DECLARATION OF VICE-PRESIDENT XUE

1. While I am in full agreement with the Advisory Opinion of the Court, I wish to highlight some aspects with regard to the application of the non-circumvention principle in this advisory opinion case.

2. It is a plain fact that the dispute between Mauritius and the United Kingdom concerning the issue of the Chagos Archipelago has been going on for decades. The two States hold divergent views on the nature of the subject-matter of the issue. Whether this bilateral dispute constitutes a compelling reason for the Court to exercise its discretional power to decline to give a reply to the questions put to it by the General Assembly is one of the core issues that was intensely debated in the proceedings.

3. In numerous cases, contentious and advisory, the Court has reaffirmed the fundamental importance of the principle of consent for judicial settlement. It considers that there is a compelling reason to decline to give an advisory opinion, if "to give a reply would have the effect of circumventing the principle that a State is not obligated to allow its disputes to be submitted to judicial settlement without its consent" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 191, para. 37; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 158, para. 47). This non-circumvention principle equally applies to the present proceedings.

4. It is not uncommon that the questions submitted to the Court in advisory proceedings involve a bilateral dispute. As the Court pointed out in the *Namibia* Advisory Opinion, "[d]ifferences of views among States on legal issues have existed in practically every advisory proceeding" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 24, para. 34). According to the consistent jurisprudence of the Court, the fact of a pending bilateral dispute, by itself, is not considered a compelling reason for the Court to decline to give an advisory opinion. What is decisive is the object and nature of the request. That is to say, the Court must examine whether the questions put to the Court by the General Assembly concern issues located in a broader frame of reference than the settlement of a dispute (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 26, para. 38; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 159, para. 50); whether the object of the request is for the General Assembly to "obtain enlightenment as to the course of action it should take", or to assist the peaceful settlement of the dispute (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71), and whether the legal controversy arose during the proceedings of the General Assembly and in relation to matters with which it was dealing, or arose independently in bilateral relations (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 34).

5. In the present proceedings, the Court determines that the questions submitted by the General Assembly relate to the decolonization of Mauritius, a subject-matter which is of particular concern to the United Nations. The object of the Request, in its opinion, is not to resolve a

territorial dispute between Mauritius and the United Kingdom, but to assist the General Assembly in the discharge of its functions relating to the decolonization of Mauritius. The Court considers that the fact that the Court may have to pronounce on legal issues disputed between Mauritius and the United Kingdom does not mean that, by replying to the Request, it is dealing with a bilateral dispute. It therefore does not consider that to give the requested opinion would have the effect of circumventing the principle of consent.

6. I concur with the above conclusion on the basis of the following considerations. First of all, it is important to note that the scope of Question *(a)* put to the Court by the General Assembly is specifically defined. The Court is requested to determine the legal status of the decolonization process of Mauritius *at a particular point of time*, namely, at the time when Mauritius was granted independence in 1968, whether this process was lawfully completed. Apparently, the issue of the Chagos Archipelago has to be examined on the basis of the facts and the law as existed at that time and against the historical background of the decolonization of Mauritius.

7. The evidence submitted to the Court demonstrates that the detachment of the Chagos Archipelago by the United Kingdom was not simply the result of a normal administrative restructuring of a colony by the administering Power, but part of a defensive strategy particularly designed in view of the prospective independence of the colonial Territories in the western Indian Ocean. In other words, the very root cause of the separation of the Chagos Archipelago lies in the decolonization of Mauritius.

8. Historical records further inform the Court that the United Kingdom's approach to securing the "consent" of Mauritius' Council of Ministers for the detachment of the Chagos Archipelago from Mauritius was apparently intended to serve two purposes, which are, in essence, contradictory to each other: first, to demonstrate to the outside world that the detachment of the Chagos Archipelago was done on the basis of self-determination of Mauritius and, second, to exclude the issue of the detachment of the Chagos Archipelago from Mauritius' general election in 1967, through which the Mauritian people were to voice their preference with regard to the Territory's independence. Whether such "consent" of Mauritius' Council of Ministers, which was still under the authority of the administering Power, can be regarded as representing the free and genuine will of the people of Mauritius is a crucial issue that the Court has to determine in accordance with the principle of self-determination under international law, as it has a direct bearing on Question *(a)*.

9. Moreover, both the United Kingdom itself and the United Nations treated the detachment of the Chagos Archipelago as a matter of decolonization rather than a territorial issue. Recently declassified archives of the Foreign Office of the United Kingdom reveal that at the time when the detachment plan was being contemplated, the United Kingdom officials were aware, and even acknowledged, that by detaching the Chagos Archipelago and other islands to set up the British Indian Ocean Territory (hereinafter as the "BIOT"), the United Kingdom was actually creating a new colony. Considering the United Kingdom's mandate as an administering Power under the Charter of the United Nations, they doubted that the planned action could escape criticism in the United Nations (see Written Statement of the Republic of Mauritius, Vol. III, Ann. 70, "U.K. Foreign Office, *Minute from Secretary of State for the Colonies to the Prime Minister*, FO 371/184529 (5 Nov. 1965)").

10. The United Kingdom's move to separate the Chagos Archipelago from Mauritius, indeed, did not pass unnoticed. From its inception, the plan to dismember the colonial territories in the western Indian Ocean gave rise to serious concern to the United Nations Special Committee on Decolonization. Resolution 2066 (XX) adopted by the General Assembly on 16 December 1965, 38 days after the United Kingdom established the BIOT, which consisted of, among others, the Chagos Archipelago, was a direct response to the action taken by the United Kingdom. The General Assembly reiterated in a number of resolutions its concern that

> "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV)".

Despite the repeated calling from the General Assembly, the construction of the military base on Diego Garcia unfortunately went ahead as planned. Although Mauritius was eventually taken off the list of non-self-governing territories after its independence, the deep concern expressed by the General Assembly was left unaddressed. It is in this frame of reference that the Court is requested to consider the questions put to it by the General Assembly.

11. Another aspect on which divergent views are expressed is the purported initiation of the dispute between Mauritius and the United Kingdom. In characterizing the issue between Mauritius and itself as a bilateral dispute concerning the sovereignty over the Chagos Archipelago, the United Kingdom claims that the dispute between the two States did not arise until 1980. This claim apparently takes the issue of the Chagos Archipelago out of its historical context.

12. It is true that Mauritius raised the issue in the United Nations in 1980, but that does not necessarily mean that the two States started a dispute concerning the sovereignty over the Chagos Archipelago from that time. On 9 October 1980, the Mauritian Prime Minister, at the thirty-fifth session of the General Assembly, recalled the parliamentary statement of the British Prime Minister, by which the United Kingdom confirmed its undertaking to revert the Chagos Archipelago to Mauritius when it is not needed for defence purposes. He called on the United Kingdom to disband the BIOT and return the archipelago to Mauritius as "its natural heritage". This intervention indicates that the genuine issue between the two States is not about territorial sovereignty, but essentially bears on the applicability of the terms of the detachment of the Chagos Archipelago and its consequential effect on the decolonization process of Mauritius.

13. Historical documents show that at the time when the United Kingdom was contemplating the separation of the Chagos Archipelago from Mauritius, there was no dispute between the administering Power and the colony of Mauritius over the fact that the Chagos Archipelago had always constituted part of the Territory of Mauritius. Both the United Kingdom's administrative acts concerning the relationship of the Chagos Archipelago with Mauritius and the way in which it handled the detachment negotiations with Mauritius, give clear indication that the United Kingdom recognized that the Chagos Archipelago formed part of Mauritius.

14. More telling on this point are the conditions on which Mauritius and the United Kingdom ultimately agreed for the detachment of the Chagos Archipelago. The United Kingdom undertook, among other things (see Advisory Opinion, paragraph 108), to return the Chagos Archipelago to Mauritius once it is no longer needed for defence purposes. This undertaking means that there was

no formal transfer of territorial title in the detachment. Although in the subsequent years, officials from either side often referred to the transfer of sovereignty over the Chagos Archipelago, the United Kingdom never officially indicated that it had revoked its undertaking to return the Chagos Archipelago to Mauritius when the agreed condition is met. Even during the present proceedings, the United Kingdom once again confirmed that undertaking.

15. As is recorded, between 1967 and 1973, the entire population of the Chagos Archipelago was either prevented from returning, or forcibly removed and prevented from returning, to the Chagos Archipelago by the United Kingdom. The deplorable situation of the displaced Chagossians has been a lingering issue for the United Kingdom. The struggle of the Chagossians to retain their right to return to their homeland not only gave rise to a number of legal actions in the British national courts, but also led the Mauritian Government to raise the issue in the United Nations. It is under these circumstances that the bilateral dispute between Mauritius and the United Kingdom came to the fore; evidently the dispute was derived from the decolonization process of Mauritius.

16. Lastly, to apply fully the non-circumvention principle in this case, in my view, it is necessary to give some further consideration to the claim raised by the United Kingdom that the issue of the Chagos Archipelago had not been put on the agenda of the General Assembly for nearly five decades and, meanwhile, Mauritius had resorted to bilateral channels and third-party mechanisms for settlement with the United Kingdom. Although acts referred to therein do not fall within the relevant period which the requested questions concern, this claim reflects the special feature of the present case.

17. Indeed, the situation of the Chagos Archipelago is very unique in itself; after 50 years of its independence, Mauritius is still confronted with a question left over from its decolonization process. As an independent sovereign State, Mauritius, nevertheless, has the right to raise the issue with the United Kingdom through the means it sees fit. This freedom of choice of means is inherently embraced in the principle of sovereignty and the right to self-determination. Equally important, as required by its mandate under the Charter of the United Nations, the General Assembly maintains a "particular concern" for decolonization. So long as decolonization remains incomplete, this mandate has no temporal limitation under the Charter.

18. The United Kingdom's claim on the existence of a bilateral dispute actually challenges Mauritius' position on its decolonization process. Logically, to claim the existence of a territorial dispute with regard to the Chagos Archipelago independently in their bilateral relations, the United Kingdom must set its claim on one premise, that is, Mauritius' decolonization process was over in 1968 with the Chagos Archipelago ceded to the United Kingdom. Without this premise, there would not even be a starting-point to talk about a territorial dispute. Apparently, the dispute that the United Kingdom has in mind relates to decolonization rather than territorial sovereignty.

19. Decolonization is a process. The right to self-determination is one of the fundamental principles of international law that was well established during the decolonization movement after the Second World War. The paramount importance of the principle of self-determination is reflected in its *erga omnes* character in the sense that it not only confers a right on the peoples of all non-self-governing territories to self-determination, but also imposes an obligation on all States to see to it that this right is fully respected. As an exercise of its substantive right, Mauritius'

endeavours to resolve the issue of the Chagos Archipelago with the United Kingdom through bilateral and third-party procedures do not by themselves change the nature of the issue as a matter of decolonization, nor do they deprive the General Assembly of its mandate on decolonization under the Charter of the United Nations. As past experiences show, the issue of decolonization may be considered at both bilateral and multilateral levels; they are not mutually exclusive under international law.

20. Given the historical background of the separation of the Chagos Archipelago, it is difficult to accept that the issue of the detachment of the Chagos Archipelago, with the lapse of time, has evolved into a bilateral territorial dispute beyond the frame of decolonization.

21. In light of the foregoing, I am convinced that the Court has properly applied the non-circumvention principle in the present proceedings and, by rendering this Advisory Opinion to the General Assembly, has duly discharged its judicial functions entrusted to it by the Charter of the United Nations.

(Signed) XUE Hanqin.