**United States Comments on the Chair's Pre-draft of the Report
of the UN Open Ended Working Group (OEWG)**

The United States wishes to thank Ambassador Lauber and his team for drafting a fair and comprehensive "pre-draft" that will serve as an excellent basis from which the OEWG can continue its work, and we welcome the opportunity to provide comments. Our comments here reflect our views on how to strengthen the text and help make it an influential product that will improve international cyber stability. We look forward to future OEWG informal and formal sessions as we work toward a consensus report in July 2020.

General Comments

Paragraph 13 of the introduction notes that sections B-G are intended to reflect the discussions of the OEWG and its recommendations. The current text of those sections contains a number of proposals raised and/or supported by only a limited number of States that we would not view as consensus recommendations. The structure of the draft does not make it clear if these ideas are intended to be included as a record of the discussions, or if they are being proposed as possible consensus recommendations. We would recommend using the term "recommendations" to refer only to content with respect to which all member states could reasonably find common ground. Proposals that have little or no chance of achieving consensus should not be included in the OEWG report.

The pre-draft contains several proposals for repositories. Some of these ideas have merit, but others may duplicate existing efforts. Also, States may have limited capacity for contributing to such repositories. We should seek to prioritize those proposals that are achievable and fill urgent gaps, such as States sharing their views regarding how international law applies to States' use of information and communications technologies (ICTs) or regarding States' implementation of norms, while also acknowledging other ongoing international efforts that could be strengthened, such as the Global Forum on Cyber Expertise's (GFCE's) work on capacity building. All these new proposals must remain voluntary and State-led, and be undertaken within existing resource constraints.

"Supranational," "trans-border," and "transnational" critical infrastructure were terms used by OEWG delegates, but it is unclear to us if delegates were using those terms interchangeably or not. If delegates view those terms as synonymous, we should choose one term to describe such critical infrastructure with international implications. If the terms are not viewed as synonymous, we should explain the distinctions among the terms. We are also unsure what it means to declare "supranational critical information infrastructure" a "special category" of such infrastructure, with protection that is a "shared responsibility" of all States. Most ICT infrastructure is owned and operated by the private sector and is located within the jurisdictions of individual States.

Comments on the Threats Section

The threats section should focus on State behavior that poses threats to international peace and security, rather than identifying specific technologies (and their development) that are listed as threats. The mere existence of a possibility to use ICTs for military purposes is not inherently a threat. Moreover, many States now have ICT capabilities that can be applied to military and non-military purposes alike.

In addition, although our preference would be for all States to act together to address threats in cyberspace, we have to acknowledge reality: some States are unwilling to do so, and, in some cases, States are actually conducting or sponsoring malicious activity in cyberspace. Paragraph 20 needs to reflect the reality that individual States may need to take measures to address threats in cyberspace when collective action is not feasible.

Comments on the International Law Section

We appreciate that the draft report memorializes that all States reaffirmed that international law and, in particular, the Charter of the United Nations, apply to the use of ICTs by States. In our view, it is important to record this consensus position because it serves as the key point of departure for the OEWG's mandate to study *how* international law applies to the use of ICTs by States. In that regard, we are pleased that the draft report includes many useful and positive elements that could garner consensus. These include, for example, statements acknowledging international law's role in helping to promote and maintain international peace and security (paragraph 22), encouraging States to share their views on how international law applies to the use of ICTs (chapeau and paragraph 68(a)), and recognizing the need for capacity-building in the area of international law (paragraph 33). In addition, the draft is useful because it identifies a number of important Charter principles and specific bodies of international law (such as the law of State responsibility, international humanitarian law, and international human rights law) that are applicable to the use of ICTs by States.

Taking into account the need to reach consensus on the final report, and with the understanding that States will have an opportunity to provide specific line edits on subsequent drafts, we believe that the draft report's section on international law could be improved in several important ways. We urge the Chair to take into account the following concerns in preparing the next draft for governments to review:

- First, the draft report should focus on consensus views of States.
  - The present draft devotes far too much attention (paragraphs 27-30) to proposals made by a minority of States for the progressive development of international law, including through the development of a legally binding instrument on the use of ICTs by States. These proposals lacked specificity and are impractical. The OEWG's mandate is to study how international law applies to the use of ICTs by States, and the report should therefore focus on existing international law. Without a clear understanding of States' views on how existing international law

applies to ICTs, it is premature to suggest that international law needs to be changed or developed further.

     o   Recommendations in paragraph 68(a) should flow only from those proposals that enjoyed consensus. Only a few States supported a recommendation that the International Law Commission (ILC) study national views and practice on how international law applies to the use of ICTs by States. In addition, that recommendation is inconsistent with the General Assembly's decision to ask the OEWG and the GGE to address this issue, and it duplicates other recommendations in the draft report that were supported by many more States, such as the call for voluntary submissions of national practice and views on the applicability of international law.

- Second, the report should reflect a balanced view of international law.
     o   To the extent that the next draft identifies specific international law obligations, it should also identify relevant rights that States have under international law. For example, paragraph 23 correctly identifies the obligation to refrain from the threat or use of force against the territorial integrity or political independence of any State, but it fails to mention that States may respond to such unlawful actions, consistent with the inherent right of self-defense. The right of self-defense recognized in Article 51 of the UN Charter plays an important deterrent role and helps to ensure the maintenance of international peace and security.

Comments on the Norms Section

The United States views voluntary, non-binding norms of State behavior during peacetime as essential components of a framework of responsible State behavior in cyberspace. The set of norms identified in the 2015 GGE report remain some of the most important recommendations affirmed by UN Member States in the area of international cyber stability. We continue to believe that the OEWG will be most productive in this area if we focus our efforts on the implementation of existing consensus norms, not the creation of entirely new normative concepts. When considering proposals from Member States, we should first explore whether the ideas could be considered articulations of existing areas of norms consensus. This could also help us avoid reconsidering concepts, such as concerns about harmful hidden functions, which the 2015 GGE report already addressed.

In addition, selective elaboration of norms or identification of specific critical infrastructure sectors carries some risk of giving precedence to certain issues over others. We do not want the OEWG unintentionally to undermine the broader set of norms addressed in the 2015 GGE report. We should therefore approach this exercise in a cautious and inclusive manner.

Separately, the term "upgrading" is unclear, so we suggest its deletion. If "upgrading" means "transforming" a norm from a non-binding status to a legally binding status, the OEWG has no

power to make such a change. If "upgrading" means "highlighting" or "promoting," we should use one of those terms rather than "upgrading."

Comments on the Confidence Building Measures (CBMs) and Capacity Building Sections

The United States has no significant concerns with the pre-draft's sections on CBMs and capacity building.

Comments on the Regular Institutional Dialogue Section

Our general views on possible repositories are expressed in the opening section of our comments. We believe that it is premature to decide whether the UNGA should convene a new OEWG or if the OEWG should put forward a different proposal for future institutional dialogue. Our views on this will depend, in large part, on the outcomes of the current OEWG. In general, we would also have concerns with a working group continuing indefinitely without a clear task and timeframe for concluding its work.