

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the right to privacy

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and Special Rapporteur on the right to privacy, pursuant to Human Rights Council resolutions 34/18 and 37/2.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **alleged acts of large-scale surveillance and cyber espionage tied to the General Security Directorate**.

According to the information received:

Since 2012, the Lebanese General Security Directorate based in Beirut has been conducting a spyware campaign called Dark Caracal.

Dark Caracal is operated by a group of State-funded hackers. The spyware and malware tools these hackers produce have been used to compromise mobile and other computer devices belonging to thousands of individuals in countries including the United States, Canada, Germany, France, and Lebanon.

The spyware and malware are distributed through a technique known as "spearphishing": phishing e-mails so that affected users download fake versions of popular applications (such as trusted messaging applications). In some cases, Dark Caracal used physical access to individuals' phones to install these applications.

When these applications are downloaded and installed on a device, they give hackers access to private data stored on and shared through the device, including call logs, text messages, photos, location information and browsing history. These applications also enable hackers to record audio through the device.

Dark Caracal has used different personas, phishing domains, and aliases that are registered to domains located near or around a building belonging to the General Security Directorate.

The exact number of devices and individuals affected is unknown. However, those affected by Dark Caracal include the military, businesses, medical professionals, activists, journalists, lawyers, and educational institutions.

While we do not wish to prejudge the accuracy of these allegations, we would like to reiterate Your Excellency's Government's obligations under article 17(1) and 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified on 3 November 1972, which guarantee the right to privacy and the right to freedom of expression.

The alleged spyware campaign described above raises concern that it is unlawful, unnecessary and disproportionate under Article 19(3). There is no apparent legal justification for Dark Caracal, raising concern that it is unlawful under both domestic and international law. The secrecy of this expansive surveillance program also raises concern that it violates the right of individuals to know the scope of information collected about them, for what purposes, and how such information may be used or analyzed. Surveillance activities can only be carried out by a Government body legally entitled to conduct such activities, using surveillance systems authorized by the law, and with a clearly defined and legitimate purpose that cannot be pursued with less intrusive measures.

The alleged interception of a wide range of targets – including activists, lawyers and journalists – also raises concern that Dark Caracal is far broader than necessary to protect national security or other legitimate aims. The extremely intrusive nature of the hacking techniques employed, the absence of public criteria for determining targets and minimizing the information collected, and the lack of judicial and other safeguards also contribute to grave concern that Dark Caracal operates outside of internationally established standards of due process and accountability.

Article 17(1) of the ICCPR provides for the rights of individuals to be protected, inter alia, against unlawful or arbitrary interference with their privacy and correspondence, and provides that everyone has the right to the protection of the law against such interference. “Unlawful” means that no interference may take place except in cases envisaged by the law which in itself must comply with provisions, aims and objectives of the ICCPR. Arbitrariness “is not confined to procedural arbitrariness, but extends to the reasonableness of the interference with the person's rights under Article 17 and its compatibility with the purposes, aims and objectives of the Covenant” (CCPR/C/59/D/558/1993).

Article 19(1) of the ICCPR holds that “[e]veryone shall have the right to hold opinions without interference.” Article 19(2) states that “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless to frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Under article 19(3) of the ICCPR, “[t]he exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.”

The requirement of necessity implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions “target a specific objective and do not unduly intrude upon the rights of targeted persons”. The ensuing interference with third parties’ rights must also be limited and justified in the interest supported by the intrusion (A/HRC/29/32). Finally, the restrictions must be “the least intrusive instrument among those which might achieve the desired result” (CCPR/C/GC/34). Once an individual has established a restriction on freedom of expression, the burden falls on the State Party to the Covenant to demonstrate that the restriction complies with the requirements of Article 19(3) (CCPR/C/GC/34).

Articles 17 and 19 of the ICCPR are closely connected, as the right to privacy is often understood to be an essential requirement for the realization of the right to freedom of expression (A/RES/68/167, A/HRC/27/37, A/HRC/23/40, A/HRC/29/32).

We would also like to refer your Excellency’s Government to the report of the High Commissioner for Human Rights, which states that “any limitation to privacy rights reflected in article 17 must be provided for by law, and the law must be sufficiently accessible, clear and precise so that an individual may look to the law and ascertain who is authorized to conduct data surveillance and under what circumstances. The limitation must be necessary for reaching a legitimate aim, as well as in proportion to the aim and the least intrusive option available” (see A/HRC/27/37, para. 23).

The Special Rapporteur on freedom of expression has explained that “[c]ommunications surveillance should be regarded as a highly intrusive act that potentially interferes with the rights to freedom of expression and privacy and threatens the foundations of a democratic society.” State surveillance of communications must therefore be authorized by law in accordance with Articles 19(3) and 17(1), which must limit such activities to “the most exceptional circumstances and exclusively under the supervision of an independent judicial authority.” Furthermore, “[s]afeguards must be articulated in law relating to the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorize, carry out and supervise them, and the kind of remedy provided by the national law.” (A/HRC/23/40, para. 81)

The Special Rapporteur on the right to privacy stated that “Preservation of democracies however requires checks and balances to ensure that any surveillance is undertaken to protect a free society. Prior authorisation of surveillance and the subsequent oversight of surveillance activities is a key part of the rules, safeguards and remedies needed by a democratic society in order to preserve its defining freedoms.” (A/72/43103, para. 7)

In addition to the normal rules that apply to surveillance, the Special Rapporteur on freedom of expression has also specified that “a higher burden should be imposed in the context of journalists and others gathering and disseminating information” and in particular measures to “circumvent the confidentiality of sources of journalists, such as secret surveillance or metadata analysis, must be authorized by judicial authorities

according to clear and narrow legal rules” (see A/70/361, paras. 24 and 62 respectively). We would also like to remind your Excellency’s Government that States are bound by the same duties and obligations under Articles 19(3) and 17(1) when they require or request corporate actors (both domestically and abroad) to participate in or cooperate with their surveillance activities (see A/HRC/23/40, para. 51).

The full texts of the human rights instruments and standards outlined above are available at www.ohchr.org and can be provided upon request.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your cooperation and observations on the following matters:

1. Please provide additional information and any comment you may have on the above-mentioned allegations and concerns.
2. Please provide information about whether Dark Caracal is authorized under domestic law, as well as copies of the relevant domestic laws.
3. Please explain on what basis individuals or groups targeted by Dark Caracal are selected, as well as how many have been targeted so far and for which duration.
4. Please detail any judicial, procedural or other safeguards, including the previous authorization of any surveillance measure and its subsequent independent review, which ensure that Dark Caracal does not unduly interfere with the rights to freedom of expression and privacy.
5. Please explain how Dark Caracal is consistent with Your Excellency’s obligations under Articles 19(3) and 17(1) of the ICCPR.

We would appreciate receiving a response as soon as possible.

We would like to inform your Excellency’s Government that this communication, as a comment on pending or recently adopted legislation, regulations or policies, will be made available to the public and posted on the website page of the mandate of the Special Rapporteur on the right to freedom of expression: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx>

Your Excellency’s Government’s response will be made available on the same website page and in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye

Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

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