

Privacy International and the Electronic Frontier Foundation’s statement to the second session of the Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communication Technologies for Criminal Purposes, May 2022

Item 4: [illegal/unlawful/unauthorized] access

Addressing some of the first group of questions, we believe that any future Treaty should ensure that [illegal/unlawful/unauthorized] access does not criminalize security research, whistleblowers, and other novel and interoperable uses of technology that ultimately benefit all of us.

In particular, the [unauthorized] access to a computer system provision should explicitly require the intention to access a computer system and the person's intent to cause damage or defraud (malicious intent or *mens rea*). Without a malicious intent requirement, this future treaty risks harshly criminalizing "breaking security," potentially without any need for harm or damage and seemingly without regard to whether the purpose was beneficial.

Some States have also interpreted unauthorized access laws so broadly as to put computer security researchers at risk of prosecution for engaging in socially beneficial security testing through standard security research practices. “Without authorization” should be defined more clearly to require the circumvention of a technical barrier like a password or other authentication stage.

When it comes to whistleblowing, the 2015 report of the UN Special Rapporteur of freedom of expression noted that prosecution of whistleblowers generally deters whistle-blowing, and recommended that States avoid it, reserving it, if at all, only for exceptional cases of the most serious demonstrable harm to a specific legitimate interest.

The report states that “in such situations, the State should bear the burden of proving an intent to cause harm, and defendants should be granted (a) the ability to present a defence of an overriding public interest in the information, and (b) access to all information necessary to mount a full defence,... Penalties should take into account the intent of the whistle-blower to disclose information of public interest and meet international standards of legality, due process and proportionality.” (available at:

https://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/361)

For these reasons, we recommend that the treaty ensure that no provisions criminalize legitimate security research or whistleblowing.