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## THE SIGNIFICANCE OF THE JOINT DECLARATIONS ON FREEDOM OF EXPRESSION

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### Abstract

This article examines the ‘Joint Declarations on freedom of expression’ from a critical perspective. Since 1999, these Joint Declarations have been adopted annually by the four intergovernmental mechanisms on freedom of expression 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. It also acknowledges the limitations of the texts, including their non-binding nature as soft law, their limited impact and lack of visibility. Notwithstanding these issues, this article contends that the Joint Declarations constitute a distinct and potentially influential body of international soft law on freedom of expression, one whose relevance to policy debates deserves broader recognition.

### Key words

Freedom of expression, Joint Declarations on freedom of expression, international soft law, standard-setting, international human rights bodies, Special Rapporteurs

## 1. INTRODUCTION

This article examines the ‘Joint Declarations on freedom of expression’ (‘Joint Declarations’) from a critical perspective. These texts have been adopted annually by the four intergovernmental mechanisms on freedom of expression (‘international mechanisms’ or ‘mandate-holders’) – namely the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (‘OSCE’) Representative on Freedom of the Media, the Organization of American States (‘OAS’), the Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (‘ACnHPR’) and the Special Rapporteur on Freedom of Expression and Access to Information.<sup>1</sup> This has been done since 1999 with the support of two non-governmental organisations (‘NGOs’), ARTICLE 19 and the Centre for Law and Democracy (‘CLD’).<sup>2</sup> The Joint Declarations have addressed a diversity of contemporary issues, which cut

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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 24 January 2019.

<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,

across all regions and demand global attention, such as restrictions on Internet freedom, policies to counter terrorism and violent extremism, and so-called ‘fake news’ and disinformation.<sup>3</sup> While 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 hitherto garnered little scholarly attention.<sup>5</sup>

In addressing this gap of academic attention, this article analyses the significance 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 highlights the texts’ shortfalls and problems, including their non-binding character, their limited impact and lack of visibility. This article 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. Moreover, the texts arguably represent an innovative 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.

## 2. VALUE

There are three essential reasons why the Joint Declarations are valuable: 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.

### 2.1. 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 Duvé, and the then OAS Special Rapporteur, Santiago Canton. The agreement consisted of a broad statement, released after a

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2005, 2006, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017 and 2018 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 (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> The only focussed considerations of the Joint Declarations have been by one practitioner, Toby Mendel, former Legal Director of ARTICLE 19 and Executive Director of CLD. See 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 referencing the Joint Declarations, often in footnotes, 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; 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; 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; Tarlach McGonagle, ‘“Fake News”: False Fears or Real Concerns’ (2017) *35(4) Netherlands Quarterly of Human Rights* 203, 207.

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 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

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<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.

<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.

<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.

IACnHR<sup>12</sup> and the ACnHPR.<sup>13</sup> They have been published in full on the websites of the mandate-holders and two NGOs.<sup>14</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>15</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>16</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>17</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 themes.<sup>18</sup>

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>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.

<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.

<sup>14</sup> See ARTICLE 19 <[www.article19.org/content-type/joint-declaration/](http://www.article19.org/content-type/joint-declaration/)> accessed 24 January 2019; CLD <[www.law-democracy.org/live/legal-work/standard-setting/](http://www.law-democracy.org/live/legal-work/standard-setting/)> accessed 24 January 2019; UN Special Rapporteur on freedom of opinion and expression <<https://freedex.org/resources/joint-declarations/>> accessed 24 January 2019; 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 24 January 2019; OSCE Representative on Freedom of the Media <[www.osce.org/fom/66176](http://www.osce.org/fom/66176)> accessed 24 January 2019.

<sup>15</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>16</sup> Mendel (n 4) 257.

<sup>17</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>18</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>19</sup> The process also seems to be fuelled by the presence of ‘ritual’,<sup>20</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>21</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>22</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>23</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).<sup>24</sup> Yet the Joint Declarations’ process is 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 expression NGOs.<sup>25</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 and the Camden Principles on freedom of expression and

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<sup>19</sup> See generally Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organisations* 887, 896 – 899.

<sup>20</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>21</sup> *ibid.*

<sup>22</sup> On UNESCO’s events for World Press Freedom Day, see <<https://en.unesco.org/commemorations/worldpressfreedomday>> accessed 24 January 2019.

<sup>23</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>24</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) <<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=829>> accessed 24 January 2019; ‘Joint Declaration on surveillance programs and their impact upon freedom of expression’ (OAS press release, 21 June 2013) <[www.oas.org/en/iachr/expression/showarticle.asp?artID=927&IID=1](http://www.oas.org/en/iachr/expression/showarticle.asp?artID=927&IID=1)> accessed 24 January 2019; ‘Trump attacks on media violate basic norms of press freedom, human rights experts say’ (OHCHR press release, 2 August 2018) <[www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=23425&LangID=E](http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=23425&LangID=E)> accessed 24 January 2019. 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 24 January 2019; ‘Turkey: Life sentences for journalists are “unprecedented assault on free speech”, say UN and OSCE experts’ (OHCHR press release, 16 February 2018) <[www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22670&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22670&LangID=E)> accessed 24 January 2019.

<sup>25</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.



equality;<sup>26</sup> filing *amicus curiae* briefs to regional human rights courts;<sup>27</sup> or providing submissions to the Universal Periodic Review,<sup>28</sup> or towards the thematic reports of the UN Special Rapporteur,<sup>29</sup> the periodic review of states or the drafting of a General Comment by the Human Rights Committee.<sup>30</sup>

## 2.2. 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), focussing 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) and media diversity and independence in a digital age (2018). The subjects covered reflect a spectrum of freedom of expression issues, which may be seen to 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>31</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 –

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<sup>26</sup> ‘The Global Principles on National Security and the Right to Information’ (‘Twshane Principles’) 12 June 2013 and ‘The Camden Principles on Freedom of Expression and Equality’ April 2009. The ‘Twshane 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 24 January 2019, which have also developed on the basis of civil society discussions.

<sup>27</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 İlıcak), 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>28</sup> See, for instance, joint submission to the Universal Periodic Review of Burundi by ARTICLE 19 and others for consideration at the 29th Session of the Working Group in January 2018, 29 June 2017.

<sup>29</sup> See, for instance, the submissions from civil society organisations in advance of the 2018 report of the UN Special Rapporteur on user-generated content online <[www.ohchr.org/EN/Issues/FreedomOpinion/Pages/ContentRegulation.aspx](http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/ContentRegulation.aspx)> accessed 24 January 2019.

<sup>30</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.

<sup>31</sup> On media freedom, see generally Andrey Richter, ‘Defining Media Freedom in International Policy Debates’ (2016) 12 (2) *Global Media and Communication* 127.

the media, the private sector, and civil society organisations – beyond states, who necessarily remain the focus of the Human Rights Committee.<sup>32</sup>

As a standard-setting tool, the Joint Declarations have appeared uniquely adept as a 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>33</sup> and a dedicated thematic report on the subject of the Internet in 2011.<sup>34</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 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>35</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>36</sup> According to ARTICLE 19, in July 2017, 118 states have adopted laws or policies on the right of access to information, with approximately 44 bills or other initiatives pending.<sup>37</sup> The Global Right to Information Rating indicates that of these 118 state laws and policies, 62 were adopted by the end of 2004; therefore, 56 of them were adopted *subsequent* to the Joint Declaration.<sup>38</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>39</sup> Second, the 2008 Joint Declaration 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>40</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

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<sup>32</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>33</sup> E/CN.4/2005/64, 17 December 2004; A/HRC/4/27, 2 January 2007.

<sup>34</sup> A/66/290, 10 August 2011.

<sup>35</sup> See also the 1999 and 2006 Joint Declarations.

<sup>36</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>37</sup> ARTICLE 19, Open Development, Access to Information and the Sustainable Development Goals (July 2017) 14.

<sup>38</sup> Global Right to Information Rating <[www.rti-rating.org/country-data/](http://www.rti-rating.org/country-data/)> accessed 24 January 2019.

<sup>39</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.

<sup>40</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.



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>41</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>42</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>43</sup> Finally, the ACtHPR has indicated that imprisonment for defamation infringes upon freedom of expression.<sup>44</sup> In the absence of an unequivocal position against the criminalisation of defamation from both the international and regional systems, it is evidence of a global trend towards decriminalisation (in states such as Jamaica, South Africa and Montenegro) that strengthens the ‘progressive and yet eminently defensible’ position of the mandate-holders from 2002.<sup>45</sup>

In some cases, the Joint Declarations have served to predict harmful policy trends. 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>46</sup> In addition, the mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism had yet to be established.<sup>47</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 global debate on its nature, scale and impacts.<sup>48</sup> The text has subsequently been used as a reference point by the mandate-holders

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<sup>41</sup> General Comment No 34 (n 18) para 47 (emphasis added).

<sup>42</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>43</sup> Mendel (n 4) 262. See, for instance, *Tristan Donoso v Panama* (IACtHR, 27 January 2009) Series C No 193, para 131.

<sup>44</sup> *Konaté v Burkino Faso* (ACtHPR, 7 December 2014).

<sup>45</sup> Mendel (n 4) 263.

<sup>46</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.

<sup>47</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>48</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 24 January 2019. 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 January 2019.

themselves, in particular by the UN Special Rapporteur.<sup>49</sup> The text's recommendations, especially on the role of the private sector, seem destined to be further elaborated by the mandate-holders in their individual work. Its standards offer a useful baseline for policy-makers in the development of human rights-based responses to disinformation, and 'information pollution' generally.<sup>50</sup> The 2017 Joint Declaration is a recent example of how such a text can provide a useful tool for the mandate-holders to engage in contemporary debates. The text was also submitted as written evidence to inquiries into 'fake news' held by the UK House of Commons Select Committee on Digital, Culture, Media and Sport<sup>51</sup> and the European Commission, who viewed it as the 'most focused, recent treatment of the application of international human rights standards to the phenomenon of disinformation'.<sup>52</sup>

### 2.3. 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>53</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>54</sup> They have been cited by national courts, notably the Supreme Court of the Republic of Chuvashiya in the Russian Federation which positively relied upon the 2011 Joint Declaration on freedom of expression and the Internet when overruling a lower court decision against the owner of the internet portal *nasvyazi.ru*.<sup>55</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 civil society organisations in their submissions to legislative

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<sup>49</sup> The UN Special Rapporteur, David Kaye (@davidakaye), has 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). Other mandate-holders active on Twitter are: OAS Special Rapporteur Edison Lanza (@EdisonLanza) and his predecessor Catalina Botero (@cboteromarinero); current OSCE Representative Harlem Désir (@harlemdesir) and his predecessor Dunja Mijatović (@Dunja\_Mijatovic), who have both relied on an institutional account of the OSCE (@OSCE\_RFoM); and current ACnHPR Rapporteur Lawrence Mute (@lamumu07).

<sup>50</sup> See, in particular, the following studies: Claire Wardle and Hossein Derakhshan, 'Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making' Council of Europe report, DGI (2017) 09, 27 September 2017; Andrew Guess and others, 'Selective Exposure to Misinformation: Evidence from the Consumption of Fake News During the 2016 US presidential campaign' (January 2018) Working Paper < [www.dartmouth.edu/~nyhan/fake-news-2016.pdf](http://www.dartmouth.edu/~nyhan/fake-news-2016.pdf) > accessed 24 January 2019; Richard Fletcher and others, 'Measuring the Reach of "Fake News" and Online Disinformation in Europe,' Reuters Institute for the Study of Journalism Factsheet, February 2018.

<sup>51</sup> Select Committee on Digital, Culture, Media and Sport, Disinformation and 'fake news', *Interim Report* (HC 363 17/19).

<sup>52</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. 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>53</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. See also (n 33 – 36).

<sup>54</sup> See 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).

<sup>55</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.

inquiries.<sup>56</sup> The Joint Declarations have also been utilised by leading human rights organisations, notably Human Rights Watch, in their reports and commentaries.<sup>57</sup>

Arguably 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 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. For instance, 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>58</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>59</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>60</sup>

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>61</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 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>62</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>63</sup> These judgments suggest that the 2004 Joint Declaration on access to information is arguably the most 'successful' in terms of its positive impact upon the ECtHR.

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<sup>56</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>57</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.

<sup>58</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>59</sup> *Magyar Jeti Zrt v Hungary* App no 11257/16 (ECtHR, 4 December 2018) para 38.

<sup>60</sup> *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011) para 32.

<sup>61</sup> *MHB v Hungary* App no 18030/11 (ECtHR, 8 November 2016) para 43.

<sup>62</sup> *Youth Initiative for Human Rights v Serbia* App no 48135/06 (ECtHR, 25 June 2013) paras 14 – 15.

<sup>63</sup> *Times Newspapers and Kennedy v UK* App no 64367/14 (ECtHR, communicated on 17 March 2015.)

*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 a case concerning blocking orders against three major Russian websites, which is currently being considered by the ECtHR, draws 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>64</sup> ARTICLE 19 has previously used Joint Declarations in its third-party interventions in cases before regional human rights courts and domestic courts on such issues of access to information,<sup>65</sup> blasphemy/defamation of religions,<sup>66</sup> defamation,<sup>67</sup> and anti-terrorism legislation.<sup>68</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>69</sup> source confidentiality<sup>70</sup> and criminal defamation,<sup>71</sup> and in those to national constitutional courts and tribunals on issues such as transparency and access to information<sup>72</sup> and the responsibility of intermediaries.<sup>73</sup> Media Legal Defence Initiative has also cited the Joint Declarations in its case submissions, including those before the ECtHR concerning defamation,<sup>74</sup> the Internet<sup>75</sup> and media regulation<sup>76</sup>, and before the East African Court of Justice in a case concerning regulation of the press, film and broadcasting.<sup>77</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

<sup>64</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 Countering Violent Extremism Online* (Position Paper, November 2016).

<sup>65</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 61) paras 43, 104 – 113.

<sup>66</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>67</sup> *Payam Tamiz v UK* App no 3877/14 (ECtHR, 19 September 2017) (admissibility decision) paras 56, 75 – 76.

<sup>68</sup> *David Miranda v Secretary of State for the Home Department* [2016] EWCA Civ 6.

<sup>69</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 36) (September 2008) fn 6; *Társaság a Szabadságjogokért v Hungary* (n 36); 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>70</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>71</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>72</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>73</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>74</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>75</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>76</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>77</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.

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>78</sup>

### 3. 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>79</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>80</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>81</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 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 sense of normative confusion about the scope of treaty obligations, rather than affirming or strengthening the core of those obligations.

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 monopoly 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 (such as Access Now or the Stanford Center for Internet and Society), 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.

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<sup>78</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.

<sup>79</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>80</sup> n 7.

<sup>81</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.

Fourth, although the Joint Declarations have become a point of reference for the ECtHR, NGOs and occasionally regional human rights bodies, 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. 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>82</sup> A specific paragraph of the 2011 text concerning ‘mere conduit principle’<sup>83</sup> was also recalled in numerous Russian cases, though not to uphold freedom of expression.<sup>84</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 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>85</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>86</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>87</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

<sup>82</sup> *Ntsele 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>83</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>84</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 Leninsky 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.

<sup>85</sup> *Stoll v Switzerland* App no 69698/01 (Grand Chamber of the ECtHR, 10 December 2007) para 39.

<sup>86</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>87</sup> *ibid* para 162.



websites could never be justified, and in doing so relied on the 2011 Joint Declaration on freedom of expression and the Internet.<sup>88</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>89</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>90</sup>

Fifth and finally, the Joint Declarations have hitherto hardly attracted any attention from the media, even though the media is often addressed in their recommendations.<sup>91</sup> A rare example is a short article in the *Philippines Star* following the adoption of the 2017 Joint Declaration on "fake news", disinformation and propaganda.<sup>92</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>93</sup> Journalists also regularly cover official visits conducted by the individual mandate-holders on freedom of expression to states, such as the visit of the UN Special Rapporteur to Turkey in 2016.<sup>94</sup> Given that greater media coverage of the Joint Declarations could generate broader awareness and acceptance of their standards amongst the addressees of the texts, including the private sector, ARTICLE 19 and CLD should devote even greater time and resources on publicity campaigns to promote the texts in the immediate aftermath of their adoption.

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<sup>88</sup> *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012), fn 19.

<sup>89</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>90</sup> *Szabo and Vissy v Hungary* App no 37138/14 (ECtHR, 12 January 2016) at para 3 of the concurring opinion.

<sup>91</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>92</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 24 January 2019.

<sup>93</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 January 2019; 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 January 2019; 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 January 2019.

<sup>94</sup> '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\\_ye\\_insan\\_haklari\\_elestirisi.html#](http://www.cumhuriyet.com.tr/haber/dunya/865436/BM_den_Turkiye_ye_insan_haklari_elestirisi.html#)> accessed 24 January 2019; '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 24 January 2019; '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-kayedden-t%C3%BCrkiye-ele%C5%9Ftirisi/a-36443584](http://www.dw.com/tr/bm-%C3%B6zel-raport%C3%B6r%C3%BC-david-kayedden-t%C3%BCrkiye-ele%C5%9Ftirisi/a-36443584)> accessed 24 January 2019; 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 24 January 2019; '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 24 January 2019.

#### 4. 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 2004 Joint Declaration on access to information and the 2011 Joint Declaration on the Internet have been particularly influential in terms of their positive impact upon the judgments of the ECtHR. Yet this article 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. But these challenges may be addressed or mitigated by the two NGOs and other advocates of the Joint Declaration through various approaches, such as:

1. Continuing to 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 as soft law;
2. Considering the possibilities of opening up the drafting process to other organisations with particular expertise; through persistent reliance upon the texts in NGO advocacy briefs and submissions, before international human rights bodies and regional courts, but also before national courts and institutions;
3. Engaging in more concerted efforts to reach out to the media to publicise the texts. Such strategies could promote the value of the Joint Declarations to key actors – including judges, the media and the private sector – and increase the possibilities for greater compliance with international and regional human rights law.

The Joint Declarations' unique and innovative model of collaborative standard-setting could also potentially offer inspiration to actors in other fields – such as the rights of women, human rights defenders, migrants and indigenous peoples – where overlapping intergovernmental mechanisms of the UN, OAS and ACnHPR exist.<sup>95</sup> This article 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. 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 given that policy makers are struggling to respond in a consistent and principled way to difficult and pressing questions surrounding the scope of the responsibilities of Internet intermediaries,<sup>96</sup> particularly social media platforms, with respect to their role in the dissemination of disinformation, 'hate speech' and extremist content in particular.<sup>97</sup> As an existing and growing body of soft law,

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<sup>95</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.

<sup>96</sup> 11 May 2016 A/HRC/32/38; 30 March 2017 A/HRC/35/22; 6 April 2018, A/HRC/38/35.

<sup>97</sup> See at the European level: European Commission, Code of Conduct on Countering Illegal Hate Speech Online, 31 May 2016; Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, Official Journal L 328, 6.12.2008, 55 – 58 (the legal basis for the code); and European Commission, Recommendation on measures to effectively tackle illegal content online, 1 March 2018, C(2018)

however, the Joint Declarations' ultimate significance is in shoring up a sense of the relevancy, legitimacy and cohesiveness of international and regional systems on freedom of expression terms. This is an especially valuable function at this time, when the effectiveness of such systems is being undermined by governments,<sup>98</sup> and when the human right to freedom of expression is under overt and sustained attack across the world.<sup>99</sup>

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1177 final (which proposes that platforms should detect, remove and prevent the re-appearance of illegal content online, including 'hate speech'). At the national level, see: German Network Enforcement Act (NetzDG), 30 June 2017 (entered into force 1 October 2017) Federal Law Gazette 2017 I, Nr. 61, 3352.

<sup>98</sup> Julian Borger, 'US Quits UN Human Rights Council – "A Cesspool of Political Bias"' (*The Guardian*, 19 June 2018) [www.theguardian.com/world/2018/jun/19/us-quits-un-human-rights-council-cesspool-political-bias](http://www.theguardian.com/world/2018/jun/19/us-quits-un-human-rights-council-cesspool-political-bias)> accessed 24 January 2019.

<sup>99</sup> Jim Waterston, 'Threat to Journalists at Highest Level in 10 Years, Report Says' (*The Guardian*, 5 December 2018) < [www.theguardian.com/media/2018/dec/05/threat-journalists-highest-level-10-years-report](http://www.theguardian.com/media/2018/dec/05/threat-journalists-highest-level-10-years-report)> accessed 24 January 2019. See also: ARTICLE 19, *The Expression Agenda Report 2017 – 18* < [www.article19.org/xpa-18](http://www.article19.org/xpa-18)> accessed 24 January 2019; Committee to Protect Journalists, 'Attacks on the Press: the New Face of Censorship' (2017) < <https://cpj.org/attacks/>> accessed 24 January 2019; Freedom House, 'Freedom of the Net 2018' < <https://freedomhouse.org/report/freedom-net/freedom-net-2018>> 24 January 2019; Reporters Without Borders, *RSF Index 2018*, 'Hatred of journalism threatens democracies' in 2018 World Press Freedom Index <<https://rsf.org/en/ranking/2018>> accessed 24 January 2019.