



LAPIN

LABORATORY OF PUBLIC
POLICY AND INTERNET

Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association Call for Input: Country Visit to Brazil & HRC 50th Session Report

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INTRODUCTION

The Laboratory of Public Policy and Internet (LAPIN) is pleased to contribute to the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association on the occasion of his country visit to Brazil from 28 March to 8 April 2022 and for his report 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

This contribution follows the Special Rapporteur on the rights to freedom of peaceful assembly and of association's ("UNSR") recommendation to Civil Society on its report on "the opportunities and challenges facing the rights to freedom of peaceful assembly and of association in the digital age":³

"Civil society actors should expand and improve data collection on – and documentation of digital threats to – the rights of association and assembly: in particular with respect to legal developments, network disruptions, surveillance, online harassment and disinformation campaigns. They should share knowledge, promote standards for data collection, and collaborate with other stakeholders in these efforts."⁴

This contribution focuses on interferences with the rights to freedom of assembly and association caused by the widespread employment of facial recognition technology (FRT) in Brazil. It is threefold.

Firstly, (I) it shortly overviews the legal framework relevant to freedom of assembly and FRT in Brazil. **Secondly, (II)** it displays challenges by drawing primarily from empirical research and reports on the employment of FRT by the Brazilian public administration. **Thirdly, (III)** it concludes by indicating corresponding trends of concern to fundamental rights and, foremostly, to freedom of assembly.

¹ OHCHR, '[Call for Input](#)' (2022).

² LAPIN, '[About Us](#)'.

³ Clément Nyaletsossi Voule, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association' UN Doc. No. [A/HRC/41/41](#) (17 May 2019).

⁴ *Id.*, para. 94.

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I. LEGAL FRAMEWORK RELEVANT TO FREEDOM OF ASSEMBLY AND FACIAL RECOGNITION

First, Brazil has a duty to respect and protect the right to freedom of assembly pursuant to international human rights law. Universally, it is bound by Article 21 of the International Covenant on Civil and Political Rights.⁵ Regionally, it is bound by Article 15 of the American Convention on Human Rights (Pact of San José).⁶

Second, freedom of assembly is a fundamental right under Article 5, XVI of the Brazilian Federal Constitution of 1988 (“CF/88”).⁷ Moreover, the rights to privacy and data protection are incidentally relevant to the context herein discussed inasmuch FRT directly and centrally interferes with both. Privacy is constitutionally protected by Article 5, X, CF/88⁸ and data protection is, likewise, autonomously protected under Article 5, LXXIX, CF/88.⁹ Simply put, the protection of the latter two safeguards the former.

As recognized by Frank La Rue in relation to freedom of expression, here, privacy (and data protection) and freedom of assembly “are interlinked and mutually dependent; an infringement upon one can be both the cause and consequence of an infringement upon the other.”¹⁰ In fact, their interdependence, although in a different context, has been noted by the Brazilian Supreme Court (“STF”).¹¹

In June 2020, the newspaper UOL published that the Ministry of Justice had secretly produced a dossier containing the personal data – such as names, photographs and social media addresses – of five hundred and seventy-nine public safety agents and three university professors who were involved in the antifascism movement and critical of President Jair Bolsonaro.¹² This was brought before STF and deemed unconstitutional primarily on the grounds of freedom of expression, assembly, and association.¹³

⁵ United Nations, ‘[International Covenant on Civil and Political Rights](#)’ (1966).

⁶ Organization of American States, ‘[American Convention on Human Rights](#)’ (1969).

⁷ Article 5, XVI, CF/88: “all persons may hold peaceful meetings, without weapons, in places open to the public, without need for authorization, so long as they do not interfere with another meeting previously called for the same place, subject only to prior notice to the proper authority.” See: [Brazil's Constitution of 1988 with Amendments through 2017](#), Constitute Project, p. 8.

⁸ Article 5, X, CF/88: “personal intimacy, private life, honor and reputation are inviolable, guaranteeing the right to compensation for pecuniary or moral damages resulting from the violation thereof.” *Id.*, p. 7.

⁹ Article 5, LXXIX, CF/88: “it is safeguarded, in the terms of the law, the right to the protection of personal data, including in digital means.” See: [Constituição da República Federativa do Brasil de 1988](#), Presidência da República.

¹⁰ Frank La Rue, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’ UN Doc. No. [A/HRC/23/40](#) (17 April 2013), para. 79.

¹¹ For a notion on the cases, see: Gustavo Ribeiro, ‘[When data protection eclipses national security: Brazil's Supreme Court leans towards unconstitutionality of ministerial dossier on antifascists](#)’ OxHRH Blog (2021).

¹² *Id.*

¹³ Brazilian Supreme Court, ‘[Action Against a Violation of a Constitutional Fundamental Right No. 722](#)’ Ratification of Provisional Measure (20 Aug. 2020), pp. 39-40 (“Therefore, I vote to grant the injunction to suspend any and all acts of the Ministry of Justice and Public Safety that produce or share information about

Notably, Justice Weber's vote highlighted the growing importance of data protection to safeguard freedom of assembly.¹⁴ Firstly she qualified the information systematized in the dossier as personal data. Secondly, analyzed their processing against the rights to individual freedom, privacy and the free development of personality, and informational self-determination. Thirdly, asserted the sensitive nature of the data's philosophical and political character. Finally, identified the chilling effects of the Ministry's practice.¹⁵ Such is the key-point where data protection and freedom of assembly intersect:

"I also emphasize that the mere insecurity resulting from the **knowledge that one is being monitored**, as well as the threat of sanctions, constitute, in themselves, a chilling effect that is detrimental to the full legitimate exercise of the fundamental rights to the free expression of thoughts, speech, **assembly**, and association: citizens may change the way they express themselves or even refrain from speaking about certain subjects."¹⁶

Thus, the legal framework for data protection in Brazil is central to the protection of the freedom to assembly. Accordingly, this is the next topic.

Third, besides the above-mentioned constitutional provision,¹⁷ in Brazil, data protection is safeguarded by STF's case law and the General Data Protection Law (LGPD). **One**, STF recognized data protection as an autonomous fundamental right in the landmark *IBGE Case*, even before the Constitution was correspondingly amended.¹⁸ **Two**, LGPD established *inter alia* guiding values (Article 2) and principles (Article 6), legal bases for data processing (Article 7), the duties of controllers and processors (Articles 37-40), rules applicable to public authorities (Chapter IV), rights of data subjects (Articles 17-22), the higher protection of sensitive data (Article 11), enforcement measures and oversight authority (Articles 42-45).¹⁹ **Lastly**, in the Americas, the Organization of American States' Principles on Privacy and Data Protection constitute a soft law instrument that govern the protection of personal data in Member-States, such as Brazil.²⁰

the personal lives, personal and political choices, and civic practices of citizens, federal, state, and municipal civil servants identified as members of an anti-fascist political movement, university professors, and any others who, acting within the limits of legality, exercise their rights to freely express themselves, assemble, and associate").

¹⁴ *Id.*, pp. 70-94.

¹⁵ *Id.*, pp. 92-93.

¹⁶ *Id.*, p. 93.

¹⁷ *Supra.*, footnote 09.

¹⁸ Brazilian Supreme Court, '[Action for the Declaration of Unconstitutionality No. 6387](#)' Ratification of Provisional Measure (7 May 2020). See also: Bruno Bioni *et. al.*, '[A Landmark Ruling from the Brazilian Supreme Court: Data Protection as an Autonomous Fundamental Right and Informational due Process](#)' *European Data Protection Law Review*, 6(4), 615-624 (2020).

¹⁹ Federative Republic of Brazil, '[Brazilian Data Protection Law \(Federal Law No. 13709/2018\)](#)' (2018).

²⁰ Organization of American States, '[Updated Principles on Privacy and Personal Data Protection](#)' (2021).

II. CHALLENGES RELATED TO FREEDOM OF ASSEMBLY AND FACIAL RECOGNITION

In short, FRT is being widely employed in Brazil without due regard for the proportionality test, normative or technical safeguards, and for a number of poorly defined purposes that provide no standard for transparency, foreseeability, and legal oversight. A study conducted in 2019 estimated that, since 2011, at least fifteen of the twenty-six states of the Federation, in addition to the Federal District, had employed FRT for various purposes. This included, at least, thirty cities and the corresponding fifteen capitals.²¹ According to a report by the newspaper Folha de S.Paulo, in 2021, the number of states rose to twenty.²² Likewise, LAPIN's empirical research non-exhaustively identified FRTs in states across all regions of Brazil.²³

This Subsection, therefore, non-exhaustively disaggregates instances in which the employment of FRTs directly interferes or, on the least, may cause a chilling effect to freedom of assembly. FRT was identified to be employed for various purposes. Particularly, for access to social security benefits, customs control, identity verification, attendance verification in schools, public safety, and urban mobility and public transportation.²⁴ Although all of these may interfere with various human rights, this contribution focuses on the latter three inasmuch these are contexts that concern freedom of assembly and association.

A. Facial Recognition for Attendance Verification in Schools

Primarily, gathering for educational purposes falls within the scope of freedom of assembly and association.²⁵ Therefore, surveillance is an interference on its own right. Moreover, it is common for educational facilities, whether schools or universities, to be both a place for political gatherings and from which political ideals, organizations and leaderships surface. Examples in Brazil abound.²⁶

²¹ Instituto Igarapé, '[Reconhecimento Facial no Brasil](#)' (2019).

²² Victoria Damasceno and Samuel Fernandes, '[Sob críticas por viés racial, reconhecimento facial chega a 20 estados](#)' Folha de S.Paulo (July 2021).

²³ Carolina Reis, Eduarda Almeida, Felipe da Silva and Fernando Dourado, '[Relatório sobre o uso de tecnologias de reconhecimento facial e câmeras de vigilância pela administração pública no Brasil](#)' LAPIN (July 2021).

²⁴ *Id.*, pp. 6-7, 43-62.

²⁵ United Nations Human Rights Committee, 'General comment No. 37 on the right of peaceful assembly (article 21) UN Doc. No. [CCPR/C/GC/37](#) (17 Sep. 2020), para. 12 ("Participating in an "assembly" entails organizing or taking part in a gathering of persons for a purpose such as expressing oneself, conveying a position on a particular issue or **exchanging ideas**").

²⁶ Paula Alegria and Marcielly Moresco, '[Occupy and resist! School occupations in Brazil Open Democracy](#) (13 Oct. 2017).

For one, in 2015, students occupied hundreds of schools in the State of São Paulo in protest to a government plan to close ninety-four public schools. The State attempted to quash it through the use of police force, but this measure was prohibited by the Judiciary.²⁷ In 2016, more than one thousand schools and universities all over Brazil were occupied by students protesting a reform to the curriculum of secondary education and the Proposal for Constitutional Amendment No. 241; which limited the Federal Government's public spending ceiling.²⁸ FRT would have halted the occupation of schools as a *locus* for political gathering.

For two, historically, students' political movement and organization, even in face of persecution, torture and murder, were largely responsible for protesting Brazil's civil-military dictatorship (1964-1985) and for the country's transition into a Democracy in the 1980s and 1990s.²⁹ FRT in schools would have provided a persecutory government with the biometric data of each individual on a student assembly.

Currently, FRT is employed for the verification of student's attendance to schools located in at least eighteen states. The following is a non-exhaustive disclosure of its widespread character.

In the **State of Alagoas**, the Municipality of Pilar commenced a project to implement FRT in the Municipal School Sueli Chagas. The technology was acquired from the company Portabilis Tecnologia LTDA through a public auction. Both the municipality and the company will have access to the collected data.³⁰

In the **State of Pernambuco**, according to the news outlet SBT, the Municipality of the State's Capital, Recife, acquired FRT from the company Ponto ID and installed it in the Municipal School Pedro Augusto.³¹ However, the municipality denied any installation of FRT in response to LAPIN's freedom of information (FOI) request.³²

In the **State of Goiás**, according to the news outlet G1, the Municipality of Anápolis acquired FRT from the company Ponto ID and installed it in the Municipal School Anapolino de Faria.³³ The municipality did not respond to LAPIN's FOI request and contact attempts.³⁴

In the **State of Tocantins**, according to the news outlet Gazeta do Cerrado, the State's Secretariat for Education, Youth and Sports acquired FRT from the company Ponto

²⁷ Pablo Ortellado, '[Brazil's Students Occupy Their Schools to Save Them The New York Times](#)' (15 Dec. 2015).

²⁸ Marina Rossi, '[PEC 241: Com quase 1.000 escolas ocupadas no país, ato de estudantes chega a SP](#)' El País (Oct. 2016).

²⁹ National Union of Students, '[Comissão Nacional da Verdade da União Nacional dos Estudantes](#)' (2015).

³⁰ *Supra.*, footnote 23, p. 57.

³¹ SBT, '[Frequência Digital Escolar Facial](#)' (Jan. 2016).

³² *Supra.*, footnote 23, p. 57.

³³ G1(GO), '[Escola adota reconhecimento facial para controlar frequência de aluno](#)' (2015).

³⁴ *Supra.*, footnote 23, p. 58.

ID in a 19 million BRL public auction.³⁵ In response to LAPIN's FOI request the Secretariat informed that the technology will be employed in educational environments and public buildings to verify attendance; regulation will only be enacted after the FRT's implementation phase; and a physical and digital version of a dossier on each student will contain, in addition to other information, their biometric data. The latter will be accessible by any agency involved in the education process, the Prosecutor's Office, the Guardianship Council and the company Ponto ID.³⁶

In the **State of Bahia**, according to the news outlet Jornal Nacional, FRT is used in twenty-seven schools of the Municipality of Mata de São João and oversees more than seven thousand students.³⁷ In the **State of Espírito Santo**, according to the newspaper G1, FRT was tested in five municipal schools in the Municipality of Nova Venécia.³⁸ In the **State of Minas Gerais**, according to the local newspaper Diário do Aço, twenty-nine public schools in the Municipality of Ipatinga employ FRT. The system oversees eighteen thousand students and three hundred classrooms.³⁹

In the **State of São Paulo**, according to G1, FRT is employed in the public schools of the Municipality of Itanhaém.⁴⁰ In the **State of Rio de Janeiro**, according to the newspaper O Dia, FRT was planned to be employed in public schools of the Municipality of Angra dos Reis as of January 2022. The system aims to oversee twenty-one thousand students.⁴¹ In the **State of Amazonas**, the Secretariat for Education has announced a pilot project to implement FRT in public school aimed at verifying attendance, "temperature measuring and emotion reading."⁴² In the **State of Ceará**, the Secretariat for Education of the Capital, Fortaleza, halted a project to implement FRT in five hundred and seventy public schools to oversee two-hundred thousand students. This halting was caused by a public outcry from civil society organizations over data protection concerns.⁴³

In the **State of Mato Grosso**, the State Secretary for Education announced in 2016 that a pilot-project for FRT in schools was in place and, in the years thereafter, it would be

³⁵ Gazeta do Cerrado, '[Seduc vai contratar novo sistema de gerenciamento escolar por R\\$ 19 milhões com reconhecimento facial](#)' (2020).

³⁶ *Supra.*, footnote 23, p. 58.

³⁷ Jornal Nacional, '[Escolas públicas de município baiano usam reconhecimento facial para controlar frequência dos alunos](#)' (2022).

³⁸ Anelice Sena and Juliana Borges, '[Escolas de Nova Venécia usam reconhecimento facial para controlar frequência e desperdício de merenda](#)' G1 (2018).

³⁹ Diário do Aço, '[Sistema de Reconhecimento Facial já Funciona nas Escolas de Ipatinga](#)' (Feb. 2020).

⁴⁰ G1, '[Escolas de Itanhaém ganham sistema de reconhecimento facial e biométrico](#)' (Feb. 2022).

⁴¹ O Dia, '[Angra implanta sistema de reconhecimento facial nas escolas municipais](#)' (Oct. 2021).

⁴² Government of the State of Amazonas, '[Secretaria de Educação tem projeto-piloto de frequência escolar por reconhecimento facial](#)' (Oct. 2021).

⁴³ Ítalo Cosme, '[Prefeitura suspende projeto de reconhecimento facial em escolas de Fortaleza](#)' O Povo (Dec. 2020).

extended to all public schools in the State.⁴⁴ In the **State of Mato Grosso do Sul**, a Councilwoman for the Municipality of Ponta Porã requested the Mayor's Office to implement FRT in municipal public schools.⁴⁵ In the **State of Pará**, the Municipality of Marituba started to implement FRT on its public schools.⁴⁶ In the **State of Paraná**, the Governor announced a plan to implement FRT in all public schools of the State.⁴⁷ In the **State of Paraíba**, a Councilman of the Municipality of Cabedelo requested the Mayor's Office to implement FRT in all municipal public schools.⁴⁸

In the **State of Santa Catarina**, the municipalities of Rodeio,⁴⁹ Xaxim,⁵⁰ and Itapema⁵¹ have implemented or presented plans to implement FRT in public schools. In the **State of Sergipe**, the Secretary of Social Protection and Citizenry of Aracaju, the State's Capital, announced the government's intention to associate all surveillance cameras employed in schools to a facial recognition system. Currently, this amounts to 1.377 cameras in seventy-four schools.⁵²

B. Facial Recognition for Public Safety

In the area of public safety, FRT is employed in various public spaces primarily to identify persons who have disappeared or are being pursued by police authorities.⁵³ LAPIN investigated and analyzed FRT used by sixteen public safety agencies across state and municipal levels of government. Specifically, ten at the state level and five at the municipal level; three of which are capitals, in addition to one entity in the Federal District.⁵⁴ This Subsection displays and draws insights from case studies on the **(1)** State of Paraíba, **(2)** the Municipality of Campinas (State of São Paulo), **(3)** State of Rio de Janeiro, and **(4)** State of Bahia.

⁴⁴ TV Paiaguás, '[Escolas de MT vão adotar sistema de reconhecimento facial](#)' (2016).

⁴⁵ Jornal Agora MS, '[Vereadora Kamila Alvarenga quer sistema de reconhecimento facial nas escolas municipais](#)' (Feb. 2022).

⁴⁶ Government of the Municipality of Marituba, '[Dia Nacional da Escola é marcado por grandes conquistas em Marituba](#)' (Mar. 2022).

⁴⁷ Government of the State of Paraná, Secretariat for Education and Sport, '[Ministério da Educação avalia modelo implantado no Paraná como case de sucesso](#)' (Sep. 2021). Célio Yano, '[Paraná quer implantar reconhecimento facial de alunos nas escolas estaduais](#)' *Gazeta do Povo* (Aug. 2018).

⁴⁸ Councilman José Pereira, '[Requirement No. 599/2021](#)' Legislative Chamber of the Municipality of Cabedelo (Dec. 2021).

⁴⁹ Maria Dutra, '[Sistema de reconhecimento facial é implementado em escola de Rodeio](#)' (Mar. 2022)

⁵⁰ Redação ND, '[Equipamentos de reconhecimento facial são testados em escolas de Xaxim](#)' (Mar. 2022)

⁵¹ Government of the Municipality of Itapema, '[Itapema é a primeira cidade em Santa Catarina a implantar Sistema de Identificação Facial para alunos da Rede Municipal de Ensino](#)' (2019).

⁵² Agência Aracaju, '[Escolas municipais de Aracaju têm em média 18 câmeras de vigilância eletrônica](#)' (Jan. 2022).

⁵³ *Supra.*, footnote 23, p. 6.

⁵⁴ *Id.*, pp. 42-55.

First, in the **State of Paraíba**, FRT was employed in one of the biggest St. John Festivals in Brazil, named São João de Campina Grande. The cultural event is frequented by more than 1.5 million persons per year. The company Facewatch (United Kingdom) supplied and installed two hundred and fifty facial recognition cameras in the event's space. It led to two hundred and fifty suspicious cases and eleven arrests. In response to LAPIN's interview, the State's Secretariat for Safety and Social Protection informed that it is interest in continuing to employ the technology, however, this had to be postponed due to the COVID-19 pandemic. The State used the database from the website 'procurados.pb.gov.br' to cross-check biometric data and any unmatched collected data was immediately deleted.⁵⁵

In response to LAPIN's FOI request as to the statewide employment of FRT, the Secretariat informed that it had hired the company Brisagnet (Brazil) to supply FRT manufactured by Hikvision (China) for a diverse set of purposes and based on all databases available in the State's public safety system.⁵⁶

Second, in the **Municipality of Campinas**, located in the State of São Paulo, FRT was supplied and manufactured by Huawei (China). The technology underwent a test-phase in what it was coined as an "open-sky laboratory", a methodology provided in Campinas' Smart City Strategic Planning. The project was a joint partnership among the Mayor's Office, Huawei (China), and the Center for Research and Development in Telecommunications. In response to LAPIN's interview, the Secretariat for Public Safety of Campinas informed that Huawei's role was to finance the technology inasmuch the Mayor's Office did not fully understand the FRT's operationalization and impacts.⁵⁷

Twenty facial recognition cameras were installed in order to test the system. In the end, the Municipality decided not to invest in FRT since its accuracy was only adequate in specific and strategic spots, whereas in open places, with significant circulation of people, it incurred in numerous accuracy errors.⁵⁸

Third, in the **State of Rio de Janeiro**, FRT was tested during the 2019 Carnival. For that, a cooperation agreement was signed between the Traffic Department (Detran), the Military Police, the Civil Police, and the company Oi (Brazil). The latter supplied FRT manufactured by Huawei (China).⁵⁹ The Military Police informed that the FRT collected biometric data and converted it into a hash function. This was cross-checked with the Civil

⁵⁵ *Id.*, p. 46.

⁵⁶ *Id.*, p. 46.

⁵⁷ *Id.*, p. 49.

⁵⁸ *Id.*, p. 50.

⁵⁹ *Id.*, p. 51.

Police's database on active arrest warrants and an alert was issued in case of matches. The unmatched data was deleted by the end of the cooperation agreement.⁶⁰

The Civil Police informed that it did not transmit any personal data to the Military Police, nor did they operate any FRT equipment. The Military Police operated the system and transmitted the hash functions for the Civil Police to cross-check it against its database on individuals under investigation. From the Civil and Military's polices responses, it remained unclear whether the cross-checking database stored information only on persons with active arrest warrants or simply under investigation.⁶¹

In the 2019 Carnival of Rio de Janeiro, FRT assisted in the recovery of one stolen vehicle and the arrest of four persons with active warrants. A woman was mistakenly identified and released after having her identity confirmed at the Police Station. This evinced an error in the database since the matched data belonged to a person who had already been arrested. The Military Police did not disclose the total number of accuracy errors and false-positives.⁶²

Fourth, in the **State of Bahia**, the Secretariat for Public Safety employs more than eighty facial recognition cameras in various public areas, such as the metro, the soccer stadium 'Arena Fonte Nova', the airport, the Center of Operations and Intelligence for Public Safety, central bus stations, ferry boats, and the touristic spot 'Elevador Lacerda'.⁶³ In response to LAPIN's FOI request, the Secretariat informed that the technology is used to enforce public policies with the purpose of preserving public order by identifying persons who have disappeared or with an active arrest warrant.

The operation lacks a special legal basis and is grounded on Article 144 of the Federal Constitution.⁶⁴ This is a general clause that attributes to the State of Brazil a duty, and to all its citizens, the right and responsibility *vis-à-vis* public safety. Its abstractness entails that the rule, on its own, is an insufficient legal ground to interfere with data protection, freedom of assembly and association under the proportionality standard. Although it establishes public safety as a legitimate aim, suitability and necessity are not addressed and such interest is not balanced against any of the afore-mentioned rights.

The Arrest Warrants and Disappeared Persons database is utilized to cross-check biometric data in order to identify targets. The technology was supplied by the company El Corte Inglés Brasil LTDA., the hardware was manufactured by Hikvision (China), Axis

⁶⁰ *Id.*, pp. 52-53.

⁶¹ *Id.*, p. 51.

⁶² *Id.*, pp. 51-52.

⁶³ *Id.*, p. 42.

⁶⁴ *Supra.*, footnote 07, pp. 107-108

(Sweden) and Huawei (China), having the latter also supplied the software. The contract's value was of 9 million BRL.⁶⁵ Moreover, the facial recognition algorithm is constantly reviewed to prevent errors caused by inconsistent information. Any identification is double-checked with the Civil Police to confirm the arrest warrant's validity through two different databases. Data subjects do not have means to request access to data.⁶⁶

In 2019, the system was employed during the Carnival of Salvador, the State's Capital. It identified at least one person with an active arrest warrant.⁶⁷ The biometric data of at least 3 million persons was processed.⁶⁸ This evinces how an interference with freedom of assembly, caused by FRT, incidentally affects the right to take part in cultural life, enshrined in Article 15 of the International Covenant on Economic, Social and Cultural Rights and Article 215, of the Brazilian Constitution.⁶⁹

In the Carnival of 2020, FRT led to the arrest of forty-two persons with active arrest warrants.⁷⁰ For reference, 16.5 million people participated in Salvador's Carnival.⁷¹ Their automated identification was subject to *ex post* human review. Finally, the Secretariat did not disclose the FRT's number of false-positives and accuracy errors.⁷² The numbers of 42 arrests against 16.5 million participants substantiates the FRT's disproportionality and the lack of transparency as to its accuracy hinders any comprehensive effort to assess suitability, necessity, and strict proportionality.

C. Facial Recognition for Access to Urban Mobility and in Public Transportation Spaces

Freedom of assembly is affected by the access to urban mobility and public transportation spaces in at least two forms. **One**, public transportation is the primary channel for transit to and from an assembly. The State of Brazil has a duty to facilitate assemblies, including means of access to citizens.⁷³ **Two**, spaces of public transportation often become themselves a *locus* for peaceful assembly. For instance, in 2014, a public gathering protested a raise in the costs of the metro, bus, and trains by assembling at

⁶⁵ *Supra.*, footnote 23, p.43.

⁶⁶ *Id.*, p. 43.

⁶⁷ *Id.*, p. 44.

⁶⁸ G1, '[Com quase 5 mil horas de músicas, Salvador recebeu 850 mil turistas no carnaval; veja números da folia'](#) (Mar. 2019).

⁶⁹ Article 215, CF/88: "The National Government shall guarantee to all full exercise of cultural rights and access to sources of national culture, and shall support and grant incentives for appreciation and diffusion of cultural expression." See: *Supra.*, footnote 07, p. 148.

⁷⁰ *Supra.*, footnote 23, p. 44.

⁷¹ G1, '[Carnaval de Salvador: 16,5 milhões de pessoas circularam pelas ruas da capital; 854 mil são turistas'](#) (Feb. 2020).

⁷² *Supra.*, footnote 23, p. 44.

⁷³ Venice Commission, '[Guidelines of Freedom of Peaceful Assembly Council of Europe'](#) (July 2020), para. 75.

'Central do Brasil', the central train station in Rio de Janeiro.⁷⁴ Moreover, Brazil has a duty to ensure that an assembly's message reaches its intended audience.⁷⁵ Thus, public transportation spaces are the most suitable for protests on the subject.

Therefore, **both** instances fall within the right's scope and the presence of facial recognition equipment, without evident normative and material safeguards against abuse, on the least, pre-emptively dissuades citizens from exercising their right to freely and peacefully assemble.⁷⁶

In Brazil, FRT employed in public transportation and corresponding spaces purports to ensure public safety⁷⁷ and verify the identity of social benefit holders. On the least, the Federal District,⁷⁸ State of Bahia, State of Rio de Janeiro,⁷⁹ and State of São Paulo have reportedly employed FRT in public transportation, such as buses and metros. This Subsection displays one instance of a biometric match in Bahia and the case of the metro of São Paulo.

Firstly, in the **State of Bahia**, the police excessively used force after the system wrongly identified a man in the metro of Salvador.⁸⁰ Eight to ten officers approached the data subject, a gun was pointed to his head before a request for identification, and the person, who had a mental disability, froze and was unable to respond.⁸¹ This evinces how false-positives lead to a state of heightened tensions between public authorities and citizens that is contrary to the duty to de-escalate tensions.⁸² The data subject's companion clarified the circumstances and it ended peacefully, however; this closure is unlikely in the more complex event of a public gathering.

Secondly, in the **State of São Paulo**, the company Companhia do Metrô de São Paulo installed FRT in the metros of the State's Capital, the City of São Paulo, with the purpose of public safety. The system identifies persons suspected of having committed a

⁷⁴ Daniel Silveira, '[Protesto contra aumento de tarifa de ônibus tem confronto na Central, Rio](#)' G1 (Feb. 2014).

⁷⁵ *Supra.*, footnote 73, paras. 82-83. See footnote 129: "*Students Against Apartheid Coalition v. O'Neil*, 660 F.Supp. 333 (W.D. Va. 1987) (the court decision voids a restriction on the construction of a temporary protest structure on public space because there was no adequate alternative channel of access to the protestors' intended audience)."

⁷⁶ Laurent Pech, '[The concept of chilling effect](#)' Open Society Foundations (2021), p. 4 ("From a legal point of view, **chilling effect** may be defined as the negative effect any state action has on natural and/or legal persons, and which results in pre-emptively dissuading them from exercising their rights or fulfilling their professional obligations, for fear of being subject to formal state proceedings which could lead to sanctions or informal consequences such as threats, attacks or smear campaigns").

⁷⁷ This Subsection addresses FRT use for the purpose of public safety with a specific focus on public transportation, rather than generally. For the latter, see **Section II.B**.

⁷⁸ *Supra.*, footnote 23, p. 60-61.

⁷⁹ R7, '[Homem é preso no Rio após reconhecimento facial por câmera](#)' (2019).

⁸⁰ *Supra.*, footnote 23, pp. 43-44.

⁸¹ Redação 4P, '[Sistema de reconhecimento facial de salvador confunde homem com necessidades especiais com assaltante](#)' (Jan. 2020).

⁸² *Supra.*, footnote 73, para. 88.

crime, who have disappeared, or with an active arrest warrant.⁸³ For reference, last month, February, 2022, the metro was taken 42 million times.⁸⁴ The FRT was acquired from the consortium Engie Ineo Johnson (Franco-Irish) for a public bid of 58.6 million BRL.⁸⁵

On March 03rd, 2022, four civil society organizations and two public defenders' offices⁸⁶ jointly filed a Public Civil Action⁸⁷ against the Metro of São Paulo.⁸⁸ The suit requests the State Court of São Paulo to *inter alia* determine the Metro of São Paulo to pay approximately 43 million BRL for collective moral damages caused to passengers and to grant an injunction to cease the processing of passenger's biometric data.

Reasons abound. **Factually**, the FRT's processing of biometric data lacks consent from data subjects and its operation is carried without transparency and available information. Moreover, an impact assessment was not conducted and the measure is disproportional to ensure public safety. **Legally**, this violates LGPD, the Code of Consumer Protection, the Statute of Children and Adolescents, the rights to privacy at the constitutional and international human rights levels, and the prohibition against discrimination.⁸⁹

As posited in **Section I**,⁹⁰ the interdependence between, on one pole, privacy and data protection and, on the other, freedom of assembly, entails, in this scenario, that a violation to the former two constitutes, likewise, an interference with the latter.

III. CONCERNING TRENDS IN FACIAL RECOGNITION: THE INTERPLAY OF DATA PRIVACY AND FREEDOM OF ASSEMBLY

The foregoing displayed the relevant legal framework and the factual background. This Subsection shortly draws the resulting insights.

One, the FRT initiatives generally lack a special legal basis.⁹¹ Without a specific instrument of law, the activity cannot be deemed to comply with data protection laws and freedom of assembly as set forth in international human rights law and the Constitution. All of these sources require, to some extent, the application of the three-pronged

⁸³ Tatiana Dias, '[As Perguntas que o Metrô de São Paulo Não Respondeu Antes de Vender Seu Rosto por R\\$ 58 Milhões](#)', The Intercept Brasil (Feb. 2020)

⁸⁴ Portal da Transparência, '[Entrada de Passageiros por Linha - Fevereiro/2022](#)' (Feb. 2022).

⁸⁵ *Supra.*, footnote 83.

⁸⁶ Namely, [Intervozes: Coletivo Brasil de Comunicação Social](#), [Artigo 19](#), [CADHu: Coletivo de Advocaci em Direitos Humanos](#), [idec: Instituto Brasileiro de Defesa do Consumidor](#) and the Public Defender's Office of the State of São Paulo and of the Union.

⁸⁷ This is similar to the concept of "Class-Action" under American law.

⁸⁸ Leonardo Sakamoto, '[Metrô de SP é alvo de ação inédita que pede fim do reconhecimento facial](#)' UOL (Mar. 2022).

⁸⁹ Lawsuit No. 1010667-97.2022.8.26.0053, State Court of São Paulo, [Initial Brief](#) (Mar. 2022).

⁹⁰ *Supra.*, p. 3.

⁹¹ *Supra.*, footnote 23, p. 16-22.

proportionality standard. Moreover, its inexistence hinders judicial review, public scrutiny and fails to tailor guidance to enforcement authorities.

Two, foreign companies are failing to meet their human rights obligations and must be urged to come into compliance. The application of data protection rules to the FRT narrows the gap towards meeting the proportionality standard in the balance of interest between freedom of assembly and another legitimate aim, such as public safety.

The FRT hardware and software are, in all cases, developed by foreign companies; specifically, from China, Israel, United Kingdom, United States, Sweden, France, and Ireland.⁹² It is unclear, however, whether the principle of privacy by design⁹³ is implemented in the technology's production.

The United Nations Guiding Principles on Business and Human Rights urges companies to respect human rights globally by taking adequate measures to prevent, mitigate, and remediate adverse human rights impacts⁹⁴ "that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."⁹⁵ This includes undertaking human rights due diligence assessments.⁹⁶ For instance, this could entail assessing whether a system is technically able to distinguish between the peaceful and non-peaceful participants of an assembly.

Three, likewise, contracting governments fail to conduct Data Protection Impact Assessments (DPIA) in relation to the processing of sensitive personal data.⁹⁷ Indeed, biometric information is, "by [its] nature, particularly sensitive in relation to fundamental rights and freedoms[, therefore it] merit[s] specific protection."⁹⁸ Moreover, cross-checking with several databases enhances risks, such as lack of accuracy, security, access control, and accidental deletion. A DPIA could mitigate these.

Four, public servants and authorities have a low level of expertise and knowledge on the technical details, operation, and risks of FRTs due to limited training.⁹⁹ The absence of systematic qualification increases the risk of adverse effects to human rights. For

⁹² *Id.*, pp. 22-27.

⁹³ Christopher Kuner, Lee Bygrave, Christopher Docksey, '[The EU General Data Protection Regulation \(GDPR\): A Commentary](#)', OUP (2020), p. 573 ("The basic rationale for this endeavour is a belief that building data protection principles into information systems architecture will substantially improve the principles' traction. Part and parcel of this rationale is recognition of the powerful regulatory potential of information systems architecture, particularly its ability to shape human conduct in ways that are often more effective than the imposition of law laid down by statute or contract").

⁹⁴ United Nations, '[Guiding Principles on Business and Human Rights: Implementing the United Nations'Protect, Respect and Remedy Framework](#)' Principle 11, p. 13. See also: UN Doc. No. [A/HRC/17/31](#) and [A/HRC/RES/17/4](#).

⁹⁵ *Id.*, Principle 13, p. 14.

⁹⁶ *Id.*, Principles 15(b) and 17, pp. 15-16, 17-19.

⁹⁷ *Supra.*, footnote 23, pp. 29-34.

⁹⁸ European Union, '[General Data Protection Regulation](#)' Recital 51.

⁹⁹ *Supra.*, footnote 23, pp. 27-29.

example, even if the FRT had been human rights compliant, for that reason, in some instances, the program had to be discontinued. Moreover, public servants are unable to scrutinize malpractice, such as the lack of data on accuracy, efficacy and false-positives, or even to oversee data access control mechanisms, leaving the information unlawfully accessible for the companies. Therefore, governments must be urged to contractually require a systematic transfer of expertise from suppliers to public servants.

Five, there is a paucity of accountability.¹⁰⁰ The employment of FRT must be coupled with provable measures of compliance with data privacy. Public authorities must be able to provide evidence that its data processing is in compliance with data protection, human rights, and the Constitution. This includes attending to rules that are ancillary for external parties to hold authorities accountable, such as devising a legal basis, respecting the rights of data subjects, and transparently informing the details of processing activity. Moreover, government must produce and publicize statistic data on the FRT's employment for external parties to assess its merits and whether it is being abused.

Six, interferences with freedom of assembly caused by the employment of FRT incidentally affects other human rights and specific groups. As seen above, citizens may be wary of participating in cultural events such as Carnival and the St. John's Festival, thereby having their right to take part in cultural life curtailed. FRTs that are unable to distinguish between adults and children interferes with the latter's rights to freedom of assembly as enshrined in Article 15 of the Convention on the Rights of the Child.¹⁰¹

It is well reported that FRTs commonly reflect biases already embedded in society and, consequently, are less accurate in identifying black persons. In fact, the Network of Safety Observatories monitored FRTs-assisted arrests in the States of Bahia, Ceará, Paraíba, Rio de Janeiro, and Santa Catarina from March to October 2019. It found that, in 151 arrests, 90.5% of person were black.¹⁰² The same occurs with transgender and non-binary persons.¹⁰³ Therefore, these groups have their right to freedom of assembly specially affected.

¹⁰⁰ *Id.*, 29-34.

¹⁰¹ UNICEF, '[Convention on the Rights of the Child](#)' (1989). Article 15: "1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly. 2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

¹⁰² *Supra.*, footnote 23, p. 38. *Supra.*, footnote 22.

¹⁰³ Mariah Rafaela Silva and Joana Varon, '[Reconhecimento Facial no Setor Público e Identidade Trans](#)' Coding Rights (Jan. 2021). *Supra.*, footnote 23, p. 09.

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