of Justice not unlike the high priestess Pythia once did at the Temple of Apollo — uttering a single sentence, the brevity of which belies its astonishing ramifications. The reader is left to ponder our Delphic pronouncement, unaided by any reasoning whatsoever. This bodes poorly. Oracular pronouncements may, by virtue of their conciseness, have helped the Court reach a unanimous Opinion, but this comes at a cost. The authority of the Court is enhanced not by mystique but by reasoned analysis — particularly in matters that may reshape the law's very foundations.

(Signed) Peter TOMKA.

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[6] Cf. *Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, 21 May 2024, ITLOS Reports 2024*, p. 62, para. 150: "The Tribunal is of the view that if the Commission had intended to solicit an opinion on the consequences of sea level rise for base points, baselines, claims, rights or entitlements to the maritime zones established under the Convention, or maritime boundaries, and the corresponding obligations, it would have expressly formulated the Request accordingly." Should the General Assembly wish to seek the Court's views on the legal implications of sea-level rise for statehood, it remains free to do so.