STATEMENT BY THE REPRESENTATIVE OF AUSTRALIA TO THE SECOND SUBSTANTIVE SESSION OF THE OPEN ENDED WORKING GROUP ON SECURITY OF AND IN THE USE OF ICTS (MARCH 2022)

International Law

- Australia greatly values the opportunity to discuss the application of international law to cyberspace,
    - Which provides States with a 'tool-kit' to identify breaches of international legal obligations, attribute those acts to the responsible State, seek peaceful resolution of disputes and, where the victim State deems appropriate, take lawful measures in response.

<u>Further development of the application of international law to cyberspace – process</u>

- Australia believes that deepening our understanding of how international law applies is an iterative process.
    - One that involves States forming national views and exchanging positions, as this landscape, and the threats that exist in it, also continue to develop.
- We also note Australia's support for the proposal from Switzerland, Columbia, UK, Canada, South Africa and others that the OEWG should take forth efforts to deepen undoubtedly of how IHL applies in cyber.
    - We especially value and pay attention when we hear development or confirmation of positions from States, for example, as we heard from India during the first substantive session of the OEWG in December last year.
- We note that in the first substantive session, a number of States posed complex questions regarding the application of existing international law to cyberspace, which are pertinent to our ongoing work in this forum.
- We would welcome States continuing to pose these questions to provide the opportunity for states to respond, be it through statements made during the OEWG, or in published national statements.

Australia also wanted to take this opportunity to address a number of statements that have been made this week.

‘Substantiating facts’

- First we note the point made by the esteemed delegate from China that ‘substantiated facts’ are required for attribution under voluntary norm (b).
    - Australia underscores that there is no international legal obligation on States to substantiate attribution decisions, including by revealing evidence on which an attribution is based
    - Nor does the 2021 GGE report recommend that substantiation necessarily be made public.
- However – we note and agree that it is in States’ interests to be very careful before making an attribution decision.
- This is because, for example, if a State takes a countermeasure on the basis of an incorrect attribution, the countermeasure will be unlawful, entailing legal consequences and a right for the State against which countermeasures were taken, to respond with its own countermeasures.

No need for a new legally binding instrument

- Earlier this morning, we heard some States call for a new legally binding instrument to address responsible state behaviour in cyberspace. Australia does not share this view.
- Chair, Australia’s firm position it that existing international law – treaties and customary international law, complemented by norms, provides a comprehensive and robust framework to address the threats posed by State-generated or State-sponsored malicious cyber activity when comprehensively implemented and adhered to.
- Negotiating a new convention would not give us greater certainty or clarity. This is because, just as with existing international law, we would still need to work out “how” a new treaty text applied to cyber incidents
    - Before created new law, Australia suggests that the path forward is to implement the law we have – that is, customary international law, the UN Charter, human rights and IHL – to identify whether there are gaps that could benefit from further elaboration.

Finally,

- I would like to also express Australia's full commitment to this OEWG's implementation of the recommendation of the last OEWG –

That States support, in a neutral and objective manner, additional efforts to build capacity, in the areas of international law, national legislation and policy, in order for all States to contribute to building common understandings of how international law applies to the use of ICTs by States, and to contribute to building consensus within the international community.

Thank you.