



LAPIN
LABORATORY OF PUBLIC
POLICY AND INTERNET

UN High Commissioner for Human Rights Call for Inputs: HRC 50th Session Report on Internet Shutdowns and Human Rights

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INTRODUCTION

The Laboratory of Public Policy and Internet (LAPIN) is pleased to contribute to the United Nations High Commissioner for Human Rights' Report on Internet Shutdowns and Human Rights to be presented at the 50th Session of the Human Rights Council.¹

LAPIN is a pioneer nonprofit think tank dedicated to digital policy based in the Brazilian capital, Brasília. Researchers, lawyers, engineers, and representatives from both the public and private sectors contribute to LAPIN's goal of analyzing and supporting the development of public policies focused on the regulation of digital technologies.²

CALL FOR INPUT

LAPIN welcomes this opportunity to address the following requested inputs: (1) "the occurrence of mandated disruptions of communications" and (2) "research conducted on the impact of mandated communications disruptions."

The submission focuses on the Brazilian experience.

Section I displays occurrences of mandated disruptions of communication in Brazil. This delves into the country's duty to respect **[A]** and to protect **[B]** those under its jurisdiction from Internet shutdowns. **Firstly**, it informs on the events that led to WhatsApp's shutdown and legal pathways for its reversal. Moreover, it discloses the current state-of-affairs of heightened tensions between Brazilian public authorities and Telegram, including talks of mandating the latter's shutdown. **Secondly**, it addressed Brazil's failure to protect its citizens from shutdowns mandated by criminal organizations in local communities, such as drug cartels and militias.

Section II traces the practical consequences of the abovementioned Internet shutdowns to the human rights of those affected. It draws from news reports, personal statements, interviews, available data, and qualitative analysis to formulate the impacts caused or to be potentially caused by the shutdown of WhatsApp and Telegram **[A]**. Thereafter, shutdowns brought about by organized crime are, likewise, analyzed **[B]**.

Section III concludes and tailor recommendations based on the foregoing findings.

¹ OHCHR, '[Report on Internet Shutdowns and Human Rights](#)' (2022).

² LAPIN, '[About Us](#)'.

I. OCCURRENCE OF MANDATED DISRUPTION OF COMMUNICATION IN BRAZIL

This Section is twofold. Firstly, **(A)** it addresses government-mandated shutdowns potentially at variance with Brazil's **duty to respect**. Secondly, **(B)** it introduces shortcomings vis-à-vis its **duty to protect** the rights of those under Brazilian jurisdiction.

A. Duty to Respect: Government-Mandated Shutdowns

This Subsection displays preparations, occurrences, and ongoing discussions on government-mandated Internet shutdowns in Brazil. Accordingly, it discloses each disruption's duration, geographical scope, official orders for intervention, and legal measures for reversal or accountability of those responsible, to the extent these are identifiable and their effects to society remained ongoing in the period of 2017–2022.

The last documented government-mandated shutdown in Brazil was to the messaging application WhatsApp in 2016. This is evinced in reports by the Freedom House's³ Freedom on the Net initiative,⁴ Access Now's #KeepItOn coalition,⁵ and InternetLab's Bloqueios.info platform.⁶ The latter provides an overview of threats of and effective shutdowns in the country.⁷

In Brazil, the phenomenon is chiefly twofold. Both fall under the category of shutdowns to social media or messaging applications. **First**, the effective shutdown of WhatsApp for the purpose of criminal investigation, prosecution, and law enforcement. **Second**, the threat of shutdown – primarily to Telegram – for the purpose of restraining disinformation and misinformation in electoral periods.

1. End-to-End Encryption and Law Enforcement: The WhatsApp Case

WhatsApp was shut down on three occasions between December 2015 and July 2016.⁸ The shutdowns' geographic scope comprised the entirety of the Brazilian territory; but they also accidentally affected other Latin-American countries, such as Argentina, Chile, and Uruguay.⁹ The intervention resulted from the compliance of telecommunication

³ Freedom House, Internet Freedom Scores. Available at: <https://freedomhouse.org/countries/freedom-net/scores>. Access 07.02.2022.

⁴ See latest report: Freedom House, Freedom on the Net 2021. Available at: <https://freedomhouse.org/country/brazil/freedom-net/2021>. For previous years: [2017](#), [2018](#), [2019](#), [2020](#).

⁵ Access Now, 'On eve of Olympics, judge orders blocking of WhatsApp in Brazil', 19 July 2015. Available at: <https://www.accessnow.org/eve-olympics-judge-orders-blocking-whatsapp-brazil/>. Access 07.02.2022. For annual reports, see: [2018](#), [2019](#), [2020](#), [2021](#).

⁶ InternetLab, 'WhatsApp IV'. Available at: <http://bloqueios.info/pt/casos/bloqueio-por-descumprimento-de-ordem-judicial-de-entrega-de-dados-2/>.

⁷ InternetLab, 'Bloqueioteca'. Available at: <http://bloqueios.info/pt/bloqueioteca/>.

⁸ For an insightful overview, see: Carlos Augusto Liguori Filho and João Pedro Favaretto Salvador, 'Crypto wars e bloqueio de aplicativos: o debate sobre regulação jurídica da criptografia nos Estados Unidos e no Brasil' (2018) 63(3) Revista da Faculdade de Direito UFPR. Available at: <https://revistas.ufpr.br/direito/article/view/59422>, pp. 150-155.

⁹ El Dínamo, 'La explicación de por qué algunos usuarios chilenos despertaron sin WhatsApp' (17 Dec. 2015). Available at: <https://www.eldinamo.cl/tech/La-explicacion-de-por-que-algunos-usuarios-chilenos-despertaron-sin-Whatsapp-20151217-0048.html>. Diario Financiero, 'Whatsapp es suspendido en Brasil y problemas con enlace internacional afecta al servicio en Chile' (17 Dec. 2015). Available at: <https://www.df.cl/noticias/empresas/telecom-tecnologia/whatsapp-es-suspendido-en-brasil-y-se->

companies with official judicial orders.¹⁰ These sought to compel WhatsApp to disclose the content of messages between users under investigation for serious crimes, such as drug trafficking and organized crime. In response, WhatsApp could not fully comply with the judicial requests due to the technical impossibility of breaching its end-to-end encryption.

The **first** shutdown occurred on December 16, 2015. It was mandated by the 1st Criminal Court of São Bernardo – State of São Paulo for a duration of 48 hours.¹¹ Nevertheless, São Paulo State Court of Appeals granted an injunction to reverse it within 10 hours of shutdown.¹² The **second** event took place on May 2nd, 2016, pursuant to an order rendered by the Criminal Court of Lagarto – State of Sergipe.¹³ This was supposed to last 72 hours; however, the Sergipe Court of Appeals granted an injunction to reverse it within 24 hours.¹⁴ The **third**, on July 19, 2016. It was mandated by the 2nd Criminal Court of Duque de Caxias – State of Rio de Janeiro.¹⁵ Rather than establishing a duration, the official order mandated the shutdown to remain in force until WhatsApp complied with the request. Notwithstanding, the Brazilian Federal Supreme Court (STF) granted an injunction to reverse the ruling within 4 hours.¹⁶

Prior to the third shutdown, two actions were filed before STF,¹⁷ namely, **Action Against a Violation of a Constitutional Fundamental Right 403** (ADPF 403) and **Direct Action for the Declaration of Unconstitutionality 5527** (ADI 5527)¹⁸ – both are being jointly processed. In short, the Court is assessing the constitutionality of the interpretation by which Article 12

reportan-problemas-en-chile-y/2015-12-17/073322.html. Olhar Digital, 'Bloqueio do WhatsApp no Brasil afeta também Chile, Argentina e Uruguai' (17 Dec. 2015). Available at: <https://olhardigital.com.br/2015/12/17/pro/bloqueio-do-whatsapp-no-brasil-afeta-tambem-chile-argentina-e-uruguai/>.

¹⁰ Felipe Busnello and Giancarlo Frosio, 'WhatsApp in Brazil?', Stanford's Center for Internet and Society (28 Dec. 2015). Available at: <http://cyberlaw.stanford.edu/blog/2015/12/whatsapp-brazil>.

¹¹ Request for Breach of Communication Secrecy #0017520-08.2015.8.26.0564, (11 Dec. 2015). Available at: <https://bit.ly/34if2ws>.

¹² Writ of Mandamus #2271462-77.2015.8.26.0000, 'WhatsApp v. State of São Paulo', Provisional Measure (17 Dec. 2015). Available at: www.omci.org.br/m/jurisprudencias/arquivos/2015/tjse_22714627720158260000_17122015.pdf. See also: Bloqueios.info, 'Caso WhatsApp II'. Available at: <http://bloqueios.info/pt/casos/bloqueio-por-descumprimento-de-ordem-judicial-de-entrega-de-dados/>.

¹³ Lawsuit #201655090143, (26 April 2016). Available at: <https://bit.ly/3qvYbsh>.

¹⁴ Writ of Mandamus #201600110899, 'WhatsApp v. State of Sergipe', (03 May 2016). Available at: http://www.omci.org.br/m/jurisprudencias/arquivos/2016/tjse_201600110899_03052016.pdf. See also: Bloqueios.info, 'Caso WhatsApp III'. Available at: <http://bloqueios.info/pt/casos/bloqueio-por-descumprimento-de-ordem-judicial-de-entrega-de-dados-whatsappiii/>.

¹⁵ Police Investigation #062-00164/2016, (19 July 2016). Available at: <https://bit.ly/34IT995>. See also: Bloqueios.info, 'Caso WhatsApp IV'. Available at: <http://bloqueios.info/pt/casos/bloqueio-por-descumprimento-de-ordem-judicial-de-entrega-de-dados-2/>.

¹⁶ Action Against a Violation of a Constitutional Fundamental Right 403 (ADPF 403), STF, Provisional Measure (2016). Available at: <https://bit.ly/3rB91Up>.

¹⁷ For explanation on Constitutional Judicial Review in Brazil, see: STF, 'Judicial Review', available at: http://portal.stf.jus.br/internacional/content.asp?id=120199&ori=2&idioma=en_us.

¹⁸ Full ADPF 403 available at: <https://bit.ly/3LtSrOf>. Full ADI 5527 available at: <https://bit.ly/3HHOzH6>.

(III) and (IV), of the Civil Rights Framework for the Internet (Law No. 12.965/2014)¹⁹ serves as legal basis to justify the application of shutdowns as sanction.²⁰

Although the trial is still pending, two of the eleven Supreme Justices have rendered their votes. **Under the Constitution, both disfavor the interpretation by which the provisions constitute a legal basis for the government to mandate generalized shutdowns as a sanction or remedy of law.**

Justice Weber²¹ found that Article 12 (III) and (IV), Law No. 12.965/2014²² did not provide for a sanction by which the government could shut down all activities of an Internet application or service provider (ISP). It may only shut down activities concerning the processing of personal data or private communications, if and only if, the application or ISP is repeatedly violating legislation on data privacy or secrecy of communications.²³ She also emphasized that mandated shutdowns to messaging apps encroach upon the Brazilian Constitution and, therefore, are subject to reversal through the due process of law.²⁴

Justice Fachin²⁵ found that the suspension of activities carried by Internet applications is not admissible to enforce a judicial order mandating breach of encryption.²⁶ Such a sanction may only be applied where an Internet application is systematically violating privacy legislation and, in any case, it should respect the proportionality standard.²⁷ Moreover, Article 12 (III), Law No. 12.965/2014,²⁸ as the legal basis under discussion, can only be applied within the competence of the Brazilian Data Protection Authority, not the Judiciary's.²⁹ He concluded that "it is not constitutionally admissible to shut down the messaging application WhatsApp through a judicial order."³⁰

Although unfinished, the WhatsApp Case Study introduces lessons that may be transposable to other instances of shutdowns. **For one**, the importance of due process, the rule of law, and judicial review in assessing the merits of shutdowns against fundamental rights and the proportionality standard. **For two**, the importance of multistakeholderism in

¹⁹ Article 12, Law No. 12.965/2014: "In addition to any civil, criminal or administrative sanctions that may apply, any infraction of the rules under articles 10 and 11 is subject to the following sanctions, applied singly or in conjunction, according to each case: (...) **III** – temporary suspension of activities that involve the acts referred to in article 11; and **IV** – prohibition of activities that involve the acts referred to in article 11." For English translation of the law, see: Carlos Affonso Souza, Mario Viola, and Ronaldo Lemos (eds), 'Brazil's Internet Bill of Rights: A Closer Look', ITS-Rio (2017), pp. 7-27. Available at: https://itsrio.org/wp-content/uploads/2018/02/v5_com-cap_a_pages_miolo_Brazil-Internet-Bill-of-Rights-A-closer-Look.pdf.

²⁰ For a critical explanation and assessment of this debate, see: Carlos Affonso Souza and Sérgio Branco, 'Brazil's Internet Bill of Rights not to blame for takedown of WhatsApp', Open Democracy (3 May 2016). Available at: <https://www.opendemocracy.net/en/digitaliberties/brazils-internet-bill-of-rights-not-to-blame-for/>.

²¹ ADI 5527, STF, Justice Rosa Weber's Vote (27 May 2020). Available at: <https://bit.ly/3BeCMxI>.

²² *Supra.*, footnote 19.

²³ *Supra.*, footnote 21, pp. 33-36.

²⁴ *Id.*, p. 10.

²⁵ ADPF 403, STF, Justice Edson Fachin's Vote (28 May 2020). Available at: <https://bit.ly/3J7jVqG>.

²⁶ *Id.*, p. 73.

²⁷ *Id.*, p. 73, 75.

²⁸ *Supra.*, footnote 19.

²⁹ *Supra.*, footnote 25, p. 75.

³⁰ *Id.*, pp. 73-74,

Internet governance. Judicial³¹ and legislative³² debates must be open to the numerous segments of society. This ensures that the material legal bases that may potentially substantiate an Internet shutdown as remedy or sanction are thoroughly discussed, addressed, and either narrowly delineated or fully rejected. Finally, more conclusions and recommendations follow in **Section III**.³³

2. Content Moderation and Electoral Disinformation: The Telegram Case

In Brazil, the Superior Electoral Court (TSE) holds adjudicative and executive jurisdiction over elections. Therefore, it leads the institutional effort to mitigate political disinformation and misinformation during electoral periods. For that, it established the 'Permanent Program of the Electoral Justice to Counter Disinformation'³⁴ – based on its experience during the 2020 Elections.³⁵ Accordingly, it enters into cooperative agreements with digital platforms to coordinate actions aimed at countering and neutralizing online disinformation. In 2022, Twitter, TikTok, Facebook, WhatsApp, Google, Instagram, YouTube, and Kwai have voluntarily signed into the program.³⁶

On December 16, 2021, the President of TSE, Justice Barroso, sent a letter to Mr. Pavel Durov, the Chief Executive Officer of Telegram. It requested a meeting to “discuss possible means of cooperation (...) on the very pressing issue of countering disinformation.”³⁷ Although four delivery attempts were made to Telegram’s headquarters in Dubai, United Arab Emirates, the letter was disregarded and returned to the sender.³⁸ This is the most recent episode in a series of frictions between Brazil’s public authorities and Telegram.

The app’s policy on content moderation³⁹ and the absence of legal representation in the country has led Telegram to fully disregard any engagement, whether cooperative or legally binding, by Brazilian authorities. Notably, on August 12, 2021, upon a TSE request, the Supreme Court ordered Facebook, Twitter, Telegram, Linode (Cloudflare), and Bitly to take

³¹ To draw from WhatsApp’s End-to-End Encryption Case Study, the Constitutional Action before the Supreme Court counted with at least thirty contributions by representatives of the private sector, government, civil society, technical community, and academia. See transcripts of public hearings: STF, Public Hearings of ADI 5527 and ADPF 403, Transcripts (June 2017). Available at: <https://bit.ly/3HBIGeg>.

³² Societal participation was even higher in the legislative discussions on the Civil Rights Framework for the Internet. See pages 09–21, 63–74 of the law’s preparatory works. Available at: <https://bit.ly/34lJKhU>.

³³ *Infra.*, **Section III: Conclusions and Recommendations**, pages 11–12 of this document.

³⁴ TSE, ‘Portaria 510/2021’ (06 Aug. 2021). Available at: <https://bit.ly/34pOnh7>.

³⁵ Gustavo Ribeiro *et. al.*, ‘Desinformação nas Eleições Municipais de 2020: Notas de uma Análise Jurisprudencial’, LAPIN & CEPI-FGV (5 Oct. 2021), p. 15. Available at: <https://lapin.org.br/2021/10/05/desinformacao-nas-eleicoes-municipais-de-2020-notas-de-uma-analise-jurisprudencial/>. Ana Claudia Santano *et. al.* (org.), ‘Relatório Final: Missão de Observação Eleitoral Nacional 2020’, Transparência Eleitoral Brasil (2021), pp. 55–58. Available at: <https://transparenciaeleitoral.com.br/wp-content/uploads/2021/11/Relato%CC%81rio-final-Missa%CC%83o-de-Observac%CC%A7a%CC%83o-Eleitoral-Nacional-2020.pdf>.

³⁶ TSE, ‘Eleições 2022: TSE e plataformas digitais firmam parceria para combate à desinformação’ (07 Feb. 2022). Available at: <https://bit.ly/3LvuNkm>.

³⁷ TSE, ‘Letter to CEO of Telegram’, (16 Dec. 2021). Available at: <https://bit.ly/3B7BX9o>.

³⁸ Reuters, ‘Brazil electoral court could ban Telegram app for not fighting fake news’ (20 Jan. 2022). Available at: <https://www.reuters.com/technology/brazil-electoral-court-could-ban-telegram-app-not-fighting-fake-news-2022-01-20/>. Gazeta do Povo, ‘Carta de Barroso ao Telegram é devolvida após entrega frustrada’ (04 Feb. 2022). Available at: <https://www.gazetadopovo.com.br/republica/breves/carta-de-barroso-ao-telegram-e-devolvida-apos-entrega-frustrada/>.

³⁹ See: <https://telegram.org/privacy>.

down specific content shared by President Bolsonaro inasmuch it concerned a confidential TSE investigation on whether its information systems and databases had been compromised.⁴⁰ Such disclosure aimed at fueling disinformation to discredit the resilience of Brazil's electoral process. After six months, Telegram remains the sole non-compliant.⁴¹

Justice Barroso recently mentioned TSE will discuss measures to address the issues with Telegram. When asked whether the app's shutdown was a possibility, TSE responded "Justice Barroso believes that no actor that is relevant for the 2022 electoral process may operate in Brazil without adequate legal representation, responsible for compliance with the national legislation and judicial orders."⁴² Nonetheless, he has also indicated an aversion for "the idea of banning a platform."⁴³

Moreover, upon a series of unanswered cooperation requests, the Federal Prosecutor's Office also declared that it may request the temporary shutdown of Telegram before the Judiciary.⁴⁴ Apart from the government, civil society and academia reacted in partial opposition. They agreed that Telegram must respect Brazilian laws and institutions; however, a shutdown is deemed a disproportionate, drastic, and ineffective sanction.⁴⁵

On the legislative front, Brazil's National Congress is currently debating a Fake News Bill (Draft Bill No. 2630/2020).⁴⁶ In connection with the concerns of TSE, Article 32 of the bill's latest version requires social networks and messaging applications to have headquarters and legal representation in Brazil.⁴⁷ Nonetheless, Article 31, which sets forth sanctions for non-compliance, does not prescribe shutdowns, nor anything remotely related as an option. In fact, it only allows for warnings and fines of up to 10% of the company's yearly revenue in Brazil. Moreover, in any case, it expressly demands judicial authorities abide by the standard of proportionality.⁴⁸

⁴⁰ Inquiry #4781, STF, Justice Moraes' Decision (12 Aug. 2021). Available at: <https://www.conjur.com.br/dl/alexandre-bolsonaro.pdf>.

⁴¹ Marcelo Rocha, 'Telegram ignora decisão do STF sobre Bolsonaro há 6 meses e expõe descontrolo no Brasil', Folha de S.Paulo (03 Feb. 2022). Available at: <https://www1.folha.uol.com.br/poder/2021/12/tse-nao-alcanca-telegram-e-expoe-desafios-de-lei-contrafake-news-entenda.shtml>.

⁴² Júlia Schiaffarino, 'Barroso Terá Reunião para Discutir Uso do Telegram e App Pode Ser Banido do Brasil', Congresso em Foco (19 Jan. 2021). Available at: <https://congressoemfoco.uol.com.br/area/justica/barroso-tera-reuniao-para-discutir-uso-do-telegram-e-aplicativo-pode-ser-banido-do-brasil/>.

⁴³ Beatriz Bulla, "Não gosto da ideia de banir uma plataforma", diz Barroso', O Estado de S.Paulo (03 Feb. 2022). Available at: <https://politica.estadao.com.br/noticias/eleicoes,nao-gosto-da-ideia-de-banir-uma-plataforma-diz-barroso,70003968280>.

⁴⁴ Gabriel Daros, 'Cercos ao Telegram: Inquérito do MPF pode suspender aplicativo no Brasil', Tilt UOL (25 Jan. 2022). Available at: <https://www.uol.com.br/tilt/noticias/redacao/2022/01/25/cerco-ao-telegram-inquerito-do-mpf-pode-suspender-aplicativo-no-brasil.htm>.

⁴⁵ Lucas Carvalho, 'Bloqueio do Telegram é exagero, mas não seria surpresa, dizem especialistas', Tilt UOL (02 Feb. 2021). Available at: <https://www.uol.com.br/tilt/noticias/redacao/2022/02/02/bloqueio-do-telegram-no-brasil.htm>. Filipe Prado, 'Eleições 2022: Proibir o Telegram é válido para coibir as fake news? Especialistas respondem', Revista Isto É (21 Jan. 2022). Available at: <https://www.istoedinheiro.com.br/eleicoes-2022-proibir-o-telegram-e-valido-para-coibir-as-fake-news-especialistas-respondem/>. Ronaldo Lemos, 'Telegram mostra falha das instituições', Folha de S.Paulo (06 Feb. 2022). Available at: <https://www1.folha.uol.com.br/colunas/ronaldolemos/2022/02/telegram-mostra-falha-das-instituicoes.shtml>. Carlos Affonso de Souza, 'YouTube, WhatsApp e agora Telegram? País pode ter onda de bloqueios do app', Tilt UOL (31 Jan. 2022). Available at: <https://www.uol.com.br/tilt/colunas/carlos-affonso-de-souza/2022/01/31/telegram-bloqueio-de-aplicativos-brasil-app-youtube-whatsapp-eleicoes-2022.htm>.

⁴⁶ For legislative procedure, see: <https://www.camara.leg.br/propostas-legislativas/2256735>.

⁴⁷ The National Congress of Brazil, Draft Bill 2630/2020, Article 32. Available at: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1909983.

⁴⁸ *Id.*, Article 31.

Besides the above, there was one threat of court-mandated shutdown due to disinformation within 2017-2022. On March 28, 2018, the 15th Civil Court of Rio de Janeiro ordered Facebook to remove “false information of criminal content”⁴⁹ relating to former Municipal Representative Marielle Franco – whose murder, two weeks before, spurred widespread protests. The removal was requested to be implemented in 24 hours, otherwise Facebook could be shut down.⁵⁰ The mandate, however, remained just a threat. On April 18, 2018, the State Court of Appeals recognized Facebook’s compliance to the extent of its technical capacity and granted an injunction to cease any possibility of a shutdown.⁵¹

The most pressing lesson to be drawn from the Telegram Case Study is that Internet applications must cooperate and attend to the concerns of public authorities. Moreover, where this stems from a binding judicial order, they should exhaust legal remedies and abide by the due process of law. Cooperation and due process tend to minimize the risk of disproportionate sanctions. Likewise, States must refrain from the use of shutdowns as threat or sanction. Any such interference must always be prescribed by law and abide by the proportionality standard. The application of these long-standing human rights maxims narrowly delineates a sanction to adequately meet the scope of the grievances it seeks to redress.

B. Duty to Protect: Failure to Prevent and Redress Shutdowns by Non-State Actors

This Subsection will shortly introduce shutdowns instantiated by non-State actors. Although not government-mandated, these may equally affect fundamental rights and, especially, those of particular groups or communities. International Human Rights Law should not only be respected, but also protected by States. Therefore, a debate limited to governmental mandates is equally restrictive to the full realization of human rights inasmuch it excludes States’ obligations to cease interferences by non-State actors.

Accordingly, this Subsection displays shutdowns implemented by criminal organizations that operate in areas and communities where the Government of Brazil, although the *de jure* authority, lacks full political control and, therefore, fails to guarantee institutional safeguards for people’s human rights.

⁴⁹ Bloqueios.info, ‘Caso Facebook III’. Available at: <http://bloqueios.info/pt/casos/descumprimento-de-ordem-judicial-de-remocao-e-filtragem-de-conteudo/>.

⁵⁰ Lawsuit #0070926-71.2018.8.19.0001. Available at: <https://bit.ly/3HRqB08>.

⁵¹ Interlocutory Appeal #0019333-06.2018.8.19.0000. Available at: http://www.internetlab.org.br/wp-content/uploads/2018/04/2018.04.23_PJ_RJ.pdf.

Organized criminal activity is endemic to Brazil⁵² and Latin America as a whole.⁵³ In numberless instances criminal organizations, such as drug cartels and militias,⁵⁴ hold *de facto* control over a community's political economy. This includes wide illegal markets of goods and services,⁵⁵ including that of ISPs – suppliers of Internet access for end-users.⁵⁶

In order to control such a market, criminal organizations must first shut down the Internet supplied by lawful ISPs. Reports of occurrences abound – especially in Rio de Janeiro. These are non-exhaustively illustrated in **Section II.B**, alongside consequences to human rights enjoyment.⁵⁷

In conclusion, State failure to prevent and redress shutdowns carried by criminal organizations leads not only to the temporary absence of Internet access, but also to the implementation of parallel Internet services outside governmental oversight. This, in turn, entails **a generalized vacuum of rule of law and fundamental rights in all matters concerning the Internet connection for users in militia-controlled areas.**

II. RESEARCH CONDUCTED ON THE IMPACT OF MANDATED COMMUNICATION DISRUPTIONS

A. Shutdowns Concerning WhatsApp and Telegram

At the time of its shutdowns in 2015 and 2016, WhatsApp was the most used application in Brazil. This comprised 90–93% of all mobile users in the country; approximately 100 million citizens.⁵⁸ Their rights to freedom of communication, expression, opinion, and access to information were suddenly curtailed.

The Brazilian Institute of Consumer Protection stated that 90 million consumers had their rights violated by the sudden suspension of the service. The same applies to thousands of service providers who depended on WhatsApp as a “basic instrument of communication.”⁵⁹

⁵² Global Initiative Against Transnational Organized Crime, ‘Global Organized Crime Index: Brazil’ (2021), p. 4. Available at: https://ocindex.net/assets/downloads/english/ocindex_profile_brazil.pdf.

⁵³ Nate Schenkkan and Isabel Linzer, ‘Out of Sight, Not Out of Reach: The Global Scale and Scope of Transnational Repression’, Freedom House (Feb. 2021), p. 52. Available at: <https://bit.ly/3JebiuD>.

⁵⁴ In Brazilian Portuguese the term “milícias” refers to paramilitary criminal organizations that, through the illegal and usually brutal and inhumane use of force, fill the vacuum of effective political power in certain locations – the Global Organized Crime Index define it as a mafia-style group.

⁵⁵ See topic on “Criminal Actors.” *Supra.*, Footnote 52, p. 4. Available at: https://ocindex.net/assets/downloads/english/ocindex_profile_brazil.pdf.

⁵⁶ Larissa Milkiewicz, Mariana Gmach Philippi, and Fernanda Dalla Libera Damacena, ‘Os reflexos socioambientais da deficiente segurança pública’, *Revista da Faculdade de Direito da UFG* 44(3)(05 Jan. 2021), p. 9. Available at: <https://doi.org/10.5216/rfd.v44i3.59998>.

⁵⁷ *Infra.*, **Section II.B: Shutdowns Caused by Criminal Organizations**, pages 9–12 of this document.

⁵⁸ Centro de Tecnologia e Sociedade da Fundação Getúlio Vargas, ‘Pesquisadora do CTS analisa bloqueio do Whatsapp no Brasil’ (18 Dec. 2015). Available at: <https://direitorio.fgv.br/noticia/pesquisadora-do-cts-analisa-bloqueio-do-whatsapp-no-brasil>. TechTudo, ‘WhatsApp é o aplicativo mais usado do Brasil, segundo pesquisa’ (16 Dec. 2015). Available at: <https://www.techtudo.com.br/noticias/2015/12/whatsapp-mais-usado-brasil.ghtml>.

⁵⁹ Brazilian Institute of Consumer Protection, ‘Nota Técnica Sobre Decisão de Bloqueio do WhatsApp’ (2015). Available at: <https://www.idec.org.br/pdf/nota-tecnica-bloqueio-whatsapp.pdf>.

Indeed, many merchants reported a decrease in demand for their goods and services associated with WhatsApp's inaccessibility.⁶⁰

The Brookings Institute conservatively estimated, without taking into account WhatsApp's third shutdown, that the first two caused an economic loss of 116 million dollars to Brazil's Gross Domestic Product between July 1st, 2015 and June 30, 2016.⁶¹ Another trend was the swift shift of a great number of users to other messaging applications. In fact, Telegram reported that 5.7 million and over 7 million new users joined the platform after the first and second shutdowns of WhatsApp, respectively.⁶²

The shutdowns disproportionately affected two groups. First, those who cannot write or read. This is because, unlike other platforms at the time, WhatsApp allowed for users to communicate via audio.⁶³ Second, those who lacked affordable broadband inasmuch WhatsApp had a Zero-Rating agreement with a major mobile operator in Brazil. Therefore, many Brazilians did not have to spend their mobile data to use the app.⁶⁴ Moreover, it adversely affected Brazilian's ability to work, to communicate with family and friends, and engage in commercial activities.⁶⁵

As per the potential shutdown of Telegram, little can be stipulated as to its effects. The app's current penetration among mobile users in Brazil is 45%, being the second most used in the country.⁶⁶ Thus, in case of a shutdown, consequences are expected to be qualitatively similar to that of the WhatsApp shutdowns, but quantitatively smaller.

B. Shutdowns Caused by Criminal Organizations

In 2020, it was estimated that militias were present in twenty-three of the twenty-six States of the Federation, in addition to the Federal District. This is most noticeable in the State of Rio de Janeiro, where militias hold control over 37 neighborhoods and 165

⁶⁰ R7, 'Brasileiros relatam prejuízos causados pelas 24 horas sem poder usar o WhatsApp' (04 May 2016). Available at: <https://noticias.r7.com/tecnologia-e-ciencia/brasileiros-relatam-prejuizos-causados-pelas-24-horas-sem-poder-usar-o-whatsapp-04052016>.

⁶¹ Darrell M. West, 'Internet shutdowns cost countries \$2.4 billion last year', Brookings Institute (Oct. 2016), p. 2. Available at: <http://www.brookings.edu/wp-content/uploads/2016/10/internet-shutdowns-v-3.pdf>.

⁶² Telegram made these announcements through its official Twitter account. For the first wave of new users, see: https://twitter.com/telegram/status/677604437905580032?s=20&t=LvtGWUc86iC-8_V9TfW-Dw. For the second, see: <https://twitter.com/telegram/status/727551443553685506?s=20&t=XIIHRkJ2t4RiekK8dXuv50>.

⁶³ *Supra.*, footnote 20.

⁶⁴ TechTudo, 'O que é Zero Rating? Entenda polêmica que envolve Facebook e operadoras' (25 May 2015). Available at: <https://www.techtudo.com.br/noticias/2015/05/o-que-e-zero-rating-entenda-polemica-que-envolve-facebook-e-operadoras.ghtml>.

⁶⁵ Ana Bárbara Gomes Pereira et. al., 'Percepções sobre criptografia e investigações criminais no Brasil: mapeamento e análise', Instituto de Referência em Internet e Sociedade (2021), p. 44. Available at: <https://bit.ly/3kGTde3>.

⁶⁶ Statista, 'Penetration of selected mobile messaging apps among smartphone owners in Brazil from 2018 to 2021' (07 Dec. 2021). Available at: <https://bit.ly/3Lnv3k>.

communities.⁶⁷ As mentioned, instances of shutdowns abound.⁶⁸ In the State of Rio de Janeiro, reports of parallel control over the Internet service dates back to, at least, 2008.⁶⁹

Back then, militias reportedly had access to private messages exchanged by Internet users in LAN-houses.⁷⁰ In one instance, militiamen interrogated and tortured a user over the content of messages he had exchanged.⁷¹ More recently, organized crime has been taking over Internet infrastructure. There have been countless reported cases of criminal organizations cutting down Internet cables to subsequently implement their own ISPs. This resulted in localized Internet shutdowns, implementation of lower quality Internet, coupled with fearmongering and life threats to prevent the local community from filing complaints with authorities or hiring alternative lawful ISPs.⁷²

In another instance, a community controlled by criminal organizations was unable to work or study from home during the COVID pandemic lockdown due to a shutdown. Teachers and local schools were unable to continue with classes and merchants had their business adversely affected.⁷³ Currently, technicians from lawful ISPs are denied access to controlled areas with threats of physical retaliation and damage to the company's property.⁷⁴ Internet towers have also been seized⁷⁵ and illegally installed in environmentally-protected areas.⁷⁶

According to Conexis,⁷⁷ in 2020, 4.6 million meters of cable were stolen and 6.679 million persons had their telecommunication service halted in Brazil.⁷⁸ The Army's Intelligence Center reported that one telecom operating in Rio de Janeiro had to halt its Internet service to 1.5 million citizens.⁷⁹ **In conclusion, shutdowns caused by criminal organizations encroach on a series of economic, social, and cultural rights. In the case of Brazil, this is to an even greater extent than that of government-mandated shutdowns.**

⁶⁷ Ricardo Brandt, 'Eleições 2020: Milícias Nas Urnas', O Estado de S.Paulo (26 Jan. 2020). Available at: <https://www.estadao.com.br/infograficos/politica/eleicoes-2020-milicias-nas-urnas,1069309>.

⁶⁸ *Supra.*, see **Section I.B: Duty to Protect: Failure to Prevent and Redress Shutdowns by Non-State Actors**, pages 7-8 of this document.

⁶⁹ Heinrich Böll Foundation and Justiça Global Organization, 'Segurança, tráfico e milícia no Rio de Janeiro' (2008), p. 63. Available at: http://www.dhnet.org.br/dados/relatorios/r_jglobal/r_jg-rj_milicias.pdf.

⁷⁰ In the late 2000s LAN Houses were a popular way of obtaining Internet access in communities. See, Ronaldo Lemos and Paula Martini, 'LAN Houses: A new wave of digital inclusion in Brazil', Publius Project (16 Sep. 2009). Available at: http://publius.cc/lan_houses_new_wave_digital_inclusion_brazil/091509.

⁷¹ *Supra.*, footnote 69, p. 63.

⁷² Chico Regueira, 'Traficantes e milicianos cortam internet de moradores no RJ para cobrar pelo serviço', G1, RJ2 (20 Oct. 2020). Available at: <https://glo.bo/3rFBOie>. Erick Rianelli, 'Traficantes cortam cabos de telefonia para obrigar clientes a assinar com provedor de internet', G1, RJ1 (08 Feb. 2021). Available at: <https://glo.bo/3Jie4yT>.

⁷³ Yuri Eiras, 'Crime corta cabos de internet e obriga moradores a utilizarem o serviço local', O Dia (24 June 2021). Available at: <https://bit.ly/3svCHS2>.

⁷⁴ Luana Alves, 'Criminosos que controlam "gatonet" no RJ danificam rede de outras empresas e impedem reparos nos equipamentos', G1, Bom Dia Rio (07 Sep. 2021). Available at: <https://glo.bo/3oEsTnJ>.

⁷⁵ According to Telecoms, by mid-2021, 26 towers had been seized in Rio de Janeiro. See, Paulo Renato Soares and Edvaldo Santos, 'Facções criminosas sequestram antenas de telefonia e internet no RJ', G1, Jornal Nacional (01 May 2021). Available at: <https://glo.bo/3uGYkSe>.

⁷⁶ Eduardo Tchao, 'Moradores denunciam desmatamento no Morro do Chacrinha para instalação de torre de internet da milícia', G1, RJ1 (02 Feb. 2022). Available at: <https://glo.bo/3rE3yft>.

⁷⁷ Conexis is the National Trade Union of Telecommunication and Mobile Service Companies.

⁷⁸ Conexis, 'Roubo de cabos de telecomunicações afetou mais de 6,6 milhões de clientes em 2020' (06 July 2021). Available at: <https://bit.ly/3uDEuXO>.

⁷⁹ Chico Alves, 'Inteligência do Exército: avanço da milícia no Rio impede acesso a serviços', Tilt UOL (16 Feb. 2021). Available at: <https://bit.ly/3uGN484>.

III. CONCLUSIONS AND RECOMMENDATIONS

We, therefore, request the Office of the United Nations High Commissioner for Human Rights to take notice of the following conclusions and recommendations for its Report on Internet Shutdowns and Human Rights to be presented at the 50th session of the Human Rights Council.

1. States and private companies alike must abide by the due process of law, the rule of law, and judicial review in their assessment of the merits of a shutdown.
2. Such analysis must consider human and constitutional rights, the proportionality standard, the invoked legal basis for sanctioning, and any rule the sanction purports to enforce.
3. Entities directly or indirectly subject to a governmental shutdown order must exercise their right to petition to challenge it, especially before the Judiciary, regardless of whether they are being requested to shut down third-parties' apps or are being shut down themselves.
4. States and private companies must work cooperatively and communicatively to address concerns such as the neutralization of disinformation and law enforcement online.
5. Internet applications must address the legitimate concerns of public authorities and comply with binding judicial orders.
6. Companies should employ legal instruments to advance any challenges, exhaust legal remedies and respect due process.
7. States must refrain from implementing Internet shutdowns as a sanction and abided by the maxims of prescription by law and proportionality where an interference with human rights is required to safeguard a legitimate aim; especially if sanctions are to be enforced.
8. Law enforcement authorities at the executive level must consider the socioeconomic consequences of their requests before the Judiciary beyond the boundaries of singular cases by observing proportionality and anticipating effects to human rights.
9. Multistakeholderism ensures that legal bases that may be invoked to justify an Internet shutdown as sanction are thoroughly discussed and narrowly delineated or fully rejected.
10. Internet shutdowns may produce extraterritorial effects due to the transnationally-intertwined character of contemporaneous Internet infrastructure. This may adversely affect the rights of persons outside a State's territorial jurisdiction and pose risks to the stability of diplomatic relations.
11. The debate on Internet shutdowns and human rights must also take into consideration State's duty to protect vis-à-vis organized criminal activity. This is because, the enforcement of human rights must account for both negative and positive obligations.
12. Shutdowns caused by criminal organizations may curtail human rights to a greater extent than that of government-mandated and may disproportionately affect the rights of particular communities.
13. Areas controlled by organized crime are subject to a vacuum of rule of law, institutional remedies, and human rights on a range of matters, including Internet connectivity.
14. There is a paucity of research and evidence on how shutdowns caused by non-State actors, such as criminal organizations, affect the continuous enjoyment of human rights in local communities.

15. States must be particularly attentive to the influence of non-State actors over internet infrastructure during times of protests or civil unrest, electoral processes, and, continuously, in locations where it lacks full *de facto* political control
16. State authorities must consider the principle of technology neutrality to, at least, a minimum baseline. Policies and case law must be tailored to address a sociotechnical context, rather than the features of one particular application. The swift and sizeable shift of users to Telegram during WhatsApp's suspension evinces that unequal consequences stem from shutdowns without attaining the sought results.
17. It is highly likely that most invoked legitimate aims to implement an Internet shutdown are intrinsically at variance with the requirements of suitability, necessity, and strict proportionality under the proportionality test. First, technological tools, such as Virtual Private Networks or proxy servers, may easily bypass shutdowns. Second, the ubiquitous impact of an Internet shutdown to a whole society hardly ever will be worth the trade-off. These factors alone are abstractly applicable to any instance of Internet shutdown and, by themselves, fail to meet the threshold of suitability and strict proportionality, respectively.

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