

ISSN pending

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SPECIAL COLLECTION OF THE CASE LAW ON FREEDOM OF EXPRESSION

Internet shutdowns



in international law

Internet shutdowns in international law

Credits

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Special thanks

Special thanks to Access Now, including Legal Fellow Sanjana Srikumar and General Counsel Peter Micek, for reviewing and providing valuable comments on the paper.

Special thanks as well to Ibrahim Sabra, and Talia Lubin, who researched the court decisions included in this paper.

The Directors, Editors, and Authors of the present collection would like to recognize and express their gratitude to all the people whose efforts and talents made the collection a reality. These publications were only possible thanks to the analysis and selection of cases for the database by a wide number of [experts](#) and [contributors](#) collaborating with Columbia Global Freedom of Expression. The case briefs presented in this collection reproduce the analysis of the cases published in our database, which was only possible due to their invaluable contribution.

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Abstract

This paper contributes to the discussions surrounding the internet and the challenges of its regulation. It is divided into two parts. Part one documents the international standards that have emerged pertaining to internet shutdowns, and part two explores the relevant case law at the national and international levels. The authors compile and reiterate what has become an international dogma of access to internet being an enabler of human rights. International mandates provide definition of the shutdowns and enumerate their threats to the whole palette of human rights. They draw the line between blanket shutdowns and specific forms of online censorship. Shutdowns are barriers to the universal access to the internet and to sustainable development, they abort freedom of expression and the right of access to information. Nevertheless, States find reasons to introduce internet shutdowns in the name of public interests to protect national security and public order. The paper reflects the international standards on the related modern arguments to justify shutdowns, such as disinformation and propaganda, as well as in situations of an imminent cyberattack from abroad.

Jurisprudence on internet shutdowns is scarce and very few internet shutdowns have been litigated, of which many are decisions on preliminary objections or national law issues and do not engage with substantive questions regarding violations of human rights. Even where we have decisions on substantive illegality, courts have focused on the interpretation of sector-specific legislation (particularly telecoms legislation) rather than necessity or proportionality, or violations of rights beyond freedom of expression. Therefore, this paper was prepared out of the belief that courts can play a significant role *vis-a-vis* internet shutdowns and related issues, and determine thresholds to balance rights in these cases. The paper, thus, reviews relevant international legal norms and standards, as well as existing case law on internet shutdowns and other related aspects of internet freedom. These norms and standards, in turn, include international human rights law, views of intergovernmental organizations, international and regional human rights mechanisms and experts, and other relevant international frameworks. The paper thus aims to serve as a guide for judges and legal professionals to help them better understand the landscape of legal standards to be considered while litigating or adjudicating on internet shutdowns.

Introduction

The Internet, and the challenges to its regulation, are the subject of heated discussions in intergovernmental fora, chatrooms, business negotiations, and in national parliaments. These times require an examination of the existing arguments, that are often sourced in international law and court decisions. While some principles, mostly those based on human rights, stay intact, others have become dated, inadequate, and obsolete.

What is clear though is that access to the internet is widely recognized today as an indispensable enabler of a broad range of human rights, particularly, freedom of expression and freedom of information which remain essential for democratic societies. But, as digitalization advances, it is also central to the realization of the rights to education, freedom of association and assembly, participation in social, cultural, and political life, health, to enjoy the benefits of scientific progress, an adequate standard of living, work, and to social and economic development, to name just a few.¹

There is also no doubt that the internet and modern technologies have expanded individuals' and groups' ability to receive and impart information and they have dramatically increased the range and diversity of information they can access. This has led to increased calls among stakeholders to recognize internet access as a human right.² In fact, some countries have already recognized internet access as such, like Estonia, France, Finland, and Costa Rica.³

This has eventually given rise to the idea of “freedom of internet”, a concept that welcomes the boom in online services as enabling human rights online, regardless of frontiers. Internet freedom is understood as the “exercise and enjoyment on the Internet of human rights and fundamental freedoms and their protection” in adherence with international human rights instruments.⁴ It also promotes the right to access to the internet and similar services, self-regulation by internet users, protection from governmental interference, and net neutrality.

Yet, a discussion over internet freedom necessitates a closer look into the corresponding challenges

1 See: Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights. Report of the Office of the United Nations High Commissioner for Human Rights, 13 May 2022, A/HRC/50/55, Para 7, <https://www.ohchr.org/en/documents/thematic-reports/ahrc5055-internet-shutdowns-trends-causes-legal-implications-and-impacts>; U.N. Human Rights Council, Report of the Special Rapporteur on the Right to Education Koumbou Boly Barry on Impact of Digitization on the Right to Education (19 April 2022), para 28, A/HRC/50/32, <https://www.undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F50%2F32&Language=E&DeviceType=Desktop&LangRequested=False>

2 Reglitz, M. (2020). The human right to free Internet access. *Journal of Applied Philosophy*, 37(2), 314-331. <https://doi.org/10.1111/japp.12395>; Çali, B. (2020). The Case for the Right to Meaningful Access to the Internet as a Human Right in International Law. In A. Von Arnould, K. Von der Decken, & M. Susi (Eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (pp. 276-284). Cambridge: Cambridge University Press. doi:10.1017/9781108676106.022; Internet Rights & Principles Coalition, 'Charter of Human Rights and Principles for the Internet', 4th eds 2014 (UN Internet Governance Forum) <https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/Communications/InternetPrinciplesAndRightsCoalition.pdf>

3 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on key trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the Internet, 16 May 2011, A/HRC/17/27, Para 65, https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/a.hrc.17.27_en.pdf

4 See, e.g. Recommendation CM/Rec(2016)5[1] of the Committee of Ministers of the Council of Europe to member States on Internet freedom (Adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415fa

which might hinder realizing a free internet where individuals are able to enjoy their fundamental rights. Internet shutdowns come on top of the list of these challenges as a barrier to open, affordable and universal access to the internet.

In connection with that, the phenomenon of internet shutdowns has emerged as a serious human rights concern that deepens digital divides between the public with free access to internet and with access limited by its shutdown. Internet shutdowns are seen now as a tactic usually used by governments to suppress dissent. In collaboration with the #KeepItOn coalition, Access Now documented, in an annual report on the status of internet shutdowns, that the year 2021 witnessed 182 internet shutdowns, if not more, in 34 countries around the world. In 2022, the report suggests that around 187 premeditated internet shutdowns took place across 35 countries. While growing in scale, these disruptions carry ever-more adverse impacts, which is why internet shutdowns are argued to be a violation of human rights for impeding the free flow of information. Michelle Bachelet, the UN High Commissioner for Human Rights, has put it simply: “[s]witching off the Internet causes incalculable damage, both in material and human rights terms.”

Nevertheless, the impact of internet shutdowns does not stop there as they also bear substantial social and economic costs. A recent report by the World Economic Forum’s Centre for Cybersecurity highlighted that internet shutdowns have serious societal ramifications: they cause significant disruption to livelihood, education, jobs, and health. For example, in Bangladesh, Myanmar and India, studies have shown that internet shutdowns during the Covid-19 pandemic severely obstructed distance learning. Human Rights Watch has also stressed that internet shutdowns during alleged public emergencies cost lives. Moreover, the adverse impact of internet shutdowns on economic growth is categorical. Shutdowns hamper local businesses, financial institutions, and digital commerce. Several studies, including a study conducted by the World Bank, have estimated the economic cost of internet shutdowns between 2019 and 2021 to amount nearly to \$20.5 billion, with Myanmar’s economy sustaining a loss of roughly \$2.8 billion in 2021. Another report has shown that in 2022 only, internet shutdowns have cost the world economy almost \$24 billion, marking a 323% increase from 2021.

Shutting down the Internet (either partially or entirely) “appears to be used by governments when they want to act quickly, particularly to quell perceived or potential civil unrest, and might have limited capacity for other mechanisms of online control”.⁵ While resisting proper inquiries into whether their shutdown orders meet legal standards for restrictions on speech and information, authorities commonly justify shutdowns based on a broad range of claims, from maintaining public safety and national security to combatting hostility or disinformation.⁶ These shutdowns also extend to periods of examinations, public demonstrations, political tensions, elections, and active conflict zones.⁷ However, reports have shown that internet shutdowns “often achieve the exact opposite, furthering fear and confusion, and stoking risks of division and conflict”.⁸

5 Giovanni De Gregorio and Nicole Stremiau, *Internet Shutdowns and the Limits of Law* / *International Journal of Communication* 14(2020), p 4225.

6 Spencer Feingold, *What happens when the internet shuts down?*, World Economic Forum’s Centre for Cybersecurity, Oct 20, 2022, <https://www.weforum.org/agenda/2022/10/internet-shutdowns-explainer/>

7 Access Now, *The Return of Digital Authoritarianism: Internet shutdowns in 2021*, April 2022, <https://www.accessnow.org/cms/assets/uploads/2022/05/2021-KIO-Report-May-24-2022.pdf>

8 Office of the United Nations High Commissioner for Human Rights, *Press release, Internet shutdowns: UN report details ‘dramatic’ impact on people’s lives and human rights*, 23 June 2022, <https://www.ohchr.org/en/press-releases/2022/06/internet-shutdowns-un-report-details-dra>

As a matter of fact, internet shutdowns have proven to be a clear reflection of the deterioration of human rights.⁹ For example, in a recent case from Iran, an internet shutdown led to “cutting off mobile data; disrupting popular social media platforms; throttling Internet service; and blocking individual users, encrypted DNS services, text messages, and access entirely”.¹⁰

These shutdowns are not solely associated with authoritarian regimes. They also happen in “consolidated democracies”. In 2019, access to the internet was shut down in the underground by the Metropolitan police to curtail climate justice protests planned across London.¹¹

In the words of the United Nations Special Rapporteur on peaceful assembly and association, “Shutdowns have become an entrenched practice in certain regions, especially as a means for incumbent regimes to retain power and stifle dissent. Shutdowns are lasting longer, becoming harder to detect and targeting particular social media and messaging applications and specific localities and communities.”¹²

Eventually, in view of the governments, shutdowns lead to a host of social ills: “suppressing the right of peaceful assembly and freedoms of association and expression; eroding civic space; reinforcing a continued climate of economic uncertainty; disrupting access to healthcare, emergency services, and financial services; preventing payments for salaries, utilities, and education; and limiting the ability of journalists, human rights defenders, and others to report on and document human rights violations or abuses that are taking place during internet shutdowns, or communications disruptions.”¹³

The aim of this paper is to identify the most relevant aspects of the notion of internet shutdowns in light of applicable international and regional human rights regimes and standards. The paper will also establish the most relevant international and regional legal and soft-law standards that need to be taken into consideration when examining decisions by States to disrupt access to the internet. In this sense, the most relevant legal and standard-setting documents will be presented and commented in the first part of the paper. The second part will analyze case law criteria established by regional and sub-regional courts and their application to cases involving internet shutdowns. It will also present several decisions adopted by national courts in different regions of the world to identify possible common trends and areas for improvement in the effective protection of internet access by the judiciary.

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9 Report of the Office of the United Nations High Commissioner for Human Rights, Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights, 13 May 2022, A/HRC/50/55, para 24, <https://www.ohchr.org/en/documents/thematic-reports/ahrc5055-internet-shutdowns-trends-causes-legal-implications-and-impacts>.

10 “FOC Joint Statement on Internet Shutdowns in Iran”, October 2022, https://freedomonlinecoalition.com/wp-content/uploads/2022/10/FOC-Joint-Statement-on-Internet-Shutdowns-in-Iran_October-2022.pdf

11 Giovanni De Gregorio and Nicole Strelau, Internet Shutdowns and the Limits of Law / International Journal of Communication 14(2020), p 4225.

12 Ending Internet shutdowns: a path forward. Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association. Human Rights Council Forty-seventh session 15 June 2021, A/HRC/47/24/Add.2, <https://documents-dds-nyun.org/doc/UNDOC/GEN/G21/149/66/PDF/G2114966.pdf?OpenElement>.

13 “FOC Joint Statement on Internet Shutdowns in Iran”, October 2022, https://freedomonlinecoalition.com/wp-content/uploads/2022/10/FOC-Joint-Statement-on-Internet-Shutdowns-in-Iran_October-2022.pdf

1. International legal framework

1.1. Access to internet as an enabler of human rights

International law has developed well-established principles recognizing access to the internet as a necessary precondition for the exercise and enjoyment of human rights online and offline. The UN Human Rights Council has consistently affirmed that “the same rights that people have offline must also be protected online” and has called upon all States to enhance the access to and use of the internet in order to promote the full enjoyment of human rights for all.¹⁴

The United Nations Secretary General also recognized in his Roadmap to Digital Cooperation that “human rights exist online as they do offline and have to be respected in full.”¹⁵

At the regional level, the Council of Europe confirmed that the European Convention on Human Rights applies both offline and online, while member States have negative and positive obligations to respect, protect and promote human rights and fundamental freedoms on the internet.¹⁶

Given the positive obligation of States to promote and facilitate the enjoyment of human rights, in 2022, the United Nations High Commissioner for Human Rights (UNHCHR) called on States to take “all steps necessary to ensure that all individuals have meaningful access to the Internet”, and to “refrain from interfering with access to the Internet and digital communications platforms unless such interference is in full compliance with the requirements of the applicable human rights instruments.”¹⁷

The 2016 UN Human Rights Council (UNHRC) Resolution on the Promotion, Protection, and Enjoyment of Human Rights on the Internet, adopted by consensus, unequivocally condemns measures to intentionally prevent or disrupt access to or dissemination of information online in violation of international human rights law and calls on all States to refrain from and cease any such restrictive measures.¹⁸

¹⁴ Ending Internet shutdowns: a path forward. Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association. Human Rights Council Forty-seventh session 15 June 2021, A/HRC/47/24/Add.2, para 9, <https://documents-dds-nyun.org/doc/UNDOC/GEN/G21/149/66/PDF/G2114966.pdf?OpenElement>. See also: Human Rights Council resolutions 20/8 of 5 July 2012, 26/13 of 26 June 2014, 32/13 of 1 July 2016, 38/7 of 5 July 2018, and 47/16 of July 2021; International Telecommunications Union, The World Telecommunication Development Conference, Resolution 67 (Kigali, 2022), The role of the ITU Telecommunication Development Sector in child online protection, https://www.itu.int/dms_pub/itu-d/opb/tdc/D-TDC-WTDC-2022-PDF-E.pdf.

¹⁵ Road map for digital cooperation: implementation of the recommendations of the High-level Panel on Digital Cooperation, Report of the Secretary-General, 20 May 2020, A/74/821, para 38, <https://www.un.org/en/content/digital-cooperation-roadmap/>.

¹⁶ See, e.g. Recommendation CM/Rec(2016)5[1] of the Committee of Ministers of the Council of Europe to member States on Internet freedom (Adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415fa. See also: Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries (Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies), para 1; IACHR. Standards for a Free, Open and Inclusive Internet (2017), para. 32; ACHPR. Declaration of principles on freedom of expression and access to information in Africa, adopted in 2019. See also, 362 Resolution on the Right to Freedom of Information and Expression on the Internet in Africa - ACHPR/Res.362(LIX)2016.

¹⁷ Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights. Report of the Office of the United Nations High Commissioner for Human Rights, 13 May 2022, A/HRC/50/55, Para 8, <https://www.ohchr.org/en/documents/thematic-reports/ahrc5055-internet-shutdowns-trends-causes-legal-implications-and-impacts>.

¹⁸ UN Human Rights Council Resolution (A/HRC/RES/32/13) on the Promotion, Protection, and Enjoyment of Human Rights on the Internet. This was the first UN resolution that spoke directly to internet shutdowns. This language has been repeated and strengthened in various resolutions since 2016.

Definition and threats of shutdowns.

To understand the scope and multiple layers of Internet shutdowns, we are guided by the definition provided by the United Nations High Commissioner for Human Rights (UNHCHR):

“Internet shutdowns are measures taken by a government, or on behalf of a government, to intentionally disrupt access to, and the use of, information and communications systems online. They include actions that limit the ability of a large number of people to use online communications tools, either by restricting Internet connectivity at large or by obstructing the accessibility and usability of services that are necessary for interactive communications, such as social media and messaging services.”

Shutdowns, noted the UNHCHR, are not just a complete blockage of internet connectivity or accessibility of its services. Governments increasingly resort to throttling bandwidth or limiting mobile service to 2G, which renders it extremely difficult to make meaningful use of the internet, for example to share and watch video footage and live streams. Other similar interventions are limiting the availability of services to prevent people from circumventing shutdown measures. “As technology develops, the modalities for disrupting access to, and the use of, online space will evolve, and the definition of shutdowns and responses to them must change as well”, concludes the UNHCHR.¹⁹

Experts believe that the intent of State actors to block access to the internet is crucial for understanding if a shutdown, and not a technical error, is taking place: “Internet shutdowns do not involve technical problems to the national infrastructure potentially limiting access or connectivity, but rather the voluntary action of a state blocking the digital environment.”²⁰ However, authorities’ willing or knowing degradation of infrastructure, to the point of non-functioning of power or telecommunications service,²¹ may feature similar malintent and adverse impacts.

They agree that internet shutdowns differ from internet censorship in several ways.²² The line between shutdowns and censorship is drawn by pointing that “online censorship usually targets content according to its purposes, morality or legality, [however] an Internet shutdown blocks access more generally, with the result that all Internet traffic [...] is treated in the same way, as unlawful or immoral content.” They conclude their explanation of the shutdowns by saying that “direct involvement of state actors is essential from an international law standpoint because states are obligated to protect and ensure the fulfillment of these rights and freedoms.”²³

19 Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights Report of the Office of the United Nations High Commissioner for Human Rights, 13 May 2022, A/HRC/50/55, Paras 4-6, <https://digitallibrary.un.org/record/3977326?n=en>.

20 See: Giovanni De Gregorio and Nicole Strelau, Internet Shutdowns and the Limits of Law / International Journal of Communication 14(2020), p 4227.

21 See, e.g., the case of Venezuela, at Freedom House, “Freedom on the Net 2022,” available at <https://freedomhouse.org/country/venezuela/freedom-net/2022> “Deliberate shutdowns and throttling may seem practically unnecessary given the state of the country’s infrastructure and recurring power outages.”

22 See: Wagner, Ben, Understanding Internet Shutdowns: A Case Study from Pakistan, International Journal of Communication 12(2018), 3917-3938, <https://ijoc.org/index.php/ijoc/article/view/8545>.

23 Giovanni De Gregorio and Nicole Strelau, Internet Shutdowns and the Limits of Law / International Journal of Communication 14(2020), p 4227-4228.

In the Roadmap for Digital Cooperation the UN Secretary-General summed up by stating that “blanket internet shutdowns and generic blocking and filtering of services are considered by UN human rights mechanisms to be in violation of international human rights law.” He suggested that to deal with the spread of disinformation and, in particular, harmful, life-threatening content, States should use other means, in accordance with international human rights law, while avoiding disruptive blanket internet shutdowns.²⁴

By their nature, internet shutdowns most deeply affect freedom of expression and access to information (see below) These freedoms are the foundation of free and democratic societies and an indispensable condition for the full development of personhood.²⁵ Furthermore, they are a touchstone for all other rights guaranteed in the International Covenant on Civil and Political Rights²⁶ and other human rights instruments. Any restriction on freedom of expression is a serious curtailment of other human rights.²⁷

Internet shutdowns also negatively impact the enjoyment of economic, social and cultural rights. Under article 4 of the International Covenant on Economic, Social and Cultural Rights,²⁸ any limitations to the enjoyment of those rights are permissible only insofar as they are compatible with the nature of those rights and solely for the purpose of promoting the general welfare in a democratic society. Given the increasing reliance of businesses and trade on digital technologies, mandated disruptions of communications services have serious repercussions for all economic sectors.²⁹ Essential services that provide education, health care, and social assistance, increasingly rely on digital tools and communications. Consequently, drastic disruptions or slowdowns of communications services negatively affect the enjoyment of economic, social and cultural rights, with immediate and long-term repercussions.³⁰

Moreover, in the words of a recent report by the Office of the UNHCHR, shutdowns “are powerful markers of deteriorating human rights situations.”³¹ Earlier, the UN Special Rapporteur emphasized that “internet shutdowns generate a wide variety of harms to human rights, economic activity, public safety and emergency services that outweigh the purported benefits.”³² This seems to illustrate the “disproportionate and unnecessary” nature of shutdowns, which are never the “least intrusive” means or measure.

²⁴ Road map for digital cooperation: implementation of the recommendations of the High-level Panel on Digital Cooperation, Report of the Secretary-General, 20 May 2020, A/74/821, para 41, <https://www.un.org/en/content/digital-cooperation-roadmap/>.

²⁵ Human Rights Committee, General comment No. 34 (2011), para. 2; and Human Rights Council resolution 44/12, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no34-article-19-freedoms-opinion-and>.

²⁶ Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd ed. (N.P. Engel Publishers, 2005).

²⁷ Human Rights Committee, General comment No. 34 (2011), para. 24, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no34-article-19-freedoms-opinion-and>.

²⁸ See: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.

²⁹ Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights Report of the Office of the United Nations High Commissioner for Human Rights, 13 May 2022, A/HRC/50/55, Para 33, <https://www.ohchr.org/en/documents/thematic-reports/ahrc5055-internet-shutdowns-trends-causes-legal-implications-and-impacts>.

³⁰ Op.cit, para 35.

³¹ Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights Report of the Office of the United Nations High Commissioner for Human Rights, 13 May 2022, A/HRC/50/55, Para 24, <https://www.ohchr.org/en/documents/thematic-reports/ahrc5055-internet-shutdowns-trends-causes-legal-implications-and-impacts>.

³² Rights to freedom of peaceful assembly and of association. Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, 17 May 2019, A/HRC/41/41, para 53, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/141/02/PDF/G1914102.pdf?OpenElement>.

Thus, shutdowns are inconsistent with basic international human rights instruments, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Universal Declaration on Human Rights, even though they were adopted before the internet was invented.

Shutdowns as barriers to universal access to the internet

The UN Secretary-General in his report entitled “Our Common Agenda”, noted that it might be time to reinforce universal access to the Internet as a human right.³³

The internet has a public service value. People, communities, public authorities, and private entities rely on the internet for their activities and have a legitimate expectation that its services are accessible, provided without discrimination, affordable, secure, reliable, and ongoing.³⁴ Another aspect of its public service value is that it serves to “promote the exercise and enjoyment of human rights and fundamental freedoms for all who use it”.³⁵

During the periodic review process over the implementation of the ICCPR, the UN Human Rights Committee expressed concerns about reports from a UN member state about shutdowns of internet access for months at a time.³⁶ It later emphasized that “States parties must not... block or hinder Internet connectivity in relation to peaceful assemblies. The same applies to geotargeted or technology-specific interference with connectivity or access to content. States should ensure that the activities of Internet service providers and intermediaries do not unduly restrict assemblies or the privacy of assembly participants.”³⁷

In several declarations and resolutions adopted within the framework of UN agencies and entities, the UN member States have pledged to take steps to ensure that high-quality, affordable, open, and secure internet is available to all individuals without discrimination.³⁸ This is also the position of regional inter-governmental organizations.³⁹

In its Internet Universality Indicators, the United Nations Educational, Scientific and Cultural Organization (UNESCO) expressly includes the incidence, nature and basis for shutdowns, or other restrictions on internet connectivity, as part of their measurements.⁴⁰

33 2 A/75/982, para. 35.

34 Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users (Adopted by the Committee of Ministers on 16 April 2014 at the 1197th meeting of the Ministers’ Deputies), Para 3, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804d5b31

35 Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet (Adopted by the Committee of Ministers on 7 November 2007 at the 1010th meeting of the Ministers’ Deputies), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d4a39

36 UN Human Rights Committee, Concluding observations on the fifth periodic report of Cameroon, 30 November 2017, CCPR/C/CMR/CO/5, para 41d), <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPFPRiCAqhKb7yhsoE0hhB%2FObfneRA6ucrf-7cLa1irsOsauNp2lkz6wXQ8%2BhGNomqrVydPd7iWIkHh133vH4%2BkSoUeo9X7SVKDPDQhslu5rWYKh1sQlytLo3jX>.

37 UN Human Rights Committee, General comment No. 37 (2020) on the right of peaceful assembly (article 21), 17 September 2020, CCPR/C/GC/37, para 34, <https://digitallibrary.un.org/record/3884725?ln=en>.

38 See, for example, General Assembly resolution 70/1 of 21 October 2015.

39 See Recommendation CM/Rec(2016)5[1] of the Committee of Ministers of the Council of Europe to member States on Internet freedom (Adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers’ Deputies), para 2.1.1, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806415fa

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A joint opinion on freedom of expression on the internet was issued by the UN Special Rapporteur on Freedom of Opinion and Expression, along with the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. These four intergovernmental rapporteurs maintain that States have the obligation to promote universal access to the internet, and cannot justify for any reason, not even for public safety or national security reasons, cutting off access to the internet, for whole populations or segments of the public. The same applies to slow-downs imposed on the internet or parts of it.⁴¹

Regional bodies have also affirmed the principle of non-interference with access to the internet and stressed that States “shall not engage in or condone any disruption of access to the internet and other digital technologies for segments of the public or an entire population.”⁴² Internet-related policies should recognise the global nature of the internet and the objective of universal access. They should not adversely affect the unimpeded flow of transboundary internet traffic.⁴³ Actions that curtail internet access within the jurisdiction of one State may illegitimately interfere with access to information in other States or negatively impact the transboundary flow of information on the internet.⁴⁴

1.2. Shutdowns and freedom of expression

The Universal Declaration of Human Rights (UDHR), a global standard in the relevant law, provides, in article 19, the right to freedom of expression, which includes the right “to seek, receive, and impart information and ideas through any media and regardless of frontiers”. Article 29 establishes the standard criteria to assess the compatibility of limitations: the principles of rule of law, legitimacy and proportionality, while article 30 adds that the rights enshrined in the UDHR should not be interpreted as implying the right to engage in any activity aimed at the destruction of other rights.⁴⁵

The International Covenant on Civil and Political Rights (ICCPR), in article 19, recognizes and protects freedom of expression, and like the UDHR, allows its restriction subject to certain conditions. It argues that the exercise of these rights requires “special duties and responsibilities,” therefore free speech may only be limited “for respect of the rights or the reputations of others” or for the protection of national security, pub-

High Commissioner for Human Rights, 13 May 2022, A/HRC/50/55, Para 45, <https://www.ohchr.org/en/documents/thematic-reports/ahrc5055-internet-shutdowns-trends-causes-legal-implications-and-impacts>.

41 International Mechanisms for Promoting Freedom of Expression, Joint Declaration on freedom of expression and the internet (2011), <https://www.osce.org/files/f/documents/e/9/78309.pdf>, see also their Joint Declaration on universality and the right to freedom of expression (2014), <https://www.osce.org/files/f/documents/f/e/118298.pdf>.

42 African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression and Access to Information in Africa, principle 38 (2). 2019. https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf. See also Resolution on the Right to Freedom of Information and Expression on the Internet in Africa - ACHPR/Res. 362(LIX) 2016, http://www.oas.org/en/sla/dil/docs/acceso_informacion_desarrollos_UA_ACHPR-Res_362_LIX_2016.pdf.

43 Declaration by the Committee of Ministers on Internet governance principles (Adopted by the Committee of Ministers on 21 September 2011 at the 1121st meeting of the Ministers' Deputies), Para 5, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c-

44 Recommendation [CM/Rec\(2015\)6](#) of the Committee of Ministers to member States on the free, transboundary flow of information on the Internet (Adopted by the Committee of Ministers on 1 April 2015, at the 1224th meeting of the Ministers' Deputies) Para 5, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c3f20

45 See: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

lic order, public health or morals.⁴⁶ It duly prohibits, in article 5, an abuse of the recognized human rights to destroy any of them or to limit them to a greater extent than is provided for in the Covenant. States have the obligation to respect and ensure the right to freedom of expression, without distinction of any kind.⁴⁷

At the regional level, the right to freedom of expression is proclaimed – in not dissimilar words – in the treaties, adopted by intergovernmental organizations. Those include the European Convention on Human Rights (Council of Europe, 1950, Arts. 10, 17), the American Convention on Human Rights (Organization of American States, 1969, Arts. 13, 19), the African Charter (African Union, 1981, Art. 9), the Charter of Fundamental Rights of the European Union (2000, Arts. 11, 52, 53), the Arab Charter on Human Rights (League of Arab States, 2004, Art. 30, Art. 32), and the Declaration on Human Rights adopted by the Association of Southeast Asian Nations (ASEAN, 2012, Art. 21).

Freedom of expression and freedom of information are not understood as absolute rights and may have certain acceptable limitations, which can be summarized in the principles of legality, legitimacy, and proportionality. “Therefore, the issue about justifications in the field of Internet shutdowns does not concern the block of the Internet per se but the assessment on its application in practice.”⁴⁸ In other words, “[a]ny restrictions on the operation of information dissemination systems must conform with the tests for restrictions on freedom of expression.”⁴⁹ These principles are to be applied by legislative and regulatory institutions, as well as in individual decisions by competent authorities and courts. “The onus to show that restrictions comply with those conditions is on the State seeking to restrict rights.”⁵⁰

The widely-recognized “three-part test” for whether restrictions on freedom of expression are legally justified includes the following elements.

Legality. Any restriction must be provided by law. The law must be precisely formulated—to allow individuals to regulate their conduct accordingly—, and it must be made publicly available.⁵¹ “The law ensures tight control over the scope of the restriction and effective judicial review to prevent any abuse of power. The law [must] indicate with sufficient clarity the scope of discretion conferred on public authorities with regard to the implementation of restrictions and the manner of exercise of this discretion.”⁵²

⁴⁶ See: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

⁴⁷ Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights Report of the Office of the United Nations High Commissioner for Human Rights, 13 May 2022, A/HRC/50/55, Para 10, <https://www.ohchr.org/en/documents/thematic-reports/ahrc5055-internet-shutdowns-trends-causes-legal-implications-and-impacts>.

⁴⁸ Giovanni De Gregorio and Nicole Strelau, Internet Shutdowns and the Limits of Law / International Journal of Communication 14(2020), p 4232.

⁴⁹ General comment No. 34, para. 34, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no34-article-19-freedoms-opinion-and>.

⁵⁰ Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights. Report of the Office of the United Nations High Commissioner for Human Rights, 13 May 2022, A/HRC/50/55, Para 12, <https://www.ohchr.org/en/documents/thematic-reports/ahrc5055-internet-shutdowns-trends-causes-legal-implications-and-impacts>.

⁵¹ Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights Report of the Office of the United Nations High Commissioner for Human Rights, 13 May 2022, A/HRC/50/55, Para 11, <https://www.ohchr.org/en/documents/thematic-reports/ahrc5055-internet-shutdowns-trends-causes-legal-implications-and-impacts>.

⁵² Recommendation CM/Rec(2016)5[1] of the Committee of Ministers of the Council of Europe to member States on Internet freedom (Adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers’ Deputies), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415fa

The UN Special Rapporteur observed that shutdowns ordered covertly, or without an obvious legal basis, violate the legality requirement. Shutdowns ordered pursuant to vaguely formulated laws and regulations also fail to satisfy it.⁵³ In this context, the UN Special Rapporteur observed that “[t]he failure to explain or acknowledge shutdowns creates the perception that they are designed to suppress reporting, criticism or dissent.”⁵⁴

Legitimacy. Any restriction on freedom of expression, and other rights protected under international law, must also pursue a legitimate goal in line with the grounds specified therein and be necessary to achieve that goal. The list of aims in the international treaties cited above is exclusive, meaning that no other aims are considered to be legitimate as grounds for restricting freedom of expression.

The Report of the Office of the UNHCHR observed that “[w]hen States impose Internet shutdowns or disrupt access to communications platforms, the legal foundation for their actions is often unstated. When laws are invoked, the applicable legislation can be vague or overly broad, which would fail to meet the requirements of article 19 (3). For example, a law referring to public order or national security that does not more specifically address the surrounding circumstances and conditions for Internet shutdowns is likely not sufficiently precise.”⁵⁵

Proportionality. A restriction must also be the least intrusive option available and must not impair the essence of the right.⁵⁶ A due assessment of the effectiveness of the restriction and risks of over-blocking is to be made. “This assessment should determine whether the restriction may lead to disproportionate banning of access to Internet content, or to specific types of content, and whether it is the least restrictive means available to achieve the stated legitimate aim.”⁵⁷

Given their indiscriminate and widespread impacts, internet shutdowns very rarely meet the proportionality test.⁵⁸ Their duration and geographical scope may vary, but shutdowns are generally disproportionate. Given the number of essential activities and services they affect, shutdowns restrict expression and interfere with other fundamental rights.⁵⁹

53 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 30 March 2017, A/HRC/35/22, Para 9-10, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/22.

54 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 30 March 2017, A/HRC/35/22, Para 12, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/22.

55 Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights Report of the Office of the United Nations High Commissioner for Human Rights, 13 May 2022, A/HRC/50/55, Para 11, <https://www.ohchr.org/en/documents/thematic-reports/ahr5055-internet-shutdowns-trends-causes-legal-implications-and-impacts>.

56 Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights. Report of the Office of the United Nations High Commissioner for Human Rights, 13 May 2022, A/HRC/50/55, Para 12, <https://www.ohchr.org/en/documents/thematic-reports/ahr5055-internet-shutdowns-trends-causes-legal-implications-and-impacts>.

57 Recommendation CM/Rec(2016)5[1] of the Committee of Ministers of the Council of Europe to member States on Internet freedom (Adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415fa

58 Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights Report of the Office of the United Nations High Commissioner for Human Rights, 13 May 2022, A/HRC/50/55, Para XXX, <https://www.ohchr.org/en/documents/thematic-reports/ahr5055-internet-shutdowns-trends-causes-legal-implications-and-impacts>

59 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 30 March 2017, A/HRC/35/22, Para 15, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/22.

A wide spectrum of intergovernmental organizations and mandates have pointed to the incompatibility of internet shutdowns with the right to freedom of expression. For example, the UN Human Rights Committee held that generic bans on the operation of certain sites and systems were not compatible with article 19 (3) of the ICCPR.⁶⁰ This position was further underlined by the UN Special Rapporteur, who stated that “Restrictions on expression must be necessary to achieve aims specified by article 19 (3) of the Covenant and may never be invoked to justify the suppression of advocacy for democratic rights”.⁶¹

In 2022, the UN Human Rights Council, guided by the purposes and principles of the Charter of the United Nations, called upon all States “[t]o refrain from imposing new restrictions, and to lift existing ones, on the free flow of information and ideas that are inconsistent with article 19 of the International Covenant on Civil and Political Rights, including through practices such as the use of Internet shutdowns and online censorship to intentionally prevent or disrupt access to or the dissemination of information online, the banning or closing of publications or other media and the abuse of administrative measures, criminalization and censorship, and the restriction on access to or use of information and communications technology, inter alia radio, television and the Internet”.⁶²

The participating States of the Freedom Online Coalition (currently 36 governments)⁶³ noted with concern that in the context of “increasing instances of intentional disruptions to online networks and internet shutdowns”⁶⁴, in many countries “the flow of information on the Internet [...] is limited beyond the few exceptional circumstances in which restrictions are acceptable in accordance with international human rights legal obligations”⁶⁵. These States consistently call upon all governments to immediately end internet shutdowns and act in a manner that ensures a free, open, interoperable, reliable and secure internet, in which a diversity of voices is heard, and fully respects human rights including freedom of expression.⁶⁶

60 Human Rights Committee, General comment No. 34 (2011), para. 43, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no34-article-19-freedoms-opinion-and>

61 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 30 March 2017, A/HRC/35/22, Para 11, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/22.

62 Freedom of opinion and expression, Resolution adopted by the UN Human Rights Council on 8 July 2022, Para 8 o), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/407/29/PDF/G2240729.pdf?OpenElement>

63 A global group of countries dedicated to co-operate for the advancement of Internet freedom and the protection of human rights and fundamental freedoms online, inter alia by furthering and protecting the free flow of information on the Internet and through connection technologies around the world.

64 Freedom Online Coalition Program of Action 2022, https://freedomonlinecoalition.com/wp-content/uploads/2022/01/FOC_Program-of-Action_2022_ENG.pdf

65 Freedom Online: Joint Action for Free Expression on the Internet. The Hague Founding Declaration of the Freedom Online Coalition, 2011. Para 4, <https://freedomonlinecoalition.com/wp-content/uploads/2021/05/1-The-Hague-FOC-Founding-Declaration-with-Signatories-as-of-2013.pdf>

66 See: “FOC Joint Statement on Freedom of Expression Online Presented at the 47th Session of the United Nations Human Rights Council”, 2 July 2021, <https://freedomonlinecoalition.com/wp-content/uploads/2021/07/FOC-Joint-Statement-on-Freedom-of-Expression-Online-Presented-at-the-47th-Session-of-the-United-Nations-Human-Rights-Council.pdf>; “FOC Joint Statement on Spread of Disinformation Online”, November 2020, <https://freedomonlinecoalition.com/wp-content/uploads/2022/03/FOC-Joint-Statement-on-Spread-of-Disinformation-Online.pdf>; and “FOC Joint Statement on the Human Rights Impact of Cybersecurity Laws, Practices and Policies”, February 2020, <https://freedomonlinecoalition.com/wp-content/uploads/2021/06/FOC-Joint-Statement-on-the-Human-Rights-Impact-of-Cybersecurity-Laws-Practices-and-Policies.pdf>; “FOC Joint Statement on State Sponsored Network Disruptions”, March 2017, <https://freedomonlinecoalition.com/wp-content/uploads/2021/06/FOC-Joint-Statement-and-Accompanying-Good-Practices-for-Government-on-State-Sponsored-Network-Disruptions.pdf>

1.3. Obstruction to the right of access to information and to sustainable development

In his report to the member States, the UN Secretary-General observed that the “internet has provided access to information for billions, thereby fostering collaboration, connection and sustainable development.”⁶⁷

The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association also underlined the role of the internet in the sustainable development of nations and in building knowledge societies. Notably, in the 2030 Agenda for Sustainable Development, States committed to “significantly increase access to information and communications technology and strive to provide universal and affordable access to the Internet in least developed countries by 2020.”⁶⁸ On the contrary, shutdowns exert significant chilling effects that “hold direct implications on participatory democracy, whose existence depends upon an active and informed citizenry capable of engaging with a range of ideas. Those on the margins of society are most impacted by these chilling effects.”⁶⁹

The High Commissioner for Human Rights reminds that the Sustainable Development Goals reinforce States’ human rights obligations to work towards universally available and accessible internet, free from unjustified restrictions: “In target 9.c of the Goals, States committed to significantly increasing access to information and communications technology and striving to provide universal and affordable access to the Internet in least developed countries by 2020.”⁷⁰ The Freedom Online Coalition also observed that Internet shutdowns “are inconsistent with the targets of the Sustainable Development Goals, in particular the target to increase access to information and communications technologies.”⁷¹

On numerous occasions, UNESCO has highlighted the key role played by information and communications technologies for culture and development and in its work to build Knowledge Societies rooted in the need for all to have the opportunity to access information and to express ideas and interests in an open and inclusive environment that fosters and benefits from diversity of opinion. The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions provides that its parties “endeavour to support cooperation for sustainable development and poverty reduction, especially in relation to the specific needs of developing countries, in order to foster the emergence of a dynamic cultural sector” by, *inter*

67 Common Agenda, Report of the Secretary-General, 5 August 2021, A/75/982, Para 92, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/217/01/PDF/N2121701.pdf?OpenElement>.

68 Ending Internet shutdowns: a path forward. Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association. Human Rights Council Forty-seventh session 15 June 2021, A/HRC/47/24/Add.2, para 11, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/149/66/PDF/G2114966.pdf?OpenElement>.

69 Ending Internet shutdowns: a path forward. Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association. Human Rights Council Forty-seventh session 15 June 2021, A/HRC/47/24/Add.2, para 20, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/149/66/PDF/G2114966.pdf?OpenElement>.

70 Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights Report of the Office of the United Nations High Commissioner for Human Rights, 13 May 2022, A/HRC/50/55, Para 4, <https://www.ohchr.org/en/documents/thematic-reports/ahrc5055-internet-shutdowns-trends-causes-legal-implications-and-impacts>.

71 “FOC Joint Statement on Freedom of Expression Online Presented at the 47th Session of the United Nations Human Rights Council”, 2 July 2021, <https://freedomonlinecoalition.com/wp-content/uploads/2021/07/FOC-Joint-Statement-on-Freedom-of-Expression-Online-Presented-at-the-47th-Session-of-the-United-Nations-Human-Rights-Council.pdf>; “FOC Joint Statement on State Sponsored Network Disruptions”, March 2017, <https://freedomonlinecoalition.com/wp-content/uploads/2021/06/FOC-Joint-Statement-and-Accompanying-Good-Practices-for-Government-on-State-Sponsored-Network-Disruptions.pdf>.

alia, “facilitating wider access to the global market and international distribution networks for their cultural activities, goods and services”.⁷²

In 2020, the four international rapporteurs deplored “restrictions on the ability of the public to access the Internet, including complete or partial shutdowns, which seriously limit... the ability of members of the public to access information”.⁷³ They went so far as to call internet shutdowns to be a form of prior censorship of the media.⁷⁴

Regarding regional intergovernmental organizations, it is important to note the African Commission on Human and Peoples’ Rights, which called on States to “recognise that universal, equitable, affordable and meaningful access to the internet is necessary for the realisation of freedom of expression, access to information and the exercise of other human rights.”⁷⁵

The Committee of Ministers of the Council of Europe, for its part, considers that freedom of information entails the right of access to documents of State bodies, which today is typically provided online. Thus freedom of information is dependent upon widely available and affordable access to the internet. “The latter is a prerequisite for content disseminated through the media and platforms to be available and accessible to all groups without discrimination.”⁷⁶ It acknowledges that “Internet access improves public administration and services by making them more accessible (*inter alia* through access to official documents), responsive, user-oriented, transparent, efficient and cost-effective, thus contributing to the economic and cultural vitality of society.”⁷⁷ In the eyes of the Council of Europe, this freedom of information “applies not only to the content of information, but also to the means of dissemination or hosting, since any restriction imposed on the means of dissemination necessarily interferes with the right to receive and impart information.”⁷⁸

1.4. Shutdowns as an instrument to protect national security and public order

Intergovernmental organizations have observed that States most often invoke public safety or national security concerns as justifications for restrictions on distribution of information deemed illegal or likely to cause harm. In the words of the report of the Office of the UNHCHR, “[W]hen shutdowns are based on legal

⁷² Convention for the Protection and Promotion of the Diversity of Cultural Expressions (2005), <https://en.unesco.org/creativity/convention/texts>. See also: <https://unesdoc.unesco.org/ark:/48223/pf0000379015>.

⁷³ International Mechanisms for Promoting Freedom of Expression, “Joint Declaration on Freedom of Expression and Elections in the Digital Age”, 2020, https://www.osce.org/files/f/documents/9/8/451150_0.pdf

⁷⁴ *Ibid.*

⁷⁵ African Commission on Human and Peoples’ Rights, Declaration of Principles on Freedom of Expression and Access to Information in Africa, principle 37 (2), 2019. https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf

⁷⁶ Council of Europe, Principles for media and communication governance - Recommendation CM/Rec(2022)11 and explanatory report (2022), Strasbourg, 2022, para 6.5, <https://edoc.coe.int/en/media/11117-principles-for-media-and-communication-governance-recommendation-cmrec202211-and-explanatory-report.html>

⁷⁷ Recommendation [CM/Rec\(2007\)16](#) of the Committee of Ministers to member states on measures to promote the public service value of the Internet (Adopted by the Committee of Ministers on 7 November 2007 at the 1010th meeting of the Ministers’ Deputies), <https://search.coe>

⁷⁸ Recommendation [CM/Rec\(2015\)6](#) of the Committee of Ministers to member States on the free, transboundary flow of information on the Internet (Adopted by the Committee of Ministers on 1 April 2015, at the 1224th meeting of the Ministers’ Deputies) Para 1, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c3f20

orders, they generally rely on vaguely formulated laws that offer a large scope of discretion to authorities.”⁷⁹

The UN Human Rights Committee agrees that “the ‘interests of national security’ may serve as a ground for restrictions if such restrictions are necessary to preserve the State’s capacity to protect the existence of the nation, its territorial integrity or political independence against a credible threat or use of force.”⁸⁰ However, they caution that where the very reason for the deterioration of national security is the suppression of human rights, this cannot be used to justify further restrictions, including on the right of peaceful assembly.⁸¹

The notion of “public order” according to the Human Rights Committee refers to “the sum of the rules that ensure the proper functioning of society, or the set of fundamental principles on which society is founded, which also entails respect for human rights, including the right of peaceful assembly.”⁸² The same document contains applicable criteria to define “public health” and “public morals”, as well as protection of “the rights and freedoms of others”.⁸³

In this regard, the UN Special Rapporteur noted: “Some governments argue that it is important to ban the spread of news about terrorist attacks, even accurate reporting, in order to prevent panic and copycat actions. Yet it has been found that maintaining network connectivity may mitigate public safety concerns and help restore public order.” This observation allowed the UN Special Rapporteur to conclude that “[n]etwork shutdowns invariably fail to meet the standard of necessity. Necessity requires a showing that shutdowns would achieve their stated purpose, which in fact they often jeopardize.”⁸⁴

Another UN Special Rapporteur on the rights to freedom of peaceful assembly and of association strongly confirmed that internet shutdowns generate a wide variety of harms that outweigh the purported benefits: “Network disruptions often backfire and cause chaos and unrest.”⁸⁵

When looking into the ways this issue is dealt with in regional intergovernmental organizations, one notes that the Committee of Ministers of the Council of Europe recommended to member States that laws addressing hate speech or protecting public order, public morals, minors, national security or official secrecy should not be applied in a manner which inhibits public debate. Such laws, according to the Committee

⁷⁹ Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights Report of the Office of the United Nations High Commissioner for Human Rights, 13 May 2022, A/HRC/50/55, Para 31, <https://www.ohchr.org/en/documents/thematic-reports/ahrc5055-internet-shutdowns-trends-causes-legal-implications-and-impacts>.

⁸⁰ Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (E/CN.4/1985/4, annex), para. 29. Cited in: UN Human Rights Committee, General comment No. 37 on the right of peaceful assembly (article 21), 17 September 2020, CCPR/C/GC/37, para 42, <https://digitallibrary.un.org/record/3884725?ln=en>.

⁸¹ *Ibid.*, para. 32.

⁸² *Ibid.*, para 44.

⁸³ UN Human Rights Committee, General comment No. 37 on the right of peaceful assembly (article 21), 17 September 2020, CCPR/C/GC/37, paras 44-47, <https://digitallibrary.un.org/record/3884725?ln=en>.

⁸⁴ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 30 March 2017, A/HRC/35/22, Para 14, https://apohchr.org/documents/dpage_e.aspx?si=A/HRC/35/22. See also, Disease pandemics and the freedom of opinion and expression Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 23 April 2020, A/HRC/44/49, Para 25, <https://www.ohchr.org/en/documents/thematic-reports/ahrc4449-disease-pandemics-and-freedom-opinion-and-expression-report>.

⁸⁵ Rights to freedom of peaceful assembly and of association. Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, 17 May 2019, A/HRC/41/41, para 53, <https://documents-dds-nyun.org/doc/UNDOC/GEN/G19/141/02/PDF/G1914102.pdf?OpenElement>.

of Ministers, may impose restrictions only in response to a pressing matter of public interest, if they are defined as narrowly as possible to meet the public interest and include proportionate sanctions.⁸⁶

Below we discuss the position of intergovernmental institutions as to the relevance of perhaps the most popular reasons for internet shutdowns that relate to protection of national security and public order. Those reasons are: introduction of emergency laws, dissemination of online disinformation, and propaganda for war or to prevent or mitigate cyberattacks from abroad.

States of emergency. Internet shutdowns often occur when States declare a state of emergency or martial law. Indeed, according to the ICCPR (art. 4), in times of public emergency that threaten the life of the country and its existence, officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law.

In this context, it is notable that the Organization for Security and Co-operation in Europe (OSCE) takes as one of its political commitments an “endeavor to maintain freedom of expression and freedom of information” during states of emergency, “with a view to enabling public discussion on the observance of human rights and fundamental freedoms as well as on the lifting of the state of public emergency.”⁸⁷

As a state of emergency is often introduced to prevent street violence, it is worthwhile to say that the Johannesburg Principles on National Security, Freedom of Expression and Access to Information provide that the protection of national security cannot be used to justify restrictions on the right to freedom of expression unless the Government can demonstrate that the expression *is intended* to incite imminent violence, that *it is likely to incite* such violence and that there is a *direct and immediate connection* between the expression and the likelihood or occurrence of such violence.⁸⁸

Disinformation. While the UN Special Rapporteur agreed that “[l]aws and policies addressing hate speech or online disinformation should be in place”, he noted that “these laws cannot justify internet shutdowns, which are disproportionate by default, and should strictly adhere to international human rights principles and standards, including those concerning the right to freedom of expression.”⁸⁹ Indeed,

86 Recommendation CM/Rec(2016)5[1] of the Committee of Ministers of the Council of Europe to member States on Internet freedom (Adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies), para 2.4.3, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415fa

87 Conference on Security and Co-operation in Europe (CSCE), Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991), Para 28.9, <https://www.osce.org/odihr/elections/14310>.

88 Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1995). They were endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression, in his reports to the 1996, 1998, 1999 and 2001 sessions of the UN Commission on Human Rights — and referred to by the Commission in their annual resolutions on freedom of expression since 1996.

89 Ending Internet shutdowns: a path forward. Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association. Human Rights Council Forty-seventh session 15 June 2021, A/HRC/47/24/Add.2, para 44, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/149/66/PDF/G2114966.pdf?OpenElement>. See also: Report on online hate speech by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 9 October 2019, A/74/486, Para 29, <https://www.ohchr.org/en/documents/thematic-reports/a74486-report-online-hate-speech>.

in the words of another UN Special Rapporteur, “by depriving people of information sources, Internet shutdowns do not curb disinformation but, rather, hamper factfinding and are likely to encourage rumours.”⁹⁰

The COVID-19 pandemic has undeniably helped expand disinformation and also exacerbated the impact of shutdowns. As noted by the UN Special Rapporteur, the shutdowns became “an affront to the right of everyone, especially health-care workers, to access health information. There is no room for limitation of Internet access at the time of a health emergency that affects everyone from the most local to the global level.”⁹¹

The UN Secretary-General, in his 2021 report “Our Common Agenda”, called upon governments “to find alternatives to disruptive blanket Internet shutdowns and generic blocking and filtering of services to address the spread of disinformation and harmful life-threatening content, in line with international human rights law.”⁹²

In its turn, the Freedom Online Coalition called on all governments to “[r]efrain from discrediting criticism of their policies and stifling freedom of opinion and expression under the guise of countering disinformation, including blocking access to the Internet”.⁹³

War propaganda. Article 20 of the ICCPR calls upon the States to prohibit by their national law “propaganda for war” and “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.⁹⁴

An applicable international agreement, although obsolete, remains relevant in this context. The International Convention concerning the Use of Broadcasting in the Cause of Peace, a 1936 League of Nations treaty recognized by the UN, binds states to “restrict expression which constituted a threat to international peace and security.”⁹⁵ The Convention obligates governments to prohibit and stop any broadcast transmission within their frontiers that are “of such a character as to incite the population of any territory to acts incompatible with the internal order or the security of a territory.” It also contains a similar mandate in regard to “incitement to war against another high contracting party.” This provision makes no distinction between the speech of the state and the speech of private individuals.⁹⁶

More recently, the Special Rapporteur for Freedom of Expression of the Organization of American States declared that under the standards of the Inter-American System for the protection of human rights,

⁹⁰ Disinformation and freedom of opinion and expression Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, 13 April 2021, A/HRC/47/25, Para 51, <https://www.ohchr.org/en/documents/thematic-reports/ahrc4725-disinformation-and-freedom-opinion-and-expression-report>.

⁹¹ Disease pandemics and the freedom of opinion and expression Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 23 April 2020, A/HRC/44/49, Para 28, <https://www.ohchr.org/en/documents/thematic-reports/ahrc4449-disease-pandemics-and-freedom-opinion-and-expression-report>.

⁹² Our Common Agenda, Report of the Secretary-General, 5 August 2021, A/75/982, Para 35, <https://documents-dds-ny.un.org/doc/UN-DOC/GEN/N21/217/01/PDF/N2121701.pdf?OpenElement>.

⁹³ “FOC Joint Statement on Spread of Disinformation Online”, November 2020, <https://freedomonlinecoalition.com/wp-content/uploads/2022/03/FOC-Joint-Statement-on-Spread-of-Disinformation-Online.pdf>.

⁹⁴ See: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

⁹⁵ <https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=509&chapter=30&lang=en>.

⁹⁶ See more in: Propaganda and Freedom of the Media. Non-paper of the Office of the OSCE Representative on Freedom of the Media, Vienna: OSCE Representative on Freedom of the Media, 2015. – 78 p., <https://www.osce.org/fom/203926>

any regulation requiring ISPs to deploy content blocking or filtering should be restricted to exceptional cases, including war propaganda, with the additional protection that an independent judge should determine the illegality of the content.⁹⁷

Shutdowns to prevent or mitigate cyberattacks from abroad. The UN Charter prohibits the threat or use of force against the territorial integrity or political independence of any State.⁹⁸ Today such threats may also exist in cyberspace. The most authoritative explanation of the existing law on cyberattacks is the Tallinn Manual 2.0. Representing the common views of experts, it notes that sovereignty includes sovereignty over cyber infrastructure within its territory, including the right to control cyber infrastructure and cyber activities. A cyber operation against this infrastructure may violate the other state's sovereignty. It certainly does so if it causes damage.⁹⁹ A cyber operation aimed to coerce a foreign government may be qualified as an armed attack (Art. 51 of the UN Charter), which triggers the right to self-defense (Art. 21 of the UN Charter), including restriction or protection (in part or in whole) of access to the internet, without prejudice to applicable international law, including human rights law or international telecommunications law.¹⁰⁰

Other experts make a point, that within the framework of internet shutdowns, national sovereignty offers States a legitimate way to block access to the digital environment as well as suspend digital services coming from other States. Internet shutdowns, they say, could be implemented to avoid damages deriving from cyber-attacks or be provoked by the legitimate exercise of the right to self-defense from the external interference of other States.¹⁰¹

As the legal grounds for the sovereign right to cut off internet access, these and other experts, as well as some States, point to the Constitution of the International Telecommunication Union (ITU), a specialized agency of the United Nations. Indeed, it refers to the right of the States to block telecommunications services according to their national law when there is a danger to the security of the state or an infringement of its laws, public order, or decency. Moreover, ITU member States also have the right to suspend international telecommunication services.¹⁰²

The United Nations High Commissioner for Human Rights and the UN Special Rapporteur have heavily criticized such justifications.¹⁰³ The Special Rapporteur held that “[s]uch an interpretation contravenes the human rights norms and standards... and the ITU’s own values and commitments”. The Special Rap-

97 Economic Commission for Latin America and the Caribbean (ECLAC)/Internet & Jurisdiction Policy Network (I&JPN), Internet & Jurisdiction and ECLAC Regional Status Report 2020 (LC/TS.2020/141), Santiago, 2020. – P. 109, https://www.cepal.org/sites/default/files/publication/files/46421/S1901092_en.pdf.

98 UN Charter, 1945, Art. 2, <https://www.un.org/en/about-us/un-charter>.

99 Schmitt, M. (2017). Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations. In Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (p. lii). Cambridge: Cambridge University Press. P. 16.

100 Op.cit., p. 17.789

101 Giovanni De Gregorio and Nicole Stremlau, Internet Shutdowns and the Limits of Law / International Journal of Communication 14(2020), p 4233.

102 Constitution of the International Telecommunication Union (1992), Arts. 34(2), 35, <https://www.itu.int/en/council/Documents/basic-texts/Constitution-E.pdf>

103 Ending Internet shutdowns: a path forward. Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association. Human Rights Council Forty-seventh session 15 June 2021, A/HRC/47/24/Add.2, para 65-67, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/149/66/PDF/G2114966.pdf?OpenElement>.

porteur referred to the UN Secretary-General, who in his Roadmap to Digital Cooperation recognized the need for greater coherence throughout the United Nations system, including by recognizing that “human rights exist online as they do offline and have to be respected in full.”¹⁰⁴

The Special Rapporteur continued to say that the ITU “legal regime on suspension of telecommunications, which predates the digital era, is ill-suited to prevent misuse by Governments and address the threats that internet shutdowns pose to human rights, including the rights to freedom of expression and peaceful assembly. ITU norms and processes lack guidelines or enforcement measures that would help prevent the human rights violations caused by these extreme measures. Even if notification to ITU is required per article 35 of the ITU Constitution, this cannot be equated with effective oversight. Article 34 of the ITU Constitution is particularly troubling as it could be interpreted to authorize internet shutdowns, including on a broad and indiscriminate basis.”¹⁰⁵

The Special Rapporteur called upon the ITU to issue guidance “clarifying that these provisions should never be understood as authorizing internet shutdowns and [to] foster collaboration between States, Internet service providers (ISPs), mobile telephony operators and civil society groups to promote policies and practices to prevent network disruptions, in line with human rights norms and principles, including the United Nations Guiding Principles on Business and Human Rights (UNGPs)” so as to prevent this undesirable outcome.¹⁰⁶

This position of the UN Special Rapporteur was affirmed by the UN High Commissioner for Human Rights, who noted that the ITU was founded to facilitate “international connectivity in communications networks”. The above provisions of the ITU Constitution, she said, must “be applied together with and subject to the additional obligations that States have assumed under international human rights law to respect the right to freedom of expression and other applicable human rights.” She also agreed with the Special Rapporteur by recommending that ITU issue guidance clarifying that those provisions “should never be understood as authorizing Internet shutdowns”.¹⁰⁷

The ITU thus recognizes that measures undertaken to protect against cyberthreats must protect and respect the provisions for freedom of expression as contained in the relevant parts of the UDHR and the ICCPR.¹⁰⁸

¹⁰⁴ Road map for digital cooperation: implementation of the recommendations of the High-level Panel on Digital Cooperation, Report of the Secretary-General, 20 May 2020, A/74/821, para 38, <https://www.un.org/en/content/digital-cooperation-roadmap/>.

¹⁰⁵ Ending Internet shutdowns: a path forward. Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association. Human Rights Council Forty-seventh session 15 June 2021, A/HRC/47/24/Add.2, para 65-67, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/149/66/PDF/G2114966.pdf?OpenElement>.

¹⁰⁶ Ending Internet shutdowns: a path forward. Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association. Human Rights Council Forty-seventh session 15 June 2021, A/HRC/47/24/Add.2, para 65-67, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/149/66/PDF/G2114966.pdf?OpenElement>.

¹⁰⁷ Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights Report of the Office of the United Nations High Commissioner for Human Rights, 13 May 2022, A/HRC/50/55, Para 18, <https://www.ohchr.org/en/documents/thematic-reports/ahrc5055-internet-shutdowns-trends-causes-legal-implications-and-impacts>.

¹⁰⁸ International Telecommunications Union, The World Telecommunication Development Conference (Kigali, 2022), Resolution 45, Mechanisms for enhancing cooperation on cybersecurity, including countering and combating spam, https://www.itu.int/dms_pub/itu-d/opb/tdc/D-TDC-WTDC-2022-PDF-E.pdf.

2. Case law

After presenting our general analysis of the international and regional standards applicable to internet shutdowns and similar restrictions to the access to the internet by state authorities, this paper will now focus on how the most important and accessible case law decisions, both at regional and national levels, have so far considered these matters.

2.1 Case law from regional human rights courts

European Court of Human Rights

The European Court of Human Rights (ECtHR) has not issued any ruling regarding internet shutdowns in member States of the Council of Europe.

However, the ECtHR has adopted several decisions interpreting the scope of protection of the right to freedom of expression in the digital world. Some of these decisions refer to measures adopted by States preventing access to certain content, services, or online applications, including the wholesale blocking of opposition online media outlets ([OOO Flavius and others v. Russia](#)), or the blocking of a website for hosting what the domestic courts considered to be prohibited content ([Engels v. Russia](#), [Vladimir Kharitonov v. Russia](#) and [Bulgakov v. Russia](#)).

It also needs to be noted, as stressed by the Court in the decision on the case of [Ahmed Yildirim v. Turkey](#), that restrictions to online content, contemplated by national legislation of Council of Europe States, include “a wide variety of approaches and legislative measures, ranging from the suspension of individual rights of internet access or the removal of the illegal content, to the blocking of access to the specific website in question.” The Court adds that in most European countries “the protection of the rights of minors and efforts to combat the sexual exploitation of minors constitute a basis for appropriate measures restricting access to the websites concerned (this is the case in France, Germany, Switzerland and the United Kingdom). When it comes to ordinary crime, the measures restricting access are different and less severe in six countries (Austria, Estonia, Finland, Italy, Lithuania and the Netherlands).” In countries such as France or Spain, legislation was passed to permit the imposition of certain internet access restrictions to protect the holders of copyright and related rights. However, it is also important to note here the [decision](#) of the Constitutional Council of France from 2009 establishing the principle that the legislature may not confer powers to restrict or prevent internet access on an administrative authority.

For the purposes of this paper, the decision in the *Ahmed Yildirim v. Turkey* case probably constitutes the most important contribution by the ECtHR in this field. The applicant owned and ran a website on which he published his academic work and his views on various topics. The website was created using the Google Sites website creation and hosting service. Based on Turkish Law no. 5651 on regulating Internet publications and combating internet offences, and following the order of the Denizli Criminal Court of First Instance, the Telecommunications and Information Technology Directorate (TIB), an administrative regulatory body, blocked all access to Google Sites and the applicant was thus unable to access his own website.

The order was issued as a preventive measure in the context of criminal proceedings against the owner of a site hosted in the mentioned service, who was accused of insulting the memory of Atatürk. Yildirim applied before the national courts to have the blocking order of 24 June 2009 set aside in respect of his website. He pointed out that he used the website regularly in order to publish his academic work and his opinions on various topics, and that the measure had barred all access to his site, which had no connection with the offending website. The Court considered that the only means of blocking access to the latter, in accordance with the blocking order, had been to block access to the Google Sites service, which had hosted the content complained of. In particular, where a court ordered the blocking of access to a specific website, it fell to the TİB to implement the measure. If the content provider or hosting service provider is abroad (as it was the case), the TİB may block all access to the pages of the intermediary service provider under section 8(3) and (4) of Law no. 5651.

This is obviously not a case of wholesale blocking of internet access, even though it is particularly relevant since the decision of State authorities affected a significant amount of internet users and prevented access to fully legal online content. In the words of the ECtHR, “the fact that the effects of the restriction in issue were limited does not diminish its significance, especially since the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest.”

The ECtHR stresses that the right to freedom of expression enshrined in article 10 ECHR “applies not only to the content of information but also to the means of dissemination, since any restriction imposed on the latter necessarily interferes with the right to receive and impart information”. The Court also considers that national judgements “simply found it established that the only means of blocking access to the offending website in accordance with the order made to that effect was to block all access to Google Sites.” However, “they should have taken into consideration, among other elements, the fact that such a measure, by rendering large quantities of information inaccessible, substantially restricted the rights of internet users and had a significant collateral effect.” Furthermore, the Court establishes the violation of article 10 ECHR mainly based on the argument that “the judicial review procedures concerning the blocking of Internet sites are insufficient to meet the criteria for avoiding abuse, as domestic law does not provide for any safeguards to ensure that a blocking order in respect of a specific site is not used as a means of blocking access in general.”

Even though, as already mentioned, the ECtHR was not dealing with a complete internet shutdown, some interesting guiding principles were established:

- a) The internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information.
- b) Restrictions that affect a significant amount of internet users and prevent access to fully legal online content must be particularly considered by competent authorities as they have a significant “collateral effect”.

- c) Domestic law and subsequent judicial interpretation and application must ensure that blocking orders targeting specific online services are not abusive and particularly are not used to block internet access in general.

In addition to this, in his concurring opinion, judge Pinto de Albuquerque straightforwardly states that in any case “blocking access to the Internet, or parts of the Internet, for whole populations or segments of the public can never be justified, including in the interests of justice, public order or national security.”¹⁰⁹ This assertion is based on the specific standards set by the repeatedly quoted United Nations Human Rights Committee General Comment No. 34 and the Joint Declaration on Freedom of Expression and the Internet. In consequence, the opinion also establishes that “any indiscriminate blocking measure which interferes with lawful content, sites or platforms as a collateral effect of a measure aimed at illegal content or an illegal site or platform fails per se the ‘adequacy’ test, in so far as it lacks a ‘rational connection’, that is, a plausible instrumental relationship between the interference and the social need pursued.” Pinto de Albuquerque also provides a thorough compilation of European standards regarding the blocking of Internet publications, thus formulating in his view the minimum criteria for Convention-compatible legislation in this field:

- a) A definition of the categories of persons and institutions liable to have their publications blocked.
- b) A definition of the categories of blocking orders, such as blocking of entire websites, IP addresses, ports, network protocols or types of use, like social networking.
- c) A provision on the territorial ambit of the blocking order, which may have region-wide, nationwide, or even worldwide effect.
- d) A limit on the duration of the blocking order.
- e) An indication of the “interests”, in the sense of one or more of those included in article 10 § 2 of the Convention, that may justify the blocking order.
- f) Observance of the criterion of proportionality, which provides for a fair balancing of freedom of expression and the competing “interests” pursued, while ensuring that the essence (or minimum core) of freedom of expression is respected.
- g) Compliance with the principle of necessity, which enables an assessment to be made as to whether the interference with freedom of expression adequately advances the “interests” pursued and goes no further than is necessary to meet the said “social need”.
- h) Definition of the authorities competent to issue a reasoned blocking order.
- i) A procedure to be followed for the issuance of that order, which includes the examination by the

competent authority of the case file supporting the request for a blocking order and the hearing of evidence from the affected person or institution, unless this is impossible or incompatible with the “interests” pursued.

- j) Notification of the blocking order and the grounds for it to the person or institution affected.
- k) A judicial appeal procedure against the blocking order.

In other decisions on similar cases, the ECtHR has expressed positions close to the ones in *Ahmed Yildirim v. Turkey*. For example, in *OOO Flavus and others v. Russia*, the Court reasoned that “blocking access to an [entire] website was an extreme measure which (...) deliberately disregarded the distinction between the legal and illegal information the website might contain,” and that the “measures taken before a judicial decision had been issued on the illegality of the published content had amounted to a prior restraint on publications.” In the cases of *Engels v. Russia*, *Vladimir Kharitonov v. Russia* and *Bulgakov v. Russia*, the ECtHR found that the respective interferences from the application of the procedural law had arbitrary and excessive effects as it did not afford the applicant the required degree of protection and opportunity to be heard. Additionally, the ECtHR found that the domestic law remedy was ineffective; the appellate court did not consider the substance of the applicant’s grievances.

The role of sub-regional courts: the use of regional human right standards by the ECOWAS Court

Beyond the case law of the ECtHR, it is necessary to look into other sub-regional case law to find significant decisions dealing with internet shutdowns and similar restrictions from an international human rights perspective.

The African Charter on Human and Peoples’ Rights establishes the African Court of Human and Peoples’ Rights as the central pillar of the African human rights system beyond national protection mechanisms. However, in recent years, new layers have been added at the so-called sub-regional level. In particular, the Court of Justice of the Economic Community of West African States (ECOWAS) and the East African Court of Justice, as part of the East African Community (EAC), are fostering freedom of expression and particularly human rights on the internet through their recent jurisprudence.

The different sub-regional economic communities existing in the continent were mainly created for economic integration purposes and may lead to the creation of a future African Economic Community (Treaty of Abuja of 1991). Integration projects are established to promote socioeconomic rights like the rights to health, education, work, and an adequate standard of living. However, economic integration and human rights protection are to be seen as mutually reinforcing. Therefore, regional economic systems have underscored the recognition, promotion, and protection of human rights among their core objectives or principles. In the case of ECOWAS and EAC this has facilitated the establishment of specific mechanisms (sub-regional courts) for the protection of human rights¹¹⁰.

110 Nyinevi, Christopher Yaw, Ayalew, Yohannes Eneyew, “The Emerging role of African Sub-Regional Courts in Protecting Human Rights on the Internet”, *Afronomics Law*. November 28, 2022. Available online at: <https://www.afronomicslaw.org/category/analysis/emerging-role-of-af->

The ECOWAS Court has adopted two important decisions particularly focusing on the matter of internet shutdowns. These are [Amnesty International Togo and Ors v. The Togolese Republic](#) (25 June 2020) and [SERAP v. Federal Republic of Nigeria](#) (14 July 2022). Even though the facts considered in each case have some differences, the Court formulates an interesting analysis by applying a few horizontal principles.

The case of Togo was triggered by the decision of local authorities to cut off access to internet during a period of popular protests. National authorities justified their conduct on the basis of the “national security interest”, claiming that existing protests had the “potential to degenerate into a civil war” due to the hate speech and incitement to violence that was spread online. The case against Nigeria originated with the decision of suspending access to Twitter’s application across Nigeria, based on the fact that the platforms’ operations constituted threats to the stability of the country and undermined its “corporate existence”. Moreover, national authorities claimed that ongoing protests were sponsored by Twitter’s founder. The applicants also challenged in this case the decision to immediately commence licensing of all over-the-top audiovisual services (OTT) and social media services in the country, which according to them were unknown to the Nigerian law.

A first important topic covered by this jurisprudence refers to the *locus standi* for submitting applications in this area. In the case against Togo the applicants were seven non-governmental human rights organizations and a natural person in her capacity as a journalist. The first seven applicants alleged that they relied on the internet for their work and shutting down internet access had thus affected their right to freedom of expression. The eighth applicant claimed that the internet shutdown denied her the right to work as a journalist and also her right to freedom of expression. The Court found that non-natural persons may initiate claims to protect their right to freedom of expression, if violated, as well as other derivative rights (including the right to access to the internet, as it will be explained below). Regarding the eighth applicant, the Court also considered that she had sufficient grounds to make a claim as a natural person alleging that the internet shutdown impeded the exercise of her professional activities.

The ECOWAS Court did not thus accept any restrictive interpretation in terms of access to justice in cases of internet shutdowns, contrary to what was demanded by the respondent national authorities. In particular, the respondents based their arguments on the fact that besides being non-natural persons, the non-governmental organizations behind the application could not be considered as “victims” of a human rights violation. The Court however considered the impact on the work of the latter as sufficient grounds for legal action. Similarly, regarding the journalist, the impact on her individual professional endeavors was also considered by the Court as sufficient for granting the *locus standi*.

It is important to note that in 2018 the Supreme Court of Cameroon, a country that is not a member of the ECOWAS, sitting as the Constitutional Council of Cameroon, had [declared](#) a petition filed by the non-profit Global Concern Cameroon, for a declaratory judgment as per article 65 of the Constitution of Cameroon, inadmissible for lack of *locus standi*. The petition was filed because of two internet shutdown incidents imposed by the government across the two English-speaking regions in Cameroon: South-West

and North-West. In its decision, the Court justified in its ruling that the petition was filed by a person who does not fall under the persons empowered to refer matters to the Constitutional Court as stipulated by Section 47(2) of the Constitution of Cameroon. This Section exclusively entitles the following persons to submit petitions to the Court: President of the Republic, President of the National Assembly, President of the Senate, one-third of the members of the National Assembly or one-third of the Senate, and Presidents of Regional Executives.

A second important area of this jurisprudence refers to the connection of the right to access the internet as well as to certain very popular applications, and the right to freedom of expression. The Court determined in the aforementioned decisions that internet access may not strictly be a fundamental right but is a “derivative right” as it “enhances” the exercise of freedom of expression. As such, the Court considers that internet access is an “integral part” of the right to freedom of expression that “requires protection by law and makes its violation actionable.” Any interference with this right must, therefore, be provided for by the law specifying the grounds for such interference and meet the requirements of necessity and proportionality. In the case against Nigeria, the Court specifies that the “derivative right” protected under article 19 ICCPR and article 9 ACHPR allows a person to enjoy the right to freedom of expression using whatever medium of choice, including access to social media platforms like Twitter, Facebook, and Instagram. Therefore, any derogation from the derivative right to access to the internet, including access to social media platforms, requires a legal instrument, which can be an existing law or an order of the Court (or, in most cases, both) and must also respect the principles of legitimacy, necessity, and proportionality.

In both cases, the Court found that the respective measures (wholesale shutdown and suspension to access to Twitter) were adopted in the complete absence of any law or court decision that would support and legitimize them. Therefore, both deserved to be qualified as clear illegitimate intrusions in the right to freedom of expression for violation of the principle of legality. The Court generally acknowledges that freedom of expression can be subjected to certain limits, and that national security allegations may have “merit” as a valid defense to justify derogating the mentioned right. At any rate, the specific circumstances of the cases show the complete omission of any law or any other legal or judicial instrument that would provide any basis or justification for the adoption of the measures under scrutiny.

Last but not least, the Court also requested national authorities in both cases, and as part of the final decision, to take “all necessary measures” to prevent the re-occurrence of the “situations” in the future, and to enact laws to protect the right to freedom of expression in accordance with international human right standards. In the case against Nigeria, it is also important to underscore that once the lawsuit was filed, the Court held that it be heard expeditiously and ordered the respondent to desist from imposing the ban, sanctioning media houses, or arresting, harassing, intimidating and prosecuting the applicants and concerned Nigerians for the use of Twitter and other social media platforms pending the hearing and determination of the substantive suit. Therefore, in this last case, the ECOWAS Court considered that the potential impact of the suspension of Twitter’s service on the fundamental right to freedom of expression justified the implementation of interim measures during the examination of the case.

2.2 Decisions by national courts

National courts in several regions of the world have also adopted some relevant decisions regarding the limitation of access to the internet, particularly in cases where the need to protect national security and public order was presented as a legitimate cause for this kind of measure.

National court decisions elaborate and are usually based on domestic legislation including freedom of expression constitutional provisions, telecommunications legal and regulatory frameworks, national security and public order legislation, as well as general legal provisions regarding the powers of national and regional governments, administrative law enforcement authorities and other agencies. In many cases the fundamental legal reasoning in the analysis of internet access restrictions may thus not consider or refer to the international and regional legal standards and case law already presented in this paper, while in some decisions, though, we shall also be able to find and recognize at least the language of international human rights standards. In any case, an overview of both scenarios may help us better understand how national judges and courts approach not only the substantive legal issues regarding the measures analyzed by this paper but also the role and scope of judicial scrutiny in assessing and determining the legitimacy and necessity of such measures, previously adopted, in most cases, by political or administrative bodies. These bodies rely on some occasions on special powers, legitimacy, and expertise to assess national security and public order circumstances.

The landmark case of Anuradha Bhasin v. Union of India

In 2020 the Supreme Court of India ruled that an indefinite suspension of internet services would be illegal under Indian law and that orders for internet shutdowns must satisfy the tests of necessity and proportionality. The case concerned the internet and movement restrictions imposed in the Jammu and Kashmir region in India during August of 2019, in the name of protecting public order. Based on orders from the Government, mobile phone networks, internet services, and landline connectivity were all shutdown in the region. The District Magistrates imposed additional restrictions on freedoms of movement and public assembly citing authority to do so under Section 144 of the Criminal Penal Code. In their submissions to the Court, the Attorney General argued that the restrictions were a measure to prevent terrorist acts and were justified considering the history of cross border terrorism and internal militancy that had long plagued the State of Jammu and Kashmir. The Solicitor General indicated that social media and the internet in general could be used as a means to incite violence through the transmission of false news or fake images. Further, he claimed that the *dark web* allowed individuals to purchase weapons and illegal substances easily.

The orders suspending access to the internet were passed in 2017 and allowed the government to restrict telecom services, including access to the internet, subject to certain safeguards, as established by the Telegraph Act. These safeguards were that first, the suspension orders may be issued only by the Secretary to the Government of India in the Ministry of Home Affairs or by the Secretary to the State Government in charge of the Home Department. In unavoidable circumstances another official not below the rank of a Joint Secretary to the Government of India may issue the orders provided that the competent authority approves the orders within 24 hours of its issuance. Without approval the suspension must be lifted within 24 hours.

The orders must include reasons for the suspension and its copy must be sent to a Review Committee consisting of senior State officials. The reasons should not only explain the necessity of the suspension but also the “unavoidable” circumstance which necessitated the order.

The [decision](#) of the Supreme Court, following a lawsuit filed by the editor of a newspaper and a member of Parliament, among others, covers several areas since the applicants articulated many important allegations:

- the internet is essential for the modern press and that by shutting it down, the authorities forced the print media to come to “a grinding halt”,
- Giving the state carte blanche to restrict fundamental rights in the name of national security and terrorism prevention would allow the State to impose broad restrictions on fundamental rights in varied situations,
- the State failed to prove the necessity of the restrictions,
- restrictions must be based on objective reasons and not merely on conjectures,
- official orders must not be kept secret by the State, which was not the case,
- when imposing restrictions, the State must choose the least restrictive measures and balance the safety of people with the lawful exercise of their fundamental rights, which did not occur here, and
- internet restrictions did not merely affect freedom of expression but also the right to trade, as well as the ability of political representatives to communicate with their constituents, thus causing broad harm even to regular and law-abiding citizens.

In light of these arguments, the Court firstly noted that it had encountered trouble in determining the legality of the restrictions since the authorities had refused to disclose the content of the orders imposing said restrictions. In any case, the Court would be the body to weigh the State’s privileges against the right to information and decide what portions of the order could be hidden or redacted. The State initially claimed privilege, and then released some of the orders, explaining that all could not be released because of unspecified difficulties. For the Court, such justification was not a valid ground. Public availability of Government orders is a settled principle of “law and of natural justice”, particularly if an order affects lives, liberty and property of people. It also constitutes a basic pre-condition for the exercise of the constitutional right to challenge them before a court. The first important conclusion would thus be that even in cases where national security is alleged to justify restrictions to internet access, this would not *per se* justify not providing access to information regarding the specific decisions adopted by the competent authorities.

Secondly, in light of the constitutional protections of freedom of expression in India, the Court affirms that the right to freedom of expression also extends to the internet as a medium for expression. Moreover,

the internet also plays a very important role in trade and commerce, and some businesses are completely dependent on the web. Therefore, the Court does not declare the right to access the internet as a fundamental right *per se*, although it is also considered to be directly connected to the exercise of the right to freedom of expression.

The Court also acknowledges that (similarly to international human rights standards) India's Constitution allows the Government to restrict freedom of expression as long as the limitations are prescribed by law, are reasonable, and pursue a legitimate purpose. The Constitution enounces an exhaustive list of reasonable and legitimate causes for restrictions that include "interests of the sovereignty, integrity, security, friendly relations with the foreign States, public order, decency or morality or contempt of Court, defamation or incitement to an offence" (article 19.2). Restrictions might even include, according to the case law of the Supreme Court, complete prohibitions in certain areas, although they should not excessively burden free speech and the relevant authority must properly justify before the Court that lesser alternatives would be inadequate.

Based on this constitutional framework, the Court particularly focuses on the implications of the proportionality standards considering the following:

- a) Modern terrorists relied heavily on the internet, which allows them to disseminate false information and propaganda, raise funds, and recruit others to their cause. Therefore, the so-called "war on terror" may be seen as a legitimate cause to restrict freedom of expression in certain circumstances.
- b) The standard of proportionality is key to ensuring that a right is not restricted beyond what is necessary. In particular, when balancing national security with liberty, authorities should in any case be prohibited from achieving a public good at the cost of fundamental rights. To illustrate the importance of proportionality when assessing restrictions to fundamental rights, the Court presents an extensive comparative review of proportionality tests used by Indian, German and Canadian Courts.
- c) Therefore, the proportionality test encompasses a series of cumulative elements: the goal of the restriction must be legitimate, the restriction must be necessary, the authorities must consider if alternative measures to the restriction exist, the least restrictive measure must be taken, and the restriction must be open to judicial review.
- d) More precisely, according to the Court, "the degree of restriction and the scope of the same, both territorially and temporally, must stand in relation to what is actually necessary to combat an emergent situation (...). The concept of proportionality requires a restriction to be tailored in accordance with the territorial extent of the restriction, the stage of emergency, nature of urgency, duration of such restrictive measure and nature of such restriction."

Regarding the central issue of the legality of the restriction, the Court subsequently declares that to issue a suspension order, the Government first had to determine that a public emergency existed. This "public emergency" is required to be of a serious nature and needs to be determined on a case-by-case basis. In

addition to this, the Court noted that the maximum duration of suspension orders had not been indicated. Nonetheless, considering the principle of proportionality, the Court opined that an indefinite suspension is impermissible and that it was up to the previously mentioned Review Committee to determine its duration and to ensure that it would not extend beyond a period which was necessary.

Section 144 of the Code of Criminal Procedure additionally grants special powers to governmental authorities, under judicial supervision, to adopt measures in circumstances of “danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, or an affray.” The Court concluded that the power under Section 144 could be exercised “not only where there exists present danger, but also when there is an apprehension of danger. However, the danger contemplated should be in the nature of an ‘emergency’ and for the purpose of preventing obstruction and annoyance or injury to any person lawfully employed.”

The Court observes that the petitioners had failed to offer evidence that the restrictions had any actual repercussion as well as any chilling effect on their freedom of expression. However, it also stated that competent authorities are required to respect the freedom of the press at all times, and that “there is no justification for allowing a sword of Damocles to hang over the press indefinitely.”

For all these reasons, the Court decided that the government had to review its suspension orders, particularly those that could be used to suppress legitimate expression, and lift those that were not necessary or did not have a temporal limit.

This judgement is important beyond its jurisdiction as it frames a series of very relevant principles that have been further utilized by the courts in the country as well as in other jurisdictions for comparative purposes. The main principles deriving from the decision are:

- a) The right to freedom of expression also extends to the internet as a medium for expression, although the Court does not proclaim access to the internet as a fundamental right.
- b) Restrictions to freedom of expression, including access to the internet, can be imposed as long as the limitations are prescribed by law, are reasonable, and pursue a legitimate purpose.
- c) Even in cases where national security is alleged to justify restrictions to internet access, this would not *per se* justify not providing access to information regarding the specific decisions adopted by the competent authorities.
- d) Restrictions should not excessively burden free speech and the relevant authority must properly justify before the Court that lesser alternatives would be inadequate.
- e) Public authorities have the burden to demonstrate and clearly present the concurrence of circumstances, in terms of national security or others, that may justify the adoption of restrictive measures.

- f) The Court is not straightforward on whether a complete and general prohibition on access to the internet may constitute an acceptable and proportionate measure under specific circumstances. It does proclaim though that indefinite suspensions are not permissible in any case.

The importance of the principle of proportionality

Following on the jurisprudence of *Anuradha Bhasin v. Union of India*, in [Foundation for Media Professionals v. Union Territory of Jammu and Kashmir](#) the Supreme Court of India examined the restriction of internet mobile service to 2G in the mentioned territories. The Court primarily recognised the necessity of balancing national security concerns against the fundamental rights of citizens. In this context, the Court held that better internet access, although “desirable and convenient” was outweighed by the threat from those “trying to infiltrate the borders and destabilise the integrity of the nation.”

In considering the proportionality of the restriction, the court observed that a blanket order was passed for the entire Union Territory of Jammu and Kashmir, rather than for specified at risk areas. The Court noted that “the degree of restriction and the scope of the same, both territorially and temporally, must stand in relation to what is actually necessary to combat an emergent situation.” While orders issued by the Union Territory of Jammu and Kashmir were for a limited period, they failed to provide any reason to support that such a restriction was necessary to be imposed in all districts of Jammu and Kashmir. Following *Anuradha Bhasin v. Union of India*, the Court noted that restrictions should only be imposed where it is deemed absolutely necessary. The Court also states that the determinations included in the latter were not respected when it came to the examination by a Review Committee to oversee the respect for substantial and procedural safeguards in the adoption and enforcement of the restrictions, particularly regarding the proper application of the principle of proportionality.

Previously, in [Banashree Gogoi v. Union of India](#), the Gauhati High Court analysed the suspension of mobile and broadband internet on December 11, 2019 in response to protests and an outbreak of violence related to the controversial amended Citizenship Act. The High Court states that “with the advancement of science and technology, mobile internet services now plays a major role in the daily walks of life, so much so, shut-down of the mobile internet service virtually amounts to bringing life to a grinding halt.” This assertion was subsequently used, as already shown, by the petitioners in the already mentioned decision of *Anuradha Bhasin v. Union of India*.

The Court also underscores that “shut-down or suspension of service (does not need) to be viewed as an anathema” and admits that in given and specific situations, “(domestic) law permits suspension” but that conditions must be continually reassessed, and services restored as soon as the situation permits it. The decision ordered the immediate restoration of mobile internet services in the State of Assam since no material was submitted by the authorities to demonstrate before the Court that there were sufficient threats, disruptions, incidents of violence or a deterioration of law and order to justify the ongoing restrictions.

In the recent judgement of the case [Ashlesh Biradar v. State of West Bengal](#) the High Court of Calcutta suspended the operation of an internet shutdown order issued by the Indian State of West Bengal. The

Court acknowledged that the suspension of internet service affected banking transactions and various other business activities, including online teaching classes in the area concerned. It also recognized that other effective measures could have been taken by the State to prevent the use of unfair means and cheating without affecting the public at large. Following the criteria set in *Anuradha Bhasin v. Union of India*, the Court held that the internet shutdown order had been passed without the authority of law, failed to satisfy the test of proportionality, and did not contain reasons for suspending internet services.

There also are cases of Indian Courts analysing petitions to issue orders to restrict internet access for the prevention of cheating during exams. The Rajasthan High Court in *Dhirendra Singh Rajpurohit v. State of Rajasthan* dismissed the petition because the government undertook to not repeat shutdowns. *Software Freedom Law Center India v. State of Arunachal Pradesh* on the other hand is a case where the Supreme Court has sought a reply from the Government regarding whether there is any standard protocol for an internet shutdown during examinations.

Beyond the Indian subcontinent, the principle of proportionality appears mentioned in other jurisdictions, referring to specific cases of Internet shutdowns.

The Constitutional Court of Uganda struck down, in *Unwanted Witness-Uganda v. Attorney General*, a petition challenging the Government's shutdown order of social media and access to mobile financial services on two occasions: the presidential and parliamentary elections in February 2016 and the inauguration of the elected president in May the same year. In its analysis, the Court went beyond national jurisprudence and repeatedly referred to the Supreme Court of India's case of *Anuradha Bhasin v. Union of India* stating that the parameters set (and described above) "are a good starting point" to determine whether the shutdown of the internet was consistent with the Constitution of Uganda. However, in this case the Court held that the petition should have been submitted before another competent court given that it did not raise any questions of constitutional interpretation but concerned only alleged violations of constitutional provisions through either acts or omissions of the Government (the latter not falling under the competences of the Constitutional Court). It is also important to note that in a concurring opinion Justice Kenneth Kakuru pointed at the fact that petitioners had failed to frame a correct question and did not pursue an answer to whether the applicants had their rights restricted beyond the justifiable limitations in a democratic society, which might have been examined by the Court precisely as a matter of constitutional interpretation.

Nevertheless, Justice Kakuru noted that in the digital era, it is quite clear that any internet shutdown would have adverse consequences on everyone even if the shutdown lasted for just one day. Moreover, Justice Catherine Bamugemereire agreed with the Court's decision yet drew a different conclusion, suggesting that the Court refer the case to the competent court instead of striking it down. In her concurring opinion, Justice Bamugemereire highlighted that in spite of the importance of the internet nowadays in various areas of life—as a tool for empowerment and knowledge—, a right to internet access should be viewed in light of the correlating, competing rights such as privacy and maintaining public order. She also noted that the internet is viewed as an enabler to other rights such as the right to expression and therefore it is "about time that a safe way to access social media whether through the internet ... is guaranteed." Justice Bamugemereire further emphasised that the constitutional aspect of digital rights is a novel area of constitutional interpre-

tation and that the question of internet shutdowns is a matter “that needs to be brought to the fore front and clear solution found for it including but not limited to creating clear rights and responsibilities around it.”

In Indonesia, the Jakarta State Administrative Court, in the case *Alliance of Independent Journalists v. Minister of Communication*, held that the actions taken by the government —shutting down the internet network in West Papua and Papua province— were unlawful and ordered the government to pay to the plaintiffs the amount of 457,000 rupiah (or \$30.59 approximately). After recognising the right to access the internet as a means of freedom of expression, the Court referred to the 1945 Indonesian constitution, national laws and international treaties, namely the International Covenant on Civil and Political Rights and the United Nations Human Rights Committee General Comment No. 34, to decide whether the restrictions laid down by the government on the right to access internet services, freedom of expression, and the right to seek information and other rights used through the internet, were in conformity with the existing human rights framework. The Court noted that restrictions on freedom of expression must fulfil three conditions. First, they must aim to protect one of the following objectives: right to reputation, morality, religious values, security, decency, public order, or public health; second; restrictions must be based in law, and third, they must be proportional. The Court also made an important observation regarding the right to access the internet by stating that “internet has been used not only as a vehicle to channel the right to express opinions and the right to seek, obtain and convey information, but also to be used as media to realize the broad freedom of expression which enables many other human rights to be carried out, including the right to education and teaching, the right to benefit from science and technology, arts and culture, the right to work, political rights, the right to associate and assemble, and the right to health services.”¹¹¹

Based on these general parameters (as well as applicable provisions from domestic legislation), the Court established that in cases of online dissemination of unlawful content, an appropriate and proportional action would be the restriction on the right to access the internet only for perpetrators, since “if it is carried out in its entirety through the termination of the internet network, it will have a greater negative impact in the form of derogating other human rights that can be positively realized through the internet.”¹¹² Therefore, “the right to internet access can only be derogated through termination of the internet network if in a state of emergency in accordance with applicable law.”¹¹³

The Court thus recognises the relevance of the internet as an instrument for the effective exercise of the right to freedom of expression and acknowledges the need to use international human rights standards to define the legitimate limits to this right, including measures to deal with the dissemination of illegal content online where wholesale shutdowns are excluded. However, at the same time the Court admits the possibility of adopting more intrusive measures within the context of a state of emergency declared and enforced according to domestic legislation.

Unfortunately, this ruling, which was seen as more protective of the right to internet access, was overturned a year later by the Constitutional Court of Indonesia with seven votes out of nine. The Constitutional

111 *Alliance of Independent Journalists v. Minister of Communication*, no. 230/G/TF/2019/PTUN-JKT, p. 246, PTUN JKT 2020.

112 *Alliance of Independent Journalists v. Minister of Communication*, no. 230/G/TF/2019/PTUN-JKT, p. 274, PTUN JKT 2020.

113 *Ibid.*

Court justified the decision that imposing a restriction on internet access amid social unrest is constitutionally valid since “the government acted ‘within reason’ to forestall threats to public order.” The Court also noted that the government has a responsibility of “preventing the dissemination and use of electronic information and/or electronic documents that have prohibited contents in accordance with statutory provisions,” especially since the characteristics of the internet allow for the widespread of illegal content, which would adversely impact the society.¹¹⁴

Cases of judicial deference

Among the national judgements analysed for the purposes of this paper, it is important to note several cases where the judiciary acknowledges and accepts the existence of a legal framework that contemplates the possibility of limiting or the complete termination of internet access (particularly for reasons of national security or public order), and at the same time upholds the assessment made by executive bodies or agencies regarding the need for the adoption of specific restrictive measures.

A very relevant [case](#) in this field is the decision of 2018 of the Supreme Administrative Court of Egypt regarding the suspension of communications and internet shutdown during the 2011 Egyptian Revolution. This judgement overturned the decision of the first instance administrative court which had levied a EGP 540 million fine against former President Mubarak, and both his Prime Minister and Interior Minister, for imposing a complete suspension of mobile services on the 28th of January 2011 and a blanket shutdown of internet services on the same day until the 2nd of February. The telecommunication companies had previously explained that the sudden shutdown was undertaken in compliance with the orders of the competent authorities rendered in accordance with the contracts between the companies and the government, which empowers the latter to issue such orders in case of national security threats.

The first instance court emphasised the fact that “telecommunication and internet services are closely related to a set of fundamental rights and freedoms, such as freedom of expression, the right to communicate, the right to privacy, the right to internet access, the right to know, the right to information, and the interconnected rights: the right to development and the right to life. Therefore, restricting these services by cutting, banning, preventing, or throttling them is a violation of these rights and freedoms that adversely affects the legitimacy of the shutdown order. The Court noted further that although the Government had invoked national security as a reason for the shutdown order, it concealed the true motive behind such order which was the protection of the regime, not the State. The Court eventually ruled that the shutdown order lacked legitimate legal basis, representing an abuse of power and a deviation from the public good. Thus it was a violation of the constitution and the law and constituted an infringement on several fundamental rights.

¹¹⁴ Katitza Rodrigues, Indonesian Court Allows Internet Blocking During Unrest, Tightening Law Enforcement Control Over Users’ Communications and Data, Electronic Frontier Foundation, 23 November 2021, <https://www.eff.org/deeplinks/2021/11/indonesian-court-allows-internet-blocking-during-unrest-tightening-law-enforcement>; Agustinus Beo Da Costa and Stanley Widiyanto, Indonesian internet blocks amid social unrest lawful, court rules, Reuters, October 27, 2021, <https://www.reuters.com/business/media-telecom/indonesian-internet-blocks-amid-social-unrest-lawful-court-rules-2021-10-27/>; Global Voices South East Asia, Indonesian court allows internet blocking amid social unrest, 9 November 2021, <https://advox.globalvoices.org/2021/11/09/indonesian-court-allows-internet-blocking-amid-social-unrest/>

This reproach of arbitrariness and abuse of power declared by the first stance court was straightforwardly overturned by the Supreme Administrative Court. In this case, the Court neither refers to relevant human rights principles included in the Egyptian Constitution, nor mentions international or regional human rights standards at any point in its reasoning. The Court bases its judgement on the fact that, as it was recognised by the first instance court, a ministerial Committee was formed to investigate and deal with these threats, which did not object to the suspension and shutdown order, as well as the testimony of the head of the Egyptian National Telecommunications Regulatory Authority—who confirmed the legality of the suspension and shutdown order based on Article 67 of the Telecommunication Law. The Court concluded that a three-criterion accumulative test of fault, harm, and causality to recognize the responsibility of the administrative authorities for the adoption of restrictive measures, was not fulfilled (by lack of “fault”), and hence the suspension and shutdown order had a legitimate basis and was in accordance with the law.

In *Pakistan Telecommunication Authority v. CM Pak Limited*, the Supreme Court of Pakistan analyzes the Ministry of Information and Technology’s Policy Directive concerning the suspension of mobile operator licenses and the Pakistan Telecommunication Authority (PTA)’s direction to mobile cellular operators to suspend their operations. The Court remarked that there is a consensus among the parties that national security or public safety priorities justify the imposition of restrictions and directions. The Court reasoned that Section 54(3) of the Telecommunication Act confers powers on the Federal Government to modify or suspend all or any orders or licences in a situation where an Emergency is imposed by the President under the Constitution. On the other hand, Section 8(2)(c) empowers PTA to take steps about matters of national security, diplomatic protocols and state functions. The Court observed that the former section is reactive and defensive, coming into the field when, on account of grave circumstances in the country or its provinces, a proclamation of Emergency is issued. Whereas the latter section is pre-emptive action as it allows for the disruption of services before any perceived threat in a specified area materialises.

The Court observed that the Policy Directive gives law enforcement authorities the power to forward written requests to PTA specifying the cellular services to be closed, the time and duration of the closure and the specific area where such closure is to be implemented in case of significant threats of “hostilities against Pakistan by a foreign power” or “internal aggression by terrorists/groups.” The Court observed that since both of these events fall under public safety and national security, the Policy Directive cannot be held as contravening Section 54 of the Telecommunication Act. Conversely, it strengthened the very purpose of the Telecommunication Act. The Court also observes that the PTA exercised its power under the Policy Directive reasonably, fairly, justly and for the advancement of the purposes of the Act. The Court assessed different factual circumstances including the Ashoora in Moharram, the Pakistan Day Parade by the Armed Forces, and the Protest at Chehlum of Mumtaz Qadri. The Court held that taking consideration of these events, there was a legitimate need to suspend cellular services. These protective measures are taken at the request of law enforcement authorities because of past experiences of terrorist activities at similar events. If such events caused the issuance of the impugned directions then the same would be in the public interest, reasonable, fair, consistent with the object of the law and therefore valid. The Court outrules the determinations of the Islamabad High Court in 2017, establishing that the power to suspend or cause suspension of the services, operations or functions of a licensed telecommunication provider in the context of national security is exclusively provided under sub section 3 of section 54 of the Act of 1996 and that it can only

be invoked if there is a Proclamation of Emergency by the President of Pakistan pursuant to powers vested under Part X of the Constitution. The High Court also warned that causing the suspension otherwise may expose the Federal Government or the Authority to claims of compensation or damages by the licensees or the users of the mobile cellular services.

In a similar vein, in 2019 the Magas District Court in Russia held that the Federal Security Service (FSB) in Ingushetia acted lawfully when they restricted internet access on eight occasions, all of which coincided with peaceful protests. The FSB qualified its actions under Section 3 of Article 64 of the Federal Law on Communication, that obliged commercial and private entities to restrict access to the internet or other modes of communication upon receipt of a written request from law enforcement or security agencies. The District Court simply agreed with the arguments of the FSB and found that the shutdowns were legal.

Once again in India, in the decision on the case of *Vyas v. State of Gujarat*, the High Court of Gujarat found that the state was justified in issuing an order blocking internet access on mobile phones for one week after widespread public protests, according to the already cited Section 144 of the Code of Criminal Procedure. The Court found the application of internet shutdown in the circumstances to be justified by giving deference to the decision of the authorities in finding the most appropriate mechanism for controlling the situation.

It is also important to note a relevant case of total absence of deference. Governments in Sudan have been systematically and abundantly using shutdowns as a mechanism to curb dissent and criticism. Disruptions in 2019 and 2021 were challenged before the Courts by a local lawyer. In September 2019, a court ordered the telecom companies Sudani and MTN to apologize to customers for disrupting access to their networks at the behest of the military authorities. In 2021 the General Court of Khartoum ordered ISPs to restore internet services to all subscribers in response to a lawsuit raised by the Sudanese Consumer Protection Organisation. On the same day, the Telecommunication and Post Regulatory Authority (TPRA) insisted on maintaining the shutdown. The various restoration orders and arrest warrants subsequently adopted by courts held the regulator, ISPs, and the government to account¹¹⁵.

Need to respect the distribution of competences

Lastly, some judicial decisions appear to overturn or confirm decisions ordering the shutdown of access to online services solely based on whether the measure had been adopted by a body or agency that had or had not the legal authority to proceed in such way.

In 2022, the High Court for Zambia at Lusaka issued a [consent judgment](#), confirming that the Zambian Information and Communications Technology Authority (ZICTA) should not “do any act or make any omission outside of their legal regulatory powers and authority which may inhibit or interrupt the flow of and uninhibited access to information on all available telecommunication platforms under their control and/

¹¹⁵ CIPESA, *Litigating Internet Disruptions in Africa: Lessons from Sudan*, 3 March 2022, <https://cipesa.org/2022/03/litigating-internet-disruptions-in-africa-lessons-from-sudan/>

or regulation where the interest of consumers and their consumer and constitutional rights are threatened". ZICTA also consented to informing the public within 36 hours of any disruptions of the reason for that interruption. This judgement thus endorses the agreement between the two parties, Chapter One Foundation (petitioner) and ZICTA (defendant). The legal action was triggered by the interruption of internet access during the general elections of August 2021.

In the judgement of the case *Zimbabwe Lawyers for Human Rights v. Minister of State and National Security*, the Zimbabwean High Court held that an order to shut down internet services was unlawful and ordered that all telecommunications service providers restore access to their subscribers. The Court held that the applicable Interception of Communications Act was directly administered by the President and so the Minister had no authority to issue an order under the law.

Conclusions

Our review of the international law and standards on internet shutdowns demonstrates a uniform condemnation of this instrument of information control. Both the United Nations, its member States, its institutions and agencies, and regional intergovernmental organizations tend to view indiscriminate and disproportionate restrictions as harmful to the fulfilment of human rights, including the right to freedom of expression, the right of access to information, and the right of peaceful assembly.

The barriers to universal access to the internet prevent nations from reaching the UN Sustainable Development Goals, undermine efforts to build inclusive and development-oriented information and knowledge societies.

While restrictions might aim at internationally recognized legitimate aims, such as protecting national security or public order, the practice – in the eyes of intergovernmental bodies and national courts – is often based on vaguely formulated regulations and does not meet the proportionality test. Moreover, such measures lead to silencing political opposition or dissenting voices and self-censorship of independent expression.

Should States nonetheless implement shutdowns, they are advised to strictly adhere to particular requirements. As summarized by the UNHCHR, any internet shutdowns must be grounded in unambiguous, publicly available law. They should clearly lead to achieve a legitimate aim, as defined in human rights law. Shutdowns should be as narrow as possible, in terms of duration, geographical scope, and the networks and services affected. Decisions to introduce a shutdown shall be subject to prior authorization by a court or another independent competent body, to avoid any political, commercial or other unwarranted influence. Such decisions should be communicated in advance to the public and ISPs, with a clear explanation of the legal basis for the shutdown, its scope and duration. Restrictions should be subject to meaningful redress mechanisms accessible to those whose rights have been affected, including through judicial proceedings in independent and impartial courts, in a timely manner.¹¹⁶

Looking particularly into existing and available case law in these areas, it is necessary to establish a distinction between the criteria formulated by regional and subregional international courts, and national judicial decisions. While the former tend to use and reaffirm some of the international standards mentioned in this paper, the latter may have adopted a less consistent approach, more focused on particularities of applicable national legislation and regulation, and procedural requirements, rather than substantive or merit-based discussions of equities and rights.

The ECtHR has not been dealing with complete internet shutdowns, although it was able to provide some interesting guiding principles, including that the internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, restrictions that affect

¹¹⁶ Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights: Report of the Office of the United Nations High Commissioner for Human Rights, 13 May 2022, A/HRC/50/55, Para 67, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/341/55/PDF/G2234155.pdf?OpenElement>.

a significant amount of internet users and prevent access to fully legal online content must be particularly considered by competent authorities as they have a significant “collateral effect”, and domestic law and subsequently judicial interpretation and application must ensure that blocking orders targeting specific on-line services are not abusive and particularly are not used to block internet access in general.

In sub-regional human rights systems, the ECOWAS Court has adopted two important decisions particularly focusing on the matter of internet shutdowns. This Court has refused any restrictive interpretation in terms of access to justice (*locus standi*) in cases of internet shutdowns. In particular, the Court has considered that the impact on the work of civil society organisations, media or individual journalists are sufficient grounds for legal action. The Court has also referred to the connection of the right to access the internet - as well as to certain very popular applications - and the right to freedom of expression. The Court has emphasized that internet access may not strictly be a fundamental right but is a “derivative right” as it enhances the exercise of freedom of expression. As such, the Court considers that internet access is an integral part of the right to freedom of expression that requires protection by law and makes its violation actionable.

Regarding national court decisions, they elaborate and are usually based on domestic legislation including freedom of expression constitutional provisions, telecommunications legal and regulatory frameworks, national security and public order legislation, as well as general legal provisions regarding the powers of national and regional governments, administrative law enforcement authorities and other agencies. In many cases the fundamental legal reasoning in the analysis of internet access restrictions may thus not consider or refer to the international and regional legal standards and case law already presented in this paper, while in some decisions, though, we shall also be able to find and recognize at least the language of international human rights standards.

SPECIAL COLLECTION OF THE CASE LAW ON FREEDOM OF EXPRESSION

Internet Shutdowns**Appendix**

List of all the cases examined and included in this paper:

Regional Courts		
<i>European Court of Human Rights</i>		
Russia	1	Bulgakov v. Russia [2020]
	2	Engels v. Russia [2020]
	3	OOO Flavus and others v. Russia [2020]
	4	Vladimir Kharitonov v. Russia [2020]
Turkey	5	Ahmed Yildirim v. Turkey [2012]
Sub-regional Courts		
<i>Economic Community of West African States</i>		
Togo	6	Amnesty International Togo and Others v. The Togolese Republic [2020]
Nigeria	7	SERAP v. Federal Republic of Nigeria [2022]
National Courts		
<i>Asia</i>		
India	8	Ashlesh Biradar v. State of West Bengal (Calcutta High Court) [2022]
	9	Software Freedom Law Center, India v. State of Arunachal Pradesh (Supreme Court of India) [2022]
	10	Anuradha Bhasin v. Union of India (Supreme Court of India) [2020]
	11	Foundation for Media Professionals v. Union Territory of Jammu and Kashmir (Supreme Court of India) [2020]
	12	Banashree Gogoi v. Union of India (Gauhati High Court, India) [2019]
	13	Dhirendra Singh Rajpurohit v. State of Rajasthan (Rajasthan High Court) [2018]
	14	Vyas v. State of Gujarat (Gujarat High Court) [2017]
Pakistan	15	Pakistan Telecommunication Authority v. CM Pak Limited (Supreme Court of Pakistan) [2020]
Indonesia	16	Alliance of Independent Journalists v. Minister of Communication (Jakarta State Administrative Court) [2020]
<i>Africa</i>		
Zambia	18	Chapter One Foundation v. Zambian Information and Communications Technology Authority (High Court of Zambia) [2021]

SPECIAL COLLECTION OF THE CASE LAW ON FREEDOM OF EXPRESSION

Uganda	17	<u>Unwanted Witness-Uganda v. Attorney General (Constitutional Court of Uganda) [2021]</u>
Zimbabwe	19	<u>Zimbabwe Lawyers for Human Rights v. Minister of State, National Security (High Court of Zimbabwe) [2021]</u>
Cameroon	20	<u>Global Concern Cameroon v. Ministry of Posts and Telecommunications and Others (Constitutional Council of Cameroon) [2018]</u>
<i>Middle East</i>		
Egypt	21	<u>The Case of Communications Suspension and Internet Shutdown During the 2011 Egyptian Revolution (Supreme Administrative Court of Egypt) [2018]</u>
<i>Europe and Northern Asia</i>		
Russia	22	<u>Murad Khazbiev v. Federal Security Services (Magas District Court, Russia) [2019]</u>
France	23	<u>In re Law No. 2009-669 furthering the Diffusion and Protection of Creation on the Internet</u>

 Global Freedom of Expression
COLUMBIA UNIVERSITY