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**United States Statement Sixth Committee UNGA 79**
**Agenda Item 79: Report of the International Law Commission on the work of its seventy-fourth session (Cluster Three)**
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Thank you, Chair. The United States is pleased to address the issues in Cluster 3, namely: prevention and repression of piracy and armed robbery at sea, non-legally binding international agreements and succession of States in respect of State responsibility.

**[Prevention and Repression of Piracy and Armed Robbery at Sea]**

Turning first to the topic of piracy and armed robbery at sea, the United States thanks Mr. Yacouba Cissé for his second report on this topic and congratulates Mr. Louis Savadogo on his appointment as Special Rapporteur.

We appreciate the ongoing work of the Commission to consider this topic and agree that it is critical to ensure consistency with existing international law concerning piracy, as reflected in the UN Convention on the Law of the Sea. The reports of the Special Rapporteur have been useful to shed light on the various ways states have addressed these issues in their domestic frameworks, especially with respect to armed robbery at sea. In this respect, we reiterate the importance of distinguishing between *piracy* and *armed robbery at sea*. Piracy is well-defined under longstanding international law and subject to universal jurisdiction. *Armed robbery at sea* involves underlying acts that may resemble piracy but do not meet all elements of that crime, and is a matter for domestic law even as it benefits from cooperation between states. Thus, for example, the duty to cooperate to the fullest possible extent in the repression of piracy in areas beyond national jurisdiction, as reflected in Article 100 of the Law of the Sea Convention, is different from the international cooperation that is possible in the context of armed robbery at sea, including because while cooperation to repress armed robbery at sea is certainly beneficial, it is not required. This important difference is because armed robbery at sea is a crime that necessarily takes place within the jurisdiction of a coastal state.

This leads to what we consider would be the best way forward on this topic for the Commission. Rather than further pursuing draft articles or any progressive development of the law on this topic, we believe the most useful product would be a report or perhaps conclusions or draft guidelines developed from the recent practice of states and the International Maritime Organization, which have cooperated in addressing armed robbery at sea. States could benefit from such a product to enhance their cooperation and domestic practices, whether by adjusting

their national legislation, gaining broader awareness of good practices states have taken, or expanding international cooperation to combat armed robbery at sea, as appropriate.

**[Non-legally Binding International Agreements]**

I turn next to the second topic of this cluster, "non-legally binding international agreements."

The United States welcomes the first report of the Special Rapporteur Mr. Forteau on this topic. We were pleased to see the report's emphasis on proceeding cautiously to avoid undermining flexibility in the use of non-binding instruments by states to advance international cooperation. On this point, we agree with the Special Rapporteur that the Commission's work on this topic should not be prescriptive in nature. We also appreciate the weight the Special Rapporteur intends to place on state practice and note the Commission's invitation to states to provide information. Non-binding instruments are an important tool in the practice of states, and the perspectives of states on this practice should be central to the Commission's work.
We share the Special Rapporteur's view that a central goal of the Commission's work should be to promote legal certainty in state practice in this area. In this connection, we have one significant concern with the Special Rapporteur's report, which relates to the designation of the project as addressing "non-legally binding international agreements."

Like many states, the United States does not use – and specifically refrains from using – the term "agreement" to refer to documents or exchanges that do not give rise to legally binding rights or obligations. Use of the phrase "non-legally binding international agreements" in the ILC's work would undermine this state practice and create the kind of legal uncertainty the ILC's work should be aimed at reducing.

There are important reasons that the United States and other states refrain from referring to non-legally binding instruments as "agreements."

First, in their drafting practices for international instruments, the United States and other states use the terms "agree" and "agreement" to convey their intention to establish legally binding rights and obligations. Were the term "agreement" to be used interchangeably to refer both to legally binding agreements and to some non-binding instruments, it would undermine the ability of the United States and other states to rely on the terms "agree" and "agreement" as a means for presumptively distinguishing legally binding agreements from non-binding instruments. The ability to make this distinction is of fundamental importance to international treaty practice; undermining it would be damaging and create significant legal uncertainty.
Second, use of the term "non-legally binding agreements" suggests the existence of a distinction among forms of non-legally binding communications among states, with some constituting "agreements" and others not. We do not believe state practice recognizes such a clear distinction. The United States and other governments carry out a broad range of exchanges and communications designed to provide bases for cooperation and mutual understanding that do not give rise to legal rights or obligations. We do not recognize a subset of these non-legally binding exchanges as having an essentially different character than others, and we are unaware of criteria recognized by states that would establish particular non-binding instruments or exchanges as constituting "agreements."

The Special Rapporteur has expressed the view that the negotiating history of the Vienna Convention on the Law of Treaties contemplated a category of agreements that were not legally binding. But state practice in the period following adoption of the Vienna Convention provides little support for the view that states have supported the characterization of their non-legally binding instruments and exchanges as "agreements."

Particularly instructive in this regard is the recent work of the Council of Europe's Committee of Legal Advisers on Public International Law in addressing these same issues. In 2022, it launched what was originally entitled an "Exchange of Views on Non-Legally Binding Agreements." In the course of that exchange, a wide majority of states and international organizations rejected the use of the term "agreement" in relation to non-legally binding instruments, on the ground that "agreement" was a term reserved in their practices for legally binding instruments. On the basis of this state input, the Committee abandoned use of the phrase "non-legally binding agreements," and adopted the phrase "non-legally binding instruments" as the subject of its ongoing work.

The Special Rapporteur's report also notes that the term "Non-binding international agreements" was used in the work of the Inter-American Juridical Committee, which in 2021 adopted "Guidelines of the Inter-American Juridical Committee on Binding and Non-Binding Agreements." It is significant to note, however, that the Inter-American Juridical Committee adopted its guidelines under a process that did not allow a meaningful opportunity for OAS member states or other OAS bodies or to review or comment on them prior to their adoption, and the guidelines themselves were not endorsed by the OAS General Assembly. The United States expressed its concern about the Guidelines' use of the term "non-binding agreements" when states were later invited by the OAS General Assembly to comment on the Guidelines. Moreover, neither the Guidelines nor their commentaries cite evidence that OAS member states, or states more generally, have a practice of referring to non-binding instruments or exchanges as "agreements."

It is also notable moreover that comments by a large number of states to date on the title for this project have generally opposed use of the term "agreements."

We note that the Commission has discussed alternatives to the use of the term "agreement," including "instrument" or "arrangement" and that the Special Rapporteur has expressed the view that these terms might not perfectly capture the envisioned scope of the project. We submit, however, that any difficulties associated with these alternative terms pale in comparison to the significant confusion and legal uncertainty that would be created in treaty practice by undermining the ability of states to use the term "agreement" to distinguish between instruments that are legally binding and those that are not. To the extent that some alternative terms might be thought to describe a broader category of instruments than the Commission wishes to focus on, the Commission could explain the specific scope of its inquiry in the commentary to its work.

We strongly urge the Commission to revisit this issue, and to revise the title and work plan for this project to avoid the characterization of non-legally binding instruments as "agreements."

**[Succession of States in Respect of State Responsibility]**

Turning to the final topic for this cluster, that of succession of States in respect of State responsibility, we thank the Commission for its work on this topic, take note of the establishment of a Working Group and congratulate Professor Patel on his appointment as Chair. The United States appreciates the Commission's decision that the Working Group draft a report bringing the Commission's work on this topic to an end.

Thank you.