79th session of the United Nations General Assembly Sixth Committee: Agenda item 79, Report of the International Law Commission on the work of its seventy-fifth session

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Statement delivered by Laura McIlhenny, First Secretary, Permanent Mission of Australia to the United Nations

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Thank you Chair,

I have the honour to deliver this statement today on behalf of Australia.

Australia expresses its appreciation for the Commission's ongoing work on clarifying and providing guidance on the law regarding the **prevention and repression of piracy and armed robbery at sea**.

We thank Mr Yacouba Cissé for his work on this topic and extend our appreciation to Mr Louis Savadogo for assuming this task, following Mr Cissé's resignation as Special Rapporteur.

It is concerning that, from data reported to the International Maritime Organization, incidents of piracy and armed robbery at sea have increased in the last year or so, after steadily declining over the decade since 2011. This

demonstrates the continued relevance of the Commission's work on this topic.

We underscore that the UN Convention on the Law of the Sea sets out the legal framework within which all activities in the oceans and seas must be carried out. This includes its provisions regarding piracy in Part VII.

We appreciate that the Commission is further considering whether draft guidelines, rather than draft articles, may be more appropriate for this topic.

We further note that the nature of the acts covered by 'piracy', are often the same as those that are characterised as 'armed robbery at sea'. However, there is an important distinction between them.

'Piracy', as defined in Article 101 of UNCLOS, occurs on the high seas or in a place outside the jurisdiction of any State, as well as in the EEZ as provided by Article 58.

'Armed robbery at sea', by contrast, is widely understood to occur within waters under the sovereignty of States, whether that be internal waters, archipelagic waters, or territorial seas, as indicated by the Commission's draft Article 3. That is, it is within the sovereign power of States to exercise criminal jurisdiction over acts of 'armed robbery at sea'.

We therefore encourage the Commission to take particular care in ensuring respect for States' sovereignty under international law, especially UNCLOS. For example, this would likely necessitate distinguishing between 'piracy' and 'armed robbery at sea' when considering prevention or repression actions. Further, we note that what is encompassed by 'armed robbery at sea' may be defined differently under states' national criminal laws.

We look forward to the Commission's continuing work on this important topic.

I will now turn to consider the topic of '**non-legally binding international agreements**'.

First and foremost I would like to congratulate the Special Rapporteur - Mr. Mathias Forteau – on his appointment, and thank him for his preliminary work to define the general direction of this important work – including its scope, final outcome, and the questions to be examined.

Like many States, Australia draws a distinction between legally binding international agreements, and non-legally binding arrangements. In Australia's system, all legally binding international agreements are considered treaty status and are subject to our domestic treaty-making

process. In contrast, arrangements (such as memoranda of understanding) reflect moral and political commitments, and are less-than-treaty status.

Australia supports the approach proposed outlined by the Special Rapporteur – which seeks to balance the sovereignty of States to exercise their capacity to enter into non-binding instruments, and the need for legal clarity and certainty within the international law regime.

We thank the Special Rapporteur for his decision to focus on the practical aspects of this question, including the nature, regime and effects of non-binding arrangements, refraining from development of prescriptive outcomes.

Australia welcomes the Special Rapporteur's initial views on the criteria which might be used to determine the nature of an instrument: the text of the instrument itself, the context surrounding conclusion of the instrument, adherence to any applicable domestic treaty processes, contemplation of dispute settlements. In Australia's view, these factors are well selected to clarify the objective intention of the participants – which Australia considers of critical importance to the question of distinguishing between binding and non-binding instruments.

On this basis Australia concurs with the proposed way forward regarding development of draft conclusions on this question in place of potential recommendations, model clauses or indicators of best practice. It is of the upmost importance that we do not deprive non-binding instruments of the flexibility and informality which provide such value to participants. In developing the draft conclusions, Australia urges the Commission to preserve the distinction between binding and non-binding instruments.

We look forward to engaging with the Commission on the components of this work suggested for progress during the upcoming session – in particular, consideration of relevant jurisprudence and doctrine.

Australia takes this opportunity to commend the Commission for its work on this important item.

Thank you.