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Anticipated Obstacles to Effective International Cooperation in Countering the Use of
Information and Communication Technologies for Criminal Purposes

Thank you, Madam Chair, and my thanks to the Ad Hoc Committee and to the Secretariat for inviting me to participate in this panel.

I would like to talk about some of the wicked obstacles that stand in the way of building a more effective multilateral cooperation framework to fight cybercrime. For that, I will draw on some of the lessons learned from two similar attempts to boost international cooperation against serious criminal threats: UNTOC and UNCAC.

The legacy cooperation mechanisms we inherited from that era were significant steps forward in facilitating cooperation. Yet, despite the progress achieved then and over the following two decades, cooperation in the prevention, investigation and prosecution of transnational crime remains largely ineffectual.

How ineffectual? How bad is it? That's certainly an open question. There is very little reliable data on international cooperation activities. The process is quite opaque. Who knows what level of cooperation between states occurs below the surface? Unfortunately, neither the UNTOC nor UNCAC formal review mechanisms have yet produced a clear picture of the progress accomplished over the last twenty years or so.

Indeed, times have changed. However, I am not sure that today's cooperation challenges are so fundamentally different from those faced by States at the end of the 1990s.

Whatever the initial merits of those legacy cooperation mechanisms, they are now largely inefficient in light of new technologies and the constant shifts in criminal patterns. The global

cooperation regime is complex, slow, and disjointed. For most states, current legacy cooperation mechanisms are impractical, unaffordable and unsustainable.

Unsurprisingly, many States now display a growing preference for bilateral, regional, and generally less formal and less binding cooperation arrangements. They seem to prefer narrow informal approaches to cooperation that reaffirm their sovereignty without being tethered to the rule of law and human rights. Some powerful States, having achieved some success at the bilateral and regional levels, are de facto signaling their disinterest in a global, multilateral approach.

The proliferation of agreements at the bilateral and regional levels is not necessarily a bad development, but it does not offer a satisfactory substitute for a more comprehensive, integrated, international legal framework.

Some regions, most notably Europe, and some bilateral partners have made substantial progress in strengthening cooperation in criminal matters. There is obviously a lot to learn from their success. And, therein lies a great opportunity for States to identify effective practices and ensure that they are reflected in a global convention.

As we all know, international cooperation in criminal matters is in a perpetually unstable state. Presently, several shifts and trends are affecting international cooperation, including challenging geopolitics, shifting alliances, and waning faith in international institutions. However, what's particularly alarming is that no clear vision has yet emerged of what a desirable end state might embody, especially in relation to effective international cooperation against cybercrime.

Global cooperation can prevail over global dysfunction if states are able to clearly identify areas in which their national interests merge or are at least compatible. Broadly speaking, the present situation resembles the context in which UNTOC and UNTAC were being negotiated.

Then as today, negotiators were confronted with issues around definitions, sovereignty, jurisdiction, harmonization of legislation, procedural conundrums, law enforcement cooperation, formal legal assistance, exchange of information and evidence, and tracing and seizing of criminal assets. Ultimately, in all these areas, negotiators arrived at realistic compromises that were perhaps imperfect but nevertheless made it possible for as many States as possible to ratify the new conventions.

To be sure, cooperation issues are presenting themselves differently today than they did twenty years ago. For example, at that time, tracking, seizing, and confiscating criminal assets and proceeds of crime were seen as important tools for tackling organized crime and corruption, but international cooperation agreements usually required that these assets be linked to an offence of which an individual was convicted. More powerful instruments, such as extended confiscation or non-conviction-based confiscation, are needed but are only found in some bilateral formal or informal arrangements. More to the point, older cooperation agreements did not anticipate that criminal assets and proceeds would reside in cyberspace, move at incredible speed, and be hidden and transferred through cryptocurrencies.

Similarly, mutual legal assistance mechanisms have also revealed their limitations. Rather than increasing international cooperation, these mechanisms have added layers of cumbersome administrative process and legal uncertainty. Mutual legal assistance for the transfer of electronic data and evidence remains painfully slow compared to the speed at which digital data can be moved or deleted. The timeliness of cooperation is always an issue, especially considering the time-sensitive nature of electronic evidence.

Some practical solutions can be explored. For example, the 24/7 network, established pursuant to Article 35 of the Budapest Convention, is seen as a helpful mechanism through which to facilitate immediate cooperation, especially the preservation of data. In the end, the new convention must improve every country's ability to gather and share cross-border evidence and data in a mutually trusting and reciprocal way, prioritizing transparency and respect for privacy and human rights.

The toughest challenge ahead will come from the fact that technical innovations happen too fast for States to understand them and adjust their responses. The new cooperation mechanisms will need to be flexible. Another new challenge will be that of engaging the private sector in the cooperation loops.

In concluding, I would like to stress that international cooperation may be enabled by multilateral treaties, bilateral agreements, and national laws, but that such instruments are not ends in themselves. Effective international cooperation invariably depends on maintaining relationships of mutual recognition, trust, and reciprocity. Extension of trust from one state to another, or from one law enforcement agency to another, is what makes cooperation in fighting transnational crime at all possible. Reciprocity is what makes it sustainable. However,

reciprocity is increasingly redefined in an ad-hoc, mostly transactional manner, without reference to a broader normative framework.

States cannot adopt a myopic view of the cooperation challenges that lie ahead and what is needed to overcome them. Our globalized world is more dependent on trust than ever before. Yet, in the current geopolitical context, in an increasingly polarized world, trust is in low supply. The fact that States are gradually disinvesting themselves from the global international criminal justice cooperation regime is a very worrying trend.

What the present negotiations must accomplish is nothing less than to reverse that trend. Unless the negotiation process itself can generate enough trust to define some common grounds and empower effective action against cybercrime, we may all be facing a very troubled future.

Thank you.