

BACKGROUND GUIDE

# United Nations Security Council (UNSC)



Property of Lagos Model United Nations

Background Guide: United Nations Security Council (UNSC)

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## Table of Contents

<b>Letter from USG</b>	<b>3</b>
<b>Abbreviations</b>	<b>5</b>
<b>Committee Overview</b>	<b>7</b>
Introduction	7
Governance, Structure and Membership	8
Mandate, Functions, and Powers	9
Recent Sessions and Current priorities	11
Annotated Bibliography	13
Bibliography	14
<b>TOPIC ONE: GENOCIDE: ADDRESSING THE GROSS HUMAN RIGHTS VIOLATION IN UYGHUR AND ROHINGYA.</b>	<b>17</b>
Introduction	17
International and Regional Frameworks	21
Roles of the International System	26
Arbitrary Arrest and Detention	28
Sexual Violence and Violations of Reproductive Rights	30
Systematic Ethnic Cleansing	31
Forces Fuelling the Rohingya and Uyghur Crisis	37
Impact of The Crisis On the Ethnic Minorities and Other Stakeholders	40
Conclusion	43
Further Research	43
Scope and Resources for Research on Background Guide	43
Annotated Bibliography	44
Bibliography	46
<b>TOPIC TWO: THE RIGHT TO PRIVACY UNDER INTERNATIONAL LAW: TECHNOLOGY AS A RISK OR MECHANISM.</b>	
Introduction	52
International and Regional Framework	55
Role of the International System	60
Right to Privacy in the Digital Age	62

Technology as a Mechanism for guaranteeing the Right to Privacy and other Human Rights	<b>71</b>
The Risks posed by Technology on the Right to Privacy	<b>73</b>
Violations of the Right to Privacy and Challenges of upholding the Right to Privacy	<b>76</b>
Measures to Curb the Challenges	<b>78</b>
Conclusion	<b>80</b>
Further Research	<b>80</b>
Scope and Resources for Research on Background Guide	<b>80</b>
Bibliography	<b>81</b>

## Letter from USC

Dear Delegates,

It is an honour to welcome you to the 7th session of the Lagos Model United Nations (LMUN) conference, 2022. For years, LMUN has established a platform for youths to lend their voices to contemporary global problems by inciting discussions and deliberations that seek to funnel a drive towards innovative and sustainable solutions. This conference offers you the opportunity to harness your abilities and equip yourselves with unique skills like diplomacy, teamwork, research, public speaking, networking, and leadership. The conference guarantees a phenomenal experience and the opportunity to contribute your quota towards global development and sustainability. I hope that you get to learn, have fun, participate actively, and have the most fantastic experience.

The staff for the United Nations Security Council (UNSC) are **Rahmat Suenu** (Under-Secretary-General), **Frances-Mary Ezeh** (Chair); **Adedayo Michael** (Vice-Chair); **Banire Mariam** (Researcher); and **Temitayo Jegede** (Researcher).

**Rahmat** is a 400-level law student at the University of Lagos. Her interest in MUNs is driven by her passion for human rights and sustainability. She has participated in several MUN conferences both as a delegate, and in official capacities. She has also bagged several awards for her participation, including the Best Delegate Award at the Ghana International MUN in 2020, the Exemplary Journalist Award at the Youth International Summit MUN in 2020, and an Honorable mention award at LMUN 2019. **Frances-Mary** is a 400-level law student at the University of Lagos. She began her MUN journey in 2019 when she attended the LMUN conference as an observer. In early 2020, she was a delegate at YISMUN, where she won a special mention award. Later, in September 2020, she was a delegate at LMUN and bagged the Best Position Paper and Outstanding Delegate Awards. She served as a researcher for the UNSC at LMUN in 2021. She is interested in international policies and relations. **Adedayo Michael** is a 200-Level Law undergraduate at the University of Lagos. He was a delegate at the 2020 virtual LMUN conference, where he bagged an Honourable Mention Award and a Position Paper Award. He also participated in the 2021 LMUN conference, where he bagged a Position Paper Award and a Distinguished Delegate Award. He believes the collective effort is as-good as individual efforts in achieving the SDGs. **Banire Mariam** is a 400-level law student at the University of Lagos. She was a delegate at YISMUN in 2020, where she won the Verbal Mention Award. She also served as a journalist during the second edition of the 2020 YISMUN conference. She is an active volunteer and is interested in sustainability and technology. **Temitayo Jegede** is a 400-level student of law at the University of Lagos. She has participated in several MUNs, with the LMUN 2019 being her first. She has ever since received a few awards such as the award of Best Delegate in YISMUN, Verbal Commendation Award in MMUN, and Special Mention Award in Comfort MUN, to mention a few.

The topics to be discussed by the Committee are:

- I. Genocide: Addressing the Gross Human Rights Violation in Uyghur and Rohingya
- II. The Right To Privacy Under International Law: Technology As A Risk Or Mechanism.

The background guide is to serve as a stepping stone to begin research on the topics to be discussed and not as a replacement for individual research. As such, delegates are encouraged to conduct their research beyond the background guides and make use of

the Further Research, Annotated bibliography and Bibliography to aid in extensive research. Also, the Delegate Prep Guide and the Rules of Procedure will acquaint you with the conference's required conduct and procedural rules. These documents can be accessed on the LMUN website- [www.lmun.ng](http://www.lmun.ng).

In preparation for the conference, each delegate is expected to submit a position paper on a date to be communicated after registration and country and committee assignment. The guidelines in the LMUN Position Paper Guide will direct delegates on this process.

To communicate any questions or concerns during your preparation for the conference, please contact me at [usgpeacesecurityhr@lmun.ng](mailto:usgpeacesecurityhr@lmun.ng) or [sc@lmun.ng](mailto:sc@lmun.ng).

We look forward to seeing you at the LMUN 2022 Conference!

**Rahmat Suenu**

USG Peace, Security and Human Rights, LMUN 2022.

## Abbreviations

<b>ARSA</b>	Arakan Rohingya Salvation Army
<b>ASEAN</b>	Association of Southeast Asian Nations
<b>CCP</b>	Chinese Communist Party
<b>CESR</b>	Centre for Economic and Social Rights
<b>CIA</b>	Central Intelligence Agency
<b>DPKO</b>	Department of Peacekeeping Operations
<b>ECHR</b>	European Convention of Human Rights
<b>FBI</b>	Federal Bureau of Investigation
<b>GA</b>	General Assembly
<b>GDPR</b>	General Data Protection Regulation
<b>ICC</b>	International Criminal Court
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ILAB</b>	Bureau of International Labour Affairs
<b>MRG</b>	Minority Group International
<b>NSA</b>	National Security Agency
<b>OHCHR</b>	United Nations Human Rights Office of the High Commissioner
<b>P5</b>	Permanent 5
<b>PBC</b>	Peace Building Commission
<b>PHR</b>	Physicians for Human Rights
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UHRP</b>	Uyghur Human Rights Project
<b>UN</b>	United Nations
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>UNDHR</b>	United Nations Declaration of Human Rights
<b>UNHRC</b>	United Nations Human Rights Council
<b>UNSC</b>	United Nations Security Council
<b>XUAR</b>	Xinjiang Uyghur Autonomous Region

## Committee Overview

### Introduction

The United Nations (UN) was established in 1945<sup>1</sup> following the end of the Second World War which left an aftermath clamour for peace. The UN was thus established as an intergovernmental organization and currently has 193 member states and 2 observer states<sup>2</sup> working to maintain international peace and security, safeguard human rights and uphold the tenets of international law hoped to prevent any future wars.<sup>3</sup> In furtherance of this objective, the United Nations established six primary organs through the UN Charter,<sup>4</sup> amongst which is the United Nations Security Council (UNSC) with a focal mandate to ensure international peace and security.<sup>5</sup> The headquarters of the United Nations is located at New York and is the seat of the 6 major organs of the United Nations including the Security Council but excludes the International Court of Justice with her headquarters situated at The Hague.<sup>6</sup> The current Secretary General of the United Nations is António Guterres since January 2017.<sup>7</sup>

The Security Council held its first session on the 17 January 1946 at Westminster, London.<sup>8</sup> The Security Council is made up of 15 members and all members of the UN are to comply with council decisions.<sup>9</sup> The Security Council is the vehicle of peace and dispute settlement amongst member states with the power to ensure binding decisions are carried out by member states by virtue of the United Nation Charter.<sup>10</sup> The decisions of the United Nation Security Council are referred to as the United Nation Security Council resolutions. A representative of the UNSC must be present always at the UN Headquarters so the Security Council can meet at any time of urgency.<sup>11</sup> Under Article 25,<sup>12</sup> all members

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<sup>1</sup>History of the United Nations.

<sup>2</sup> Ferdinand Bada "Which Countries Are Not Members of the United Nations)."

<sup>3</sup>History of the United Nations.

<sup>4</sup>Charter of the United Nations, 1945.

<sup>5</sup>United Nations Security Council.

<sup>6</sup> United Nations Office at Nairobi.

<sup>7</sup> United Nations Secretary General.

<sup>8</sup> United Nations Security Council.

<sup>9</sup> United Nations Security Council.

<sup>10</sup> See Article 25 of the UN Charter.

<sup>11</sup> United Nations Security Council.

<sup>12</sup> United Nations Charter.



of the UN are obligated to accept and implement the decisions of the Security Council.<sup>13</sup>The history of the United Nations Security Council is a book with many blank pages left to be filled with the sands of time.

### **Governance, Structure and Membership**

The Security council is the only UN organ whose resolutions are legally binding.<sup>14</sup>The Security Council is made up of 15 member states.<sup>15</sup> It consists of the Permanent five (P5) and the non-permanent members elected for a term of two years by the General Assembly (GA) with five member states per year voted in on a regional basis. The P5 members consist of: China, United States of America, United Kingdom, France and Russia.<sup>16</sup> The non-permanent consist of Albania, Brazil, Gabon, Ghana, India, Ireland, Kenya, Mexico, Norway and United Arab Emirates with tenures to end 2022/2023.<sup>17</sup>

The P5 members have veto powers<sup>18</sup> which allows them to block the adoption of a resolution. A vote against any resolution by a P5 member makes that resolution void. If a P5 member chooses not to use this veto power due to lack of consensus, they may choose to abstain from voting on the resolution. Consequently, the resolution would pass if it obtains the nine votes required.<sup>19</sup>Each member state of the UNSC has one vote.<sup>20</sup>A State which is a Member of the United Nations but not a member of the Security Council may participate without a vote in the Security Council discussions when the Council considers that country's interests are affected. Also, both Members and non-members of the United Nations, if they are parties to a dispute being considered by the Council, may be invited to take part, without a vote, in the Council's discussions; the Council sets the conditions for participation by a non-member State.

In accordance with the General Assembly Resolution of 1991(XVII),<sup>21</sup> the ten

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<sup>13</sup> United Nations Peacekeeping.

<sup>14</sup>Council on Foreign Relations, The UN Security Council, 2021.

<sup>15</sup> United Nations Security Council.

<sup>16</sup>Ibid.

<sup>17</sup>Ibid.

<sup>18</sup>Hanhimäki, The United Nations: A Very Short Introduction, 2008, p. 52

<sup>19</sup> United Nations, "Basic facts about the United Nations" 42<sup>nd</sup> ed.

<sup>20</sup>Ibid.

<sup>21</sup> United Nations General Assembly, Question of equitable representation on the Security Council and the

non-permanent seats are distributed on a regional basis with five for African and Asian states; one for the Eastern European states; two for the Latin American and Caribbean States; and two for Western European and other States.

Each member of the Security Council holds the presidency for a month in rotation. This rotation is done in alphabetical order of the names of the countries.<sup>22</sup> The UNSC works in hand with the General Assembly on activities of the Peace Building Commission (PBC) as a supervisor.

### **Mandate, Functions, and Powers**

The Security Council has a sole mandate of maintaining international peace and Security amongst member states.<sup>23</sup> The UNSC has the function of approving necessary modifications to the UN Charter and approving new membership to the UN General Assembly.<sup>24</sup> Its power encompasses imposing sanctions,<sup>25</sup> establishing peacekeeping operations and military action authorization.<sup>26</sup> The UNSC is the only body or organ of the UN empowered to pass binding resolutions on all organs of the UN and Member states. The Security Council's power is on par with the four primary purposes of the UN highlighted in the charter which are: maintaining international peace and Security; developing friendly relations amongst states, cooperation in solving international problems; and promotion of human rights.<sup>27</sup> By virtue of Article 39, the Security Council has the mandate to determine the existence of threat to the peace of any state which includes inter and intra conflicts. Furthermore, threats to international peace is included in Article 39 which covers terrorist acts and the proliferation of weapons of mass destruction.

In addition, Chapter VI and VII of the Charter<sup>28</sup> lays emphasis on the workings of the Security Council and the plethora of actions that can be adopted in dispute settlement.

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Economic and Social Council (A/RES/1991(XVIII) 1991.

<sup>22</sup>UN Security Council, Provisional Rules of Procedure of the Security Council (S/96/Rev.7), 1982.

<sup>23</sup>Charter of the United Nations, 1945.

<sup>24</sup>Ibid.

<sup>25</sup> Article 41 of the UN Charter.

<sup>26</sup> United Nations Security Council.

<sup>27</sup>Charter of the United Nations, 1945.

<sup>28</sup>Charter of the United Nations, 1945.

Article 41 of the UN Charter allows the Security Council to call on its members to not use violence and opt for peace settlements through economic sanctions,<sup>29</sup> arms embargoes, disarmament and so on.<sup>30</sup> The Security Council takes the lead in determining the existence of a threat to the peace or act of aggression. It calls upon the parties to a dispute to settle it by peaceful means and recommends methods of adjustment or terms of settlement. In some cases, the Security Council can resort to imposing sanctions or even authorize the use of force to maintain or restore international peace and security. The use of mandatory sanctions is intended to apply pressure on a State or entity to comply with the objectives set by the Security Council without resorting to the use of force. Sanctions thus offer the Security Council an important instrument to enforce its decisions.

The Council may establish new UN peacekeeping operations to be led by the Department of Peacekeeping Operations (DPKO).<sup>31</sup> The Security Council creates Peacekeeping Operations by adopting resolutions that outline the mandates of a particular mission.<sup>32</sup> The Security Council has the power to recommend a new Secretary General to be appointed by the General Assembly which shall be held for a term or two of five years.<sup>33</sup> The Security Council has a role in admission of new members into the United Nations which is done by the GA on the recommendation of the Security Council.<sup>34,35</sup>

### **Recent Sessions and Current priorities**

The UNSC called for an emergency special session on 28 February 2022 with the 193 member states since 1982 to discuss the Russia-Ukrainian war. The war started in February 2014 with subtlety. Russia and Ukraine were members of the Communist Soviet Union before disbanding in 1991. Ukraine sought for closer ties with Western Europe due to a transition towards market-orientation. By 2021, Russia, in question as to why Ukraine decided to join the NATO had built up military around the Ukraine borders which led to

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<sup>29</sup> Article 97 of the UN Charter.

<sup>30</sup> Malone, The UN Security Council: From the Cold War to the 21st Century, 2004, p. 11.

<sup>31</sup> Chapter VII United Nations Charter; UN DPKO, Forming a New Operation.

<sup>32</sup> UN Peacekeeping, Role of the Security Council.

<sup>33</sup> United Nations Secretary General; Article 97 of the UN Charter.

<sup>34</sup> Article 4 of the UN Charter.

<sup>35</sup> [Security Council Documents | United Nations Security Council](#).

the 2022 upheaval by Russia. The war is based on aggression that has piled up over the years.

The measure to convene the General Assembly was adopted by 11 member states in favour, with Russia voting against and China, India, and the United Arab Emirates in abstention. The meeting was held in urgency as Russia vetoed a US-led draft Security Council Resolution<sup>36</sup> that would have 'deplored in the strongest terms the Russian Federation's aggression against Ukraine.'<sup>37</sup>

The Security Council on International women's day held on 8 March 2022, held a high-level debate on women, peace and security that focused on women's economic inclusion and partnership as an important tool to end and recover from conflicts.<sup>38</sup>

Also, 16 November 2021, under the Women Peace and Security, Maintenance of International Peace and Security agenda that focused on upholding multilateralism and the United Nations-centred international system, the Council invited the Secretary-General and the Presidents of the General Assembly, the Economic and Social Council (ECOSOC) and the International Court of Justice (ICJ) to provide briefings specifically on the sub-item "Peace and security through preventive diplomacy: a common objective to all the principal organs of the United Nations."

The Security Council has adopted resolution 2573 (2021) which was adopted strongly condemned attacks in situations of armed conflict directed against civilians or civilian objects, resulting in the deprivation to the civilian population of objects indispensable to their survival as flagrant violations of international humanitarian law.

In addition, Resolution 2589 (2021)<sup>39</sup> was adopted by the security council in which it reiterated its primary responsibility under the Charter of the United Nations for the

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<sup>36</sup> United Nations, Meetings Coverage and Press Releases.

<sup>37</sup> UN News Global Perspective Human Stories.

<sup>38</sup> United Nations Security Council Meetings Press and Security Coverage "Women's Economic Empowerment Would Yield Huge Dividends for Peacebuilding Efforts, Speakers Tell Security Council, Urging Greater Action to End Gender Barriers" SC/14825.

<sup>39</sup> United Nations Security Council Resolution, S/RES/2573 (2021).

maintenance of international peace and security and, in this context, the need to promote and ensure respect for international humanitarian law and called on the Member States to promote accountability for the killing of and all acts of violence against United Nations personnel serving in peacekeeping operations.

Likewise, the Council adopted by acclamation resolution 2580 (2021),<sup>40</sup> recommending to the General Assembly that António Guterres be appointed Secretary-General of the United Nations for a second term of office. As provided for in the provisional rules of procedure and consistent with previous practice, the resolution was adopted in a private meeting on 8 June 2021. On 18 June 2021, the General Assembly adopted resolution 75/286<sup>41</sup> effectively appointing António Guterres as Secretary-General of the United Nations for a term of office beginning on 1 January 2022 and ending on 31 December 2026.

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*This website gives an overview of the recent priority of the Security Council which is the Russia-Ukrainian war. It also gives an insight into the powers of the P5 and how it can be used in the security council sessions.*

Charter of the United Nations (1945). Available at <http://www.un.org/en/charterunited-nations/index.html> (accessed 15 February 2022).

*The United Nations Charter lists out in its Articles, the various powers of the Security Council. Delegates are to read through the charter to further understand the scope, powers and functions of the Security Council.*

UN, "Charter of the United Nations, 1 UNTS XVI, (24 October 1945)", available at

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<sup>40</sup> United Nations Security Council Recommendation for the appointment of the Secretary-General of the United Nations.

<sup>41</sup> Appointment of the Secretary-General of the United Nations A/RES/75/286.

<https://treaties.un.org/doc/publication/ctc/uncharter.pdf> (accessed 15 February 2022).

*This is the principal document of the United Nations, which sets out the rights and obligations of Member States and establishes the principal organs of the United Nations. The Charter also explains the procedures and workings of the United Nations.*

United Nations "History of the United Nations", available at <https://www.un.org/en/about-us/history-of-the-un> (accessed 14 March 2022).

*To further understand the essence of the United Nations, a look into history by the delegates is the best place to start and understand why the United Nations does what it does, How and to what extent is it binding?*

United Nations Security Council. (2017), "What is the Security Council?" Available at <https://www.un.org/securitycouncil/content/what-security-council> (accessed 15 February 2022).

*This website gives an overview of the Security Council's history, its mandate, its basic functions, powers and the output of its recent sessions. It should be considered one of the most important resources for delegates' further research into the mandates, governance, power, structure, membership and functions of the Security Council. This website provides detailed information about how the Security Council works.*

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## Genocide: Addressing the Gross Human Rights Violation in Uyghur and Rohingya

*"We can disagree and still love each other unless your disagreement is rooted in my oppression and denial of my humanity and right to exist."* - **James Baldwin, Writer and Activist**<sup>42</sup>

### Introduction

Human mass slaughter is a phenomenon older than the 21<sup>st</sup> century. The popularity of the idea of genocide reflects its continued relevance in today's world. There were at least forty-four state-organized mass slaughters around the world between 1945 to 1989, including the Holocaust and Roma/Sinti Porrajmos, the Armenian Genocide, the Rwandan genocide amongst others. These massacres resulted in an average of 1.6 million to 3.9 million deaths per annum, which is significantly more than the total number of fatalities caused by all wars and natural disasters during that period. But that's not all. In every decade since 1945, another 1.85 million people have died in wars and civil wars (Gurr and Harff 1989).<sup>43</sup> The most recent includes the Uyghur and the Rohingya, which are quasi-genocidal by almost any definition.<sup>44</sup>

The concept of genocide was brought about after the massacre of Jews and thousands of Gypsies (Roma) by Nazi Germany during World War II.<sup>45</sup> International bodies, scholars and dictionaries have attempted a definition of genocide but none can be said to be all-encompassing.

The Genocide Convention<sup>46</sup> of 1948, defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group." Consequently, it entails killing, the imposition of stringent living conditions, and the causing of bodily and mental harm through torture. The word genocide originally referred to the killing of

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<sup>42</sup> Carol Thomas Cissel "An Awful, Magnificent Truth" available at <https://www.uua.org/braverwiser/awful-magnificent-truth> (accessed 14 March 2022).

<sup>43</sup> Gurr; Harff, "Toward Empirical Theory of Genocides and Politicides: Identification and Measurement of Cases Since 1945" (1988) 32 International Studies Quarterly 32 p.359-371

<sup>44</sup> Fein Helen, Genocide: A Sociological Perspective (Sage Publication: London, 1993) p.5.

<sup>45</sup> David Norman Smith, "Genocide, in The Encyclopedia of Sociology" (2000) Research Gate.

<sup>46</sup> United Nations Office on Genocide Prevention and the Responsibility to Protect, "Convention on the Prevention and Punishment of the Crime of Genocide".

people based on race,<sup>47</sup> now, it encompasses ethnicity.<sup>48</sup> Article 2 of the United Nations Charter<sup>49</sup> which came into force on December 9 1948 spells out what is deemed to be genocide and includes:

*"killing members of the group; causing serious bodily or mental harm to members of the group;<sup>50</sup> deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group".*

Merriam-Webster's Collegiate Dictionary defines genocide as "the deliberate and systematic destruction of a racial, political, or cultural group."<sup>51</sup> Scholars have differed in their analyses of the concept, but the most widely accepted understanding of genocide pertains to the deliberate slaughter of vast numbers of human beings.<sup>52</sup> Genocide is the intentional destruction of an ethnic and religious group of persons.<sup>53</sup>

A jurist, Raphael Lemkin coined the word genocide in 1944,<sup>54</sup> in his book *Axis Rule in Occupied Europe* to mean the destruction of a nation or ethnic group that is, "murder, though on a vastly greater scale."<sup>55</sup> Lemkin also defined genocide as "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves." And surmised that these massacres are typically fuelled by religious or ethno-racial fanaticism, which are among the deadliest of genocides, since they seek to destroy targeted people for philosophical reasons.

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<sup>47</sup>Ibid.

<sup>48</sup> Encyclopedia.com "Europe Since 1914: Encyclopaedia of the Age of War and Reconstruction Encyclopaedia".

<sup>49</sup> United Nations Office on Genocide Prevention and the Responsibility to Protect, "Convention on the Prevention and Punishment of the Crime of Genocide".

<sup>50</sup> Article 2, Convention on the Prevention and Punishment of the Crime of Genocide.

<sup>51</sup> Merriam-Webster's Collegiate Dictionary.

<sup>52</sup> David Norman Smith, "Genocide, in The Encyclopaedia of Sociology" (2000) Research Gate.

<sup>53</sup> Link Fang "Genocide".

<sup>54</sup> Encyclopedia.com "Europe Since 1914: Encyclopaedia of the Age of War and Reconstruction Encyclopaedia".

<sup>55</sup> Fein Helen, *Genocide: A Sociological Perspective* (Sage Publication: London, 1993).

With the inception of the *Universal Declaration of Human Rights* in 1948, rights are guaranteed to be protected with no discrimination herein. Thus, every human has the right to live peacefully and belong to any and every religious belief. But this is not the case in the Rohingya tribes of Myanmar formerly known as Burma and the Uyghur tribes of China. Human rights violations are a major threat to the peace, security, and stability of a country. Myanmar, also referred to as Burma<sup>56</sup> is one of the eleven countries in the South-East of Asia. In the 19<sup>th</sup> century, Myanmar was colonized by Britain.<sup>57</sup> There have been various military juntas in Myanmar caused by the rivalry of ethnic minorities.<sup>58</sup> Since the Myanmar's independence in 1948, the different ethnic minorities have been subject to various forms of systematic discrimination and deprivation, especially since the military coup and seizure of power in 1962.<sup>59</sup>

The Rohingya minority is an ethnic group living in the Rakhine State of Myanmar. The Myanmar Government implemented a policy that is, in fact, a violation of human rights: The Burma Citizenship Act of 1982 explicitly does not acknowledge the people of the Rohingya as Burmese citizens.<sup>60</sup> About 90 percent of the 50 million population of Myanmar are Buddhist, while the Muslims represent a religious minority of just over 4 percent of the population. The Rohingya are the largest Muslim group in Myanmar, although a fraction of them are Hindu.<sup>61</sup>

Likewise, the Xinjiang Uyghur Autonomous Region (XUAR), located in China's northwest, is the only region in China with a majority Muslim population. The Uyghurs, Kazakhs, Kyrgyz, and other communities in the region are ethnically Turkic. Unlike the majority Han Chinese, who are primarily Chinese speakers, the Turkic population is predominantly Muslim and have their own languages. According to the 2010 census, Uyghurs made up 46 percent and Kazakhs 7 percent of the Xinjiang population.<sup>62</sup> The Chinese government

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<sup>56</sup>U.S. Central Intelligence Agency "The World Factbook".

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Human Rights Watch, "Discrimination in Arakan".

<sup>61</sup> Ibid.

<sup>62</sup> Link Fang, Genocide.

has prohibited the Uyghur people who are majorly Turkic Muslims from worshipping and performing religious rituals such as prayers. The Uyghurs have also been banned by the Chinese government from obtaining education and employment.

The people of Rohingya have suffered long standing marginalization. They have been denied Myanmar citizenship and have never been legally recognized in Myanmar as an ethnic group. Many people in Myanmar hold the opinion and belief that the Rohingya people are originally from Bangladesh, while many Bangladeshis similarly think that the Rohingyas originate from Myanmar. Neither Bangladesh nor Myanmar is willing to recognize them as citizens.<sup>63</sup>

### International and Regional Frameworks

Legislative effort has been implemented by the international community to protect the rights of people at large. The *Universal Declaration of Human Rights (UDHR)*<sup>64</sup> was the first international human rights document and the backbone upon which other human rights instruments are built guarantees the right to freedom from discrimination. *Article 1 of the UDHR* states that all humans are born free and equal and should all be treated the same way. *Article 2* states that all human beings are entitled to the rights stated in the document without distinction of any kind. *Article 5* states that no one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment.

The *United Nations Declaration on Human Rights Defenders of 1998*<sup>65</sup> was adopted by consensus by the General Assembly in 1998, and it reiterates rights that are instrumental for the defence of human rights, like freedom of association, freedom of peaceful assembly, freedom of opinion and expression, the right to access information, provide legal aid, develop and discuss new human rights ideas among others. *The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)*<sup>66</sup> and the 1996

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<sup>63</sup> Laignee Baron "Rohingya crisis report".

<sup>64</sup> Universal Declaration of Human Rights, adopted Dec. 10, 1948, art. 27, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

<sup>65</sup> General Assembly Resolution, adopted March 8, 1999, A/RES/53/144.

<sup>66</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS vol. 993, p. 3.

*International Covenant on Civil and Political Rights (ICCPR)*<sup>67</sup> also provide for the right to freedom from discrimination in *Article 26* and *Article 2(1)* respectively. *Article 2(2)* of the *ICESCR* urges state parties to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or another status. The human right to dignity is guaranteed in *Article 7* of the *ICCPR*.

*The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* (1965)<sup>68</sup> remains the principal international human rights instrument defining and prohibiting racial discrimination in all sectors of private and public life. *Article 1* defines racial segregation to mean “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” *Article 2(c)* provides that state parties should take effective measures to review and nullify where necessary, such laws and policies which have the effect of creating racial discrimination.

*The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (1992)<sup>69</sup> calls upon state parties to guarantee the existence and identity of minorities. *Article 2(1)* provides that “Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practice their religion, and to use their language, in private and in public, freely and without interference or any form of discrimination.” Countless persons have vanished into a network of camps in the far west of China and more than 43,000 Rohingya parents have been reported lost and presumed dead since Myanmar’s military released a crackdown<sup>70</sup>.

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<sup>67</sup> International Covenant on Civil and Political Rights, 16 December 1966, UNTS vol. 999, p. 171.

<sup>68</sup> UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195

<sup>69</sup> UN Commission on Human Rights, Rights of persons belonging to national or ethnic, religious and linguistic minorities., 9 April 1998, E/CN.4/RES/1998/19.

<sup>70</sup> Laignee Baron “Rohingya crisis report” 12 March 2022.

The *International Convention for the Protection of All Persons from Enforced Disappearance (CPED) (2006)*<sup>71</sup> places an obligation on states to prevent forced disappearance which has been described as a crime against humanity. Enforced disappearance is defined in *Article 2 of the Convention* as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law.”

The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>72</sup> requires that signatories to the convention take measures to stop all acts of torture and punish all such acts. *Article 1* defines torture to mean “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.” Several cases of rape and mistreatment of women in Uyghur and Rohingya have been reported in the detention camps. The *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)* condemns all forms of discrimination against women.

The government of Myanmar and Rohingya implemented several discriminatory policies which encourage the persecution of ethnic minorities in the name of curbing terrorism and infiltration. In the eyes of the UN, the acts carried out by these states amount to

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<sup>71</sup> UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006.

<sup>72</sup> UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

genocide but both states have vehemently denied these accusations. *Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide*<sup>73</sup> describes acts that amount to genocide and including killing members and causing serious bodily or mental harm to a group. Due to the mistreatment faced by the Rohingyas and Uyghurs, several of them have become refugees and are sometimes sent back by the states where they seek refuge in<sup>74</sup>. Refugee protection is important to the survival of these ethnic minorities. *Article 3 and Article 33 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*<sup>75</sup> respectively provide that state parties shall not discriminate against refugees and shall not forcibly return them to the country they fled from.

Due to the discrimination faced by ethnic minorities, they are forced to carry out business activities which amount to an abuse of their human rights. *The UN Guiding Principles on Business and Human Rights*<sup>76</sup> are guidelines that seek to prevent human rights abuse during business operations. *The Guiding Principles on Internal Displacement (1998) by the UN Commission on Human Rights* guarantees the rights, protection of internally displaced people, and framework for providing humanitarian assistance to these people.

*New York Declaration on Refugees and Migrants*<sup>77</sup> also reaffirms and reiterates the importance of refugee protection and urges member states to develop mechanisms to ensure such protection.

*Bangkok Principles on Status and Treatment of Refugees in 1966*<sup>78</sup> includes a broad refugee definition expressly including persons fleeing persecution for reasons of colour, ethnic origin, and gender in addition to the five traditional grounds of the 1951

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<sup>73</sup> UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277.

<sup>74</sup> Asim Kashgarian "Uyghurs outside China said they have been abandoned", July 2020.

<sup>75</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

<sup>76</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations "protect, Respect and Remedy" Framework. , 2011.

<sup>77</sup> UN General Assembly, New York Declaration for Refugees and Migrants : resolution / adopted by the General Assembly, 3 October 2016, A/RES/71/1.

<sup>78</sup> Asian-African Legal Consultative Organization (AALCO), Bangkok Principles on the Status and Treatment of Refugees ("Bangkok Principles"), 31 December 1966.



*Convention*<sup>79</sup>. They also include persons fleeing 'external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of [their] country of origin' and their lawful dependents.<sup>80</sup>

*The Uyghur Forced Labour Prevention Act*<sup>81</sup> is a United States law that would ensure that the US is not funding any forced labour that is going on in Xinjiang, China. It establishes a rebuttable presumption that the importation of any goods, wares, articles and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of the People's Republic of China, or produced by certain entities, is prohibited by Section 307 of the Tariff Act of 1930, and such goods, wares, articles, and merchandise are not entitled to entry to the United States.<sup>82</sup>

*UN resolution on The Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar A/76/312*<sup>83</sup> is a report which highlights the violence taking place in Rohingya and a call to engage in a dialogue for reconciliation.

The *resolution on the situation of human rights of Rohingya Muslims and other minorities in Myanmar (A/HRC/RES/47/1)*<sup>84</sup> though not binding on states, calls upon the military of Rohingya to release detainees and stop the violence against the minorities. *World Uyghur Congress Resolution on the Situation of Uyghurs and other Turkic People in East Turkistan RE14112021*<sup>85</sup> calls for help from the international community, and the Chinese government to end the brutal act of violence against the Uyghurs.

It is pertinent to also pay attention to the health issues these ethnic minorities are facing.

*The WMA Resolution on Human Rights Violations against Uighur people in China*<sup>86</sup> calls

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<sup>79</sup> UN High Commissioner for Refugees (UNHCR), Information Note on Article 1 of the 1951 Convention, 1 March 1995.

<sup>80</sup> "Rights in exile" Merrill Smith, 12 March 2022.

<sup>81</sup> Uyghur Forced Labour Prevention Act, H.R. 6256 (Public Law No. 117-78), June 21 2022.

<sup>82</sup> Breaking Down the Uyghur Forced Labor Prevention Act for U.S. Importers, Holland & Knight, January 24, 2022.

<sup>83</sup> Situation of human rights of Rohingya Muslims and other minorities in Myanmar - Report of the Secretary-General A/76/312.

<sup>84</sup> Resolution adopted by the Human Rights Council on 12 July 2021: 47/1. Situation of human rights of Rohingya Muslims and other minorities in Myanmar (A/HRC/RES/47/1).

<sup>85</sup> On the Situation of Uyghurs and other Turkic People in East Turkistan adopted 14th November 2021 RE14112021.

<sup>86</sup> WMA Resolution on Human Rights Violations against Uighur people in China Adopted by the 71st WMA General Assembly (online), Cordoba, Spain, October 2020.

for the treatment of the Uyghurs being abused and demands that international observers be let in. *European Parliament Resolution on forced labour and the situation of the Uyghurs in the Xinjiang Uyghur Autonomous Region (2020/2913(RSP))* calls upon the Chinese government to give unrestricted access to Xinjiang province and condemns all forms of violence and discrimination against the Uyghurs<sup>87</sup>

### **Roles of the International System**

Efforts have been made by international bodies to sufficiently address this issue. The Security Council fosters and ensures adherence to international human rights principles and international humanitarian law principles, such as the right to life under the UNHRC and ICCPR vis-a-vis humanitarian crisis that could occur as a result of genocide. The UN in 2012, established the United Nations Network on Racial Discrimination ("The Network") which provides an avenue for raising awareness, addressing issues of racial discrimination, and providing a means of advocacy whilst protecting the right of national or ethnic, linguistic, and religious minorities.

The Association of Southeast Asian Nations (ASEAN), an intergovernmental body that promotes intergovernmental cooperation and facilitates economic, political, security, military, educational, and sociocultural integration between its members and other countries in Asia and its hesitation to speak on the crisis would also be taken into account. However, it has a principle that provides for the "non-interference in the internal affairs of ASEAN Member States"<sup>88</sup> which has limited their assistance to those who need it. While the Uyghur Human Rights Project (UHRP)<sup>89</sup> promotes and protects the rights of the Uyghurs through research based advocacy which includes publishing reports which defend the civil, cultural, political, and economic rights of the Uyghurs. They also submit recommendations to the United Nations and European Union. Their reports such as the 2019 UHRP report<sup>90</sup> highlighted the demolished mosques in East Turkistan which

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<sup>87</sup> European Parliament resolution of 17 December 2020 on forced labour and the situation of the Uyghurs in the Xinjiang Uyghur Autonomous Region (2020/2913(RSP)).

<sup>88</sup> ASEAN (2007) The ASEAN Charter.

<sup>89</sup> Uyghur Human Rights Project, 2004.

<sup>90</sup> National Endowment for Democracy, "Demolishing Faith: China sharpens hacking to hound minorities, home

attracted international media attention.

The Joint Response Plan for Rohingya provides humanitarian assistance to refugees in Bangladesh and their host communities, and states how the United Nations and NGO partners, under the leadership of the Government of Bangladesh, can meet those needs.<sup>91</sup>

The Centre for Economic and Social Rights (CESR)<sup>92</sup> is an international human rights organization promoting social justice through human rights. The CESR upholds universal human rights of all people, including the right to education, health, food, water, housing, and work, as well as other economic, social, and cultural rights that are essential to human dignity. This organization helps in exposing violations of human rights and working with civil society groups around the world assisting them to hold all actors involved accountable for these violations.

The Minority Group International (MRG)<sup>93</sup> is an international human rights organization that works on the promotion of the rights of minorities and cooperation between communities. It works in over 60 countries with around 130 partners and campaigns over the world for marginalized ethnic, religious, and linguistic minorities and indigenous people. At the Commonwealth of Nations at CHOGM 2018 in London, leaders of member states in the Commonwealth of Nations addressed the crisis in a joint communique, stating that they stand with the people of Rohingya and commended Bangladesh for helping the refugees.<sup>94</sup> It called for peace and the need to stop the human rights abuse carried out against the Rohingyas. Fortify Rights,<sup>95</sup> a nongovernmental organisation that aims to defend human rights by investigating human rights violations has been actively involved in collecting information on the crisis in both Uyghur and Rohingya.

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and abroad", October 2019.

<sup>91</sup> The Joint Response For Rohingya Humanitarian Crisis, 2021.

<sup>92</sup> Center for Economic and Social Rights (CESR), 1993.

<sup>93</sup> Minority Rights Group International, 1966.

<sup>94</sup> "Commonwealth Heads of Government Meeting Communiqué "Towards a Common Future" - The Commonwealth", the commonwealth.org. Archived from the original on 1 May 2018.

<sup>95</sup> Official website of Fortify Rights, 2013.

## Arbitrary Arrest and Detention

The Chinese government has arbitrarily arrested more than one million of the Muslims in Xinjiang and put in the facility called the political education camp.<sup>96</sup> The number of Turkic Muslims detained since the crackdown began is also unknown, but it is widely accepted that between several hundred thousand and one million Turkic Muslims have been detained in so-called political education camps.<sup>97</sup> Many Turkic Muslims reported that over half of their family members have been interned in political education camps, pre-trial detention centres, or prisons.<sup>98</sup> This maltreatment is a deprivation of physical liberty and Human Rights which leads to a gross crime against humanity. These Muslims are not only detained, but tortured. The Rome Statute has defined torture to be “the intentional infliction of severe pain or suffering” that can be either physical or mental.<sup>99</sup> Some of this torture includes interrogation in “tiger chairs” using electroshock and other violent means of interrogation, beatings, prolonged solitary confinement, sexual violence, and deprivation of food or water that are arbitrarily inflicted on detainees.<sup>100</sup>

Human Rights Watch in 2005 documented the “systematic repression of religion in Xinjiang as a matter of considered state policy,” at a “level of punitive control seemingly designed to entirely refashion Uighur religious identity to the state’s purposes,” which seemed to be primarily the “enforcement of loyalty to the Chinese Communist Party and the state.”<sup>101</sup> A former governor of Hebei province has been quoted as directing that the centres “teach like a school, be managed like the military, and be defended like a prison.”<sup>102</sup> To this end, in accordance with Party directives, these facilities are surrounded by perimeter walls, guard watchtowers, and armed guards in order to prevent escapes.<sup>103</sup>

Officials have also detained Turkic Muslims religious practices including any unofficial

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<sup>96</sup>“A cultural genocide before our eyes” Cheng June, 2 July 2020.

<sup>97</sup>Ibid.

<sup>98</sup>Ibid.

<sup>99</sup> Human Rights Watch, China: Crimes Against Humanity in Xinjiang Mass Detention, Torture, Cultural Persecution of Uyghurs, Other Turkic Muslims.

<sup>100</sup>Ibid.

<sup>101</sup>Ibid.

<sup>102</sup> Human Rights Watch, “Break Their Lineage, Break Their Roots” China’s Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims.

<sup>103</sup>Ibid.

religious activities such as fasting, prayer, or attendance at religious events and ceremonies, wearing a headscarf or having a wife who wore a headscarf or having a beard.<sup>104</sup> In a 2018 report, Human Rights Watch documented that in Xinjiang,<sup>105</sup> police detention facility staff beat detainees, hung them from ceilings and walls, forcibly deprived them of sleep, and subjected them to prolonged shackling. Some former detainees reported having been strapped to metal chairs, known as “tiger chairs,” during police interrogations.

Beyond the refusal of the Myanmar government to grant the Rohingyans citizenship, the Rohingyans have been denied access to higher education and suffered restrictions in their freedom of movement. Myanmar authorities continue to use overly broad and vaguely worded laws to arrest, detain, and prosecute human rights defenders, activists, journalists, and ordinary people for criticizing the government or military or engaging in peaceful protest.<sup>106</sup>

### **Sexual Violence and Violations of Reproductive Rights**

The 1998 Rome Statute enumerates several other related acts, namely "sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity." Forced pregnancy means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

In Rohingya, there are reported mass rape as many Rohingya women have died due to gang rapes. The Rohingya need permission from the State before getting married and they are restricted to having only two children.<sup>107</sup> The leader of the Myanmar Government, Aung San Suu Kyi, has denied the allegations that the Myanmar forces engage in organized persecution of the Rohingya minority. She has stated that the Myanmar

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<sup>104</sup>Ibid.

<sup>105</sup>Ibid.

<sup>106</sup> 'Myanmar soldiers tell of Rohingya killings, rapes and mass burial' The Guardian 8 September 2022.

<sup>107</sup>Ibid.

security forces have operated with the intent of neutralizing Rohingya militants.<sup>108</sup> Trafficking of women and girls also remains a serious problem in both states, where conflict and economic desperation have made them vulnerable to being lured to China under false promises and sold as “brides”. The Myanmar government is still not taking sufficient steps to prevent trafficking, recover victims, bring perpetrators to justice, or assist survivors.<sup>109</sup> Allegations of sexual violence in detention, including rape, would be crimes against humanity if committed with knowledge of an attack on the civilian population.<sup>110</sup> For example, the ICC Elements of Crimes specify that sterilizations carried out without patients’ “genuine consent” qualify as crimes against humanity. On the other hand, the Elements of Crimes also note that birth control measures that have a “non-permanent effect” would not count as “enforced sterilization” which makes it more difficult to include the forced or coerced implantation of IUDs in this category.<sup>111</sup>

Multiple women who were formerly detained in the Xinjiang internment camps have publicly made accusations of systemic sexual abuse, including rape, gang rape, and sexual torture, such as forced vaginal and anal penetrations with electric baton<sup>112</sup> and rubbing chili pepper paste on genitals.<sup>113</sup> Many Xinjiang women and girls have their passports seized and forced into marriages, brothels and labour on farms.<sup>114</sup>

### **Systematic Ethnic Cleansing**

Ethnic cleansing has no specific definition under international law but it is referred to as “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area”.<sup>115</sup>

Both the Rohingyas and Uyghurs have suffered from a systematic pattern of persecution

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<sup>108</sup> United Nations Meetings Coverage and Press Releases.

<sup>109</sup> Human Rights Watch.

<sup>110</sup> Human Rights Watch, “Break Their Lineage, Break Their Roots” China’s Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims.

<sup>111</sup> Ibid.

<sup>112</sup> China Uses Rape as Torture Tactic Against Uighur Detainees, Victims Say.

<sup>113</sup> Newlines institute, “The Uyghur Genocide: An Examination of China’s Breaches of the 1948 Genocide Convention.”

<sup>114</sup> Caritas, POVERTY AND CONFLICT IN MYANMAR FUEL HUMAN TRAFFICKING.

<sup>115</sup> “Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780,” UN SCOR, UN Doc. S/25274, January 26, 1993, 16.

including being denied their basic human rights like citizenship and putting them up for persecution which stems from the fact that they have different ethnic beliefs. This abuse system has been designed to instill fear in them so they are left with the choice of staying in fear of death and getting killed or leaving their homeland and everything to survive

From the story of several Uyghur activists who have escaped from the camps over the past few years, the act of detainment, mass surveillance, and forced sterilization can be classified as an act of genocide. Sadly, this repression and abuse go back to when the Communist Party of China was formed in 1949 when Muslim Uyghurs faced prohibitions in practicing their religious and cultural rites. There have been periodic calls for independence motivated by the collapse of the Soviet Union; however, none of these calls have been considered. The year 1990 marked the period when China started referring to the Muslim Uyghurs as terrorists. This was due to the Taliban's invasion of Afghanistan. Though several Uyghurs were connected to Al Qaeda, there was no sign of extremism in that area.

The Chinese Communist Party (CCP) is one of the state organisations that has taken active steps to erase all forms of religious beliefs and ethnic practices of the Uyghurs. They have imposed the implementation of bilingual education, strict restrictions on Islamic practices by mandating cleric leaders to attend political classes, passing a law that mandates the cutting of beards, and imposing the infamous one child policy rule. It has also engaged in employing military forces in Xinjiang and the creation of camps in the region in a bid to de-radicalize Uyghurs and combat separatist and extremist ideas.

Myanmar's persecution of the Rohingya began in 1977 with 'Operation Dragon King'. This saw the Rohingya become forcibly displaced from their homes, with Myanmar arguing that the group originates from East Bengal<sup>116</sup> and they have been described as "the world's most persecuted minority".<sup>117</sup> According to an April 2018 Al Jazeera feature article,<sup>118</sup> Myanmar has taken part in "ethnic cleansing" of the Rohingya people by not recognizing

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<sup>116</sup> "Four years on from the Rohingya genocide" Inigo Boucher, October 7, 2021.

<sup>117</sup> "Seven facts about the Rohingya genocide" Areina Ismail, JUNE 29, 2018.

<sup>118</sup> "Myanmar leader Suu Kyi defends journalists' imprisonment", Al Jazeera, 13 September 2018.

the group as people and stripping away basic human rights such as food, shelter, and clothing.

They have been subjected to forced labour and forced to seek refuge in unfertile lands that are not suitable for farming. They are also restricted from travelling unless official permission is given. The constant violence made many Rohingyas flee their land to become refugees in Thailand and Bangladesh where they have little to no means of livelihood.

A report by Human Rights Watch<sup>119</sup> gave a glaring description of what 24 internment camps situated around the Rakhine State looked like and described it as a place that has no regard for the dignity of the people living in it as they are segregated from others and suffer constant abuse and extortion by military operators with no hope for helpful insight. However, the Myanmar government has repeatedly denied these allegations when a report from Doctors without Borders (MSF) stated that more than 9,000 Rohingya were persecuted in the Rakhine state.

The State's military security forces initiated a widespread and systematic attack on the Rohingya civilian population. The army, police, and armed civilian perpetrators (a) razed entire villages; (b) killed men, women, and children; (c) raped and gang-raped Rohingya women and girls; and (d) arrested masses of Rohingya men and boys, many of whom remain missing, according to family members. Several Rohingya eyewitnesses described mass killings in three villages located, respectively, in Maungdaw, Buthidaung, and Rathedaung Townships during the second wave of violence starting in August 2017.<sup>120</sup>

### **Forced Labour**

According to Article 1(1) of the 1926 Slavery Convention, "slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." The 1926 Slavery Convention also recognizes that forced labor can grow into, "conditions analogous to slavery." From these definitions, it can be deduced that forced

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<sup>119</sup> World Report 2019, Myanmar by Human Rights Watch.

<sup>120</sup> Joint report by the Simon-Skjoldt Center for the Prevention of Genocide and Fortify Rights, November 2017.



labour manifests as a form of slavery and is designed to erase a part or whole of a group.

China's repression of the Uyghur Muslims does not stop at detaining and denying them basic human rights; most of them are reported to be working under hostile conditions which amount to forced labour.

China has been included on the List of Goods Produced by Child Labor or Forced Labor (TVPR List) since 2009. In 2020, the Bureau of International Labor Affairs (ILAB) added five goods produced by forced labor by Muslim minorities in China to the 2020 edition of the TVPR List. These goods include gloves, hair products, textiles, thread/yarn, and tomato products. In 2021, ILAB added an additional good, Polysilicon, produced by forced labor by Muslim minorities in China.<sup>121</sup> Uyghurs have been transported and exploited to work in other regions in China thereby producing a huge number of goods made under forced and hostile conditions.

The Bureau of International Labour Affairs (ILAB) also reports that China gives subsidies to companies who employ Muslim Uyghurs or companies planning to move to Xinjiang.<sup>122</sup> The subsidies granted resulted in high demand for Uyghur Muslims to work in such companies, allowing the Chinese government to control them and monitor their movements. Uyghur muslims that work in a factory at Quanzhou, situated in a coastal province named Fujian also face abuses related to forced labour. Their dormitories are guarded by security cameras and iron gates and are made to live in different dormitories apart from workers from Han province.<sup>123</sup> Uyghur workers after having their passports seized are made to live in separate dormitories from Han workers. They are always escorted back to their dormitories by security officials from Xinjiang and are given more working hours than those from Han province.

The ones detained in the internment camps are also subjected to forced labour and have no communication with their family members; In camps where communication and visitations are allowed, it is monitored by security officials leaving no room for privacy.

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<sup>121</sup> "Against Their Will: The Situation in Xinjiang" ILAB 2020.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

Victim testimonies, news media, and think tanks report that factories, including gloves, frequently engage in coercive recruitment; limit workers' freedom of movement and communication; and subject workers to constant surveillance, retribution for religious beliefs, exclusion from the community and social life, and isolation<sup>124</sup>

According to trusted sources numerous incidents of forced labor have been reported on Chinese fishing vessels. While onboard on the vessels, workers' identity documents are often confiscated, the crew spends months at sea without stopping at a port of call, and they are forced to work 18 to 22 hours a day with little rest. Workers face hunger and dehydration, live in degrading and unhygienic conditions, are subjected to physical violence and verbal abuse, are prevented from leaving the vessel or ending their contracts and are frequently not paid their promised wages.<sup>125</sup>

The Australian Strategic Policy Institute (ASPI) published a report in March, 2020 titled "Uyghurs for sale: 'Re-education', forced labour and surveillance beyond Xinjiang"; this report mentioned both Chinese and foreign companies who have been alleged to exploiting Uyghurs outside Xinjiang through inhumane schemes for labour transfer. Companies alleged to have participated in these schemes are Puma, Adidas, Abercrombie and Fitch, Apple, Ryohin Keikaku Co Ltd, BMW, Gap, H&M, Inditex, Marks & Spencer, Nike, North Face, Puma, PVH, Samsung and UNIQLO. Majority denied these allegations while some did not respond to it. Human rights experts have reported that Beijing's policies of moving Uyghurs into farms and factories that feed the global supply chain are an integral part of its repression in Xinjiang, an attempt to assimilate minorities and strip them of their culture and religion.<sup>126</sup>

Similarly, in Rohingya, men, women, and children are subjected to patterns of forced labour. Reports from Fortify Rights show that the military in Myanmar arrested and detained men and boys, and forced them to transfer equipment needed by the army for a day without food, resting breaks, or water.

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<sup>124</sup> "Rights Group: Lacoste Gloves Made in Chinese Internment Camp." Associated Press, March 3, 2020.

<sup>125</sup> "Against Their Will: The Situation in Xinjiang" ILAB 2020.

<sup>126</sup> "U.S. Effort to Combat Forced Labour Targets Corporate China Ties" Ana Swanson, Catie Edmondson and Edward Wong, Dec. 23, 2021.

Burma is known for its notorious use of child labour in recruitment for use in armed conflict commercial sexual exploitation, and agricultural labourers. The police, NaSaKa (border security forces), and army exploit these people by forcing young boys from nine years old to work on road construction, serve as porters in railway stations, and work in clothing factories with little or no pay; they are constantly hit by the security officials if they are not fast enough.

In October 2020, two boys in Rakhine Province were reportedly killed in a crossfire after being forced by the national military to walk in front to ensure the path was clear of landmines and to act as human shields for soldiers.

Children were also forcibly recruited and used in armed conflict by non-state armed groups, including the Kachin Independence Organization, Democratic en Benevolent Army (DKBA), the Karen National Liberation Army, the Shan State Progress Party/Shan State Army, the Ta'ang National Liberation Army, and the United State Army.

According to the United Nations' International Organization for Migration (IOM), young girls who are among the Rohingya refugees are being sold into forced labor in Bangladesh through trafficking. A report by IOM stated that of the victims, 35 were girls and 31 women. 31 of the girls and 26 of the women were sold into forced labor, with at least 10 percent facing sexual exploitation. Traffickers take advantage of the desperation of refugees to leave the camps and Rakhine Province by offering them free transportation, shelter, and work opportunities.

Lack of formal identity, limited access to the formal labour market, absence of social sanctions against child employment, lack of aspirations, household composition, and substandard living conditions are also some of the factors that drive the refugees to engage in various forms of labour and believe the promises of traffickers.<sup>127</sup>

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<sup>127</sup> "Forced Labour and Access to Education of Rohingya Refugee Children in Bangladesh: Beyond a Humanitarian Crisis" Md Mahmudul Hoque, 2021.

## Forces Fuelling the Rohingya and Uyghur Crisis

The main reason behind the clash between the government and Rohingya and the clash against the Uyghurs in Myanmar lies in their ethnic and religious differences.

The Rakhine state saw the influx of Muslims during colonization by the British government in Myanmar. During World War II, there was a massive divide within the Rakhine state where the Muslims supported the British, and most of the Buddhists supported the Japanese government. After Myanmar became independent from British rule in 1948, the Muslims in Rakhine state began to clamour for autonomy and equal rights. The government defeated the rebellions made, encouraged the divide between the Muslims and the Buddhists, and denied them a formal identity. In 1982, a new citizenship law denying Rohingya's nationality was passed rendering them stateless. Due to this, tensions between the two groups became worse thereby displacing most Rohingyas.

The government of Myanmar does not recognize the Rohingyas as an innocent stateless group of people but rather views them as a separate group adhering to foreign propaganda sponsored by foreign terrorists who are fueled by extreme Islamic beliefs. They believe that if the Rohingyas are formally recognized and granted autonomy due to the 1982 citizenship law, the area would become an area for terrorist groups who might attack the Myanmar government and strip them of their autonomy by the growth of the Arakan Rohingya Salvation Army's (ARSA) presence in the region and surrounding areas.

Another factor fueling the attack is the silence of the state government these attacks and the restrictions placed by the government on the remaining Rohingya Muslim residents that are effectively restricted in their community. International organisations such as the United Nations have also been denied access to the state while security officers offer no help during the attacks and sometimes join in the violence. Arakanese (same as Rakhine) Buddhist monks and political party officials also berates the Rohingyas publicly and state that there is a threat to Rakhine thereby increasing the tension between the two groups which ultimately results in violence against the Rohingyas. For example, on October 23,

2012 in Yan Thei village where over 70 Rohingya were killed in a massacre; only a few soldiers, rioters, and local police were present during the attack despite the warning given to them by the locals. They also assisted in the attack by disarming the Rohingyas of weapons they carried for defense.<sup>128</sup>

The situation is no different from the one in Rohingya as the Chinese state officials are also worried that Uyghurs also subscribe to separatist and religious extremist ideas. They view the internment camps as a way of eliminating such ideas and promoting national integrity.

A major factor to be considered is the presence of the largest coal and natural gas reserve which is situated in Xinjiang. The Chinese government has plans for China's Belt and Road Initiative, which represents a development plan. Any separatist movement can spoil this plan which is one of the reasons they want to eradicate the Uyghurs by transforming them in the camps. Several peaceful protests carried out by Uyghurs for autonomy has been translated into an act of violence and terrorism even when the Chinese officials are responsible for the tensions.

Chinese communist political officials have implemented and formulated several policies to disempower the Uyghurs socio-economically and politically. The policy is widely regarded as Hanification; meaning imposition of language and forced displacement and settlement.

The Chinese Communist Party (CCP) has continuously promoted the teaching of Putong Hua (Mandarin Chinese) in the Xinjiang region whilst stipulating methods to implement bilingual education in Xinjiang.<sup>129</sup>

The CCP's implementation of discriminatory policies like the one child policy, bilingual policy, and institutionalization of transformation camps as well as its opposition to any trace of political sentiment that promotes the nationalism of the Uyghurs nationalism has

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<sup>128</sup> "Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State", Human Rights Watch, April 22, 2013.

<sup>129</sup> "How the Chinese Communist Party is persecuting Uyghur Muslims", ERLC, August 17 2020.

further encouraged marginalization and has given the Chinese government more power to control the Uyghurs.

### **Impact of The Crisis On the Ethnic Minorities and Other Stakeholders**

The consequences of the crisis do not only affect the ethnic minorities but also neighbouring states where displaced people seek refuge. The Rohingyas in refugee camps living in extreme conditions under harsh weather conditions with little or no food have no sign of hope. Those who try to escape by sea are mostly met with ill-fated accidents.

The poor infrastructure and unhealthy sanitation in refugee camps increase the risk of water and foodborne related diseases for Rohingyas. Though the recommended number of refugees per latrine present to promote healthy living is 20, according to the Minimum Standards in Humanitarian response; the situation in Rohingya refugee camps is worse as one latrine accommodates 37 people which increases the risk of infection. Clean water is also in demand for the Rohingya refugees. The source of water which is mainly from rivers nearby is also contaminated by feces and serves as a dump for refuse thereby increasing the risk of water-borne diseases. Refugees would even be at greater risk during the monsoon, a period characterized by heavy rainfall and flood. During these seasons, harmful pathogens would be circulated easily thereby increasing the risk of diseases. Also, many refugees would either be killed or displaced due to heavy flooding. According to the UNHCR, 63,750 Rohingya refugees suffering from AWD (Acute Water Diarrhea) visited a registered camp's clinic between 25 August and 2 December 2017. There were also 15 reported deaths due to AWD during that time.<sup>130</sup>

In March 2021, a catastrophic fire spread in Cox's Bazar camp, causing dozens of deaths and destroying nearly ten thousand shelters. The COVID-19 pandemic has also exacerbated health crises in the camps.<sup>131</sup>

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<sup>130</sup> "Rohingya Refugee Emergency at a Glance" Gaynor, Tim, ed. (21 March 2018).

<sup>131</sup> Rohingya Crisis in Myanmar, Global Climate Tracker, March 18, 2022.

The resurgence of diphtheria is also an effect of the crisis on refugees with the presence of 5,710 reported cases and 35 reported deaths due to the disease. Plans for mass vaccination efforts to stop the spread of diphtheria have been difficult due to cultural barriers and the hesitation of the Rohingya.<sup>132</sup>

Another issue for concern of is the increase in sexually transmitted infections due to drug trafficking and different forms sexual violence present among the Rohingya refugees. The report shows that there are 83 known cases of HIV among refugees, with many more unknown cases likely.<sup>133</sup> The Bangladesh home ministry states that a staggering 90% of female refugees have been victims of rape. Many victims of rape at the hands of soldiers are killed because of their race.<sup>134</sup>

Neighbouring states like Bangladesh are not left out in suffering the brunt of the crisis, economic dropdown and overcrowding are largely increasing there. Since the beginning of the crisis, Bangladesh has helped Rohingya refugees in many ways which has affected them socially, economically and legally. It is a known fact that Bangladesh is not as prosperous as it is barely managing its resources. The appalling living conditions in the camps set up for Rohingyas in Bangladesh, along with lack of educational and employment opportunities for them, is leading to increased criminal activity.<sup>135</sup>

Several refugees have been caught transporting a drug named "Yaba " also known as the madness drugs. The use of this drugs has led to an increase in robbery, sexual violence and other related criminal activities.

The U.N. Development Program released an environmental assessment, highlighting factors threatening biodiversity. The settlements built by refugees previously housing national forests and were inhabited by wild elephants are negatively transforming.

The Chinese repression of Uyghur has resulted in the loss of freedom for Uyghurs. Those who attempt to escape are faced with serious threats to their liberty and life and if

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<sup>132</sup> "Humanitarian disaster for Rohingya refugees: impending natural hazards and worsening public health crises". The Lancet Global Health, May 2018.

<sup>133</sup> "Rohingya in Bangladesh: an unfolding public health emergency". White Kate , 28 October 2017.

<sup>134</sup> "Gendered insecurity in the Rohingya crisis" Hutchinson Susan, 2 January 2018.

<sup>135</sup> "Drug trafficking and Rohingya refugees in Bangladesh" Sreeparna Banerjee, 15 March 2019.

eventually caught are punished severely while those who escape lose contact with their family members. Some children who now live abroad have lost contact with their parents with no hopes of seeing them. Uyghur children in China are placed in boarding houses with bad living conditions and harsh treatments. They are thereby affected psychologically because of the trauma they have faced and are unable to cope in these conditions most times.

Sterilisation of women in camps without their knowledge is now a norm that results in mental illness and causes menstruation to stop.

Several professionals and intellectuals have reportedly disappeared and are nowhere to be found. In 2019 the Uyghur Human Rights Project identified 386 Uyghur intellectuals who had been imprisoned, detained, or disappeared since early 2017.<sup>136</sup>

Textbooks, mosques, religious artefacts have all been destroyed with the government alleging that the textbooks contain dangerous information and that it is not safe for a large group of people to stay in a mosque as they may be concerning some sort of separatist plan.

Rape and torture are commonplace and authorities force detainees to take a medicine that left some individuals sterile or cognitively impaired.<sup>137</sup>

The cumulative results of these actions are that many children become orphans prematurely, women are sterilised and raped whilst open to the risk of mental illness. The ultimate effect is the erasure of the Uyghur's culture with no reference to their past.

## Conclusion

The International community has long recognised that the several extreme human rights abuse going on in both Rohingya and Uyghurs is genocide. Several resolutions have been passed, donations have been made and restrictions have been put in place, but all these have not stopped the ongoing crisis as it seems it is growing worse day by day. The Chinese and Myanmar government have repeatedly denied the allegations made by the

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<sup>136</sup> "Detained and Disappeared: Intellectuals Under Assault in the Uyghur Homeland" Uyghur Human Rights Project, 11 December 2019.

<sup>137</sup> "A cultural genocide before our eyes" Cheng June, 2 July 2020.



international community claiming that they want to eradicate terrorism in their region. Their actions have continuously left many homeless, separated many families, and left others at risk of disease, mental illness, and death. Despite all the efforts being carried out, nothing has changed and we are all left with the question, “When would these atrocities stop”?

### Further Research

What measures can be taken to ensure state compliance on the prevention of genocide? What future efforts and nations can be taken by the international community to protect stateless persons? Would granting asylum to the people of Rohingya and Ughyur improve their situation?

Do you think the policies passed by the Rohingya and Chinese governments are for the state’s safety or more of an epidemic? Do you believe both groups should assume different approaches on the topic, if so how? What other progressive ways can you come up with to curb these crimes against humanity?

### Scope and Resources for Research on Background Guide

For this topic, the research will be based on existing international and regional laws concerning the protection of minority rights, a timeline of the crisis, and major events that have gained public concern. The research would also look at existing regulations, policies, arguments, journals from UN websites, and other verified resources.

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## The Right To Privacy Under International Law: Technology As A Risk Or Mechanism

*"In my considered opinion, the right to privacy of any individual is essentially a natural right, which is inherent in every human being by birth. Such right remains with the human being till he/she breathes last. It is indeed inseparable and inalienable from human beings. In other words, it is born with the human being and extinguishes with human beings,"*

**-Justice Abhay Manohar Sapre.**

### Introduction

It can be stated with all certainty that every human person holds the respect of their privacy with high importance; no one appreciates their privacy being intruded on and as such, international, regional and national bodies have taken action to guarantee the right to privacy, though not without its limitations. It suffices to say that no democratic society can function successfully without the guarantee of the right to privacy for everyone living within its territory.

Privacy has been described as “an integral part of our humanity”, the “heart of our liberty” and “the beginning of all freedoms”.<sup>138</sup> Whether or not this reflects in practice is a question for debate. The term ‘Privacy’ does not have a generally recognized and accepted definition. Privacy is rather described based on the perspective of lawmakers, jurists and scholars. The Cambridge English Dictionary defines privacy as “the state of being alone or the right to keep one’s personal matters and relationships secret”. The *Australian Law Reform Committee* in its report, stated that “the term ‘privacy’ is one fraught with difficulty; the concept is an elusive one”.<sup>139</sup> As succinctly put by *Professor J Thomas McCarthy*, “it is apparent that the word ‘privacy’ has proven to be a powerful rhetorical battle cry in a plethora of unrelated contexts ... Like the emotive word ‘freedom’, ‘privacy’ means so many different things to so many different people that it has lost any precise

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<sup>138</sup>Daniel J. Solove, ‘Conceptualizing Privacy’ (2002) 90 California Law Review 1087, 1099.

<sup>139</sup>Australian Law Reform Commission, Privacy, ALRC 22 (1983).



legal connotation that it might once have had”.

Privacy, in its generic form, has been described as the right to be let alone. Though, this does not suffice to cover the broad concept of the term, certain jurists, judges and scholars have done well to expatiate on this.<sup>140</sup> With the advancement of technology, a great threat to privacy of persons has been posed resulting in considerable concern from many.

The internet age has come with several shortcomings that have affected the privacy of individuals. CCTV Cameras, websites, cookies, social media privacy terms and conditions have more often than not been a threat to the privacy of persons. *The Norwegian Criminal Code* prohibited the publication of information relating to “personal or domestic affairs” in 1889. Several years later, international bodies began to lace their shoes and follow suit in guaranteeing the right to privacy in its human rights treaties and in providing specific legislation to address prevailing areas of its violation. Soon enough, certain committees in the international human right bodies were allotted the responsibility of ensuring its protection in its member states and providing solutions to the recurring problems of its violation.

For several years, there was an outright disregard for the right to privacy. This right was deemed inconsequential - being of no importance, and this was evident in its absence in various international, regional and national bodies protecting and promoting fundamental human rights. Over the years, the threat to international security resulting from the violation of the right to privacy greatly skyrocketed. The UN Committee initially solely responsible for protecting this right was the *UN Human Rights Council*. However, as the threat to international security resulting from the violation of privacy began to surface, the *United Nations Security Council* developed particular interest in its protection and promotion.

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<sup>140</sup>Professor Solove in his book ‘Conceptualizing Privacy’ summarized privacy under six themes, namely (1) the right to be let alone; (2) limited access to the self – the ability to shield oneself from unwanted access by others; (3) secrecy—the concealment of certain matters from others; (4) control over personal information - the ability to exercise control over information about oneself; (5) personhood – the protection of one’s personality, individuality, and dignity; and (6) intimacy – control over, or limited access to, one’s intimate relationships or aspects of life.

Technological innovations have in some situations been detrimental to the right of persons to protect certain intimate information about themselves. With these innovations, information involving a person's private life, such as a person's whereabouts, business transactions, relationships, past/present actions, could be disclosed intentionally or inadvertently.

Despite the efforts of the United Nations Committees and the UN Security Council in protecting the right to privacy, as a result of the technological advancement in many countries, new ways for its violation have been discovered, thereby requiring an even more modern approach to ensuring its protection in this digital age.

A major bane to the protection of the right to privacy in a world with advanced technology is wide use of social media. Platforms such as Facebook, Instagram, Twitter have been instrumental to the increased cases of privacy right violation. Despite their respective policies on privacy, several allegations and actions have been brought against these platforms along with Meta, their parent company, on the violation of the right to privacy. An article in the New York Times revealed that the Zoom app allowed personal information about its users to be intercepted by unknown persons. The report stated that "a data-mining feature on Zoom allowed some participants to surreptitiously have access to LinkedIn profile data about other users - without Zoom asking for their permission during the meeting or even notifying them that someone else was snooping on them".<sup>141</sup>

Similarly, in 2019, a news report revealed that government officials around the world had their smartphones invaded by a hacking software that used their personal data on WhatsApp to execute such a nefarious act.<sup>142</sup>

It is reasonably foreseeable that the WhatsApp cyber intrusion of high profile government and military officials in many nations of the world poses a threat to international security.

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<sup>141</sup> (Krolik Aaron and Singer Natasha: "A Feature on Zoom Secretly Displayed Data from People's LinkedIn Profiles" The New York Times, April 2 2020. <https://www.nytimes.com/2020/04/02/technology/zoom-linkedin-data.html>)

<sup>142</sup> Christopher Bing, Raphael Satter: "Exclusive: Government Officials Around the Globe targeted for Hacking through WhatsApp" Reuters, USA, October 31 2019. <https://www.reuters.com/article/us-facebook-cyber-whatsapp-whatsapp-nsogroup/exclusive-whatsapp-hacked-to-spy-on-top-government-officials-at-us-allies-sources-idUSKBN1XA27H>

As rightly put by John Scott-Railton, a senior researcher at Citizen Lab, in responding to the allegation against WhatsApp, “it is an open secret that many technologies branded for law enforcement investigations are used for state-on-state and political espionage”.

This topic seeks to proffer new and recent methods that would suffice to protect the right to privacy in light of technological advancement.

### International and Regional Framework

The *Universal Declaration on Human Rights* was the first international document guaranteeing the right to privacy in 1948 as a result of the Second World War. *Article 12* of the document provides that:

*“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”*

This provision was apt for the range of time of its creation. However, as the years went by with the consequent technological advancement, it has become evident that it fails to address very real issues of our digital age that could not have been foreseen in 1948 by the drafters of the UDHR.<sup>143</sup>

The provision on the right to privacy in *Article 17 of the ICCPR*, which was adopted in 1966, is similar to that of the *UDHR* and as such has similar issues. However, the *General Comment no 16 on Article 17 of the ICCPR* in 1988 states that:

*“the gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person’s private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and*

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<sup>143</sup>OHCHR (2018) Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 12 <https://www.ohchr.org/en/press-releases/2018/11/universal-declaration-human-rights-70-30-articles-30-articles-article-12?LangID=E&NewsID=23907>.

*is never used for purposes incompatible with the Covenant.”*

The General Assembly (GA) adopted a number of resolutions on the right to privacy in the digital age. Its first resolution on this subject is the *GA Third Committee Resolution*<sup>144</sup> *on the Right to Privacy in the Digital Age*, where it was noted “that the rapid pace of technological development enables individuals all over the world to use information and communication technologies, and at the same time enhances the capacity of governments, companies, and individuals to undertake surveillance, interception and data collection which may violate or abuse human rights and, in particular, the right to privacy and is, therefore, an issue of increasing concern.”

The *GA Third Committee’s Resolution 69/166 2014*<sup>145</sup> reemphasized the concern about right to privacy in the digital age and the threat to international security that it poses. The *GA Third Committee’s Resolution*<sup>146</sup> on the Right to Privacy called upon states to “review their procedures, practices and legislation regarding the surveillance of communications, their interception and the collection of personal data, including mass surveillance, interception and collection, with a view to upholding the right to privacy by ensuring the full and effective implementation of all their obligations under international human rights law”.

It also implored states to establish effective oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for State surveillance of communications, their interception and the collection of personal data”.

The *UN Special Rapporteur on the Right to Privacy* is a body established by the *UN Human Rights Council* to give an annual report on the state of the right to privacy in member states, its protection or violations and to provide strategies on ways it can be better protected and guaranteed.

The 2017 Report of the Special Rapporteur on the Right to Privacy in its first Article

<sup>144</sup> UNGAOR, UN Doc A/RES/ 68/167 (2013).

<sup>145</sup> The Right to Privacy in the Digital Age, UNGAOR, UN Doc A/RES/69/166 (18th December, 2014) 69.

<sup>146</sup> The Right to Privacy in the Digital Age, UNGAOR, UN Doc A/C.3/71/L.39/Rev.1 (16th of November, 2016) 71.

provides that “the Special Rapporteur hopes to contribute to raising the level of respect, protection and fulfillment of the right to privacy, which is challenged particularly by developments in the Digital Age.”<sup>147</sup>

The Special Rapporteur also notes that there are insufficient or inadequate data protection laws in many States stipulating who is allowed to access personal data, what it can be used for, how it should be stored, and for how long.<sup>148</sup> It was recommended in the *2010 Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms* that restrictions to the right to privacy in light of technological development should be clearly defined in the international human right law to deter states from circumventing the laws to their advantage.<sup>149</sup>

Along with its responsibility of ensuring peace and security among Member States, the *UN Security Council* is also saddled with the responsibility of protecting the privacy of persons, preventing threats to peace resulting from the violation of the right to privacy, *inter alia*.

The UN Security Council Resolutions is devoted to the protection of human rights in member states in order to achieve international security. The resolutions has frequently demanded states to act with “full respect for human rights and fundamental freedoms” when implementing measures to combat terrorism offenses.

The *UN Security Council's resolution* <sup>150</sup> on ‘threats to international peace and security caused by terrorist acts’ requires member states to develop systems to collect, process and analyze passenger name record (PNR) data and to ensure PNR data is used by and shared with all their competent national authorities. It has however been observed that PNR data, when used inappropriately may constitute a violation of the right to privacy of persons.

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<sup>147</sup>Joseph A. Cannataci, Report of the Special Rapporteur on the Right to Privacy, UNHRCOR, UN Doc A/HRC/34/60 (24th February 2017) 34.

<sup>148</sup>Frank La Reu, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, GA Res 17/27, UNHRCOR, UN DocA/HRC/17/27, (16th May2011) 17.

<sup>149</sup>*Ibid*.

<sup>150</sup> UNSCOR Res 2396, UN Doc S/RES/2396 (2017).

Flowing from this, the *United Nations Human Rights Council* was established to protect the right to privacy along with other rights in the member states. Similarly, the *United Nations Human Rights Office of the High Commissioner (OHCHR)* set up a Special Rapporteur mandated to promote and protect the right to privacy by reviewing government policies and laws on the interception of digital communications and collection of personal data; identifying actions that intrude on privacy without compelling justification; assisting governments in developing best practices to bring global surveillance under the rule of law; articulating private sector responsibilities to respect human rights and; and helping to ensure that national procedures and laws are consistent with international human rights obligations.<sup>151</sup>

Along with its responsibility of ensuring peace and security among Member States, the *UN Security Council* is also saddled with the responsibility of protecting the privacy of persons, preventing threats to peace resulting from the violation of the right to privacy, *inter alia*.

As the rate of use of the internet increased, with billions interacting on social media, it became imperative that policies and laws are adopted to regulate the activities on the internet and ensure that it does not result in the violation of human rights. The regional legislative frameworks were not left behind in this huge role of ensuring the protection of the right to privacy especially via the internet. One of such regional provisions is the *African Declaration on Internet Rights and Freedom Coalition of 2014* which was tasked with the responsibility of monitoring the implementation of privacy laws in African countries and other related legislation in order to hold governments to account at different levels and also documenting and reporting breaches of data protection and privacy legislation. The *African Declaration on Internet Rights and Freedoms* therefore seeks to promote human rights standards and principles of openness in internet policy formulation and implementation on the continent. According to the Declaration, “the Internet should be a secure, stable, resilient, reliable and trustworthy network... Unlawful

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<sup>151</sup> UNHRCOR, Res 28/16, UN Doc A/HRC/RES/37/2 (2015).

surveillance, monitoring and interception of users' online communications by state or non-state actors fundamentally undermine the security and trustworthiness of the Internet".

In order to bring the provisions of the *European Convention of Human Rights (ECHR)* to effect, the *European Union Data Protection Directive 1995*<sup>152</sup> was established to address the aspect of the ECHR that provides for the right to privacy. The directive regulates the regulation of personal data, its use and its free movement.

As a result of the failure of the *OECD's*<sup>153</sup> *Recommendations of the Council Concerning Guidelines Governing the Protection of Privacy and Trans-Border Flows of Personal Data* to be implemented in European States, the *EU Data Protection Directive* incorporated and implemented the recommendations in its document. These recommendations were based on principles for protection of personal data.

These principles were set in place to ensure that personal data should only be used for the purpose to which it was collected; that the consent of the data subject must be obtained before any disclosure of such data is made; and that data collected should be secure from any potential abuses, *inter alia*. These principles were grouped by the EU Directive into three broad categories: transparency, legitimate purpose and proportionality.

### **Role of the International System**

The UN Security Council is tasked with the responsibility of investigating situations threatening international peace and security and recommending solutions for its resolution. Just as the violation of the right to privacy is one of such situations, the UNSC has the role of guaranteeing the protection of persons from the improper use of their private information through the internet or all other media platforms thereby threatening the safety of such persons. The committee has the role of undertaking investigations into

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<sup>152</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data Official Journal L 281 , 23/11/1995 P. 0031 – 0050.

<sup>153</sup> Organisation for Economic Co-Operation and Development 1980.

the various state laws of its Member States in order to find out whether any provision of the laws of such states unlawfully gives the government access to the private information or life of its citizens. It also has the role of establishing a small investigative body within its committee for the smooth running and effectiveness of this role.

In order to hold combatants accountable for their actions, the Security Council has the role of creating international tribunals to prosecute those accused of such grave human rights violations. The Council makes decisions with regard to the issue of the threat to international peace and security as a result of the violation of the right to privacy and imposes sanctions on the perpetrators of such crimes.

The *United Nations Human Rights Council* was established to protect the right to privacy along with other rights in the member states. Similarly, the *United Nations Human Rights Office of the High Commissioner (OHCHR)* set up a Special Rapporteur mandated to promote and protect the right to privacy by reviewing government policies and laws on the interception of digital communications and collection of personal data; identifying actions that intrude on privacy without compelling justification; assisting governments in developing best practices to bring global surveillance under the rule of law; articulating private sector responsibilities to respect human rights and; and helping to ensure that national procedures and laws are consistent with international human rights obligations.<sup>154</sup>

The United Nations Conference on Trade and Development (UNCTAD), in its project of achieving data protection and privacy, has also devised the role of building trust online, managing cross-border data transfers; encouraging countries to adopt data protection laws while also monitoring its implementation; balancing surveillance and data protection, among other things.

The OECD Guidelines on the Protection of Privacy and Transborder Flow of Personal Data was established by the United Nations to prevent the violation of fundamental human

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<sup>154</sup> UNHRCOR, Res 28/16, UN Doc A/HRC/RES/37/2 (2015).



rights such as the unlawful storage of personal data, the storage of inaccurate personal data, or the abuse or unauthorized disclosure of such data. The disparities in national privacy laws posed a great challenge to the free flow of personal data all over the world. As a result, the OECD Guidelines was enacted to provide a framework for member states in drafting their privacy laws and policies and to help in harmonizing national privacy legislations. This resulted in the prevention of interruptions in the international flow of data.

### **Right to Privacy in the Digital Age**

The phenomenal evolution of information and communication technology (ICT) in the 21<sup>st</sup> century unquestionably improved communication and exchange of information in several ways, making the world a borderless, global village in the cyberspace. Consequently, it opens up a wide range of latitudes and opportunities for the expression and enjoyment of some human rights, including the right to freedom of expression, freedom of the press, right to receive, impact, and access information, and democratic participation, and also the facilitation of global debates.<sup>155</sup> Expression of these rights occur in the cyberspace in a number of ways. Opinions are freely shared, campaigns are carried out, and information, in whatever form they exist, can be accessed by the entire world within seconds. Technology does hold a lot of promises for human rights and freedom in the present age.

In light of the foregoing, privacy - even in the cyberspace - has been said by many commentators to be an essential element of a democratic state because without it, freedom is only an illusion.<sup>156</sup> That is to say, without the right to privacy, individuals cannot interact freely. Noting that the right to privacy is connected to human development and self-actualization in a community of fellow human beings, it means that without privacy, regardless of how large a person's mansion is, such a one is as good as a modern slave, lacking autonomy and the comfort that a reasonable degree of secrecy brings. These illustrate how important the right to privacy is to any human being. It is a fundamental

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<sup>155</sup> A/HRC/27/37

<sup>156</sup> Thomas B. Kearns, Technology and the Right technology and the Right to Privacy: The Convergence of Surveillance and Information Privacy Concerns , Williams and Mary Bill Rights Journal, Volume 7 (1998-1999) Issue 3 Symposium: Strengthening Title VII: 1997-1998, Sexual Harassment Jurisprudence Article 10 April 1999

human right that must be safeguarded.

However, technology grossly threatens the right to privacy and international security. Advancement in technology has made electronic surveillance and communication interception, email interception, data collection, unethical hacking, and various other activities that threaten to interfere with or altogether violate the right to privacy possible. These activities pose a threat to humanity as the right to privacy is a fundamental human right that should be enjoyed without any arbitrary intervention or unpermitted incursion by prying eyes.<sup>157</sup>

Because of technology and easy access to it, these intrusive activities can now be performed not only by states but by individual actors. Individual actors now own drones, surveillance cameras that are attachable to someone's body, and many are unethical hackers. Hence, proposals and recommendations have been made that existing international frameworks that protect the right to privacy from governmental incursions be extended to also protect the right to privacy in cyberspace. By extension, the obligation of states under these frameworks places upon them a positive duty to hold private individuals who interfere with the right to privacy of their citizens to account.

However, the rate at which technology is evolving is increasingly fast. It is difficult for modern legal frameworks to match its speed and prevent unlawful limitations and gross violations of the right to privacy. Hence a lot remains to be done by way of curbing the incessant violations of the right to privacy. A corollary of this is that violation of the right to privacy is usually only recognized in breach.

For example, the CIA recently conducted unlawful mass surveillance that grossly violated the right to privacy of tens of thousands of people by taking and retaining their personal data without complying with minimal legal safeguards or oversight.<sup>158</sup> This act is unconstitutional and is an affront to the principle of civil liberties of arguably the country

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<sup>157</sup>The Right to Privacy in the Digital Age: Meeting Report

<sup>158</sup> Mathew Guariglia and Andrew Crocker, "We Need Answers About the CIA's Mass Surveillance".

that celebrates human rights and liberties the most. But this act is not new, it has happened before.

NSA did something similar in 2013 when it collected telephone records of tens of millions of Americans.<sup>159</sup> Commentators argue that the surveillance is only reminiscent of the global surveillance conducted by the NSA. If not for Edward Snowden, a contractor of the NSA, the world wide privacy violation would not have been known. Edward Snowden reported to China that NSA had led more than 61,000 hacking operations worldwide, including many in Hong Kong and mainland China.<sup>160</sup> He also reveals that EU offices were bugged; that Germany's Chancellor, Angela Merkel's mobile phone was bugged, and that embassies were placed under surveillance. Latin America was also monitored, and SMS messages were collected from different parts of the world and stored.<sup>161</sup> All of these were done with no consent and no knowledge of those involved. The power of technology in violating the right to privacy is indeed terrifying. But beyond the fact that these actions are violations of some people's rights, they also amount to a threat to the national security of the affected countries. Information that are essential to the national security of Germany that is in possession of the Chancellor could have been leaked. Discussions that are important to world security within the EU offices that were bugged could have also been leaked in the process.

Note how these governmental bodies and telecommunication companies that assisted them in the performance of these acts could have done all that without anyone knowing and they would not have suffered any criticism for their action if they had successfully kept it secret. Technology makes the violation of the right to privacy subtle unlike other intrusive forms, say, unlawful searches which are physical. This makes the violation of the right to privacy mostly recognized after a breach or in the process and hardly before.

Right now, there is a chance that you are being tracked through your browsing signature in the cyberspace; there is a chance that somebody is monitoring you through the camera

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<sup>159</sup> "Edward Snowden: Leaks that exposed US spy programme", BBC News, July, 2013

<sup>160</sup> Ibid

<sup>161</sup> Ibid

of your phone and computer right now without you authorizing such incursion, and worse, without you knowing at all. These are no longer outside possibilities in this age. These possibilities are threatening to the right to privacy, family life, and other associated rights.

Nevertheless, positive actions have been taken. *The General Data Protection Regulation (GDPR)*<sup>162</sup> is one that strongly regulates the collection, processing, and usage of data by data processors by placing strict obligations upon them. It is a regional framework on data protection that was passed by the European Union; however, it place obligations on and is binding upon any organization that is in the business of controlling personal data of Europeans wherever they are situated. It is becoming widely adopted by other states in their national legislations. The GDPR also limits governmental institutions' access to information of people by placing strict obligations on data processors as regard processing, copying, and saving personal data of people. Furthermore, administrative agencies that process personal data of people must abide by the privacy and data security regulations of the GDPR.

In addition to the aforementioned measures that protect the right to privacy, it is noteworthy that states' obligations under existing human right laws also limit their power of interference with the right to privacy of their citizens. Limitations exist under international human rights instruments like the ICCPR and Siracusa Principles in form of stringent conditions that must be satisfied by states before their interference can be deemed valid and internationally acceptable. These limitations as well as states' obligation to protect right to privacy are already customary international law.

However, evidence abounds that states do not necessarily always satisfy these thresholds in the light of any flimsy "public threat". This is common in some countries like China. It

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<sup>162</sup> *EU General Data Protection Regulation (GDPR)*: Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

can be argued that this is because most times, determination of what amounts to public threat, public safety, public emergency, national security, all of which are grounds for interference with the rights of individuals by states, is within the discretion of states.<sup>163</sup> And as a result of that, they retain gross power of discretion which in many cases help them justify arbitrariness and misuse of power. A ready example is the NSA's violation of the right to privacy of millions of people in 2013. It is quite interesting that the NSA also argued that it was exercising its power of intelligence and supervision and referenced certain administrative laws that govern these areas. The point is that states and administrative agencies can easily interpret laws in ways that favour their excesses.

Arbitrary and unlawful communications surveillance and interceptions are indeed threats to the anonymity of communication. Whistle-blowers, investigative journalists, and human rights defenders; actors who maintain through their activities a democratic and free society could be endangered as is the case in countries like China and Vietnam. The anonymity that technology offers embolden them to speak out against draconic governmental policies and actions. However, the slight chance of these communications being traced back to them makes them unable to perform their watchdog activities and reveal government conspiracies without fears. This is detrimental to the achievement of a strong civil society.

The United Nations High Commissioner for Human Rights in her opening remarks at the seminar *The Right to Privacy in the Digital Age in Geneva*, 24-25 February 2014s, said such practice 'threatens individual rights and inhibits the free functioning of a vibrant civil society'.<sup>164</sup> The practice the Commissioner refers to are activities that hinder the right to expression and the right to privacy, including electronic surveillance, communication interception, unethical hacking and other acts that violate the right to privacy in the cyberspace.

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<sup>163</sup> *Handyside v. The United Kingdom* (1979-80) 1 EHRR 737

<sup>164</sup> *Ibid*

Cognizant of the aforementioned challenges - including the fact that many international human rights instruments do not explicitly extend the protection of the right to privacy to the cyberspace, the Human Rights Council and the General Assembly strongly advise states to recognize that the right to privacy under international law applies to online information, activity, and communication, and that surveillance, interception, collection and storage of online activity and communications does not foster the enjoyment of the right to privacy and other associated rights.<sup>165</sup>

*General Assembly Resolution 68/167*<sup>166</sup> unequivocally states that universal human rights law provides the universal framework against which any interference with individual privacy rights must be tested. A very pivotal human rights framework on the right to privacy and lawful limitations to the rights is the ICCPR<sup>167</sup>. Another instrument that supports the ICCPR and outlines explicitly the conditions for valid limitation or derogation is the Siracusa Principles<sup>168</sup>. Although the right to privacy is not absolute, any limitation to it or interference with it must satisfy some conditions: Firstly, it must be provided by law; secondly, it must be necessary for a legitimate aim; thirdly, it must be proportional to the aim sought.<sup>169</sup> Additionally, any such interference must not disregard the whole point of the right to privacy and must be consistent with other human right laws, including the prohibition on discrimination, and dignity of human persons.<sup>170</sup> That is to say that the right to privacy is also linked to freedom from discrimination and dignity of human persons and other fundamental rights; therefore making the right to privacy a very important right that must not be left unprotected from unwarranted interferences.

Further, any interference with an individual's right to privacy is only permissible under

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<sup>165</sup> Ibid

<sup>166</sup> United Nations General Assembly Resolution 68/167. The Right to Privacy in the Digital Age

<sup>167</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>168</sup> The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, United Nations Commission on Human Rights, 1984.

<sup>169</sup> The Siracusa Principles on Derogations of Rights, the works of the UN Human Rights Committee, for example in its General Comments 27, 29, 31 and 34, are important sources for guidance with regard to permissible limitations.

<sup>170</sup> Op cit, Alexander Rengel

international human rights law if it is neither arbitrary nor unlawful.<sup>171</sup> In its *General Comment No. 16*<sup>172</sup> on the ICCPR, the Human Rights Committee pointed out the fact that the term “unlawful” implied that no interference could take place “except in cases envisaged by the law.” Further, lawful interference must itself comply with the provisions, aims, and objectives of the Covenant”.<sup>173</sup> This means that besides there being a law that limits a right, such law must also align with the provisions and objectives of the ICCPR, which means, altogether, such law must not be to hinder the enjoyment of human rights but to foster their realization. Any interference that is permitted by this national law may nonetheless be “unlawful” so long it conflicts with the provisions of the ICCPR. The expression, “arbitrary interference” can also extend to interference provided for under the law.

According to the Committee, the introduction of the concept “arbitrary interference”, “is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims, and objectives of the Covenant and be reasonable in the particular circumstances”.<sup>174</sup> Commenting on the element of reasonableness, the Committee stated that the concept of reasonableness indicates that “any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case”.<sup>175</sup> These two elements of reasonableness imply that a permissible interference with the right to privacy is one that is necessary in that given circumstance and where no better alternative exist and that such limitation is commensurate to the gravity of the situation.

Additionally, the limitation placed on the right to privacy must be shown to have the chance of achieving a legitimate aim. The onus of proof lies on the government to prove the legitimacy of the aim. Further, any limitation to the right to privacy must not render

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<sup>171</sup> A/HRC/27/37

<sup>172</sup> UN Human Rights Committee (HRC), CCPR General Comment No.16: Article 17 (Right to Privacy), the Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988.

<sup>173</sup> Ibid

<sup>174</sup> Ibid

<sup>175</sup> Ibid

the essence of the right meaningless and must be consistent with other human rights, including the prohibition of discrimination. Any interference by states that do not meet these criteria would amount to arbitrary and unlawful interference and is completely unacceptable under international customary law. Also, interference of this nature is a gross violation of existing human rights frameworks.<sup>176</sup>

Notably, states often justify digital communications surveillance programmes on the grounds of national security, including the risks posed by terrorism and other activities by non-state actors (including recruitment for and the financing and commission of terrorist acts). Admittedly, a lawful, targeted surveillance of digital communication may amount to a necessary and effective measure for intelligence and law enforcement entities when conducted in accordance with international and domestic laws. Any surveillance on the grounds of national security and for the prevention of terrorism or other crimes may be said to amount to “legitimate aim” for purposes of an assessment from the viewpoint of *Article 17 of the Covenant*. However, the degree of interference must be measured against the necessity of the measure to achieve that aim and the actual benefit it yields.<sup>177</sup>

At this point, to appreciate the extent of the right to privacy in a digital age, it is essential to briefly discuss its conceptual and practical magnitude and the effect of its infringement on individuals and democratic societies at large. First, notably, the right to privacy is not simply a right to be “left alone” but rather it includes an individual’s autonomous development in a particular community and the liberty to communicate with others for the sake of achieving such personal development.<sup>178</sup> The communication necessary for personal development can arguably occur through any form, including the internet and other information communication technologies that exist in a given time.

This helps to appreciate the interconnection of the right to privacy with the right to freedom of opinion and expression, to seek, receive, and impart information, freedom of

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<sup>176</sup> Ibid

<sup>177</sup> Ibid

<sup>178</sup> Op cit, Alexander Rengel



peaceful assembly and association, and right to family life.<sup>179</sup> All these rights are dependent upon one another and all of them help facilitate a person's participation in a democratic community.<sup>180</sup> A limitation of one automatically amounts to a limitation of the enjoyment of others and therefore inhibits human's happiness and self-actualization and these negatively affect the larger society.

Second, beyond the generally accepted definition of privacy as "the right to be left alone", privacy has become a broad, all-encompassing concept that now includes a whole host of modern human concerns about various forms of intrusive behaviour including wiretapping, surreptitious physical surveillance, and mail interception.<sup>181</sup>

Individuals now claim the right to privacy for an enormously wide range of issues from the right to practice contraception, the right to bodily autonomy, the right to an abortion to the right to make bank records and medical records confidential.<sup>182</sup> Over time, these claims have expanded to include the right to protect one's trail on sites visited on the internet confidential.<sup>183</sup> One consequence of this is that courts now have a difficult time determining where to draw the line. Indeed, the impact of technology on the right to privacy is great. The question that must now be answered is whether technology has done more harm than good. And if the former is the answer, what actions must be taken?

### **Technology as a Mechanism for guaranteeing the Right to Privacy and other Human Rights**

Due to the nature of some information, anonymity is highly important as its absence could lead to discrimination and persecution in extreme cases. Hence, the press, human rights activists,<sup>184</sup> whistle-blowers, and others who have legitimate public interests in any democracy have found cyberspace secure because it protects their identity. Using

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<sup>179</sup> Ibid

<sup>180</sup> Ibid

<sup>181</sup> Flaherty, "Protecting Privacy in Surveillance Societies", (University of North Carolina Press) (1989)

<sup>182</sup> Ibid

<sup>183</sup> Alexander Rengel, "Privacy Rights as an International Human Right and the Right to Obscurity in the Cyberspace", Groningen Journal of International Law, vol 2(2): Privacy in International Law

<sup>184</sup> A/HRC/27/37

information and communication technology and its security, they can publish information on the cyberspace and let a huge number of people exercise their right of access to information and reveal important information that could compel accountability from the government. Anonymity is guaranteed through encrypted codes that modern technological devices have, therefore, their identities can be easily protected. Realistically speaking, however, this expectation is no longer as strong as it used to be because various means now exist through which identities can be revealed with just minimal amount of data. Nevertheless, the anonymity technology offers is unrivalled and the protection technology offers can be safeguarded through international regulations, governmental efforts, legislation and other means.

Furthermore, data processors secure the identity of users as an ethical, administrative, legal, and contractual obligation. In any case, should this information be given out or leaked without the consent of the owners, data processors could suffer liabilities. This therefore places a heavy responsibility on data processors to process such data according to existing legal frameworks and the terms of the contract because of the heavy liability they might incur when there is a breach, especially one involving a large number of customers. This, therefore, is an incentive for data processors to secure them well. At best, information can only be used, processed, and released in accordance with certain laws, rules, and regulations that exist in a given state. A standard regulation that protects personal data is the *General Data Protection Regulation* which is widely adopted and which many national legislations mirror on the regulation of data privacy. The regulation provides stringent measures to prevent the processing of personal data while also protecting state interests by making certain data available to states under certain circumstances.

Additionally, due to the sense of security that digital technologies and ICTs offer, the freedom of expression has the potential of being realized to its maximum. Moreover, the right of access to information is also guaranteed as individuals understand that their identity is protected on cyberspace, and as such, they can access any information without

fears of intrusion.

### **The Risks posed by Technology on the Right to Privacy**

Without question, the capacity, power, speed, and influence of information technology are accelerating at an incredible rate. Its progressions however also mean a corresponding increase in the risks to the right to privacy.<sup>185</sup> Data processors can collect and retain the information of persons and use them for commercial purposes without the consent or knowledge of data owners. And also, states could use such information for investigation and surveillance, either criminal or otherwise. While that might sound justifiable, states can be arbitrary about it.

However, it must be said that for the right to privacy to flourish, a right which is always almost readily violated since the invention of technology, the demands of a democratic community and states obligations towards protecting individual rights must be weighed against the thirst for exploration of electronic commerce, information technology, and general human development. The fact is that technologies can be instruments of invasion one's privacy but they also have potential for unprecedented opportunities for prosperity and security.<sup>186</sup>

Indeed, technology is a two-edge sword that holds the potential to aid in the realization of fundamental human rights like the right to privacy and freedom of expression just as much as it facilitates the violation of these rights. The risks posed by technology to the right to privacy are high because, for one, the information of identifiable and unidentifiable persons could be processed and used for various purposes, and most times, without their permission; and sometimes, to their detriment.

Technology can cause the proliferation of biometrics and other data collected for access to banking and other essential services. The sensitivity of these data could make persons with evil intent to use them in ways that are harmful to the owners. It is admitted that

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<sup>185</sup> Daniel J. Solove, "Privacy and Power: Computer Databases and Metaphors for Information Privacy", Stanford Law Review, vol. 53, ed. 6, 2001, 1393-1462, 1394.

<sup>186</sup> Op. cit, Alexander Rengel

these could result from insufficient control and regulation of data processing or at least, the implementation of those regulations. An example of the result of the insufficient controls for the collection and processing of biometric data is how private service providers can access and monetize the information stored within the South African Department of Home Affairs's biometric registry to market biometric verification technologies.<sup>187</sup> Accordingly, 66.3 million South Africans' personal details including national identity number, full name, gender, ethnicity, home address, phone number, marital status, economic status, estimated income, employer, and email address, were exposed.<sup>188</sup>

As evidenced by the South African Department of Home Affairs case, data processors can collect and process information that one never intended for them to access and collect. In this regard, notable also are the events that led to Germany passing amendments to its Federal Data Protection Act in 2009. Shortly after passing the amendments, it began a long battle with United States technology companies like Apple, Facebook, and Google. The country launched investigations into how these companies collect and store personal data. At one point, German officials asked Google to deliver data gotten from home wireless networks that were collected when the company compiled information for its Street View map.<sup>189</sup>

At another time, German data-protection officials instituted legal proceedings in 2010 against Facebook because of how Facebook handles non-user information.<sup>190</sup> This is because Facebook's social graph architecture allows any site to share information between the site and the Facebook platform, allowing readers of the German news magazine to view what posts their Facebook "friends" like, for instance.<sup>191</sup> Moreover, Facebook privacy policy suggests that Facebook receives an array of data when a user

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<sup>187</sup> James Walker, "'Pretty much the entire population' – South Africa hit by major data leak", *The Daily Swig*, 20 October, 2017

<sup>188</sup> *Ibid*

<sup>189</sup> *New York Times*, O'Brien, K., Google Balks at Turning Over Data to Regulators, 27 May 2010, at B3, available online at <[nytimes.com/2010/05/28/technology/28google.html](http://nytimes.com/2010/05/28/technology/28google.html)> (accessed 4 November 2014).

<sup>190</sup> *Wall Street Journal*, Lawton, C., and Fuhrmans, V., Google Rouses Privacy Concerns in Germany— Mapping Service Sparks Debate as Nation Scarred by Authoritarian Past Grapples With Personal Data in Digital Age, 17 August 2010, at B5.

<sup>191</sup> *Op. cit*, Alexander Rengel

visits a website that connects to the Facebook Platform through such links as the “Like” button.

These instances prove two material facts. First, data processors through simple and sometimes random human activities in cyberspace can amass lots of information than the owners intended for them to access. This possibility in itself is discomforting. Second, governments could forcefully compel these data processors to supply them certain information. Either way, the unwarranted collection and exchange of personal data or information threaten the right to privacy. The government could use the data to conduct intrusive surveillance and private individuals could monetize them; all without the consent of owners. There are also several other cases involving security agencies monitoring individuals without their knowledge through their gadgets.

A crucial challenge that can arise is with recent development in technology - the microchip implant in humans. This type of implant, which contains a unique ID number for every person that has it, can reveal certain information about a person such as criminal record, medical record, payment cards, and many more. The major concern is that it gives the developers the ability to track a person and watch their movements. Privacy advocates have expressed concerns that microchip implant poses great security issues. While the device has its advantages, for instance, one could be easily be tracked in cases of kidnap or abduction, one could also be monitored without their knowledge. The issue that therefore arises is whether its benefit could be sufficient justification for the gross invasion of privacy of persons.

### **Violations of the Right to Privacy and Challenges of upholding the Right to Privacy**

There have been several violations of the right to privacy. In some, the right to privacy was upheld, in others, challenges to the right to privacy became apparent. Some of those that are notorious will be mentioned; nevertheless, it must be conceded that many are unreported either because they were so subtle that the victims did not discover their rights had been violated or the violation is ongoing and the victims are yet unaware.

Anyone could be a victim. The negative potential that technology has in restricting and violating the right to privacy is no doubt frightening. Some challenges that prevent the realization of the right also will be highlighted for the purpose of approaching the violations or interferences with the right to privacy. It should be noted that the violation of the right to privacy has the potential to cause the violation of other human rights, whether fundamental or not.

A classic example of where interference with the right to privacy led to the violation of other rights is the case of *Hervé G. v. Facebook France*, where the **Paris Court of First Instance** considered a claim brought by a French Bishop, Hervé Giraud of Soissons against Facebook.<sup>192</sup> The facts of the case are rather intriguing. Bishop Hervé Giraud of Soissons claimed that a Facebook page titled “Courir nu dans une église en poursuivant l’évêque” (running naked in a church after the bishop) incited hate and violence against Catholics and, thus, violated the French hate speech codes.<sup>193</sup> He further claimed that his photograph was used without his explicit permission.<sup>194</sup> On both grounds, the French court ruled in the favour of the Bishop.<sup>195</sup> Even though the photograph at issue was not at all scandalous, but rather simply a portrait of the bishop, the French court ordered Facebook to remove the page, and to pay 2,000 Euros in damages, with a penalty for every day the page was in existence.

A major challenge to the right to privacy is the power of access that data processors like Facebook possess, their ability to access delicate information that are remotely beyond what an owner intends to let out. The facts in *Lane v. Facebook*<sup>196</sup> reveal how easy it is for social network sites to access and share users’ information that should remain otherwise remain private. In 2007, Facebook launched its Beacon program where user records were released to the public for friends to view. Mr. Sean Lane bought a diamond ring from overstock.com, and it appeared on his newsfeed, which was visible to his wife. Along with other plaintiffs, Lane filed a class-action suit against Facebook complaining that the

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<sup>192</sup> TGI Paris, 13 April 2010, *Hervé G. v. Facebook France*@.

<sup>193</sup> Ibid

<sup>194</sup> Ibid

<sup>195</sup> Ibid

<sup>196</sup> US Court of Appeals 9th Circuit, *Lane v. Facebook Inc.*, 2012, 696 F.3d 811.

Beacon program was causing the publication of otherwise private information about their outside web activities to their personal profiles without their knowledge or approval. The parties eventually settled for USD9.5 million in damages, and Facebook ended the Beacon program.

Another challenge is determining the line between private and public information in cyberspace. This challenge is deals a huge blow to the right to privacy of a person in the digital age. At the fore is the case of *New York v. Harris*. The case began in 2011, during the “Occupy Wall Street” movement. After being arrested and charged with misconduct during a march across the Brooklyn Bridge, Mr. Harris pled “not guilty” and claimed New York police did not warn against protestors blocking traffic on the bridge. The Prosecutor then subpoenaed Mr. Harris’ tweets saying they would reveal that he was “well aware of police instructions” ordering protesters not to block traffic. The New York City District Attorney's Office requested Twitter to provide some information, including the content Harris's of tweets, IP addresses from where he used his Twitter account, and any email addresses it had attached to his account. Harris challenged the subpoena on the ground that the tweets are protected by the Fourth Amendment because the government admits that it cannot publicly access them, thus establishing that he maintains a reasonable expectation of privacy in his communication. However, the court held that Harris did not have legal standing to challenge it because the information—including all of his tweets—belonged to Twitter.

The Judge made the following statement: “If you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy. There is no proprietary interest in your tweets, which you have now gifted to the world. This is not the same as a private e-mail, a private direct message, a private chat, or any of the other readily available ways to have a private conversation via the Internet that now exist. Those private dialogues would require a warrant based on probable cause in order to access the relevant information.”<sup>197</sup> The case testifies to the fact that many courts, including those in the United States, have

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<sup>197</sup> Ibid, Alexander Rengel

had a difficult time determining reasonable expectation of privacy in the context of the internet (cyberspace).<sup>198</sup>

### **Measures to Curb the Challenges**

Technology holds a lot of potential. It has the potential to aid the realization of not only the right to privacy but the right to freedom of information and access to information and others. However, it also has the potential to inhibit the realization and enjoyment of these rights as has been demonstrated through sufficient examples and references. For the sake of furthering the expression of human rights, the following are measures that can be adopted to tackle the challenges facing the realization of the right to privacy in a digital world.

The importance of clear guidelines and legislation cannot be overemphasized. Developers of data-driven technology and data processors should be guided by clear-cut rules, regulations, and standards to tackle the issues affecting the right to privacy. For manufacturers of data-based technologies, their products must satisfy minimum standards that help safeguard the right to privacy. Furthermore, standard international and globally coordinated principles regarding biometric collection, use and retention of data must include regulatory controls beyond standard contracting. There should also be protective requirements of international instruments that secure the right to privacy like the General Data Protection Regulation. Additionally, businesses of data processors should be regulated more strictly to prevent them from monetizing information of owners without their consent. Strict procedural rules and regulations that clearly outline the requirements states must fulfil before they can collect information from data processors for whatever purposes should also exist and be strictly applied on the international level.

The minimum requirements imposed by the GDPR regarding portability, consent, notice, and algorithmic and user-centric transparency, all of which guarantees the right

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<sup>198</sup> Daniel J. Solove, "Fourth Amendment Pragmatism", Boston College Law Review, vol. 51, 2010, 1511–12. The author explains that '[t]he reasonable expectation of privacy test has led to a contentious jurisprudence that is riddled with inconsistency and incoherence. Debates rage over whether particular government information activities invade "privacy"'. Ibid, Alexander Rengel



to privacy, should be adopted by states and implemented as much as possible. Transparency is also a very important measure that must be emphasized. State actors - as well as individuals - must conform with transparency requirements by doing compliance reports and by adhering to strict conditions for derogation of the rights.

Technology also has a role in solving the challenges. First, technological safeguards and mechanisms that enhance computer security and consequently increase individual privacy in systems should be emphasized in regulations. These mechanisms include authentication, cryptography, cookie cutters, and firewall authorization. Individuals should leverage on these mechanisms to further protect themselves from an incursion into their private space in cyberspace. It is further suggested that technology developers also make their devices slightly impossible to hack by random hackers without authorization.

States must also understand that obligations abound under international human rights law to protect the right to privacy. It is an important right that must be balanced with states interest, and as such, states must strive to promote the right. Hence, states are to actively strike toward implementing regulations and laws that protect the right to privacy.

## Conclusion

According to Robert Peck,<sup>199</sup> "privacy makes possible individuality, and thus, freedom."<sup>200</sup> For generations, man has been asking for freedom. And in his quest for sustenance, and ultimately freedom, he developed technology. And now, technology hinders privacy, which makes true freedom impossible. It is therefore high time that concerted efforts be made by all actors and stakeholders to help achieve a world where the right to privacy is a reality, even in the digital age.

## Further Research

What can be done to further secure the right to privacy? Are the measures suggested sufficient to protect the right to privacy? Can the risks posed by technology mitigated? If yes, how can that be achieved? What technological measures can be adopted to secure

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<sup>199</sup> Robert S. Peck, the Right to Be Left Alone, 15 HuM. RTS. 26, 27 (1987)

<sup>200</sup> Ibid

the right to privacy? Where is the dividing line between private matters and the public domain?

### Scope and Resources for Research on Background Guide

To research on this topic, focus will be on existing legislation, laws, international treaties, and conventions regarding the right to privacy. Also, reports of bodies like the human rights council will be used to address how technology and right to privacy intersect and the recommendations submitted to solve the resulting issues.

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