

**THE JOINT DECLARATIONS ON FREEDOM OF EXPRESSION:  
RECOGNISING THEIR VALUE AND BUILDING ON THEIR  
POTENTIAL IN THE OSCE REGION**

**WORKING PAPER COMMISSIONED BY THE OFFICE OF THE OSCE  
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**BY**

**DR SEJAL PARMAR  
SCHOOL OF LAW,  
UNIVERSITY OF SHEFFIELD**

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## Summary

This working paper considers the value of the series of ‘Joint Declarations on freedom of expression’. Since 1999, these Joint Declarations have been adopted annually by the four intergovernmental mechanisms on freedom of expression – including the OSCE Representative on Freedom of the Media – with the assistance of two non-governmental organisations. This article identifies the factors which contribute to the Joint Declarations’ value, with a specific focus on the collaborative process leading up to their adoption, their progressive content and their demonstrated influence upon courts and other actors, particularly in the OSCE region. In critically reviewing the impact of the texts to date, this working paper acknowledges their limitations, including their non-binding nature as soft law, their limited impact and lack of visibility, but argues that these issues may be addressed in various ways. The working paper contends that the Joint Declarations constitute the most significant body of non-binding standards on freedom of expression at the global level, one whose relevance to policy debates deserves broader recognition. It concludes with a set of recommendations for how the Joint Declarations can be advanced and implemented across the OSCE region by states, non-state actors, and the OSCE institutions themselves.

The author is Dr. Sejal Parmar, Lecturer in Law, School of Law, University of Sheffield; Visiting Professor, Central European University, Vienna; ESRC Academic Policy Fellow, Foreign, Commonwealth and Development Office (U.K.). \*

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## Contents

|   |    |
|---|----|
| I. Introduction .....                               | 3  |
| II. Value .....                                     | 4  |
| a. A Collaborative, Commitment-Driven Process ..... | 4  |
| b. Common, Progressive Standards.....               | 8  |
| c. A Point of Reference .....                       | 12 |
| III. Limitations and challenges .....               | 16 |
| IV. Conclusions.....                                | 20 |
| V. Recommendations for the OSCE region .....        | 21 |

## I. INTRODUCTION

This working paper considers the significance of the ‘Joint Declarations on freedom of expression’ (‘Joint Declarations’) in the OSCE region and beyond. These texts have been adopted annually by the four intergovernmental mechanisms on freedom of expression (‘international mechanisms’ or ‘mandate-holders’) – more specifically, the Organization for Security and Co-operation in Europe (‘OSCE’) Representative on Freedom of the Media alongside the United Nations (‘UN’) Special Rapporteur on Freedom of Opinion and Expression, the Organization of American States (‘OAS’) Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples’ Rights (‘ACnHPR’) Special Rapporteur on Freedom of Expression and Access to Information.<sup>1</sup> The Joint Declarations have been adopted since 1999 with the support of two non-governmental organisations (‘NGOs’), ARTICLE 19 and the Centre for Law and Democracy (‘CLD’).<sup>2</sup> Over the years, the texts have addressed a diversity of contemporary issues, which cut across all regions and demand global attention, such as restrictions on Internet freedom, policies to counter terrorism and violent extremism, disinformation, elections in the digital age, politicians and public officials and freedom of expression, and gender justice.<sup>3</sup> Although they have been increasingly viewed as a compelling, and even as a core, set of international soft law standards on freedom of expression by advocates and activists in the field,<sup>4</sup> the Joint Declarations have garnered limited dedicated scholarly attention, though references to them in academic journals have burgeoned since 2017, particularly around the issue of disinformation.<sup>5</sup>

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<sup>1</sup> For a compilation of the Joint Declarations on freedom of expression, see <[www.osce.org/fom/66176](http://www.osce.org/fom/66176)> accessed 21 April 2022.

<sup>2</sup> *ibid.* While the first Joint Declaration of 1999 did not reference ARTICLE 19 at all, the preambles of the Joint Declarations of 2000, 2001, 2002, 2007, 2008 indicated they were adopted ‘under the auspices’ of ARTICLE 19, and those of 2003, 2004, 2005, 2006, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021 and 2022 have all indicated they were adopted ‘with the assistance’ of ARTICLE 19 and, since 2010, CLD also.

<sup>3</sup> See Joint Declarations of 2001, 2005, 2011, 2016, 2017, 2020, 2021, 2022 (n 1).

<sup>4</sup> See Toby Mendel, ‘The UN Special Rapporteur on freedom of opinion and expression: progressive development of international standards relating to freedom of expression’ in Tarlach McGonagle and Yvonne Donders (eds), *The United Nations and Freedom of Expression and Information* (CUP 2015) 265.

<sup>5</sup> Sejal Parmar, ‘The Significance of the Joint Declarations on Freedom of Expression’ (2019) 37 *Netherlands Quarterly of Human Rights* 178. See also Mendel (n 4) and Toby Mendel, ‘History of the Joint Declarations’ in OSCE Representative on Freedom of the Media, *Joint Declarations of intergovernmental bodies to protect free media and expression* (OSCE 2013) 9. For academic articles reflecting on or referencing (often in footnotes) the Joint Declarations, see: Herdis Thorgeisdottir, ‘Self-Censorship among Journalists: A (Moral) Wrong or a Violation of ECHR Law’ (2004) *European Human Rights Law Review* 383, 388; Michael O’Flaherty, ‘Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No 34’ (2012) 12 *Human Rights Law Review* 627, fn 38; Michael Karanicolas, ‘Understanding the Internet as a Human Right’ (2012) 10 *Canadian Journal of Law and Technology* 263, 269; Maeve McDonagh, ‘The Right to Information in International Human Rights Law’ (2013) *Human Rights Law Review* 25, 30; Christian Moller, ‘New Technology, Minorities and Internet Governance’ (2013) 12(4) *Journal on Ethnopolitics and Minority Issues in Europe* 16 fn 6; Fernando Mendez Powell, ‘Seeking Equality in Broadcasting: the Case for Third Sector Broadcasting’ (2014) 21 *International Journal on Minority and Group Rights* 178, fn 23; Patrick Ford, ‘Freedom of Expression Through Technological Networks: Accessing the Internet as a Fundamental Human Right’ (2014) 21 *Wisconsin Law Journal* 142, 163 – 164; Stephen Tully, ‘A Human Right to Access the Internet? Problems and Prospects’ (2014) *Human Rights Law Review* 175, 186; Ammar Oozeer, ‘Internet and social networks: freedom of expression in the digital age’ (2014) 40(2) *Commonwealth Law Bulletin* 341, 359; Arturo J Carrillo and Dawn C Nunziato, ‘The price of paid prioritization: the international and domestic consequences of the failure to protect net neutrality in the United States’ (2015) 16 *Georgetown Journal of International Affairs* 98, 103, fn 42; Lisl Brunner, ‘The Liability of an Online Intermediary for Third Party Content: The Watchdog Becomes the Monitor: Intermediary Liability After *Delfi v Estonia*’ (2016) *Human Rights Law Review* 163, fns 50, 59; Amy Shepherd, ‘Free Speech and the Rule of Law: Evaluating the Compliance of Legislation Restricting Extremist Expressions with Article 19 ICCPR’ (2017) 33(85) *Utrecht Journal of International and European Law* 62, fns 57, 58, 139; Andrew T Kenyon, Eva-Maria Svensson and Maria Edström ‘Building and Sustaining Freedom of Expression: Considering Sweden’ (2017) 38(1) *Nordicom Review* 31, 34; Tarlach McGonagle, ‘“Fake News”: False Fears or Real Concerns’ (2017) 35(4) *Netherlands Quarterly of Human Rights* 203, 207; Leila Nadya Sadat ‘Whither human rights in the era of Trump’ (2017) 35(2) *Netherlands Quarterly of Human Rights* 77, 80; Alexa Koenig, ‘“Half the Truth is Often a Great Lie”: Deep Fakes, Open Source Information, and International Criminal Law’ (2019) 113 *AJIL Unbound* 250, 253; Emma J Llanso ‘No amount of

This working paper analyses the impact of the Joint Declarations by illustrating their importance and strengths as sources of soft law on freedom of expression, as well as their limitations and challenges. Part II sets out the key factors which contribute to the value of the Joint Declarations, namely the process leading to their development, their substantive content and evidence of their influence upon judicial decisions and policy-making. Part III goes on to highlight the texts' shortfalls and problems, including their non-binding character, their limited impact and visibility. In demonstrating the strengths and shortfalls of the text, a critical approach and qualitative methodology is adopted. This working paper argues that, notwithstanding these challenges, the Joint Declarations constitute a distinct and influential body of international soft law on freedom of expression, one whose relevance to policy debates deserves further recognition, within and beyond the OSCE. The texts certainly represent an innovative and systematic model of collaboration between intergovernmental human rights mechanisms and leading NGOs, which could – and arguably should – be applied by similar actors operating in other human rights fields, including, within the OSCE context, the OSCE High Commissioner on National Minorities. Part V concludes with a set of recommendations for how the Joint Declarations can be advanced and implemented across the OSCE region by states and non-state actors.

## II. VALUE

There are three essential reasons why the Joint Declarations are valuable for a range of state and non-state actors operating in the OSCE: the collaborative process leading to their adoption; the progressive normative standards they aim to articulate; and evidence of their impact upon key decision makers, especially judges.

### a. A Collaborative, Commitment-Driven Process

The series of Joint Declarations began with an agreement between the then UN Special Rapporteur, Abid Hussain, the OSCE Representative, Freimut Duve, and the then OAS Special Rapporteur, Santiago Canton. The agreement consisted of a broad statement, released after a meeting organised by ARTICLE 19 in November 1999 in London,<sup>6</sup> shortly after most of the international mechanisms on freedom of expression had been established.<sup>7</sup> While subsequent Joint Declarations proceeded largely on an *ad hoc* basis, they soon emerged as a regular and systematised feature of the work of the NGOs and mandate-holders, largely because they

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“AI” in content moderation will solve filtering’s prior-restraint problem’ (2020) 7(1) *Big Data and Society* 1, 5; Alan M Sears, ‘Algorithmic Speech and Freedom of Expression’ (2020) 53(4) *Vanderbilt Journal of Transnational Law* 1327, 1349; Anna Kobernjuk and Agnes Kasper, ‘Normativity in the EU’s Approach towards Disinformation’ (2021) 11(1) *Baltic Journal of European Studies* 170; José Rúas-Araújo, Talía Rodríguez-Martelo, Carmen Máiz-Bar ‘Verification Systems and Programs in Regional Television Stations That Are Members of the CIRCUM Network’ (2021) 3(1) *Journalism and Media* 1, 2; Pattamon Anansaringkarn and Ric Neo, ‘How can state regulations over the online sphere continue to respect the freedom of expression? A case study of contemporary ‘fake news’ regulations in Thailand’ (2021) 30(3) *Information and Communications Technology Law* 283, 284, 287; Diane Orentlicher, ‘Ensuring Access to Accurate Information and Combating Misinformation about Pandemics’ (2021) 36(5) *American University International Law Review*, 36(5) 1067, 1078, 1081; Lesia Dorosh, Teresa Astramowicz-Leyk and Yaryna Turchyn, ‘The impact of post-truth politics as a hybrid information influence on the status of international and national security: the attributes of interpretation and the search for counteraction mechanisms’ (2021) *European Politics and Society* 1, 16.

<sup>6</sup> Mendel (n 4) 251.

<sup>7</sup> Commission on Human Rights Resolution 1993/45, E/CN.4/RES/1995/40, 5 March 1993; Inter-American Commission on Human Rights, 97<sup>th</sup> session, October 1997; OSCE Permanent Council Decision No 193: Mandate of the OSCE Representative on Freedom of the Media, 5 November 1997 (137<sup>th</sup> Plenary Meeting, PC Journal No. 137, Agenda item 1); African Commission on Human and Peoples’ Rights, Resolution 71 at the 36<sup>th</sup> Ordinary Session held in Dakar, Senegal from 23 November to 7 December 2004.

presented a unique opportunity for these intergovernmental mechanisms ‘to speak with a common voice’.<sup>8</sup> The texts are based on, and hence derive their principal legitimacy from, the broadly-framed mandates of the UN, OSCE, OAS and ACnHPR mechanisms themselves.<sup>9</sup> Since their initiation, they have been referenced or reproduced in their entirety in the annexes of the mandate-holders’ annual reports to their respective supervisory organs – namely the Human Rights Council and General Assembly,<sup>10</sup> the OSCE Permanent Council,<sup>11</sup> the IACnHR<sup>12</sup> and the ACnHPR.<sup>13</sup> They have been published in full on the websites of the

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<sup>8</sup> Dunja Mijatović, ‘Foreword’, in OSCE Representative on Freedom of the Media (n 5) 5.

<sup>9</sup> (n 7).

<sup>10</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, 18 January 2000, E/CN.4/2000/63, para 12; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, 13 February 2001, E/CN.4/2001/64, Annex V; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, 13 January 2002, E/CN.4/2002/75, Annex V; Report of the Special Rapporteur Mr. Ambeyi Ligabo, 30 December 2003, E/CN.4/2003/67, paras 7, 19, 73; The right to freedom of opinion and expression Report of the Special Rapporteur, Ambeyi Ligabo, 17 December 2004, E/CN.4/2005/64, para 44; The right to freedom of opinion and expression Report of the Special Rapporteur, Ambeyi Ligabo, 30 December 2005, E/CN.4/2006/55, Annex I; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, 2 January 2007, A/HRC/4/27, Annex; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, 28 February 2008, A/HRC/7/14, Annex; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 30 April 2009, A/HRC/11/4, para 24; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue, 20 April 2010, A/HRC/14/23, para 85 and Addendum, 25 March 2010, A/HRC/14/23/Add.2; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 4 June 2012, A/HRC/20/17, para 17; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 7 September 2012, A/67/357, para 19; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 4 September 2013, A/68/362, fns 23 and 29; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, 11 May 2016, A/HRC/32/38, para 6, fn 30; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, 18 August 2017, A/72/350, fn 8; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, 6 April 2018, A/HRC/38/35, fn 8 and 97; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, 29 August 2018, A/73/348, fn 24; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, 23 April 2020, A/HRC//44/49, paras 18, 25, 40, 44, 49; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, 28 July 2020, A/75/261, fn 17; 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, fn paras 45, 63; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, 30 July 2021, A/76/258, fn 24.

<sup>11</sup> See the following regular reports of the OSCE Representative on the Freedom of the Media to the OSCE Permanent Council: FOM.GAL/29/04/Rev.1, 14 December 2004; FOM.GAL/1/06/Rev.1, 16 February 2006; FOM.GAL/3/07/Rev.2, 14 November 2007; FOM.GAL/2/08/Rev.2, 13 March 2008; Regular Report to the Permanent Council, 2 April 2009; FOM.GAL/3/09/Rev.1, 2 July 2009; FOM.GAL/1/10/Rev.2, 4 March 2010; FOM.GAL/3/11/Rev.1\* 23 June 2011; FOM.GAL/4/12/Rev.1, 21 June 2012; FOM.GAL/6/12/Rev.2, 29 November 2012; FOM.GAL/3/13/Rev.1, 13 June 2013; Report to the Permanent Council, 19 June 2014; FOM.GAL/2/15/Rev.1, 18 June 2015; FOM.GAL/2/17/Rev.2, 9 March 2017; FOM.GAL/3/18/Rev.1, 5 July 2018; FOM.GAL/3/19/Rev.1, 4 July 2019; FOM.GAL/4/20/Rev.1, 2 July 2020; FOM.GAL/2/21/Rev.1, 13 May 2021.

<sup>12</sup> See the following regular reports of the OAS Special Rapporteur on Freedom of Expression to the IACnHR: OEA/Ser.L/V/II.102. Doc 6 rev, 16 April 1999; OEA/Ser.L/V/II.106. Doc 3, 13 April 2000; OEA/Ser.L/V/II.111. Doc 20 rev, 16 April 2001; OEA/Ser.L/V/II.114. Doc 5 rev, 16 April 2002; OEA/Ser.L/V/II.117. Doc 1 rev 1, 7 March 2003; OEA/Ser.L/V/II.118 Doc 70 rev 2, 29 December 2003; OEA/Ser.L/V/II.122. Doc 5 rev 1, 23 February 2005; OEA/Ser.L/V/II.124. Doc, 27 February 2006; 2006 OEA/Ser.L/V/II.127 Doc 4, 3 March 2007; 2007 OEA/Ser.L/V/II.131, Doc 34 rev 1. 8 March 2008; 2008 OEA/Ser.L/V/II.134 Doc 5, 25 February 2009; 2009 OEA/Ser.L/V/II. Doc 51, 30 December 2009; 2010 OEA/Ser.L/V/II. Doc 5, 4 March 2011; 2011 OEA/Ser.L/V/II. Doc 69, 30 December 2011; 2012 OEA/Ser.L/V/II.147 Doc 1, 5 March 2013; 2013 OEA /Ser.L/V/II.149 Doc 50, December 31 2013; 2014 OEA/Ser.L/V/II. Doc 13, March 9 2015; 2015 OEA/Ser.L/V/II. Doc 48/15, 31 December 2015; 2016 OEA/Ser.L/V/II. Doc 22/17, March 15 2017; OEA/Ser.L/V/II. Doc. 210/17. December 31, 2017; OEA/Ser.L/V/II. Doc. 30. March 17, 2019; OEA/Ser.L/V/II. Doc. 5. February 24, 2020; OEA/Ser.L/V/II. Doc. 28. March 30, 2021.

<sup>13</sup> See the final activity reports of the Special Rapporteur on Freedom of Expression and Access to Information in Africa presented to the following sessions of the African Commission on Human and Peoples’ Rights: 49th Ordinary Session, 28 April – 12 May 2011, para 12; 50th Ordinary Session, 24 October – 7 November 2011, para 24; 51st Ordinary Session, 18 April – 2 May 2012, para 19; 52nd Ordinary Session, 9 –22 October 2012, para 74; 61st Ordinary Session, 1 – 15 November 2017, para 48; 62nd Ordinary Session, 25 April – 9 May 2018, para 18; 63rd Ordinary Session, 24 October – 13 November 2018, fn 34.

mandate-holders and two NGOs.<sup>14</sup> The mandate-holders have also chosen to showcase them on their Twitter accounts, including the dedicated Twitter account of the OSCE Representative on Freedom of the Media.<sup>15</sup>

The development of the Joint Declarations over successive years has also been accompanied by an understanding that existing standards are not nearly comprehensive, explicit or progressive enough to respond to current and emerging freedom of expression-related challenges.<sup>16</sup> The texts thus appear intended to bolster the existing fabric of international human rights law on freedom of expression under Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights ('ICCPR'), as well as regional human rights law on the same right, and to also address gaps resulting from the absence of any or sufficient interpretation by regional courts and the Human Rights Committee.<sup>17</sup> At the time of the agreement of the first text, the international mandate-holders and NGOs considered that treaty law on freedom of expression was rather generic, international jurisprudence was limited, and regional human rights standards and mechanisms were developing at different paces.<sup>18</sup> Notwithstanding significant normative strides since 1999, most notably with the 2011 adoption of the Human Rights Committee's General Comment No 34, the adoption of Joint Declarations has continued to be informed and justified by an understanding that human rights courts and the Human Rights Committee are unable to provide ongoing, progressive and timely clarifications of international law on emerging and specific themes.<sup>19</sup> For the OSCE, an intergovernmental organisation based on non-binding commitments rather than binding international treaty obligations, the significance of the Joint Declarations derives in large part from the fact that the initiative institutionally links the OSCE Representative on Freedom of the Media with that mandate-holder's intergovernmental counterparts on an annual basis and also connects relevant OSCE commitments to the broader international human rights law on freedom of expression under Article 19 of the ICCPR.

At the heart of the process of the Joint Declarations has been the unique, mutually beneficial collaboration between, on the one hand, ARTICLE 19 and, since 2010, CLD. The NGOs convene the mandate-holders, set a timeline for the process and produce texts for discussion. For their part, the mandate-holders agree on the subject matter, consider and discuss the content of drafts, and eventually adopt the final texts, bearing the final responsibility for their content. The texts are thus the result of not one but several strategic partnerships between 'norm

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<sup>14</sup> See ARTICLE 19 <[www.article19.org/content-type/joint-declaration/](http://www.article19.org/content-type/joint-declaration/)> (accessed 21 April 2022); CLD <[www.law-democracy.org/live/legal-work/standard-setting/](http://www.law-democracy.org/live/legal-work/standard-setting/)> (accessed 21 April 2022); UN Special Rapporteur on freedom of opinion and expression <<https://freedex.org/resources/joint-declarations/>> (accessed 21 April 2022); the OAS Special Rapporteur for freedom of expression <[www.oas.org/en/iachr/expression/basic\\_documents/declarations.asp](http://www.oas.org/en/iachr/expression/basic_documents/declarations.asp)> (accessed 21 April 2022); OSCE Representative on Freedom of the Media <[www.osce.org/fom/66176](http://www.osce.org/fom/66176)> (accessed 21 April 2022).

<sup>15</sup> The mandate-holders active on Twitter are: the current UN Special Rapporteur, Irene Khan (@Irenekhan) and her predecessor David Kaye (@davidakaye) current OAS Special Rapporteur Pedro Vaca Villarreal (@PVacaV) and his predecessors, Edison Lanza (@EdisonLanza) and Catalina Botero (@cboteroamarino); current OSCE Representative Teresa Ribeiro, and her predecessors Harlem Désir (@harlemdesir) and Dunja Mijatović (@Dunja\_Mijatovic), who have relied on an institutional account of the OSCE (@OSCE\_RFoM); and the former ACnHPR Rapporteur and Lawrence Mute (@lamumu07). The current ACnHPR Rapporteur Ourveena Geereesha Topsy-Sonoo and her immediate predecessor, Jamesina Essie L. King, were not active on Twitter at the time of writing.

<sup>16</sup> By 1999, the year of the first Joint Declaration, the Human Rights Committee had adopted one General Comment on Article 19, General Comment No. 10: Article 19 (Freedom of Opinion), which was adopted at its nineteenth session on 29 June 1983.

<sup>17</sup> Mendel (n 4) 257.

<sup>18</sup> Mendel (n 5) 10. See also Joint Declaration on the challenges to freedom of expression in the new century, 20 November 2001, calling for the establishment of such mechanisms 'in every region of the world, including in Africa and Asia', with the African Charter on Human and Peoples' Rights mandate being established in 2004.

<sup>19</sup> General Comment No 34, Article 19: freedom of opinion and expression, CCPR/C/GC/34, 12 September 2011. See also 'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence', Appendix in the Annual Report of the United Nations High Commissioner for Human Rights (11 January 2013) A/HRC/22/17/Add.4, para 25.

entrepreneurs’ – the two NGOs, the four mandate-holders, and the two NGOs and mandate-holders.<sup>20</sup> The process also seems to be fuelled by the presence of ‘ritual’,<sup>21</sup> in the sense that the texts clearly ‘establish and entrench [a] consensus’ amongst the contributors, indicate that a certain ‘way of thinking or of being’ about freedom of expression ‘has achieved some degree of permanence and importance’, and help to ‘[enshrine] a practice [that] ... reduces [the chances of] contestation’ between themselves and also with other human rights authorities and courts.<sup>22</sup> This feature of the texts’ development is amplified by the fact that they are often launched on World Press Freedom Day, a pinnacle of the ‘global freedom of expression calendar’.<sup>23</sup>

Collaboration between individual mandate-holders on freedom of expression is not unusual. Such mandate-holders have also agreed upon joint statements with mandate-holders in other fields of human rights, albeit rarely and on an *ad hoc* basis.<sup>24</sup> At various times, two mandate-holders on freedom of expression have come together to issue joint statements on thematic issues or country-specific situations, such as those on WikiLeaks (2010), surveillance programmes (2013) and the attacks on the media by US President Trump (2018) (by the UN and OAS mandate-holders), or on the crackdown on journalists in Turkey (2016 and 2018) (by the UN and OSCE mandate-holders), COVID-19 (2020) (by the UN, OSCE and OAS mandate-holders) or on the importance of freedom of expression and information in the context of Russia’s invasion in Ukraine (2022).<sup>25</sup>

Yet the Joint Declarations’ process remains the only regular, structured opportunity for all four intergovernmental mechanisms to come together. It demands minimal resources from their offices, while affording them the possibility to test and develop framework positions on emerging issues to which they may return in their individual work. At the same time, interacting with international human rights bodies and courts is a crucial part of the work of freedom of

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<sup>20</sup> See generally Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organisations* 887, 896 – 899.

<sup>21</sup> Rituals are about ‘the endless work of building, refining, and rebuilding webs of relationships in an otherwise fragmented world’ and may contribute to ‘a world that, for brief moments, creates pockets of order, pockets of joy, pockets of inspiration’, Adam B. Seligman and others, *Ritual and its Consequences* (OUP 2008) at 180 quoted in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2014) at 9.

<sup>22</sup> *ibid.*

<sup>23</sup> On UNESCO’s events for World Press Freedom Day, see <<https://en.unesco.org/commemorations/worldpressfreedomday>> (accessed 21 April 2022).

<sup>24</sup> See, for instance, Joint statement by Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Asma Jahangir, Special Rapporteur on freedom of religion or belief and Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression at the Durban Review Conference (Geneva, 22 April 2009).

<sup>25</sup> See the following examples of joint initiatives by the UN and Inter-American Special Rapporteurs only: UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and the Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression, ‘Joint Statement on Wikileaks’ (OAS press release, 21 December 2010) <<https://www.oas.org/en/iachr/expression/showarticle.asp?artID=829>> (accessed 21 April 2022); ‘Joint Declaration on surveillance programs and their impact upon freedom of expression’ (OAS press release, 21 June 2013) <<https://www.oas.org/en/iachr/expression/showarticle.asp?artID=927&IID=1>> (accessed 21 April 2022); ‘Trump attacks on media violate basic norms of press freedom, human rights experts say’ (OHCHR press release, 2 August 2018) <<https://www.ohchr.org/en/press-releases/2018/08/trump-attacks-media-violate-basic-norms-press-freedom-human-rights-experts?LangID=E&NewsID=23425>> (accessed 21 April 2022). The UN and OSCE mandate-holders have recently adopted the following statements together: ‘Freedom of expression: UN and OSCE experts deplore crackdown on journalists and media outlets in Turkey’ (OHCHR press release, 28 July 2016) <[www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=20319&LangID=E](http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=20319&LangID=E)> (accessed 21 April 2022); ‘Turkey: Life sentences for journalists are “unprecedented assault on free speech”, say UN and OSCE experts’ (OHCHR press release, 16 February 2018) <<https://www.ohchr.org/en/press-releases/2016/07/freedom-expression-un-and-osce-experts-deplore-crackdown-journalists-and?LangID=E&NewsID=20319>> (accessed 21 April 2022); COVID-19: ‘Governments must promote and protect access to and free flow of information during pandemic – International experts’ (OHCHR press release, 19 March 2020) <<https://www.ohchr.org/en/press-releases/2020/03/covid-19-governments-must-promote-and-protect-access-and-free-flow?LangID=E&NewsID=25729>>; ‘On the invasion in Ukraine and the importance of freedom of expression and information’ (2 May 2022) <https://www.osce.org/representative-on-freedom-of-media/517107> (accessed 5 May 2022).



expression NGOs.<sup>26</sup> Consider the role of NGOs in leading standard-setting initiatives, such as those which led to the adoption of the Tshwane Principles on national security and the right to information, the Camden Principles on freedom of expression and equality, or the Manila Principles on Intermediary Liability;<sup>27</sup> filing *amicus curiae* briefs to regional human rights courts;<sup>28</sup> or providing submissions to the Universal Periodic Review,<sup>29</sup> or towards the thematic reports of the UN Special Rapporteur,<sup>30</sup> the periodic review of states or the drafting of a General Comment by the Human Rights Committee.<sup>31</sup>

## b. Common, Progressive Standards

In terms of their content, the Joint Declarations embody several, interrelated qualities: they are designed to advance the common, collective positions of the mandate-holders, to be progressive normative statements, and to respond to emerging freedom of expression issues and trends. Certainly, they appear aimed at not only reinforcing international and regional human rights law through the reiteration and reaffirmation of established principles, but also advance a positive understanding of how that law ought to be applied to specific areas, especially where there is a normative gap or uncertainty. They may thus be seen as constituting a living corpus of ‘international freedom of expression soft law’. While the 1999 text could be considered rather minimalist, over the years, the Joint Declarations have grown in their specificity in tackling a wider range of issues. The 1999 text broadly affirmed freedom of expression as ‘a fundamental and internationally recognised human right [,] a basic component of any democratic society’ and ‘crucial for economic development’. It indicated the collective concern of the mandate-holders about the ‘current state of free media’, the harassment of media professionals and ‘instances of hate speech’. Subsequent Joint Declarations have tackled ‘challenges’ to media freedom (2000) or freedom of expression generally (2010, 2019) or have focussed on particular themes such as: counter-terrorism and the related issue of countering violent extremism (2001, 2005, 2008, 2016); media regulation (2001, 2003, 2007); attacks on journalists (2006, 2012); the Internet (2005, 2011); media diversity and independence in a

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<sup>26</sup> See in other human rights fields: Makau Mutua, ‘Standard-setting in Human Rights: Critique and Prognosis’ 29 (2007) *Human Rights Quarterly* 547; Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 41; Corinne Lennox, ‘The Role of International Actors in Norm Emergence: Supporting Afro-Descendants’ Rights in Latin America’ in Jane Boulden and Will Kymlicka (eds), *International Approaches to Governing Ethnic Diversity* (OUP 2015) 128.

<sup>27</sup> ‘The Global Principles on National Security and the Right to Information’ (‘Tshwane Principles’) 12 June 2013 and ‘The Camden Principles on Freedom of Expression and Equality’ April 2009. The ‘Tshwane Principles’ have been expressly referenced in the following reports of the UN Special Rapporteur: A/HRC/29/32, para 15; A/70/361, paras 10, 31, 44, 47. See also Council of Europe, Parliamentary Assembly (PACE) Recommendation (2024) 2013 on National Security and Access to Information, 2 October 2013, para 1.3; *Szabó and Vissy v Hungary* App no 37138/14 (ECtHR, 6 June 2016) fns 4 and 16. The ‘Camden Principles’ have been a reference point in the Rabat Plan of Action (n 18) para 18, fn 4 and the following reports of special procedures mandate-holders: A/67/357, para 44; A/HRC/31/18, para 49. See also the ‘Manila Principles on Intermediary Liability’ <[www.manilaprinciples.org](http://www.manilaprinciples.org)> accessed 26 April 2022, which have also developed on the basis of civil society discussions.

<sup>28</sup> See, for instance, the joint interventions by a number of key NGOs in ten cases against jailed Turkish journalists which the ECtHR has given priority status: App nos 72/17 (Atilla Taş), 80/17 (Murat Aksoy), 36493/17 (Ahmet Şık), 1210/17 (Ayşe Nazlı İlicak), 25939/17 (Ali Bulac), 23199/17 (Mehmet Murat Sabuncu and others), 27684/17 (Deniz Yücel), 16538/17 (Şahin Alpay), 13237/17 and 13252/17 (Ahmet and Mehmet Altan).

<sup>29</sup> See, for instance, joint submission to the Universal Periodic Review of Turkey by ARTICLE 19, Pen International, P24, English PEN, Reporters Sans Frontières (RSF), International Press Institute (IPI), Freemuse, European Centre for Press and Media Freedom (ECPMF), IFEX and Norsk PEN, July 2019 <<https://pen-international.org/app/uploads/JointSubmissionTurkeyUPR.pdf>> (accessed 26 April 2022).

<sup>30</sup> See, for instance, the submissions from NGOs and other civil society organisations in advance of the 2021 report of the UN Special Rapporteur on disinformation <<https://www.ohchr.org/en/calls-for-input/reports/2021/report-disinformation>> (accessed 26 April 2022).

<sup>31</sup> A number of human rights organisations submitted comments to the Human Rights Committee’s consultation process on General Comment No 34, though these were not at the time of writing available on the Human Rights Committee’s site <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no34-article-19-freedoms-opinion-and>> (accessed 26 April 2022).

digital age (2018); the relationship between freedom of expression and elections (2020) and public officials and politicians (2021); and gender justice (2022).

The subjects covered reflect a spectrum of freedom of expression issues, which may be seen to largely fall under the umbrella of media policy, regulation or governance, rather than issues that easily lend themselves to a court case, such as defamation or the protection of confidential sources.<sup>32</sup> Although the Joint Declarations are more detailed than the recommendations of the UN Special Rapporteur on discrete subjects, taken together as a body of soft law, the Joint Declarations are more detailed and speak to a broader range of actors – the media, the private sector, and civil society organisations – beyond states, who necessarily remain the focus of the Human Rights Committee, as the UN treaty body that supervises the implementation of the ICCPR.<sup>33</sup>

The Joint Declarations have appeared uniquely adept as a standard-setting tool of intergovernmental mechanisms for addressing emerging cross-cutting issues of freedom of expression, most notably the Internet. Joint Declarations on the subject of the Internet which appeared in 2005 (on the Internet and anti-terrorism measures) and 2011 (on the Internet and freedom of expression generally) pre-empted reports by the UN Special Rapporteur partly dealing with Internet governance in 2006 and 2007,<sup>34</sup> and a dedicated thematic report on the subject of the Internet in 2011.<sup>35</sup> In other areas such as access to information, ‘defamation of religions’ and criminal defamation, specifically – the Joint Declarations have been ‘ahead of the curve’ in terms of embracing a more liberal interpretation of freedom of expression than that articulated by international or regional human rights bodies until that time. In all three of these areas, the existence of one or more relevant Joint Declarations contributed to the normative backdrop against which a shift in position was made possible.

First, the right of access to information held by public bodies was clearly recognised in the 2004 Joint Declaration, which stated that the ‘right should be given effect at the national level’.<sup>36</sup> This was two years before the regional human rights courts explicitly recognised the right – the Inter-American Court of Human Rights (‘IACtHR’) in 2006 in the case of *Claude Reyes v Chile* and the European Court of Human Rights (‘ECtHR’) in 2009 in *HCLU v Hungary* – and seven years before the Human Rights Committee addressed it through General Comment No 34.<sup>37</sup> According to UNESCO, 127 states have laws on access to information in place.<sup>38</sup> The Global Right to Information Rating indicates that of these 127 laws, 62 were adopted by the end of 2004; therefore, 65 of them were adopted *subsequent* to the Joint Declaration.<sup>39</sup> The continued impact of the 2004 Joint Declaration was shown through its citation by the UN Special Rapporteur in his 2017 report on the state of access to information with regard to the activities of international organisations.<sup>40</sup> Second, the 2008 Joint Declaration

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<sup>32</sup> On media freedom, see generally Andrey Richter, ‘Defining Media Freedom in International Policy Debates’ (2016) 12 (2) *Global Media and Communication* 127.

<sup>33</sup> General Comment No 34 (n 18). Interestingly, the Joint Declarations seldom address the role of intergovernmental organisations themselves. For an exception, see Joint Declaration on crimes against freedom of expression adopted on 25 June 2012.

<sup>34</sup> E/CN.4/2005/64, 17 December 2004; A/HRC/4/27, 2 January 2007.

<sup>35</sup> A/66/290, 10 August 2011.

<sup>36</sup> See also the 1999 and 2006 Joint Declarations.

<sup>37</sup> *Claude Reyes et al v Chile* (IACtHR, 19 September 2006) Series C No. 151; *Társaság a Szabadságjogokért v Hungary* App no 37374/05 (ECtHR, 14 April 2009); General Comment No 34 (n 18) paras 18 – 19.

<sup>38</sup> Report of the Office of the High Commissioner of Human Rights on good practices for establishing national normative frameworks that foster access to information held by public entities, 10 January 2022, A/HRC/49/38, para 31.

<sup>39</sup> Global Right to Information Rating < [www.rti-rating.org/country-data/](http://www.rti-rating.org/country-data/) > (accessed 26 April 2022).

<sup>40</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 18 August 2017, A/72/350, para 13.

on ‘defamation of religions’ highlighted that ‘the concept [...] does not accord with international standards regarding defamation’ and called on the UN General Assembly and the Human Rights Council to ‘desist from further adoption’ of resolutions on the subject. This predated the 2011 adoption by the Human Rights Council of resolution 16/18 on combatting religious intolerance, and the Human Rights Committee’s authoritative statement in General Comment No 34 that prohibitions on blasphemy are incompatible with Article 19 of the ICCPR.<sup>41</sup> And third, in the 2002 Joint Declaration, the mandate-holders asserted that ‘[c]riminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary with appropriate civil defamation laws’. This position remains in striking contrast to the current position of the regional courts, as well as the Human Rights Committee, which are not absolutely opposed to criminal defamation laws, even though they have imposed serious limitations on their acceptability. In General Comment No 34, the Human Rights Committee urged states to ‘consider the decriminalisation of defamation’, while stating that ‘the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.’<sup>42</sup> The ECtHR has indicated that criminal-law sanctions for defamation are not necessarily disproportionate, but has said it will take into account the imposition of criminal sanctions in considering the issue of proportionality.<sup>43</sup> Although the IACtHR ‘has also never upheld a conviction for criminal defamation’, it has not clearly ruled out the possibility of criminal sanctions under the American Convention on Human Rights.<sup>44</sup> Finally, the ACtHPR has indicated that imprisonment for defamation infringes upon freedom of expression.<sup>45</sup> In the absence of an unequivocal position against the criminalisation of defamation from both the international and regional systems and in the face of around 160 countries with criminal defamation on their statute books, such developments are evidence of a global trend towards decriminalisation that buttresses the progressive position that the mandate-holders have held since 2002.<sup>46</sup>

In some cases, the Joint Declarations have served to engage with harmful emerging policy trends. This is most clearly seen through the Joint Declarations concerning countering terrorism and disinformation. Although it did not go into any detail, the 2001 Joint Declaration focussed in large part on ‘countering terrorism’ less than three months after the 9/11 attacks, issuing the warning that ‘guarantees for freedom of expression [...] developed over centuries [...] can easily be rolled back’, and expressing concern that ‘recent moves by some governments to introduce legislation limiting freedom of expression set a bad precedent’. At the time, relevant jurisprudence of the ECtHR and the Human Rights Committee laid out principles on the relationship between national security and freedom of expression, but the then-existing authoritative interpretation of Article 19 of the ICCPR, General Comment No 10, was very limited and did not elaborate on any particular issue.<sup>47</sup> In addition, the mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while

<sup>41</sup> Human Rights Council resolution 16/18 on combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief, 24 March 2011, A/HRC/RES/16/18; General Comment No 34 (n 18) para 47.

<sup>42</sup> General Comment No 34 (n 18) para 47 (emphasis added).

<sup>43</sup> *Radio France and others v France* App no 53984/00 (ECtHR, 30 March 2004) para 40; *Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02 and 36448/02 (ECtHR, 22 October 2007) para 59.

<sup>44</sup> Mendel (n 4) 262. See, for instance, *Tristan Donoso v Panama* (IACtHR, 27 January 2009) Series C No 193, para 131.

<sup>45</sup> *Konaté v Burkino Faso* (ACtHPR, 7 December 2014).

<sup>46</sup> See UNESCO, *World Trends in Freedom of Expression and Media Development, Global Report 2021/22* (UNESCO, 2022); See also OSCE, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* 7 March 2017.

<sup>47</sup> In the context of the ECtHR see, notably *Observer and Guardian v UK* App no 13585/88 (ECtHR, 26 November 1991). In the context of the Human Rights Committee, see *Keun-Tae Kim v Republic of Korea* Communication N 574/1994, views adopted 4 January 1999, CCPR/C/64/D/574/1994; *Jong-Kyu Sohn v Republic of Korea* Communication No. 518/1992, views adopted 19 July 1995, CCPR/C/54/D/518/1992.

countering terrorism had yet to be established.<sup>48</sup> Thus, the 2001 Joint Declaration was an important statement from international human rights mechanisms raising the alarm about the risks to freedom of expression posed by far-reaching anti-terrorism legislation.

In a similar vein, the 2017 Joint Declaration on the topical issue of “‘fake news’, disinformation and propaganda’, was adopted at a still early stage of the ongoing global public debate on the nature, scale and impacts of disinformation and appropriate responses, especially with regard to the dissemination of online disinformation.<sup>49</sup> The 2017 text has subsequently been used as a reference point by the mandate-holders themselves. For example, while the former UN Special Rapporteur, David Kaye, referenced the text numerous times in his public statements, especially on Twitter, the current UN Special Rapporteur, Irene Khan, has built on the 2017 text by dedicating her 2021 report to the Human Rights Council to the subject of disinformation.<sup>50</sup> Moreover, the provisions 2017 Joint Declaration resonated in the March 2022 communiqué of the OSCE Representative, Teresa Ribeiro, on ‘media freedom during armed conflict and to stop propaganda for war’, even though it was not explicitly mentioned.<sup>51</sup> The text has proven to be a useful way for the mandate-holders to directly engage in contemporary policy debates on disinformation and has become a source of reference for policy-makers themselves. The mandate-holders submitted the 2017 Joint Declaration as written evidence to inquiries into ‘fake news’ held by the UK House of Commons Select Committee on Digital, Culture, Media and Sport<sup>52</sup> and the European Commission, who viewed it as the ‘focused, recent treatment of the application of international human rights standards to the phenomenon of disinformation’.<sup>53</sup> At the same time, civil society actors have explicitly drawn on the text. For example: it provided inspiration for a collection of NGOs in issuing an open letter on ‘fake news’ and elections in Latin America;<sup>54</sup> it was translated for the context of Montenegro by the NGO Human Rights Action, which has also drawn on the text in its advocacy;<sup>55</sup> and it has been

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<sup>48</sup> Human Rights Committee, General Comment No 10: Freedom of expression (Article 19), 29 June 1983, UN Doc HRI/GEN/1/REV.6, 29 June 1983.

<sup>49</sup> ‘Fake news’ is defined as the dissemination of ‘false, often sensational, information ... under the guise of news reporting’ by the Collins Dictionary < [www.collinsdictionary.com/dictionary/english/fake-news](http://www.collinsdictionary.com/dictionary/english/fake-news) > (accessed 26 April 2022). The term’s usage surged by 365% between 2016 and November 2017 according to the dictionary’s lexicographers. See also A Flood, ‘Fake news is “very real” word of the year for 2017’ (*The Guardian*, 2 November 2017) [www.theguardian.com/books/2017/nov/02/fake-news-is-very-real-word-of-the-year-for-2017](http://www.theguardian.com/books/2017/nov/02/fake-news-is-very-real-word-of-the-year-for-2017) > (accessed 24 April 2022).

<sup>50</sup> The former UN Special Rapporteur, David Kaye (@davidakaye) frequently cited the text in comments on Twitter. See his tweets concerning the criminalisation of false information (12 and 13 December 2017), the European Commission’s appointment of a High-Level Group on ‘Fake News’ (12 January 2018) and Malaysia’s new legislation on ‘fake news’ (2 April 2018), as well as a thread on the capitalisation of ‘fake news’ as a concept to clamp down on legislative speech (6 April 2018). See also 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, fn paras 45, 63.

<sup>51</sup> Communiqué by the OSCE Representative on Freedom of the Media: A call to protect media freedom during armed conflict and to stop propaganda for war 3 March 2022 < <https://www.osce.org/files/f/documents/7/c/513313.pdf> > (accessed 26 April 2022).

<sup>52</sup> Select Committee on Digital, Culture, Media and Sport, *Disinformation and ‘fake news’, Final Report*, Eighth Report of Session 2017 – 2019 (HC 1791).

<sup>53</sup> See European Commission (Directorate-General for Communication Networks, Content and Technology), *A Multi-Dimensional Approach to Disinformation: Report of the Independent High-level Group on Fake News and Online Disinformation*, 12 March 2018. See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling online disinformation: a European Approach, COM(2018) 236 final, 26 April 2018. Similarly, McGonagle refers to the 2017 Joint Declaration as ‘the most explicit and detailed international text addressing “fake news” in recent years’ above (n 5) 207.

<sup>54</sup> Open letter on fake news and elections in Latin America, 12 January 2018 < <https://www.opendemocracy.net/en/democraciabierta/open-letter-on-fake-news-and-elections-in-latin-america/> > (accessed 26 April 2022).

<sup>55</sup> See ‘Prevod Zajednicke Izjave Specijalnih Izvjestilaca O Slobodi Izražavanja I “Lanžnim Vijestima”, Dezinformacijama I Propagandi 20 January 2020 < <https://www.hraction.org/2020/01/15/prevod-zajednicke-izjave-o-slobodi-izrazavanja-i-lanznim-vijestima-dezinformacijama-i-propagandi/> > (accessed 26 April 2022); Vijesti 25, ‘HRA: Hapšenja novinara protivna su međunarodnom standardu slobode izražavanja’, 13 January 2020 (accessed 26 April 2022); CDM, ‘HRA: Krivični zakonik

considered by academics in publications on disinformation and misinformation, including in the context of the COVID-19 pandemic.<sup>56</sup>

### c. A Point of Reference

The Joint Declarations are, to varying degrees, seen as useful and legitimate sources of authority in supporting policy positions, and for making and shaping arguments for the protection of freedom of expression at the global, regional and national levels. They have become integral to the work of the individual mandate-holders themselves.<sup>57</sup> They have also become a point of reference for regional human rights bodies, such as the Committee of Ministers of the Council of Europe, as well as the European Commission, as indicated above.<sup>58</sup> Their influence has been felt in the reports of the High Level Panel of Legal Experts on Media Freedom (the independent advisory body of the Media Freedom Coalition which was established at the Global Conference for Media Freedom in London in July 2019), with the panel's report on effective investigations replicating a section of the 2012 Joint Declaration on crimes against freedom of expression.<sup>59</sup>

The Joint Declarations have also been cited by national courts, notably in the OSCE region. It is interesting to note that the Russian courts have focused on the 2011 Joint Declaration on freedom of expression and the Internet in particular – especially given the country's appalling record on freedom of expression and Internet freedom, which has only deteriorated since the February 2021 invasion of Ukraine.<sup>60</sup> The Russian Supreme Court positively referenced the text as an 'international legal act' in 2013. The 2011 text was also discussed by eight 'general jurisdiction' courts in ten cases concerning defamation, including three appeal cases, and relied

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ne definiše šta se smatra lažnom vijesti', 13 January 2020 < <https://www.cdm.me/hronika/hra-krivicni-zakonik-ne-definise-sta-se-smatra-laznom-vijesti/>> (accessed 26 April 2022).

<sup>56</sup> See, for instance, Alexa Koenig, "'Half the Truth is Often a Great Lie": Deep Fakes, Open Source Information, and International Criminal Law' (2019) 113 AJIL Unbound 250, 253; Diane Orentlicher, 'Ensuring Access to Accurate Information and Combating Misinformation about Pandemics' (2021) 36(5) American University International Law Review, 36(5) 1067, 1078, 1081. See also supra at n 5.

<sup>57</sup> See for example: 'UN expert urges Cameroon to restore internet services cut off in rights violation', OHCHR press release, 10 February 2017; OSCE Representative on Freedom of the Media, 'Net neutrality in the United States must be safeguarded to ensure free flow of information, says OSCE media freedom representative' press release, 5 December 2017; OSCE Representative on Freedom of the Media, Media freedom situation deteriorated all over the region, said OSCE Media Freedom Representative at Permanent Council meeting in Vienna, 25 November 2021.

<sup>58</sup> See, for instance, the Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, 'Libel Tourism', to Ensure Freedom of Expression (Committee of Ministers, 1147<sup>th</sup> meeting of the Ministers' Deputies, 4 July 2012) para 9 (referring to 2011 Joint Declaration on the Internet); Steering Committee for Human Rights (CDDH), Analysis on the Impact of Current National Legislation, Policies and Practices on the Activities of Civil Society Organisations, Human Rights Defenders and National Institutions for the Promotion and Protection of Human Rights (CDDH, 87<sup>th</sup> meeting, 6-9 June 2017), CM(2017)92-add5final at fn 292 (referring to the 2004 Joint Declaration on access to information); How to protect journalists and other media actors? Implementation Guide to selected topics under the Protection and Prosecution pillars of the Guidelines of Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors DGI(2020)11 pp 29, 47, 49, 50, 57; Steering Committee for Media and Information Society (CDMSI), Guidance Note on Content Moderation: Best practices towards effective legal and procedural frameworks for self-regulatory and co-regulatory mechanisms of content moderation adopted at 19<sup>th</sup> plenary meeting of Steering Committee, 19-21 May 2021.

<sup>59</sup> See Report on the Use of Targeted Sanctions to Protect Journalists, 13 February 2020, para 160; Advice on Promoting More Effective Investigations into Abuses against Journalists, 25 November 2020, para 72. On the Media Freedom Coalition, see < <https://mediafreedomcoalition.org/>> (accessed 26 April 2022).

<sup>60</sup> See Marko Milanovic, 'The Legal Death of Free Speech in Russia', EJIL: Talk, 8 March 2022 < <https://www.ejiltalk.org/the-legal-death-of-free-speech-in-russia/>> (accessed 26 April 2022); Human Rights Watch, 'Russia: Assault on Freedom of Expression: Repressive Laws and Policies Restrict Online Speech, Stifle Critical Voices' 18 July 2017 < <https://www.hrw.org/report/2017/07/18/online-and-all-fronts/russias-assault-freedom-expression>> (accessed 26 April 2022). See generally <https://www.article19.org/region/russia/> (accessed 26 April 2022).

upon by the courts in nine of those cases.<sup>61</sup> It was also relied upon in a further ten decisions of eight arbitration courts, including two of appellate courts.<sup>62</sup> The Supreme Court of the Republic of Chuvashiya in the Russian Federation had also previously relied on the text when overruling a lower court decision against the owner of the internet portal *nasvyazi.ru*.<sup>63</sup> The provisions of the same 2011 Joint Declaration were also cited in a 2015 decision of a Portuguese Intellectual Property Court in support of the argument that blocking measures could only be justified in the most serious cases, such as the protection of sexual abuse of children.<sup>64</sup>

Although their influence upon the development and implementation of national legislation is difficult to discern, there is evidence that the Joint Declarations have been cited by national public authorities, such as the Commissioner for Information of Public Importance and Personal Data Protection of Serbia,<sup>65</sup> and civil society organisations in their submissions to legislative inquiries.<sup>66</sup> The Joint Declarations have also been utilised by leading human rights advocacy organisations, notably Human Rights Watch, in their reports and commentaries.<sup>67</sup>

Yet the Joint Declarations' most significant impact has been felt via the rulings of the ECtHR, which has recalled various texts on a number of occasions in parts of the judgment devoted to 'relevant international materials'. (Neither of the other two regional human rights courts appear to have explicitly referenced the Joint Declarations in their rulings to date). In a number of 'positive rulings' of the ECtHR, the Court's ultimate decision follows the position taken by a Joint Declaration cited in the case. These rulings suggest that the 2004 Joint Declaration on access to information and the 2011 Joint Declaration on freedom of expression and the Internet are arguably the most 'successful' in terms of its positive impact upon the ECtHR.

The landmark 2016 Grand Chamber judgment in *MHB v Hungary* cited the assertion of the 2004 Joint Declaration on access to information that: 'the right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.'<sup>68</sup> The Court went on to rule that the refusal by the state's authorities to release information about *ex officio* public defenders to an NGO, infringed the NGO's right of access to information as protected by Article 10 of the

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<sup>61</sup> Decision of the Constitutional Court of the Russian Federation of July 9, 2013 N 18-P in relation to the case of checking the constitutionality of the provisions of paragraphs 1, 5 and 6 of Article 152 of the Civil Code of the Russian Federation in connection with the complaint of E V Krylova para 3. See < [https://www.consultant.ru/document/cons\\_doc\\_LAW\\_149168/](https://www.consultant.ru/document/cons_doc_LAW_149168/)> (accessed 26 April 2022).

<sup>62</sup> Research provided by the Office of the Representative on Freedom of the Media.

<sup>63</sup> Decision of the Supreme Court of the Chuvash Republic, Case No 2-81/2012, 18 June 2012; Decision of the Supreme Court of the Chuvash Republic, Case No 2-82/2012, 20 June 2012.

<sup>64</sup> Decision of the Intellectual Property Court (Tribunal da Propriedade Intelectual) in Case No 153/14.0YHLSB Audiogest and GEDIPE v Ar Telecom, Cabovisão Onitelem, PT, MEO, Vodafone Portugal, Nos Comunicações 'Pirate Bay Portugal', 24 February 2015.

<sup>65</sup> The site of the Commissioner for Information of Public Importance and Personal Data Protection provides a translation of the 2004 Joint Declaration < <https://www.poverenik.rs/images/stories/dokumentacija-nova/medjunarodna-dokumenta/SLOBODAN-PRISTUP/SMERNICE/ZajednickadeklaracijaLAT.pdf>> (accessed 26 April 2022).

<sup>66</sup> See, for example, Joint Committee on Human Rights, *Scrutiny: First Progress Report* (fourth report) (2004 – 05, HL 26, HC 224) paras 17 – 18 and 108 (submission from British Irish Rights Watch referring to the 2004 Joint Declaration on access to information).

<sup>67</sup> See, for instance, the following Human Rights Watch reports: 'Stifling Dissent: The Criminalization of Peaceful Expression in India', 24 May 2016; "'They Can Arrest You at Any Time': The Criminalization of Peaceful Expression in Burma', 29 June 2016; "'Kill the Chicken to Scare the Monkeys': Suppression of Free Expression and Assembly in Singapore', 12 December 2017; 'Honduras: Cybersecurity Bill Threatens Free Speech', 9 April 2018; "'No Place for Criticism': Bangladesh Crackdown on Social Media Commentary', 9 May 2018. See also 'Amnesty International, Somalia: Social media shut down over exam leakages unjustified' 14 May 2019.

<sup>68</sup> *MHB v Hungary* App no 18030/11 (ECtHR, 8 November 2016) para 43.

ECHR. The 2004 and 2006 Joint Declarations on access to information were also extensively cited in the 2013 decision *Youth Initiative for Human Rights v Serbia* concerning a claim for access to information from an intelligence agency.<sup>69</sup> These two texts are also included as part of the relevant international law and materials in *Times Newspapers and Kennedy v UK*, a currently pending case before the Court.<sup>70</sup>

The ECtHR has cited provisions of the 2011 Joint Declaration on freedom of expression and the Internet on filtering and blocking as relevant international material in finding violations of Article 10 of the ECHR in a number of cases concerning Russia which were all unanimously decided and in which the rulings were delivered on 23 June 2020 – in *Bulgakov v Russia* in which an entire website was blocked because it contained an e-book previously categorised as terrorist material;<sup>71</sup> in *Engels v Russia* which concerned the forcible removal of information on filter-bypassing tools, such as virtual private networks (VPN), in order to avoid the blocking of a website;<sup>72</sup> in *OOO Flavus and others v Russia* which concerned the blocking of websites containing content critical of the Russian government policy;<sup>73</sup> *Vladimir Kharitonov v Russia* which concerned the blocking of a website featuring content relating to the production and distribution of electronic books because of a blocking order against another website, containing a collection of cannabis-themed stories, with the same IP address.<sup>74</sup>

In addition, the ECtHR quoted all the operative paragraphs of the 2008 Joint Declaration on defamation of religions, and anti-terrorism and anti-extremism legislation in its July 2018 ruling that there had been a violation of Article 10 of the ECHR due to the conviction and prison sentences of three band members of Pussy Riot in Russia.<sup>75</sup> The Court cited the principle of the 2005 Joint Declaration that ‘no one should be liable for content on the Internet of which they were not the author’ in its December 2018 decision. The Court found a violation of Article 10 of the ECHR in a case where the applicant news portal was found liable for posting a hyperlink to a YouTube video featuring comments by the leader of the Roma minority local government.<sup>76</sup> In its 2011 ruling in *Editorial Board of Pravoye Delo and Shtekel v Ukraine*, the ECtHR quoted from the same text in concluding that Ukrainian law lacked adequate safeguards for journalists using material obtained online and, therefore, did not pass the ‘prescribed by law’ part of the test for restrictions on freedom of expression under Article 10 of the ECHR.<sup>77</sup>

*Amicus curiae* briefs submitted by leading freedom of expression NGOs to regional and domestic constitutional courts regularly display reliance upon texts of the Joint Declarations. For instance, the *amicus curiae* submissions of a group of NGOs in *OOO Flavus and others v Russia* drew on sections of the 2016 and 2011 texts to argue that ‘blanket prohibitions on encryption and anonymity’ and the ‘mandatory blocking of entire websites’ are disproportionate and unacceptable.<sup>78</sup> ARTICLE 19 has previously used Joint Declarations in

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<sup>69</sup> *Youth Initiative for Human Rights v Serbia* App no 48135/06 (ECtHR, 25 June 2013) paras 14 – 15.

<sup>70</sup> *Times Newspapers and Kennedy v UK* App no 64367/14 (ECtHR, communicated on 17 March 2015.)

<sup>71</sup> *Bulgakov v Russia* App no 20159/15 (ECtHR, 23 June 2020) para 18.

<sup>72</sup> *Engels v Russia* App no 61919/16 (ECtHR, 23 June 2020) para 14.

<sup>73</sup> *OOO Flavus and others v Russia* App nos 12468/15 and 2 others (ECtHR, 23 June 2020) para 15.

<sup>74</sup> *Vladimir Kharitonov v Russia* App no 10795/14 (ECtHR, 23 June 2020) para 16.

<sup>75</sup> *Mariya Alekhina v Russia* App no 38004/12 (ECtHR, 17 July 2018) para 112. See also *Ibragim Ibragimov and Others v. Russia* App nos 1413/08 and 28621/1 (ECtHR, 28 August 2018) para 57.

<sup>76</sup> *Magyar Jeti Zrt v Hungary* App no 11257/16 (ECtHR, 4 December 2018) para 38.

<sup>77</sup> *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011) para 32.

<sup>78</sup> Third-party intervention submissions by ARTICLE 19, the Electronic Frontier Foundation, Access Now and Reporters Without Borders in *OOO Flavus and others v Russia* App nos 12468/15, 20159/15, 23489/15, 19074/16 and 61919/16 (ECtHR 11 January 2018) paras 10, 11 and 26. See also Access Now, *A Digital Rights Approach to Proposals for Preventing or*

its third-party interventions in cases before regional human rights courts and domestic courts on such issues of access to information,<sup>79</sup> blasphemy/defamation of religions,<sup>80</sup> defamation, and defamation liability and hyperlinking<sup>81</sup> and anti-terrorism legislation.<sup>82</sup>

Similarly, the Open Society Justice Initiative has drawn on the texts in its submissions to regional courts on issues of access to information,<sup>83</sup> source confidentiality,<sup>84</sup> and criminal defamation,<sup>85</sup> and in those to national constitutional courts and tribunals on issues such as transparency and access to information<sup>86</sup> and the responsibility of intermediaries.<sup>87</sup>

Media Legal Defence Initiative has also cited the Joint Declarations in its case submissions, including those before the ECtHR concerning defamation,<sup>88</sup> the Internet,<sup>89</sup> and media regulation<sup>90</sup>, and before the East African Court of Justice in a case concerning regulation of the press, film and broadcasting.<sup>91</sup> It is also interesting to note that the Joint Declarations have also featured in the written and oral submissions of students at the major moot court competition in the area of media law, suggesting that students from around the world may be more likely to draw upon them in their future work as practitioners.<sup>92</sup>

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*Countering Violent Extremism Online* (Position Paper, November 2016). See also *OOO Flavus and others v Russia* App nos 12468/15 and 2 others (ECtHR, 23 June 2020).

<sup>79</sup> Written comments of Open Society Justice Initiative, ARTICLE 19, Libertad de Información Mexico, Instituto Prensa y Sociedad, Access Info Europe in *Marcel Claude Reyes and others v Chile*, Case No 12.109 (IACHR, March 2006) para 21; *Magyar Helsinki Bizottság v Hungary* (n 68) paras 43, 104 – 113.

<sup>80</sup> Written comments of ARTICLE 19, Amnesty International, the Cairo Institute for Human Rights Studies and the Egyptian Initiative for Personal Rights to the Indonesian Constitutional Court in the judicial review of Law Number 1/PNPS/1965 (March 2010); *Amicus Curiae* brief of ARTICLE 19 to Constitutional Tribunal of Poland, Case SK 54/13 on the constitutionality of Article 196 of the Polish Criminal Code penalizing ‘offence to religious feelings’ (5 July 2015); *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) paras 92 – 94; Third-party submissions of ARTICLE 19 in *Dorota Rabczewska v Poland* App no 8257/13 (ECtHR, 6 April 2018).

<sup>81</sup> *Payam Tamiz v UK* App no 3877/14 (ECtHR, 19 September 2017) (admissibility decision) paras 56, 75 – 76; Written Comments of Third Party Interveners (ARTICLE 19, Access Now, Electronic Frontier Foundation, Mass Media Defence Center, Media Law Resource Center, Media Legal Defense Initiative) in App No 62670/12 *Aleksey Anatolyevich Navalny v Russian Federation* 18 September 2017.

<sup>82</sup> *David Miranda v Secretary of State for the Home Department* [2016] EWCA Civ 6.

<sup>83</sup> At the ECtHR: written comments of the Open Society Justice Initiative, The Financial Times Ltd and Access Info Europe in *Társaság a Szabadságjogokért v Hungary* (n 37) (September 2008) fn 6; *Társaság a Szabadságjogokért v Hungary* (n 37); Written comments of the Open Society Justice Initiative (November 2010), fn 8 in *Bubon v Russia* App no 63898/09 (ECtHR, 7 February 2017). At the IACtHR: *amicus curiae* submissions of the Open Society Justice Initiative and others in *Gudiel Álvarez y Otros (‘Diario Militar’) v Guatemala* (10 May 2012) paras 17 and 42, fn 166; *Gudiel Álvarez y Otros (‘Diario Militar’) v Guatemala* (20 November 2012). At the ACnHPR: Communication 290/04, *Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v Republic of Cameroon*, Additional Submissions on Admissibility and Request for Hearing (5 May 2008) para 18.

<sup>84</sup> Written comments of the Open Society Justice Initiative and the International Commission of Jurists (October 2013) para 21 in *Girleanu v Romania* App no 50376/09 (ECtHR, communicated 10 September 2009).

<sup>85</sup> Written comments of Open Society Justice Initiative and ARTICLE 19 (December 2008) paras 22 and 39 in *Kasabova v Bulgaria* App no 22385/03 (ECtHR, 19 April 2011).

<sup>86</sup> *Amicus curiae* submission of the Open Society Justice Initiative to the Supreme Court of Justice of Paraguay, *Defensoria del Pueblo v Municipalidad de San Lorenzo*, February 2014, para 12; Comentarios Escritos en la Causa Francisco Javier Casas Chardon vs Ministerio de Transportes y Comunicaciones y Otro, Informe de Open Society Justice Initiative dirigido al Tribunal Constitucional de Perú, 19 November 2007, fn 8.

<sup>87</sup> *Amicus curiae* submission of the Open Society Justice Initiative to the Supreme Court of Justice of Argentina, *Da Cunha v Yahoo de Argentina SRL*, March 2014, paras 48 and 68.

<sup>88</sup> Written comments of Media Legal Defence Initiative (5 April 2012) paras 23, 30,34 and 35 in *Amorim Giestas and Jesus Costa Bordalo v Portugal* App No 37840/10 (ECtHR, 3 April 2014).

<sup>89</sup> Written comments of interveners, paras 18, 31, 36 and 41 in *Tamiz v UK* App no 3877/14 (ECtHR, 19 September 2017) (admissibility decision) para 56.

<sup>90</sup> Written comments of Media Legal Initiative and Mass Media Defence Centre, para 13 in *RID Novaya Gazeta and ZAO Novaya Gazeta v Russia* App nos 16435/10 and 44561/11 (ECtHR, communicated on 7 November 2016).

<sup>91</sup> *Burundi Journalists Union v The Attorney General of the Republic of Burundi*, Reference No 7 of 2013, East African Court of Justice of 15 May 2015, para 58.

<sup>92</sup> See, for instance, submissions of Teams 403A (at 18) and 607A (para 63 and 68), Agents for the Applicants, Blenna Ballaya and See Sey (Applicant) v Amostra (Respondent), 2016-2017 Oxford Price Media Law Moot Court Competition.



Finally, the Joint Declarations speak to the non-state actors by addressing private actors, such as social media companies and other digital platforms directly, and also by interpreting freedom of expression standards relevant to states in their relationship with such actors.<sup>93</sup> In this context, it would not be surprising if the Oversight Board identified the Joint Declarations as amongst relevant ‘human rights standards’ in adjudicating future appeals concerning Meta’s content moderation decisions. This prediction is based on the fact that the Oversight Board may be increasingly open to such soft law sources of human rights law and the Joint Declarations inform the work of the multi-stakeholder initiative, the Global Network Initiative, which includes Meta amongst its corporate members.<sup>94</sup>

### III. LIMITATIONS AND CHALLENGES

Despite the qualities which point to their actual or potential impact, the Joint Declarations are encumbered by a number of factors. *First* and foremost, the texts are obviously neither binding, like international treaty provisions or regional human rights court decisions, nor authoritative interpretations of international law, like General Comments of the Human Rights Committee. While their formal language and structure suggests their standard-setting purpose and normative agenda, their actual impact is inhibited by their soft law status. A formalistic approach to international law may reject the legal value of the Joint Declarations entirely,<sup>95</sup> and consider them simply as a manifestation of NGO-fuelled activism or wishful thinking about the possibilities of international law, even though the individual mechanisms are clearly empowered to engage in such standard setting exercises under their mandates.<sup>96</sup> From a ‘positivist conception of soft law’, however, the Joint Declarations’ legal authority derives from the fact that they have been adopted by mandate-holders whose positions are themselves established on the basis of the will of states.<sup>97</sup> As the product of the pooled authority of *all four* intergovernmental mandate-holders, the Joint Declarations are even more compelling and persuasive as sources of soft law on freedom of expression.

*Second*, the Joint Declarations may have negative, in addition to positive, effects in terms of the understanding of international and regional human rights law. Their self-consciously progressive approach – in areas such as access to information, ‘defamation of religions’ and criminal defamation – may be seen as inherently problematic, as it results in standards which go beyond and hence deviate from those that have, up until that point, been accepted by international and regional human rights bodies and courts. When they have departed from the position taken by the Human Rights Committee or regional human rights courts as in these cases, the Joint Declarations could have been projected as undermining, or at least leading to a

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<sup>93</sup> See, for instance, the inclusion of non-state actors in 2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression and 2020 Joint Declaration on Freedom of Expression and Elections in the Digital Age.

<sup>94</sup> ‘GNI Statement on U.N. Work on the Human Right of Freedom of Expression’ 11 August 2011 (viewing the 2011 Joint Declaration as ‘an important step’) <<https://globalnetworkinitiative.org/gni-statement-on-u-n-work-on-the-human-right-of-freedom-of-expression/>> (accessed 26 April 2022); ‘Letter to Prime Minister Ardern and President Macron on the Christchurch Call’ (recalling the 2017 Joint Declaration on countering extremism) <<https://globalnetworkinitiative.org/gni-letter-christchurch-call/>> (accessed 26 April 2022).

<sup>95</sup> A number of decisions of the Russian courts emphasise that the 2011 Joint Declaration on the Internet is ‘not a norm of law’ that requires application. See Decision of Supreme Court of Chuvash Republic, Case No 33-1914-12, 18 June 2012; Decision of Supreme Court of Chuvash Republic, Case No 33-1925-12, 18 July 2012; Decision of Eighth Arbitration Appeals Court, Case No A75-1015/2012, 24 December 2012; Decision of the Voskresensky city court (Moscow region), Case No 2-512/2014, 27 January 2014.

<sup>96</sup> (n 7).

<sup>97</sup> John Cerone, ‘A Taxonomy of Soft Law: Stipulating A Definition’ in S Lagoutte and others (eds), *Tracing the Origins of Soft Law* (OUP 2016) 18, 22 – 23.

sense of normative confusion about the scope of treaty obligations, rather than affirming or strengthening the core of those obligations. Yet the progressive nature of the Joint Declarations as a body of soft law and their focus on particular subjects have both been a strength of the texts. The texts have paved the way for and supported subsequent interpretations and recommendations of intergovernmental bodies, jurisprudence of the ECtHR, and positions of state and civil society actors, as indicated previously.

*Third*, the annual drafting of the Joint Declarations depends on the willingness of the mandate-holders to constructively collaborate with each other and the NGOs – something that cannot be taken for granted, especially given that mandate-holders, with their distinct personalities and working methods, change periodically. A sense of stability, direction and enhanced efficiency is brought to the drafting process by the two NGOs. But their domination over the process may also have negative implications in terms of the texts’ content and broader appeal. Expanding participation in the process to other NGOs or university centres with relevant expertise in particular areas and a global mandate (such as Access Now or Global Partners Digital), even on an *ad hoc* basis, could potentially increase the texts’ substantive quality, profile and legitimacy before a broader range of addressees and stakeholders, including the private sector.

*Fourth*, although the Joint Declarations have become a point of reference for the ECtHR, NGOs, regional human rights bodies, and national courts, their explicit application in practice has so far been limited. Indeed, the significance of the Joint Declarations lies more in their *potential* for positively influencing their key targets – namely, States, private actors, media organisations and journalists – rather than their actual impact to date. Indeed, even a cursory survey of the OSCE region indicates that the situation of freedom of expression in many OSCE participating states is deeply worrying, including in contexts where policymakers and courts appear to be aware of the existence of the Joint Declarations, notably Russia.<sup>98</sup>

Moreover, plain reference to one or more of the Joint Declarations does not necessarily result in judicial rulings in support of freedom of expression, obviously. For instance, the Gauteng Division of the High Court of South Africa referenced the 2002 Joint Declaration urging states to abolish all criminal defamation laws, even though it ultimately ordered that the ‘common law crime of criminal defamation insofar as it pertains to the media is consistent with the Constitution’.<sup>99</sup> A specific paragraph of the 2011 text concerning ‘mere conduit principle’<sup>100</sup> was also recalled in numerous Russian cases, though not to uphold freedom of expression.<sup>101</sup>

There have also been ‘negative rulings’ by the ECtHR, where despite reference to a Joint Declaration, the court ultimately decided against finding a violation of freedom of expression. There was a significant mention of the 2006 Joint Declaration on the publication of confidential

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<sup>98</sup> Regular Report of the OSCE Representative on Freedom of the Media to the Permanent Council, FOM.GAL/5/21, 18 November 2021.

<sup>99</sup> *Ntele Cecil Motsepe v the State* (Gauteng Division of the High Court of South Africa, 5 November 2011) A816/2013, paras 34.2 and 51.

<sup>100</sup> Para 2(a) of the 2011 Joint Declaration states: ‘No one who simply provides technical Internet services such as providing access, or searching for, or transmission or caching of information, should be liable for content generated by others, which is disseminated using those services, as long as they do not specifically intervene in that content or refuse to obey a court order to remove that content, where they have the capacity to do so’.

<sup>101</sup> Decision of Ninth Arbitration Appeal Court, Case No A40-118714/2013, 28 November 2014; Decision of the Arbitration Court of the St Petersburg and Leningrad Region, Case No A56-22461/2014, 9 September 2014; Decision of the Leninisky District Court of Ulyanovsk, Case No 2-864/13, 8 February 2013; Decision of Kirov district court of Ekaterinburg (Sverdlovsk region), Case No 2-1123 / 2016 ~ M-11305/2015, 22 March 2013; Decision of the arbitration court (Kursk region), Case No A35-7737/2015, 20 November 2015; Decision of fourth arbitration appeal, Chita, Case No A19-2571/2014, 19 March 2015; Decision of Kirov district court of Volgograd, Case No 2-688/2015, 19 May 2015; Decision of Noginsk City Court (Moscow region), Case No 2-3349/2015, 19 May 2015.

information in the 2007 Grand Chamber decision of *Stoll v Switzerland* in the section on ‘international law and practice’. Notwithstanding the statements that ‘journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it’ and ‘it is up to public authorities to protect the legitimately confidential information they hold’, the Court went on to decide that there was no violation in a case concerning the conviction of a journalist for the publication of a diplomatic document which had been classified as confidential.<sup>102</sup> Similarly, in its controversial ruling in *Delfi v Estonia*, the Grand Chamber quoted the statement in the 2005 Joint Declaration on the Internet that ‘no one should be liable for content on the Internet of which they are not the author, unless they have either adopted that content as their own or refused to obey a court order to remove that content’ within the section on ‘other international documents’.<sup>103</sup> But it then went on to hold that there was no violation in the case concerning an award for damages and liability of an internet news portal for posting offensive comments on its site.<sup>104</sup>

The experience of the ECtHR suggests that the Joint Declarations’ influence upon regional human rights courts depends upon whether individual judges are persuaded that the texts constitute legitimate reference points. Consider how one particular judge, Judge Pinto De Albuquerque, has placed more emphasis upon the Joint Declarations than others at the ECtHR. In *Yildirim v Turkey*, Judge Albuquerque supported the finding that the wholesale blocking of websites could never be justified, and in doing so relied on the 2011 Joint Declaration on freedom of expression and the Internet.<sup>105</sup> He also drew upon the same text in asserting that ‘[S]tates have a positive obligation to promote and facilitate universal Internet access, including the creation of the infrastructure necessary for Internet connectivity’ in his partly-dissenting opinion in *Barbulescu v Romania*.<sup>106</sup> In *Szabo and Vissy v Hungary*, he also referenced the 2013 Joint Declaration of the UN and OAS mandate-holders on surveillance in his concurring opinion.<sup>107</sup> Judge Albuquerque drew on several Joint Declarations in his concurring opinion in the case of *ATV ZRT v Hungary* in 2020, which concerned a ban on a television broadcaster from repeating that the political party Jobbik was of the ‘parliamentary far-right’.<sup>108</sup> In supporting the decision that the restriction amounted to a disproportionate interference with freedom of expression, Judge Albuquerque explicitly draws on several Joint Declarations. More specifically, he recalls: the **assertion** in the 2017 Joint Declaration on freedom of expression, ‘fake news’, disinformation and propaganda that the positive obligation to ‘promote a free, independent and diverse communications environment, including media diversity’ is also a ‘key means of addressing disinformation and propaganda’; the assertion in the 2018 Joint Declaration on Media Independence and Diversity in the Digital Age that ‘States have a positive obligation to ensure media plurality and diversity’; and also the fact that the Joint Declarations (notably of 2011 on the Internet, of 2018 on Media Independence and Diversity in the Digital Age) have ‘repeatedly emphasised the merits of media self- and co-regulation ...[as] instrumental in attaining content diversity and addressing problematic issues such as hate speech, and can even help to deal with emerging issues posed by new forms of media.’<sup>109</sup>

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<sup>102</sup> *Stoll v Switzerland* App no 69698/01 (Grand Chamber of the ECtHR, 10 December 2007) para 39.

<sup>103</sup> *Delfi v Estonia* App no 64569/09 (Grand Chamber of the ECtHR, 6 June 2015) para 49. See Robert Spano, ‘Intermediary Liability for Online User Comments under the European Convention on Human Rights’ (2017) *Human Rights Law Review* 1.

<sup>104</sup> *Ibid* para 162.

<sup>105</sup> *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012), fn 19.

<sup>106</sup> *Barbulescu v Romania* App no 61496/08 (ECtHR, 12 January 2016), fns 5 and 44. The decision was later referred to the Grand Chamber which delivered its judgment on 5 September 2017.

<sup>107</sup> *Szabo and Vissy v Hungary* App no 37138/14 (ECtHR, 12 January 2016) at para 3 of the concurring opinion.

<sup>108</sup> *ATV Zrt v Hungary* App no 61178/14 (ECtHR judgement of 28 April 2020).

<sup>109</sup> Concurring Opinion of Judge Pinto Albuquerque, *ibid*.

Fifth and finally, the Joint Declarations have hitherto attracted little attention from the media in their reporting or by journalists' associations in addressing the issues facing journalism,<sup>110</sup> even though the media is often addressed in their recommendations.<sup>111</sup> However, there are some examples of the adoption of Joint Declarations being covered by local media. For instance, Radio Television of Vojvodina in Serbia reported on the adoption of the 2015 Joint Declaration on freedom of expression and responses to conflict situations;<sup>112</sup> Radio Television of Serbia profiled the launch of the 2016 Joint Declaration on Freedom of Expression and Countering Violent Extremism.<sup>113</sup> The *Philippines Star* reported on the adoption of the 2017 Joint Declaration on 'fake news', disinformation and propaganda.<sup>114</sup>

It is perhaps not surprising that journalists have not covered the development of such technical standards through their reporting; the Joint Declarations do not appear intended for direct public consumption. Yet there are compelling reasons as to why the Joint Declarations should be better profiled by the media: the texts are more accessible than the texts produced by international human rights bodies and regional courts; they unpack some of the most pressing contemporary challenges to media freedom and offer relevant recommendations; and they are already regularly launched on World Press Freedom Day, which receives broader media coverage anyway. Moreover, one might expect increasing reporting on the Joint Declarations because the work of NGOs in the area of freedom of expression has been garnering more media attention in recent years.<sup>115</sup> Journalists also regularly cover official visits conducted by the UN Special Rapporteur to states, such as the visit of David Kaye to Turkey in 2016 or his successor, Irene Khan, to Hungary in 2021.<sup>116</sup> Given that greater media coverage of the Joint Declarations

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<sup>110</sup> An exception is the publication of the 2019 Joint Declaration on Challenges to Freedom of Expression the Next Decade which was published on the website SafeJournalists of the Association of Independent Electronic Media (ANEM) <<https://www.bezbedninovinari.rs/static/themes/bezbedni-novinari/documents/Zajednicka%20deklaracija%20Londan.pdf>> (accessed 26 April 2022).

<sup>111</sup> See, for instance, 2018 Joint Declaration on media independence and diversity in the digital age, para 7; 2017 Joint Declaration on freedom of expression and 'fake news', disinformation and propaganda, paras 5 and 6; 2014 Joint Declaration on the right to freedom of expression and universality, para 2(c).

<sup>112</sup> RTV, 'Riga: Deklaracija o slobodi izražavanja' 4 May 2016 <[https://rtv.rs/sr\\_lat/evropa/riga-deklaracija-o-slobodi-izrazavanja\\_595982.html](https://rtv.rs/sr_lat/evropa/riga-deklaracija-o-slobodi-izrazavanja_595982.html)> (accessed 26 April 2022).

<sup>113</sup> RTS, 'OEBS: Pristup informacijama je osnovno ljudsko pravo' 3 May 2016 <<https://www.rts.rs/page/stories/sr/story/10/svet/2304335/oeps-pristup-informacijama-je-osnovno-ljudsko-pravo.html>> (accessed 26 April 2022).

<sup>114</sup> Pia Lee-Brago, 'UN: Don't spread disinformation, propaganda' (*The Philippine Star*, 13 March 2017) <[www.philstar.com/headlines/2017/03/13/1678750/un-dont-spread-disinfo-propaganda](http://www.philstar.com/headlines/2017/03/13/1678750/un-dont-spread-disinfo-propaganda)> (accessed 26 April 2022).

<sup>115</sup> For examples of opinion pieces by the representatives of such NGOs, see: Thomas Hughes and Jodie Ginsberg, 'The Biggest Risk to Trump isn't Posed by Trump' (*The Guardian*, 19 January 2018) <[www.theguardian.com/commentisfree/2018/jan/19/american-journalism-fake-news-trump](http://www.theguardian.com/commentisfree/2018/jan/19/american-journalism-fake-news-trump)> (accessed 24 April 2022); Thomas Hughes, 'Who Will Protect Press Freedom Now?' (*The Guardian*, 30 November 2017) <[www.theguardian.com/commentisfree/2017/nov/30/press-freedom-censorship-fake-news-journalism](http://www.theguardian.com/commentisfree/2017/nov/30/press-freedom-censorship-fake-news-journalism)> (accessed 24 April 2022); Joel Simon, 'Trump Is Damaging Press Freedom in the U.S. and Abroad' (*The New York Times*, 25 February 2017) <[www.nytimes.com/2017/02/25/opinion/trump-is-damaging-press-freedom-in-the-us-and-abroad.html](http://www.nytimes.com/2017/02/25/opinion/trump-is-damaging-press-freedom-in-the-us-and-abroad.html)> (accessed 24 April 2022).

<sup>116</sup> On Turkey see: 'BM'den Türkiye'ye 'insan hakları' eleştirisi' ('Human Rights Criticism from UN to Turkey'), (*Cumhuriyet*, 13 November 2016) <[www.cumhuriyet.com.tr/haber/dunya/865436/BM\\_den\\_Turkiye\\_je\\_insan\\_haklari\\_elestirisi.html#](http://www.cumhuriyet.com.tr/haber/dunya/865436/BM_den_Turkiye_je_insan_haklari_elestirisi.html#)> accessed 26 April 2022; 'BM Raportörü'nden Türkiye'ye: Tutuklu gazeteci ve akademisyenleri bırakın' ('UN Rapporteur to Turkey: Release the arrested journalists and academics') (*BBC Türkçe*, 18 November 2016) <[www.bbc.com/turkce/haberler-turkiye-38025785](http://www.bbc.com/turkce/haberler-turkiye-38025785)> (accessed 26 April 2022); 'BM Özel Raportörü David Kaye'den Türkiye eleştirisi' ('UN Special Rapporteur David Kaye criticises Turkey') (*DW Türkçe*, 18 November 2016) <[www.dw.com/tr/bm-%C3%B6zel-raport%C3%B6r%C3%BC-david-kayeden-t%C3%BCrkiye-ele%C5%9Ftirisi/a-36443584](http://www.dw.com/tr/bm-%C3%B6zel-raport%C3%B6r%C3%BC-david-kayeden-t%C3%BCrkiye-ele%C5%9Ftirisi/a-36443584)> (accessed 26 April 2022); Sevil Erkuş, 'After 20 years, UN Human Rights Council again on duty for Turkey' (*Hurriyet Daily News*, (19 November 2016) <[www.hurriyetdailynews.com/after-20-years-un-human-rights-council-again-on-duty-for-turkey-106307](http://www.hurriyetdailynews.com/after-20-years-un-human-rights-council-again-on-duty-for-turkey-106307)> (accessed 26 April 2022); 'BM Raportörü: Batı, Türkiye'yi hukukun üstünlüğüne ikna etmeli' ('UN Rapporteur: West has to persuade Turkey on rule of law') (*BBC Türkçe*, 30 November 2016) <[www.bbc.com/turkce/haberler-turkiye-38155970](http://www.bbc.com/turkce/haberler-turkiye-38155970)> (accessed 26 April 2022). On Hungary, see: Euronews, 'UN Special Rapporteur says press freedom is under threat in Hungary' 22 November 2021

could generate broader awareness and acceptance of their standards amongst the addressees of the texts, including the private sector, ARTICLE 19 and CLD as the NGOs steering the Joint Declarations process should dedicate even greater time and resources on publicity campaigns to promote the texts in the immediate aftermath of their adoption.

#### IV. CONCLUSIONS

This analysis of the significance of the Joint Declarations on freedom of expression suggests that their value as sources of soft law stems from the collaborative process between leading NGOs and intergovernmental mandate-holders leading up to their adoption, the progressive nature of the standards they advance on the basis of international and regional human rights law, and evidence of their impact upon key policy-makers and courts. Amongst all the texts, the 2011 Joint Declaration on the Internet and the 2004 Joint Declaration on access to information that have been particularly influential, including in terms of their positive impact upon the judgments of the ECtHR, while the 2017 Joint Declaration on ‘fake news’, disinformation and propaganda attracted growing attention from policy makers following its adoption.

This working paper has also highlighted a number of limitations or challenges that may be raised against the texts: their non-binding soft law status; their potential inconsistency with existing treaty law; their dependency on the willingness of the intergovernmental mandate-holders at the time to constructively work together and the monopoly of ARTICLE 19 and CLD over the drafting process; their limited impact in practice; and their lack of visibility. Many of these challenges may be addressed or mitigated by the mandate-holders, including the OSCE Representative, the two leading NGOs and other advocates of the Joint Declaration, including through various approaches as indicated in the section on Recommendations below. At the same time, it must be recognised that the implementation of the Joint Declarations ultimately depends on the political will of states and also increasingly the interests of companies to meet their obligations and responsibilities in protecting freedom of expression.

Yet the Joint Declarations’ unique and innovative model of collaborative standard-setting also potentially offers inspiration to actors in other fields where overlapping intergovernmental mechanisms do exist – such as the OSCE High Commissioner on National Minorities and the Special Rapporteur on Minorities, or the UN, OAS, and ACnHPR mechanisms on the rights of women, human rights defenders, migrants and indigenous peoples – of the UN, OAS and ACnHPR.<sup>117</sup> This working paper shows that, for this, what would be required is strong strategic partnerships between intergovernmental mechanisms with similar mandates and at least one leading NGO willing to guarantee consistent, long-term resources to the initiative.

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<<https://www.euronews.com/2021/11/22/un-special-rapporteur-says-press-freedom-is-under-threat-in-hungary>> (accessed 26 April 2022); Reuters, ‘U.N. expert raises concerns over media freedom in Hungary ahead of 2022 vote’ <<https://www.reuters.com/world/europe/un-expert-raises-concerns-over-media-freedom-hungary-ahead-2022-vote-2021-11-22/>> (accessed 26 April 2022); 168, ‘ENSZ szakértője: A magyar kormány fojtogatja a médiát, ami komoly veszélyt jelent az emberi jogokra’ 22 November 2021 <<https://168.hu/itthon/ensz-szakerto-a-magyar-kormany-fojtogatja-a-mediát-ami-komoly-veszelyt-jelent-az-emberi-jogokra-219628>> (accessed 26 April 2022); Hirado.hu, ‘Varga Judit: Nincs új a Nap alatt, ha Magyarország lejárataáról van szó!’ <<https://hirado.hu/belfold/cikk/2021/11/23/varga-judit-nincs-uj-a-nap-alatt-ha-magyarorszag-lejaratasarol-van-szo>> (accessed 26 April 2022).

<sup>117</sup> There are several thematic special procedures of the Human Rights Council addressing the rights of women – the Special Rapporteur on violence against women, its causes and consequences, the Special Rapporteur on trafficking in persons, especially women and children, and the Working Group on the issue of discrimination against women in law and practice – whereas the OAS and the ACnHPR both have rapporteurships ‘on the rights of women’. The UN, OAS, ACnHPR have mechanisms on the rights of human rights defenders, migrants and indigenous peoples.

In terms of the future of the Joint Declarations as an initiative, it is predicted that its dominant focus will be on issues concerning the Internet as policy makers continue to contend with difficult and pressing questions surrounding the scope of the responsibilities of Internet intermediaries,<sup>118</sup> particularly social media platforms, with respect to their role in the dissemination in disinformation and ‘hate speech’ in particular, and in a range of contexts.<sup>119</sup>

Yet the adoption of the 2022 Joint Declaration has also exposed the gaps in the series of the Joint Declarations, which had not addressed gender justice or other issues concerning equality, including and particularly around racial justice, in a dedicated way before. There are other areas where the Joint Declarations could clearly advance an understanding of how freedom of expression should be protected – in the context of the existential threat of the climate emergency, global public health challenges (including pandemics), and extreme poverty. In developing Joint Declarations in response to these issues, the role of the private sector, particularly social media companies, should remain key focus for the mandate-holders and their NGO facilitators.

As an existing and growing body of soft law, the Joint Declarations’ ultimate significance is in shoring up a sense of the relevancy, legitimacy and cohesiveness of international and regional institutions on freedom of expression, including the OSCE Representative on Freedom of the Media. This is an especially valuable function at this time, when the effectiveness of such systems continues to be undermined by governments and private actors, and when the human right to freedom of expression is under overt and sustained attack across the world.<sup>120</sup>

## V. RECOMMENDATIONS FOR THE OSCE REGION

### 1. OSCE participating states should take effective steps to:

- a. Implement the Joint Declarations through their own domestic legislation and policies;
- b. Promote the relevance of the Joint Declarations to relevant state actors (including key legislators, government departments, media regulators, national human rights institutions, and members of the judiciary), as well as stakeholders;
- c. Promote the implementation of the Joint Declarations by other states through their foreign policies, including through their bilateral relationships, their engagement in multilateral organisations and their participation in ‘groups’ of countries (e.g. the Media Freedom Coalition, the Freedom Online Coalition, and the Groups of Friends on the Safety of Journalists).

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<sup>118</sup> 11 May 2016 A/HRC/32/38; 30 March 2017 A/HRC/35/22; 6 April 2018, A/HRC/38/35.

<sup>119</sup> See debates around the EU Digital Services Act < [https://ec.europa.eu/info/digital-services-act-ensuring-safe-and-accountable-online-environment\\_en](https://ec.europa.eu/info/digital-services-act-ensuring-safe-and-accountable-online-environment_en)> (accessed 26 April 2022) and the UK Online Safety Bill <<https://www.gov.uk/government/publications/online-safety-bill-supporting-documents/online-safety-bill-factsheet>> (accessed 26 April 2022).

<sup>120</sup> See also: ARTICLE 19, The Global Expression Report 2021< <https://www.article19.org/wp-content/uploads/2021/07/A19-GxR-2021-FINAL.pdf>> (accessed 26 April 2022); Committee to Protect Journalists, ‘Attacks on the Press: The Deadliest Countries’ (2021) 19 January 2022 < <https://cpj.org/reports/2022/01/attacks-on-the-press-the-deadliest-countries-in-2021/>> (accessed 26 April 2022); Freedom House, ‘Freedom of the Net 2021’ < <https://freedomhouse.org/report/freedom-net/2021/global-drive-control-big-tech>> (accessed 26 April 2022); Reporters Without Borders, 2021 World Press Freedom Index < <https://rsf.org/en/2021-world-press-freedom-index-journalism-vaccine-against-disinformation-blocked-more-130-countries>> (accessed 26 April 2022).

2. **Companies** operating in the OSCE region, particularly social media companies and other technology companies, should take effective steps to implement relevant provisions of the Joint Declarations through their own company policies, practices, and mechanisms of oversight and review.
3. **Media organisations and journalists' associations** working in the OSCE region should take effective steps to:
  - a. Implement relevant provisions of the Joint Declarations through their own codes of conduct and guidance;
  - b. Promote the understanding of the Joint Declarations amongst journalists and media workers;
  - c. Encourage journalists to draw explicit attention to the Joint Declarations in their reporting.
4. **Civil society organisations** working in the OSCE region, particularly NGOs working in the areas of human rights, media freedom, and digital rights, should take effective steps to:
  - a. Support the implementation of Joint Declarations by states and private sector actors;
  - b. Draw on the Joint Declarations in their approaches to advocacy, including in strategic litigation;
  - c. Promote a wider understanding of the Joint Declarations, particularly amongst influential policymakers and lawyers arguing cases on freedom of expression before national and regional courts.
5. **The judges of the European Court of Human Rights and the Inter-American Court on Human Rights**, as the two regional courts covering the OSCE region, should recognise the relevance of the Joint Declarations as international legal material (in cases where they have been raised by lawyers) and explicitly engage with the substantive content of the texts as relevant in their decisions.
6. **The OSCE Representative on Freedom of the Media, alongside the other three intergovernmental mandate holders on freedom of expression from the UN, OAS and ACnHPR and the NGOs facilitating the Joint Declarations process (i.e. ARTICLE 19 and CLD)** should:
  - a. Emphasise the fact that the texts have been adopted jointly by all four mandate-holders on the basis of existing international and regional human rights law, and are hence particularly compelling sources of soft law;
  - b. Consider the possibilities of opening up the drafting process to other organisations with particular expertise;
  - c. Engage in more concerted efforts and campaigning to reach out to the media to publicise the texts, especially amongst key actors – including judges, the media and the private sector – across the OSCE region
  - d. Commission an in-depth and systematic review of the impact of the Joint Declarations across all OSCE participating States.
7. **Other OSCE institutions and structures, particularly the OSCE Office for Democratic Institutions and Human Rights, the High Commissioner for National Minorities, and the Secretariat under the Secretary-General**, should reinforce the importance of the Joint Declarations by highlighting their relevance through their outputs and promoting their implementation by states and non-state actors, including at Human Dimension Implementation Meetings and Supplementary Meetings.