

Rights Groups: NSO Group continues to fail in human rights compliance

27 April 2021



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Mr. Chaim Gelfand
Vice-President, Compliance
NSO Group

Dear Mr. Gelfand,

We, the undersigned organizations, have published this open letter in response to your [correspondence](#) to Professor Ronald J. Deibert dated 18 February 2021. We have previously issued [open letters](#) to Novalpina Capital regarding concerns with NSO Group's involvement in documented spyware abuses and its failure to respect the *United Nations Guiding Principles on Business and Human Rights*. We have summarized our various concerns and requests in this letter in **Appendix A**.

Failures in the implementation of NSO Group's human rights compliance

Starting in 2019, Novalpina Capital and NSO Group exchanged a series of letters and communications with [civil society](#), including the undersigned organizations and the former Special Rapporteur on the promotion and protection of freedom of opinion and expression, [Mr. David Kaye](#).

A review of these communications shows that Novalpina Capital and NSO Group have made a number of commitments regarding NSO Group's compliance with and implementation of the *United Nations Guiding Principles on Business and Human Rights*. Many of these promises remain outstanding and unaddressed. Further, information that could be made public—even when taking into consideration Israeli law—has not been. The totality of these omissions and outstanding questions and concerns suggest Novalpina Capital and NSO Group have not engaged in good faith when it comes to respect for human rights. We review some of Novalpina Capital and NSO Group's failings in the following paragraphs.

Unfulfilled commitment to transparency

During the acquisition of NSO Group, Novalpina Capital [undertook](#) to implement a “[s]trengthened governance framework for NSO that would “include a robust transparency programme” in line with Principle 21 of the *United Nations Guiding Principles on Business and Human Rights*. Further, Novalpina Capital's [stated commitment](#) that the “level of transparency” would change within NSO Group and that the “the transparency framework” being developed at NSO Group “will be based on a default assumption that all that can be disclosed will be

disclosed when necessary to ensure that stakeholders [...] are appropriately informed and aware of the company's activities." Novalpina Capital also [stated](#) that, as part of this new transparency commitment, "NSO will in future aim to disclose all information of relevance and importance to civil society groups unless it is expressly prohibited in law from doing so or it cannot do so for reasons of public safety, risk of employee harm, or to protect legitimate commercial confidentiality." Such a "robust transparency program" has yet to materialize. We know little more today about NSO Group's implementation of and compliance with the *United Nations Guiding Principles on Business and Human Rights* and its new governance and due diligence framework than in March 2019 when these commitments to transparency were made. Nothing has been presented by NSO Group or Novalpina Capital that permits an objective evaluation of whether there is meaningful implementation.

We have identified below different data and information that could be provided by NSO Group and Novalpina Capital. This non-exhaustive list shows that neither Israeli law nor purported commercial confidentiality agreements bar NSO Group from meeting its transparency responsibilities under the *United Nations Guiding Principles on Business and Human Rights* and now under its own governance and human rights due diligence framework:

- Novalpina Capital [undertook](#) to publish the Human Rights Impact Assessment (HRIA) of NSO Group during the acquisition process. That pledge remains unfulfilled. Further, because of the inherent risks—as acknowledged by NSO Group—that the sale and transfer of surveillance technology poses to human rights, such HRIAs should be regularly conducted to monitor implementation of the due diligence and governance framework and disclosed to the public.
- NSO Group [undertook](#) to conduct "auditing and assessment activities" to assess whether the company complies with internal procedures. In its [Human Rights Policy](#), it notes that NSO Group procedures will be "reviewed periodically by experienced external human rights compliance experts and updated based on their findings and recommendations." NSO also states that key performance indicators are tracked "qualitatively and quantitatively," and that the company is "committed to provide appropriate training to [its] directors, managers, employees, and other relevant stakeholders on this Human Rights Policy and related procedures and routinely check their adherence through [...] internal audit." It remains unclear if such audits and assessments have begun, whether they will be undertaken by an independent third-party with access to all of the necessary information within NSO Group, or how often they will take place. Further, the results of these audits and assessments must be made public if the commitment to transparency is to be taken seriously.

- Novalpina Capital and NSO Group have [repeatedly referenced](#) a multi-step due diligence process for vetting customers. Details regarding specific vetting processes could be made public, without disclosing the identity of a client or potential client. For example, NSO Group could provide monthly reporting on the number of potential clients vetted, what steps were taken during those processes, what materials were reviewed and by whom, what decisions were made regarding selling to that client, and what post-sale due diligence activities have been undertaken regarding each client and with what outcome. Notably, in correspondence with Mr. David Kaye, NSO Group [undertook](#) in December 2019 to publish summaries of the implementation of its new governance structure, which remain outstanding in April 2021.
- Novalpina Capital has [previously](#) described NSO Group’s investigative process. It remains unclear what NSO Group’s investigative process presently is and whether it remains the same process as described by Novalpina Capital during the acquisition in March 2019 or has subsequently been modified to ensure compliance with the *United Nations Guiding Principles on Business and Human Rights*. While there are vague references to NSO Group investigating customer use in its correspondence with Mr. David Kaye, there are few details of what the investigative process actually is or what is considered “[a well-founded report](#)” of misuse. Similarly, with regards to investigations, NSO Group could provide monthly reporting on the number of investigations taken into existing clients, what the steps were, who was involved, what type of materials were reviewed, and what the specific outcome was.
- NSO Group [stated](#) that it has “engaged independent investigators” and/or “consulted with human rights experts.” In the interests of transparency, NSO Group should provide the names and profiles of these parties it purportedly consulted or engaged, a summary of the advice received from the relevant independent investigator or consultant, and a summary of information from NSO Group and its clients that was made available to that individual for the purpose of the consultation and/or investigation.
- Novalpina Capital [stated](#) that the new governance framework at NSO Group would include “the importance of independent oversight and civil society consultation.” There is no information available on how “independent oversight” is being implemented. Further, Novalpina Capital and NSO Group have failed to provide details regarding the “Governance, Risk and Compliance Committee.” As of the day of this letter, the website still states that such information is forthcoming and the status of the Committee remains unknown today.

- While not specifically promised, neither NSO Group nor Novalpina have publicly noted the specific corporate officers charged with carrying out the above commitments, nor noted new or existing staff who have such responsibilities. Naming those responsible is a best practice for ensuring internal and external stakeholders have clarity.

Deficiencies in NSO Group's due diligence framework

There remain a number of concerns and deficiencies with NSO Group's due diligence framework, as highlighted in the former Special rapporteur David Kaye's [communications](#) to NSO Group. We highlight a number of these concerns here:

- Novalpina Capital [promised](#) that it would “address the requirement for remediation” during the acquisition process. In a subsequent communication, Novalpina Capital wrote that the remediation framework would be “complementary to - and facilitate - a broader remediation by the state in cases of misuse.” There is no indication that NSO Group has taken any action to facilitate remediation of past harms.
- In correspondence with Mr. David Kaye, NSO Group stated that under its due diligence framework it does not pursue a contractual agreement with a potential client where the human rights risks are “[unduly high](#).” It is unclear what is meant by “unduly high,” a term that does not appear in human rights law or relevant normative frameworks. There is no specific information on how the term “unduly high” is being defined by NSO Group nor whether there is an objective matrix for determining when this (still undefined) threshold has been reached.
- NSO Group [stated](#) that it “monitors and reviews the due diligence of all entities that use its technologies both on an ongoing and periodic basis.” However, NSO Group has previously [claimed](#) that it has little insight into client use (namely, that, “[a]bsent customer cooperation, [NSO Group is] limited to reviewing available metadata, which fails to provide detailed insights and does not provide sufficient data to allow one to determine if there was any misuse”). If NSO Group is unable to determine whether misuse of its technology occurred absent client cooperation—cooperation that clients would likely withhold in instances of human rights violations—then there is no basis to conclude that NSO Group is able to meaningfully monitor and review the due diligence of client entities.
- NSO Group has provided conflicting statements on its capacity to ensure that clients are not abusing its technology. In an interview with [Ynet News](#) in January 2019, NSO Group's

CEO stated, in response to questions regarding NSO Group’s involvement in Khashoggi’s murder, that: “We checked all of our clients, both through conversations with them and through technological testing that cannot be forged. The systems have records and it is impossible to act against a target such as this without us being able to check it.” However, more recently in its June 2020 [correspondence](#) to Mr. David Kaye, NSO Group stated that its ability to “assess the use of its technologies through system-based inquiries depends on cooperation of the user” and that “absent customer cooperation, [NSO is] limited to reviewing available metadata, which fails to provide detailed insights and does not provide sufficient data to allow one to determine if there was misuse.” This statement by NSO Group directly contradicts prior assertions made by its CEO. If correct, it also means that NSO Group had no mechanism by which to independently verify whether a client targeted Khashoggi with NSO Group’s technology.

- NSO Group [noted](#) that it “generally” suspends the use of technology while it investigates misuse. This suggests there are circumstances where NSO Group does not suspend the use of its technology, raising the question of how NSO Group decides when to suspend versus not suspend client usage. NSO Group also stated that it “generally” seeks to use the leverage it has to “take appropriate action to prevent/mitigate.” Similarly, this suggests that NSO Group makes a conscious decision not to leverage its position in favor of prevention and mitigation. How is such a decision made, by whom, and on what objective criteria? NSO Group has [underlined](#) that a meaningful inspection of whether a client is abusing the technology requires the cooperation of the client itself and that such cooperation is required as a condition of usage. If such cooperation is a condition of usage, it is unclear why NSO Group does not simply suspend a client’s ability to use the technology where such cooperation is absent.
- NSO Group [claimed](#) that in a “small number of instances” it has “terminated contracts and severed relationships with customers after misuses were identified.” It is unclear whether NSO Group has granted clients continued access to the technology, even in situations where it has identified misuse, or whether it takes a strict approach in such situations and always terminates the contract. Further, NSO Group has not identified how many customers they severed relationships with and for what specific reasons.

Failure to update the public regarding implementation of the due diligence program

In September 2019, NSO Group [commissioned](#) the law firm of Paul Hastings LLP to assess its human rights program. The firm’s memorandum contains numerous elements that NSO Group’s counsel declares are either intended, in-progress, or launched. NSO Group’s legal counsel

labeled this September 2019 assessment as a “preliminary evaluation” as so many elements were nonexistent or in draft form and yet to be made operational. Paul, Weiss, Rifkind, Wharton & Garrison LLP also [prepared](#) a brief opinion on NSO Group’s human rights policy, and similarly cautioned that the “new Policy and attendant documents have not been implemented yet” and that the firm was “not in a position to offer an opinion on whether these documents, as implemented, will in practice by the Group conform to the Guiding Principles.” How does NSO Group plan to bring this assessment of its current human rights program, particularly in light of [reported plans](#) to publicly list? Should potential investors expect a new assessment from Paul Hastings LLP or Paul, Weiss, Rifkind, Wharton & Garrison LLP in the near future in which the questions set forth in the **Appendix A** are addressed? Leaving these issues unresolved will have concrete implications for the risks assumed by future NSO investors.

NSO Group has [claimed](#) in *WhatsApp Inc. and Facebook, Inc. v. NSO Group Technologies Ltd. and Q Cyber Technologies Limited* that the entities act “entirely at the direction of their government customers,’ and ‘follow those directions completely.” Research shows that NSO Group technology has been used in targeting dissidents and journalists (research which NSO Group has yet to address in substance). We reiterate our request that NSO Group provide independently verifiable information demonstrating that its technology is not engaged in the targeting of dissidents, journalists, and human rights defenders and in violation of international human rights law.

Sincerely,

Access Now

Amnesty International

Committee to Protect Journalists

Human Rights Watch

Paradigm Initiative

Privacy International

R3D: Red en Defensa de los Derechos Digitales

Reporters Without Borders

Appendix A

| Novalpina Capital and NSO Group’s human rights framework | Status of this element or undertaking |
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| <p>Novalpina Capital announced it will publish an HRIA of NSO Group during the acquisition process. NSO Group undertook to conduct “auditing and assessment activities.”</p> | <p>❖ Will the public be provided a copy of the HRIA? Are HRIAs, auditing, and assessment activities being undertaken? How often? How will NSO Group incorporate the findings of Novalpina’s HRIA into its business practices? What do NSO’s “auditing and assessment activities” consist of? What is the external reporting plan?</p> |
| <p>Paul Hastings LLP noted that NSO Group has “vested oversight of its human rights program in the Governance, Risk, and Compliance Committee of the Board of Directors.” Further, that the “Committee’s charter expressly includes a human rights mandate, and the charter covers monitoring adherence to and effectiveness of the Human Rights Policy and diligence procedures.” The “charter” also “includes a detailed reference to decisions on sales, as well as management requirements for diligence and risk analyses.”</p> | <p>❖ The memo labels the status of this Committee’s charter as “draft” as of August 2019. What is the current status of this committee and its charter? Why has NSO Group failed to provide details regarding this Committee and a copy of the charter?</p> |
| <p>Paul Hastings LLP noted that NSO Group “has vested the incoming General Counsel with authority to oversee the human rights program.”</p> | <p>❖ Who is presently accountable for overseeing the human rights program? What specific measures have been taken to ensure their independence from commercial interests?</p> |
| <p>NSO Group outlined a due diligence process and undertook to publish summaries of the implementation of its new governance structure. Novalpina Capital also stated that the governance framework included “independent oversight.”</p> | <p>❖ How is independent oversight being guaranteed in NSO Group’s due diligence process and governance framework? How does NSO Group define “unduly high” in terms of deciding not to pursue an engagement with a potential client under its due diligence framework? Is there an objective matrix for determining when “unduly high” has been met and how is such a decision made independently? What is the external reporting plan on NSO Group’s</p> |

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| | implementation of its due diligence process? |
| <p>NSO Group has claimed that it does not have sufficient insight into its clients’ operations to ensure there is no abuse of its products. At the same time, NSO Group has claimed that it monitors and reviews the due diligence of its clients. NSO Group has also stated that it was able to confirm through “conversations” and “technological testing that cannot be forged” that no client was involved in the murder of Mr. Khashoggi, and that “the systems have records and it is impossible to act against a target such as this without [NSO Group] being able to check it.”</p> | <p>❖ Will NSO Group address these inconsistencies in statements regarding how much insight it has into clients' use of its systems? If NSO Group has limited insight into client use of its products—as it has claimed most recently—was NSO Group’s CEO misleading the public in the Ynet News interview in claiming that it was able to confirm that no NSO Group client had been tracking Mr. Khashoggi?</p> |
| <p>Paul Hastings LLP noted that NSO Group was “developing with a range of stakeholders a detailed Human Rights Policy that identifies the Company’s salient risks to rights-holders that will be made public.” The law firm also stated that it “understand[s] [NSO Group] is in the process of developing a more detailed procedural framework to support the policy, although some of these procedures exist in draft or outline form.”</p> | <p>✅❖ NSO Group’s Human Rights Policy is now publicly available, along with a Transparency Statement of Principles and the Whistleblower Policies. While available, the lack of transparency and public reporting regarding the Human Rights Policy means there is no objective basis to track implementation (if any) within NSO Group. Such a lack of transparency is directly contrary to the Policy itself, which undertakes to communicate certain information to the public (see paragraph “X”).</p> |
| <p>Paul Hastings LLP noted that a “detailed draft Sales Process and Procedures standard enumerates an initial and subsequent risk assessment process.”</p> | <p>❖ Has this document moved beyond the “draft” stage? When will it be made public? What is the external reporting plan?</p> |
| <p>Paul Hastings LLP noted that NSO Group’s “form end-user and reseller agreements contain a representation from the end-user that the system will only be used for preventing and investigating criminal activities and that the user will ensure that it will not be used for human rights violations.”</p> | <p>❖ The Paul, Weiss, Rifkind, Wharton & Garrison LLP memo includes an excerpt from NSO Group’s end-user license agreement that contains this representation. However, NSO Group has failed to share any template contracts in its entirety with civil society, which it should as part of its commitment to transparency.</p> |

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| <p>NSO Group stated that it “always” investigates whenever the company becomes “aware of a well-founded report” of alleged unlawful use of its products. It has also stated that it “generally” suspends the use of its technology during investigation and that it “generally” seeks to use the leverage it has to “take appropriate action to prevent/mitigate.”</p> | <p>❖ What is the current investigative process? What independent consultants and experts have been engaged in an investigation? What is considered to be a “well-founded” claim of misuse of NSO Group’s technology that “always” warrants an investigation? In what cases does NSO Group elect <i>not</i> to suspend a client’s usage during an investigation, or elect <i>not</i> to leverage its position to ensure appropriate prevention/mitigation? What is the external reporting plan on the investigation process and its implementation?</p> |
| <p>Novalpina Capital undertook that it would address the requirement of remediation.</p> | <p>❖ How has remediation been addressed? How does NSO Group plan to remediate past and future harms? What does NSO Group believe to be its responsibility in remediation?</p> |