Opportunities and Challenges of a Soft Law track to Economic and Social Rights – The Case of the Voluntary Guidelines on the Right to Food

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A. Introduction

Where a legal regime suffers from the stigma of ineffectiveness, the occurrence of soft law instruments can be an opportunity and a challenge to existing norms. Such is the case with economic and social rights: established legal norms, they have been widely disregarded due to their ambiguous wording, alleged impracticability, and institutional weaknesses. A great variety of soft law instruments have emerged to interact with socio-economic rights set out in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other binding sources. On the one hand, they are frequently sought to elaborate, operationalize, or otherwise complement existing norms to address limitations of the regime. On the other hand, soft law sometimes appears as an alternative rather than a supplement to standards in place, resulting in their gradual softening or replacement. In either role – complementing or challenging hard law – the impact of soft law instruments on existing legal standards can only be understood where they are not perceived as mere policy tools, but as capable of producing legal effects.

The Voluntary Guidelines on the Right to Food, a set of non-binding policy recommendations adopted at the Food and Agriculture Organisation (FAO) in 2004 to assist states in the implementation of the right to food, constitute a novel and *prima facie* promising approach in this perspective. The first document negotiated by states to interpret and operationalize an economic and social right, they are politically significant and address familiar weaknesses of the regime. Yet only if the Guidelines are understood as a soft law instrument that can considerably impact on the content and scope of established hard law, the legal challenges implicit where states in a sense renegotiate the substance and policy implications of already assumed obligations are fully grasped.

Examining the effects of soft law instruments on established but widely neglected economic and social rights is of both theoretical and practical relevance. From a theoretical perspective, analysing the impact of soft law on pre-existing hard law may add to the understanding of the complex interaction of binding and non-binding norms, which has

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received less attention in legal scholarship than the role of soft law as a pioneer to hard law. From a practical perspective, the persisting neglect of economic and social rights makes the search for alternative routes to advancing implementation a compelling task, and the approach taken by the Voluntary Guidelines constitutes a possible model for other socio-economic rights.

The first part of this article establishes the theoretical framework for subsequent deliberations, setting out the functions of soft law and its interactions with hard law. Since soft law instruments are capable of triggering compliance and producing legal effects, they can promote either spread or retrenchment of legalization. Two factors are identified as influential in determining the scope of such impact: the legitimacy or authority of a soft law instrument, and its relation to hard law in place.

In the second part, attention will turn to the realm of economic and social rights, where soft law instruments assume a particularly significant role in conjunction with otherwise ineffective legal norms. Drawing on the example of the right to food, it will be shown how soft law is instrumental in the clarification of conceptual understandings and the gradual strengthening of state support.

Finally, the Voluntary Guidelines on the Right to Food constitute a pertinent case study to highlight the opportunities and challenges of a soft law approach for economic and social rights. Assumptions and expectations as to their normative effects differ widely, but clarity over their potential impacts on the legal right to food is crucial to avoid the impression that such a novel approach could make voluntary what is already obligatory.

B. Soft Law and the Legal Challenges of Non-binding Norms

The proliferation of informal regulatory instruments can no longer be captured by recourse to the traditional sources of international law.[1] With view to the mounting complexity of the international legal order, the term "soft law" lends itself to circumscribe a seemingly "infinite variety" of forms of agreements emerging to regulate state and non-state behaviour.[2] The following part sets out preliminary theoretical considerations on the meaning and functions of soft law, focussing on its impact on pre-existing hard law standards.

1 See, for example, Dinah Shelton (ed.), Commitment and Compliance. The Role of non-binding Norms in the International Legal System. Oxford 2000; *Rüdiger Wolfrum,* Introduction, in: Rüdiger Wolfrum/ Volker Röben (eds.), Developments of International Law in Treaty Making, Berlin 2005; *Richard Baxter*, International Law in her "Infinite Variety". Int'l & Comp. L.Q. 29 (4) (1980), p. 566. In the following, "hard law" shall mean binding international legal norms according to the traditional sources of international law.

2 See *Baxter*, note 1, p. 566. For the argument here made, it suffices to concentrate on "public codes of conduct", i.e. soft law standards elaborated by states, states parties to a treaty, or international

I. Definition and Function of Soft Law

Soft law norms set out behavioural standards that are non-binding according to traditional modes of law-making. Nonetheless, they are capable of influencing state behaviour, i.e. "they attract compliance" and have certain legal effects.[3] They may be more or less specific in wording, specialist or programmatic, involving various degrees of coercion or monitoring of compliance. Such variations can be captured where soft law is understood, according to *Abbott* and *Snidal*, as a form of legalized institution that falls short on one of the three defining dimensions of legalization: obligation, precision, and delegation.[4] States make recourse to soft law where they seek to address an ever-growing number of transnational problems whose complexity, changing nature, and multiplicity of (non-state) actors involved appear to require more flexible and deformalized standard-setting.[5] In contrast to hard law norms, the negotiation process may be faster and less politicized for soft law instruments, which come with the advantage of relative flexibility to adapt to new developments. Non-binding norms are also politically attractive for governments who expect non-compliance and seek to avoid the cost of sanctions.[6] More generally, soft law is frequently chosen where states are still unwilling to enter into legally binding commitments, but nonetheless seek a means to express shared values or to create expectations of compliance. Where international legal norms exist to impose obligations on states, however, the function of subsequently adopted soft law changes. It can be utilized to fill gaps or resolve ambiguities in the text of hard law instruments that "proved to be ineffective", or act as a "fallback provision" for those not (yet) legally bound.[7]

organisations rather than private actors. *Jürgen Friedrich*, Codes of Conduct. in: Rüdiger Wolfrum (ed.), Max-Planck Encyclopedia of Public International Law, Oxford, forthcoming.

3 See *Jonathan Charney*, Commentary: Compliance with International Soft Law, in: Shelton, note 1, p. 116. Also: *Jan Klabbers*, The Redundancy of Soft Law, Nordic Journal of International Law 65 (1996), p. 168: "instruments that give rise to legal effects, but do not amount to real law"; John Kirton/ Michael Trebilcock (eds.), Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance, Burlington 2004, p. 22: "non-authoritatively coercive processes"; *Kal Raustiala*, Form and Substance in International Agreements, Am. J. Int'l L. 99 (2005), p. 590: soft law "influence[s] state behaviour and therefore possess some minimum indicia of international law".

4 *Kenneth Abbott/ Duncan Snidal*, Hard and Soft Law in International Governance, International Organization 54 (3) (2000), p. 422.

5 *Raustiala*, note 3, p. 591; *Andrew Guzman*, The design of international agreements, Eur. J. Int'l Law 16 (4) (2005), p. 591f.; *Friedrich*, note 2, at 36.

6 *Guzman*, note 5, p. 596.

7 *Francesco Sindico*, Soft law and the elusive Quest for Sustainable Global Governance, Leiden J. of Int'l L. 19 (2006), p. 832; *Shelton* in: Shelton, note 1, p. 9 and *Christine Chinkin*, Normative Development in the International Legal System, in: Shelton, note 1, p. 31.

The line between hard and soft law is often blurred, causing authors like *Shelton* to advise that soft and hard forms of legalization be considered as complementary rather than exclusive, as continuum rather than dichotomy.[8] But the coexistence and convergence of hard and soft norms poses a challenge to the international legal system. Some authors caution the introduction of "soft law" as an intermediate category between law and non-law because they are concerned that it might blur a clear concept of normativity in international law.[9] Certainly, the proliferation of soft norms that are not subject to international treaty law, and the according lack of rules on collision, interpretation and application, bears a challenge for the discipline.[10] Beyond questions of classification, however, there is a general unease that the acceptance of a culture of soft "promotionalism" or "voluntarism" as the bottom line will distract efforts to achieve or strengthen hard law standards.[11] Soft norms can lack legitimacy consequential to a deformalized process of standard-setting, and their capacity to produce legal security and predictability is limited. The often weak surveillance and enforcement mechanisms attached to it cause the apprehension that "soft law may promote compromise, or even compromised standards."[12]

In any case, soft legalization cannot be denied any capability of affecting "the incentives and behaviour of states" and triggering compliance.[13] Whereas empirical work on why states comply with non-binding norms is scarce, scholars put forward factors that influence compliance, i.e. the adherence by states to a norm in their behaviour. The perceived legitimacy of the norm-generating process and outcome are central, just as the link of a soft norm to existing treaty obligations may add to its authority.[14] Precision and clarity of soft norms, as opposed to ambiguity and open-endedness in wording, possibly increase

8 *Dinah Shelton*: Introduction, in: Shelton, note 1, p. 8, *Kirton/Trebilcock*, note 3, p. 12: "hard law and soft law may be more complementary than competitive, might also blend and overlap in a single regime, or combine separately to reinforce each other and fill gaps".

9 E.g. *Prosper Weil*, Towards Relative Normativity in International Law? Am. J Int'l L. 77 (1983), *Klabbers*, note 3, p. 168; *Raustiala*, note 3, p. 582.

10 *Hartmut Hillgenberger*, A Fresh Look at Soft Law, Eur. J. Int'l Law 10 (3) (1999), p. 515; *Oscar Schachter*, The Twilight Existence of nonbinding International Agreements, Am.J.Int'l.L. 71 (2) (1977), p. 302; *Klabbers*, note 3, p. 177.

11 *Philip Alston*, 'Core labour standards' and the transformation of the international labour rights regime, Eur. J. Int'l Law 15 (3) (2004), p. 458; *Sindico*, note 7, p. 835: "in some cases, soft law may be a step backwards rather than forwards."

12 *Kirton/Trebilcock*, Introduction, in: Kirton/Trebilcock, note 3, p. 6.

13 *Guzman*, note 5, p. 610.

14 E.g. *Sindico*, note 7, p. 839; *Francis Maupain*, ILO Recommendations and similar instruments, in: Shelton, note 1, p. 392. On the significance of a link to binding norms, see *Shelton* p. 14 and *Chinkin* p. 3, in: Shelton, note 1.

compliance.[15] Monitoring and enforcement mechanisms, and the linkage to a machinery of follow-up procedures and capacity-building programmes in the context of established international institutions, provide further incentives to act in accordance with soft law.[16] In sum, even where the distinction between soft law and traditional sources of international law is upheld, theoretical studies on compliance with nonbinding norms substantiate the view that soft standards can have considerable effects on state behaviour. These effects, together with the interaction of soft law norms with binding norms, may catalyse normative development and impact on pre-existing hard law standards that cover essentially the same subject matter as the subsequently agreed soft law.

II. The Impact of Soft Law on Pre-existing Hard Law

Soft standards are increasingly used in international treaty regimes, where they interact with and impact on treaty standards in various ways. As the wording of treaties and the meaning of particular provisions are often indeterminate, soft law takes on an important function in the clarification and interpretation of hard law. Soft law instruments can explicitly provide definitions and concepts as interpretative aid, or offer a framework for the legal discourse on the application of norms.[17] For example, resolutions adopted by the United Nations (UN) General Assembly have further elaborated the content of the UN Charter and provided an authoritative interpretation of certain articles. Commitments expressed in soft law instruments may qualify subsequent state practice under a treaty and draw attention to its potential interpretative effect.[18] Treaty obligations that are thus concretised can become more practicable and likely to attract compliance. However, a positive effect on compliance is to be expected mostly where the interpretative process and outcome are regarded as legitimate.

Where soft law is used to "provide detailed rules and standards required for implementation" of binding norms, the boundaries blur between mere interpretation and progressive normative development.[19] For instance, in international environmental law, soft

15 *Shelton* p. 15 and *Charney* p. 117 in: Shelton, note 1.

16 See *Friedrich*, note 2, at 31and 32.

17 *Ulrich Fastenrath*, Relative normativity in international law, Eur. J. Int'l .L. 4 (1993), p. 314: "[t]he importance of such informal instruments in the development of law *intra legem* has frequently been confirmed by judicial decisions and doctrine."

18 See *Tadeusz Gruchalla-Wesierski*, A framework for understanding "soft law", McGill L. J. 30 (1984), p. 61-65. On the interpretative function of subsequent state practice, see Vienna Convention on the Law of Treaties, Art. 31 para 3 (b).

19 *Alan Boyle*, Some reflections on the relationship of treaties and soft law, Int'l & Comp. L.Q. 48 (1999), p. 905. Also *Eibe Riedel,* Standards and sources. Farewell to the exclusivity of the sources

law instruments setting behavioural standards to be achieved by the parties in satisfying their obligations often complement framework conventions which are binding but open-ended in wording. Soft and hard standards blend into a normative regime wherein soft standards serve various functions, from offering guidance on interpretation, operationalizing abstract provisions and gap-filling, to preparing the ground for future legal developments. Soft law can allow for the concretization and advancement of treaty norms, e.g. where they could not be devised to encompass for all prospective circumstances.

Further, in the context of treaty law regimes or certain institutional settings, soft standards can become obligatory as a consequence of their interaction with hard law. Commitments that are adopted in form of resolutions or recommendations of international organisations may create certain legal obligations for member states, such as obligations of good faith and due diligence, or according to follow-up procedures foreseen in the statute.[20] Moreover, subsequently agreed soft law can have an effect on the accession to and status of existing treaties. As *Kahler* observed, legalization may "spread and harden or recede and soften over time" for various reasons, one being the availability of institutional substitutes.[21] Where soft law presents itself as an alternative rather than a complement to treaty standards, states not yet parties to a treaty may prefer to stay absent from the binding regime.[22] In turn, where voluntary compliance with soft law has reduced uncertainty over the estimated costs and advantages of choosing harder forms of legalization, non-parties may eventually decide to enter a treaty regime.

With regard to the domestic level, soft law may also facilitate the implementation of a hard law instrument. Treaty provisions that are vague and general are difficult to translate into domestic legislation. A soft law instrument providing behavioural guidelines suitable for practical implementation can thereby effectuate the incorporation of hard law into municipal law, in particular where it is equipped with an institutional machinery offering technical assistance for such purposes.[23] However, it is a matter of state discretion whether

triad in international law? Eur. J. Int'l Law 2 (1991), p. 83: "Standards may also be deployed to bridge gaps in the law conceptually, paving the way for future legal developments."

20 See *Friedrich*, note 2, at 20 and 22. *Gruchalla-Wesierski*, note 18, p. 52. Beyond such institutional settings, it is a matter of controversy to what extent the legal principle of good faith may be applied in relation to non-legal norms, and whether soft law may constitute the basis of *estoppel* (p. 62).

21 *Miles Kahler*, Conclusion: The causes and consequences of legalization, International Organization 54 (3) (2000), p. 680.

22 Such concern has been voiced by Philip Alston as regards the adoption of the Fundamental Principles and Rights at Work (ILO, 86th Session, Geneva 1998). *Alston,* note 11, p. 467.

23 Widespread incorporation into municipal law, and the concurrent harmonization of domestic legislations on a particular subject matter, could again generate or concretize a rule of customary

and how to implement soft law, and the positive impact on pre-existing hard law is hence not guaranteed.[24] Finally, where an international treaty is already incorporated into domestic legislation, judges may turn to a subsequently adopted soft law instruments as interpretative guide, or expression of international trends in normative development.[25]

Beyond treaty regimes, soft law plays a significant role in the detection, clarification, and development of rules of customary international law.[26] In the absence of authentic wording, state practice and *opinio juris* as constitutive elements of customary law must be determined by reference to various sources, including soft law.[27] The commitments expressed in non-binding agreements can provide evidence of *opinio juris*, pointing to the existence or emergence of a customary rule. Soft law is suitable for such purposes in that it is capable of reflecting widespread consensus in a more immediate manner than treaties may. However, the role it can play in this regard depends on its perceived legitimacy and authority, and its non-binding nature can also be expressly invoked by states to preclude the induction of *opinio juris.*[28] Where acts of states are in conformity with commitments expressed in a soft law instrument, they can more easily be qualified as state practice indicative of customary law, because the expectations of compliance created by soft law precludes the view that they may be fortuitous. Finally, the adoption of a soft law instrument contrary to an existing customary norm, though not capable of abrogating its legal status, could be seen as indicative of a change in *opinio juris* and gradually lead to doubts as to the status and content of that norm in its current form.

Beyond the specific impacts of soft law on established treaty or customary norms, most authors acknowledge its contribution to the future development of legal discourse in a respective field. Where states adopt a non-binding international agreement, mutual expectations, the future course of negotiations, and the process of interaction in what becomes a composite regime of hard and soft standards will not be the same as before.[29] The need to

law. See *Bernard Oxman*, The duty to respect generally agreed international standards, N.Y.U. J. Int'l L. & Pol. 24 (1991/92), p. 117.

24 "[T]he use of soft law in national law is purely subjective", and has accordingly been termed by *Gruchalla-Wesierski* a political, rather than a legal effect of soft law; note 18, p. 66.

25 For example, the South African constitutional court is held by means of constitutional provision 39 (1) b) to "consider international law" when interpreting the Bill of Rights.

26 Art. 38 (1) ICJ statute: "international custom, as evidence of a general practice accepted as law".

27 See *Boyle*, note 19, p. 903.

28 *Fastenrath*, note 17, p. 318. As indicated by Chinkin, where the choice of soft legal form is understood to be deliberate, soft law cannot be used as a base for the formulation of instant custom. *Christine Chinkin*: The challenge of soft law. Development and change in international law, Int'l & Comp. L.Q. 38 (1989), p. 857.

29 *Baxter*, note 3, p. 565.

analyse these developments is reinforced where it is understood that they might indicate the "likely direction in which formally legal obligations will develop."[30]

III. Summary – The Opportunities and Challenges of Soft Law

Acknowledging the potential legal effects of soft law – its capability to attract compliance, and the various ways in which it interacts with hard law – should be a prerequisite for judging its impact on established legal norms. A preclusion of "any effect on the specific obligations already undertaken" is thereby exposed as premature, while it remains advisable to neither consider soft law solely in its role as a precursor to hard law, nor to portray it as "necessarily softening hard law."[31]

Where they complement established binding norms, soft law instruments promise to provide a flexible, informal, and often less politicized tool to clarify, concretize, and operationalize hard law, ultimately rendering it more effective. Meanwhile, the challenge remains that the adoption of soft norms could constitute a step backwards rather than a positive contribution to the further development of commitments already undertaken. Rhetoric depicting soft law as a more adaptable, effective means of responding to problems of transnational concern, particularly in the complex socio-economic realm, could lead to a prioritization of soft legalization that does not pay tribute to the many advantages of hard legal norms.[32] As one author put it: "The focus away from direct legal enforcement softens what is arguably most distinctive about rights discourse: the character of rights claims as 'trumping' claims."[33]

Finally, the preceding observations suggest at least two factors that appear influential in determining significance and scope of soft law's impact on pre-existing hard law:

1. *Legitimacy and authority***.** Where the elaboration and adoption of a soft law agreement is considered legitimate by its addressees, levels of compliance increase and the agreement gains in political weight and capacity to produce legal effects. The perception as legitimate

30 *Alexandre Kiss*, Commentary and Conclusion, in: Shelton, note 1, p. 228.

31 See *Langille* with view to the 1998 ILO declaration on core labour principles: "the Declaration […] cannot have any effect on the specific obligations already undertaken by members". *Brian Langille*, Core labour rights – the true story (reply to Alston), Eur. J. Int'l L. 16(3) (2005), p. 454. Cautioning the opposite, *Fastenrath*, note 17, p. 324, and *Boyle*, note 19, p. 913.

32 E.g. an established process of law-making that is – at least theoretically – more legitimate; the attribution of responsibility under international law for violations; a stronger form of commitment by states; potentially stronger enforcement mechanisms; consideration of a lack of authority and sense of legal obligation attributed to soft law.

33 *Robert Wai*, Countering, branding, dealing: using economic and social rights in and around the international trade regime, Eur. J. Int'l L. 14 (1) (2003), p. 38.

is particularly important for soft law, which does not presuppose a formal, consent-based and participatory standard-setting process, and usually lacks monitoring and enforcement mechanisms. Legitimacy, i.e. the "justification of authority", could be induced, for instance, where soft law is elaborated in a participatory intergovernmental forum, or a properly authorised (and hence authoritative) body, to address concerns of legality and participation.[34] Legitimacy is not only process-based, but also important in relation to the content, objectives, and perceived quality of a regulatory instrument.

2. *Reference and congruence.* The relation of a subsequent soft law instrument to formally binding norms in place can be determined with view to first, the degree of reference it makes to established hard law, and second, the extent of congruence between soft and hard law instrument. Congruence can exist between the regulatory objectives in general, and the behavioural standards set out in specific rules respectively. Where the link is very close, soft law might constitute an authoritative interpretation, indicate subsequent state practice interpreting a treaty, or explicitly provide standards required for implementation. Further down the scale, it may still be more or less influential as an interpretative tool, or in the detection and development of customary law. Determining the relation of a soft law instrument to hard law along these lines can serve as a basis for understanding its role in relation to hard law: complementary, or rather substitutive.

C. Soft law in the Realm of Economic and Social Rights

The regime of economic and social rights suffers from a number of weaknesses in textual and institutional design that have contributed to its perception as ineffective. While socio-economic rights are no longer contested and neglected as two decades ago, even continuous lip service paid to the indivisibility, interdependence and interrelation of all human rights since the 1993 World Conference in Vienna cannot disguise the fact that they still suffer from widespread disregard and insufficient implementation.[35] On the basis of the theoretical framework established before, the following part analyses the impact of different kinds of soft law instruments in the realm of economic and social rights, and their contribution to overcoming the alleged weaknesses of the regime.

[34] On the concept of legitimacy, see *Daniel Bodanksy*, The Legitimacy of international governance: a coming challenge for international environmental law? Am. J. Int'l L. 93 (1999), p. 601.

[35] Vienna Declaration and Programme of action, UN-Doc. A/CONF.157/23, 12. July 1993.

I. Weaknesses of Economic and Social Rights

The debate about the nature and status of socio-economic rights, as opposed to civil and political rights, has accompanied the development of human rights law from the start, and it shall not be reproduced here. It suffices to give account of a number of commonly alleged weaknesses of socio-economic rights that are impedimental to their implementation, and that induce the perception of the regime as ineffective.

First, critics and proponents of economic and social rights alike have considered the lack of clarity and precision in wording with respect to the nature and extent of obligations as prejudicial to their realization.[36] Where ambiguity persists as to what constitutes a violation, how responsibility can be attributed, and what is the remedy, effective implementation of rights becomes difficult. In other words, clear provisions have been acknowledged as a major requirement for effective international legislation, inter alia in that they are a precondition for the measurement of compliance.[37] Specifying the nature of obligations becomes thus a principal policy challenge to achieving economic and social rights.[38]

Socio-economic rights also suffer from the stigma of impracticability, which is partly related to their aforementioned ambiguity in wording, as well as to the connotation of "positive" or "affirmative" rights. While a certain level of abstraction is inherent in the codification of (human) rights, socio-economic rights are considered process-based and frequently associated with complex policy adjustments and budget allocations, explaining the more urgent demand for practicable models for their realization. At the same time, the sensitive link to redistributional policies, considered to belong to the domain of national democratic decision-making, makes the provision of common benchmarks of achievement to overcome misconceptions on socio-economic rights a complicate task.[39]

Further, the institutional mechanisms for monitoring and enforcement under the ICESCR are considered weak, consisting principally of a system of state reporting, and no

[36] E.g. *Craig Scott/ Patrick Macklem*, Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution, U. Pa. L. Rev. 141 (1) (1992/93), p. 148; *Martin Scheinin*, Economic and social rights as legal rights, p. 910 in: Asbjørn Eide/ Catarina Krause/ Allan Rosas (eds.), Economic, Social and Cultural rights. A textbook. Dordrecht 1995.

[37] *Hanspeter Neuhold*, The inadequacy of law-making by international treaties: "soft law" as an alternative?, in: Wolfrum/ Röben, note 1, p. 43.

[38] *Shareen Hertel/ Lanse Minkler*, Economic rights: Conceptual, Measurement, and Policy Issues, Cambridge 2007, Chapter 1. The Limburg on the Implementation of the ICESCR (1987) and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) have considerably clarified the nature of obligations, but were drafted by international law experts and never officially endorsed by states.

[39] See, for example, *Philip Alston*, Making economic and social rights count: A strategy for the future, The Political Quarterly 68 (2) (1997), p. 192-193 or *Hertel/ Minkler*, note 38, p. 53,

complaints mechanism.[40] The Committee on Economic and Social Rights (CESCR), charged with monitoring the implementation of the Covenant, faces considerable challenges in fulfilling its mandate, partly built into its structure, partly linked to the general lack of support for socio-economic rights.[41] The absence of an individual complaints mechanism contributes to the perception that they are not justiciable, the means for providing technical assistance to support their progressive implementation are inadequate, and the contribution of UN specialised agencies as foreseen in the Covenant, e.g. to provide technical expertise and possibly more practical, policy-oriented advice on implementation, falls short of its potential.[42]

Taken together, the textual and institutional weaknesses of socio-economic rights have contributed to the fact that the culture of respect for economic and social rights is still embryonic. While recent developments, attributable inter alia to the end of the Cold War and the significant work done by the CESCR, give rise to cautious optimism, the commitment to the indivisibility of human rights "masks a deep and enduring disagreement over the proper status of economic, social and cultural rights."[43]

II. Soft law Instruments Elaborating Economic and Social Rights

To address the aforementioned limitations of economic and social rights – ambiguity, impracticality, institutional weaknesses and insufficient support – a variety of soft law instruments have been adopted both outside and within the context of treaty regimes, by state conferences, international organisations, or authorised bodies. With view to their

40 International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966, entry into force 3 January 1976.

41 CESCR, established through ECOSOC Res. 1985/17 (18.05.1985), first session in 1987. On challenges encountered, see *Kitty Arambulo*, Strengthening the supervision of the ICESCR: Theoretical and Procedural Aspects, Antwerpen 1999, p. 45.

42 See, in particular, Art. 18 and 22 ICESCR. Thereon, *Mary Dowell-Jones*, Contextualising the ICESCR: Assessing the economic deficit, Leiden/Boston 2004, p.167-169, acknowledging that "the expertise of specialized agencies could play an important role in the conceptual development of the covenant", but the "technicality and specialization of their work does not sit easily with the Committee's more general methodology". With view to the right to education, *Tomaševski*, notes the "absence of a link between normative and operational work", with the right not yet "mainstreamed throughout the work of the UN." *Katarina Tomaševski*, Has the right to education a future within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004. Hum. Rts. L. R. 5(2) (2005), p. 207.

43 Henry Steiner/ Philip Alston/ Ryan Goodman (eds.): International Human Rights in Context. Law, Politics, Morals. New York 2008, p. 263; consider also the restatement of the "reduced moral importance"- argument in *Fiona Robinson*, NGOs and the Advancement of Economic and Social Rights: Philosophical and Practical Controversies, International Relations 17 (1) (2003), p. 84.

diversity and number, *Shelton* suggests a distinction between primary soft law such as summit declarations, and secondary soft law like General Comments and concluding observations issued by the CESCR.[44] Hence, it is advisable to proceed by considering the impact on existing obligations of a sample of primary and secondary soft law instruments, taking examples from soft law relevant to the right to food.

The right to adequate food is set out in various legal documents, with the central provision contained in Article 11 (1) ICESCR as part of the right to an adequate standard of living, and in Article 11 (2), recognizing the "fundamental right" to be free from hunger.[45] In 1984, *Philip Alston* noted "few human rights have been endorsed with such frequency, unanimity or urgency as the right to food, yet probably no other human right has been as comprehensively and systematically violated on such a wide scale in recent decades."[46] While the statement still applies in fact, primary and secondary soft law documents have since interacted and fuelled a process of normative development that was particularly dynamic in the case of the right to food, but is otherwise typical for a number of other ICESCR rights.[47]

With view to primary soft law, the first milestone in the advancement of the right to food was the World Food Summit (WFS) in 1996, concluding with the adoption of the Rome Declaration that "reaffirmed the right of everyone to have access to safe and nutritious food."[48] World Summits frequently serve the objective of reiterating existing or pronouncing new standards, and concluding declarations or plans of action serve as an indica-

44 *Shelton* in: Shelton, note 1, p. 450. Primary soft law are non-binding instruments addressed to all states or states parties to an adopting organisation, proclaiming new norms or elaborate existing norms often considered as too vague and general. Secondary soft law includes documents emanated from institutions established on the basis of a treaty, clarifying or applying norms contained therein.

45 It has been argued that the "fundamental right" constitutes customary international law. Other relevant provisions include Art. 25 Universal Declaration on Human Rights (1948); Convention on Prevention and Punishment of the Crime of Genocide (1948), Art. 2; Convention relating to the Status of Refugees (1951), Art. 20 and 23; Convention on Elimination of All Forms of Discrimination Against Women (1979), Art. 12; Convention on the Right of Child (1989), Art. 24 and 27.

46 Quoted in *Sally-Anne Way*, The Role f the UN Human Rights Bodies in Promoting and Protecting the Right to Food, p. 206, in: Wenche Barth Eide/ Uwe Kracht (eds.): Food and Human Rights in Development: Legal and Institutional Dimension and Selected Topics, Vol. 1, Antwerpen 2005.

47 See *Arne Oshaug/ Wenche Barth Eide*, The Long Process of giving Content to an Economic, Social and Cultural Right: Twenty-five years with the Case of the Right to adequate Food. In: Morten Bergsmo (ed.): Human Rights and Criminal Justice for the Downtrodden. Essays in Honour of Asbjørn Eide. Leiden/Boston 2003.

48 Rome Declaration on World Food Security and World Food Summit Plan of Action, Rome 1996.

tor of normative trends, particularly in that they express widespread state consensus. Increased publicity and a solemn context of adoption contribute to their elevated status, often referred to when seeking to establish the customary law status of a norm.[49] The reiteration of the right on parts of states in the Rome Declaration paved the way for the incorporation of a rights-perspective into food security policies, an objective that human rights practitioners and nutritionists had been working to achieve since the early 1980s. The Declaration also stands out for advancing the conceptual development of the right by calling upon the relevant human rights treaty bodies and the OHCHR to "better define the right to food" and consider "formulating voluntary guidelines".[50] Such explicit references to existing obligations and advocacy for a normative approach in what is generally a policy-oriented setting are unusual. For instance, the Millennium Declaration adopted in 2000 deliberately avoids the use of rights-language in its commitment to achieving freedom from hunger.[51]

The WFS initiated significant legal developments in the realm of secondary soft law. In 1999, the CESCR adopted General Comment No. 12 that spells out the normative content of the right to food for state parties.[52] General Comments are drafted by experts within the CESCR and intend to provide guidance to states in preparing their periodic reports to the Committee. Clarifying the meaning of treaty provisions and thus facilitating the direct application of Covenant provisions by courts, they address the problems of textual ambiguity and impracticality of obligations.[53] Yet their potential depends on factors such as perceived quality, reaction of states, and subsequent developments based on the Comments. The tendency of the CESCR since the early 1990s to progressively develop rather than restate the law raised the question whether it engages in standard-setting that is no longer in conformity with the drafters' intentions, and is perceived by state parties as a mere "aca-

49 The context within which a soft law document is negotiated, accompanying statements by states, and the degree of support reflected in voting outcomes, should be considered to assess the *opinio juris* of states. *Alan Boyle/ Christine Chinkin*, The making of international law, Oxford 2007, p. 226.

50 Rome Declaration, objective 7.4. The follow-up World Food Summit: five years later (WFS *fyl*) in 2002 went even further, commissioning an intergovernmental working group to elaborate the Voluntary Guidelines.

51 United Nations Millennium Declaration, UN-Doc. A/RES/55/2 (18 September 2000).

52 General Comment No. 12, UN-Doc. E/C.12/1999/5 (12 May 1999).

53 For example, *Scheinin*, note 36, p. 55. And *Chinkin* in: Shelton, note 1, p. 33: "the Committee has amplified the minimalist terms of the Convention through its thoughtful and detailed General Comments", and the "impact of these measures has been to raise the level of obligation under the Covenant far beyond that originally envisaged."

demic exercise" that can be ignored.[54] The "inherently high degree of authority" derived from the fact that the Comments are drafted by a body of experts established under the treaty and independent of "individualistic interests" of states parties is thus diminished.[55]

Another source of secondary soft law and important contribution to the elaboration of socio-economic rights is the work of Special Rapporteurs. In 2001, the Commission on Human Rights appointed a Special Rapporteur on the Right to Food, *Jean Ziegler*, who was mandated to seek, receive and respond to information on all aspects of the right, establish cooperation with governments and international organisations, and identify emerging issues.[56] The work of Special Rapporteurs often skilfully combines a normative focus with a more practical approach and proximity to developments at the national level, and their annual, conceptual and country reports contribute to raising the overall profile of a right.[57] However, such potential is circumscribed by a chronic lack of resources and support for their work, just as their weight depends to a great extent on "substantive quality, expert competence and state acceptance".[58]

This short overview has paid no attention to resolutions adopted by, for example, the Human Rights Council or the Sub-Commission on the Promotion and Protection of Human Rights. Like the World Summit outcomes, albeit in a more routine and often specialized setting, they constantly call for action to achieve the right to food, address emerging issues and at times generate momentum to promote normative development.[59] Of further interest are other forms of secondary soft law emanating from the human rights treaty bodies, e.g.

54 See *Gudmundur Alfredsson*, Human Rights Commissions and Treaty Bodies in the UN-System, in: Wolfrum/ Röben, note 1, p. 561/ 564 and *Michael Dennis/ David Stewart*, Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?, Am. J. Int'l L. 98 (3) (2004), p. 495 ("revisionist views have not generally been accepted by states"). In this sense, the designation of General Comments as authoritative interpretation seems questionable.

55 Dennis and Stewart argue that the trajectory in CESR treaty interpretation made the task of bringing the US to ratify the Covenant even more difficult. See note 21 in *Dennis/ Stewart*.

56 Res. 2000/10 (17 April 2000); mandate at para 11. The Human Rights Council extended and elaborated further the mandate of the Special Rapporteur by its resolution 6/2 of 27 September 2007.

57 On the contribution of the Special Rapporteur on the right to food, see *Way*, note 46, p. 222-225.

58 See *Tomaševski*, note 42, p. 213 and *Alfredsson*, in: Wolfrum/ Röben, note 1, p. 563. Jean Ziegler, for example, has been criticized for some of his positions "not in accord with the current development paradigm", and denunciation of certain countries, in particular the US. See *Way,* note 46, p. 225.

59 Resolutions on the right to food adopted by Commission, Council, and General Assembly are available online: www2.ohchr.org/english/issues/food/overview.htm (accessed: 01/08/08).

reporting guidelines and concluding observations by the CESCR, all of which are influential in correcting misconceptions on content and implementation of socio-economic rights.

Finally, since human rights are gradually mainstreamed throughout the UN system, economic and social rights are no longer solely debated in Geneva's human rights bodies. The example of FAO's role in the advancement of the right to food is certainly striking, not just through the hosting of two World Summits, but through other, often persistent and less visible initiatives aimed at linking the (developmental) food security with the (normative) right to food agenda and establishing collaboration with human rights institutions.[60] Yet other Covenant rights are increasingly taken up by UN specialized agencies in what could be called a process of "outsourcing" human rights from Geneva, whereby more institutions become entrusted with contributing to the effective realization of rights. The soft law resolutions adopted in such technical rather than human rights forums promise to overcome a politicized debate and press ahead with implementation through a rights-based approach. On a more cautious note, "the quality control of people knowledgeable in the legal dimensions" is still necessary to accompany the translation of benchmarks established in hard law into practical policies.[61]

III. Summary – The Opportunities and Challenges of Soft Law for Economic and Social Rights

Hard law and soft law, primary and secondary, "interact to shape the content of obligations" in the realm of economic and social rights.[62] Primary soft law documents, where their content is not qualified by accompanying statements or dissenting votes, often enjoy legitimacy derived from state consent expressed in a participatory intergovernmental forum or institution. As they do not directly emanate from a treaty regime, however, the link to established norms is not always clear, and reference and congruence to hard law are worth examining when considering their potential legal effects. Where primary soft law deliberately omits reference to existing norms on the same subject matter, it could appear as alternative, not complement to established hard law. If soft law is used to restate norms already adopted in treaty form in a modified (incongruent) manner, its effects on pre-existing norms are uncertain. For instance, the 1998 Declaration on Fundamental Principles and Rights at Work, which compresses the core principles of the International Labour Organisation's

60 On FAO's contribution, see *Wenche Barth*, From Food Security to the Right to Food, note 46, at 67.

61 Such a lesson draws *Eide*, note 46, p. 86.

62 *Dinah Shelton*: Commentary and Conclusions, in: Shelton, note 1, p. 461.

numerous conventions into a soft law document reduced in content, but expanded in scope, has therefore been met with applause and scepticism.[63]

Secondary soft law can be said to play a complementary role for hard law by definition: it is the soft law emanating from institutions established by a treaty to apply or elaborate norms contained therein. Questions of congruence and reference are thus of lesser concern, unlike questions of legitimacy and authority. Whether states acknowledge a soft law instrument, e.g. a General Comment, as authoritative interpretation or application of the law influences its potential to effectively establish behavioural benchmarks and provide conceptual clarifications.[64] Still more, a former Special Rapporteur argued that "[d]enouncing abuses becomes possible only after a right has been properly defined by governments themselves."[65]

With view to the alleged weaknesses of economic and social rights, soft law documents have been instrumental in the gradual clarification of the nature and scope of obligations in general, and the content of certain rights in particular. They contribute to the gradual strengthening of support for socio-economic rights in what is a process of constant reaffirmation and amplification of commitments. Less advancement has been made at the level of implementation, not least because the explanations of the normative content of particular rights provided by authorised human rights experts contain only limited practical policy guidance. Meanwhile, a rights-perspective in the policies of UN specialized agencies has yet to take hold and proof itself as an opportunity to compensate for the regime's institutional weaknesses.

D. The Case of the Voluntary Guidelines on the Right to Food

The adoption of the Voluntary Guidelines on the Right to Food (VG) constitutes the most recent peak in the gradual process of advancing the understanding and implementation of

63 Philip Alston cautioned the acceptance of soft "promotionalism" as the bottom line, gradual downgrading of ILO's role through decentralization, and an "ethos of voluntarism in relation to implementation and enforcement" (*Alston*, note 11, p. 458). In favour: *Langille*, note 31.

64 Though of course, the authority owned by a treaty body that is charged by state parties to develop an understanding of their agreed human rights obligations puts the burden on dissenting states at least to argue against its interpretations. See *Eckart Klein*, Impact of treaty bodies on the international legal order, in: Wolfrum/ Röben, note 1, p. 572.

65 *Tomaševski*, note 42, p. 207 and elsewhere: "one ought to determine the extent to which governments are willing and able to meet their human rights obligations", *Katarina Tomaševski,* Indicators, note 36, p. 392.

the right through soft law.[66] Expectations as to their normative effect differ, however, widely. The VG state clearly that "[t]hey do not establish legally binding obligations for states or international organisations", and that no provision in them is "to be interpreted as amending, modifying or otherwise impairing rights and obligations under national and international law." Still, they have been greeted by experts as a "key tool to promote normative development", and as a "first step in a process of developing detailed binding international rules.[67]

The following part will examine the potential impact of the Guidelines on the right to food under international law, looking at the negotiating process and comparing the outcome document with established standards.

I. The Guidelines – Emergence of a "Human Rights-based Practical Tool"

At the World Food Summit: *five years later* in 2002, states had provided the mandate for an Intergovernmental Working Group (IGWG) to elaborate a set of voluntary guidelines on the right to food.[68] The IGWG, an ad hoc body open to all FAO and UN member states, met four times over the following two years to negotiate the envisaged tool, with relevant international organisations, NGOs and other stakeholders participating as observers.[69]

Although it was clear that the instrument should be non-binding, the drafting process proved extremely difficult.[70] States not parties to the ICESCR or generally sceptical about

66 Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security, adopted by the 127th Session of the FAO Council, Nov. 2004, para 9.

67 *Jean Ziegler/ Sally-Anne Way/ Christophe Golay*, The Voluntary Guidelines in the work of the UN Special Rapporteur on the right to food, SCN News 30 (2005), p. 20, and *Kerstin Mechlem*, The role of FAO and the intergovernmental process to develop voluntary guidelines for the right to adequate food, available online: www.fao.org/legal/rtf/statemts/mechlem-e.pdf (accessed 18.08.09), p. 8. A participant in the negotiations noted "such a document would by default shed new light on how the right to adequate food is interpreted." *Arne Oshaug*: Developing Voluntary Guidelines for Implementing the Right to adequate Food: Anatomy of an Intergovernmental Process, note 46, p. 278.

68 See World Food Summit: *fyl* Declaration, op. 10 requesting the FAO Council to establish the IGWG.

69 The IGWG was established as a subsidiary body to the Committee on World Food Security (CFS); for its mandate, see Report of the 123rd Session of the FAO Council, Rome (28 Oct. -1 Nov. 2002), CL 123/REP-Revised. 70-90 government delegations took part in the negotiations.

70 This signals that states were well aware of the fundamental difference of a rights-based approach as compared to conventional food security policies. On the difficult negotiations, see *Michael Windfuhr*, Civil society groups working on the right to adequate food. A User's guide to the Voluntary Guidelines, SCN News 30 (2005), p. 23; *Oshaug*, note 46, p. 278.

the binding nature of socio-economic rights were wary of additional commitments being created, while others feared that existing obligations might be watered down in the process.[71] Much of the value added of the Guidelines certainly derives from the fact that they were negotiated by *states.* But intergovernmental (standard-setting) negotiations often entail characteristic pitfalls – political horse-trading, need for compromise, and attempts to dilute levels of commitment – and there was a risk that the state-owned outcome would not keep up with existing standards in international law. [72]

Considerable challenges faced by the IGWG included that the ICESCR as most comprehensive source of the right to food was not universally ratified, opinions about nature and level of obligations differed greatly, and consensus was lacking on the structure, scope, and amount of detail of the Guidelines. Did General Comment No. 12 provide an authoritative interpretation (to be referred to in the VG), was the right justiciable (so that the VG should recommend legislative measures), and what did international obligations consist of (to be included in the VG)?

In the end, the outcome document was perceived as positive by the majority of participants and observers.[73] Whereas General Comment No. 12 provided a conceptual basis, the Guidelines "might increase state's commitment to the right to food, and create a sense of 'ownership'".[74] Whereas previous soft law elaborations had gone far to overcome textual ambiguity and imprecision, the Guidelines proceed further on the implementation level, proposing a range of concrete measures aimed at fulfilling the right.[75] And whereas UN specialized agencies had started to take up ICESCR rights in their work, the adoption of the Guidelines was described as the first attempt of human rights-mainstreaming dictated by

71 See *Isabella Rae/ Julian Thomas/ Margret Vidar*, History and Implications for FAO of the Guidelines on the Right to adequate Food, in: Wenche Barth Eide/ Uwe Kracht (eds.), Food and Human Rights in Development: Evolving issues and emerging applications, Vol. 2, Antwerpen 2007, p. 458, 467; or *Oshaug*, note 46, p. 269. Of the 187 FAO member states that adopted the VG in 2004, all were UN member states, but only 148 had ratified the ICESCR.

72 With General Comment No. 12 already in place, "developing another instrument with a largely overlapping content might seem questionable or even risky". *Mechlem*, note 67, p. 6.

73 For example, most civil society organisations "called the text 'no masterpiece of political will'", but were nonetheless "finally satisfied with the results". *Windfuhr*, note 70, p. 23.

74 *Mechlem*, note 67, p. 7. This contrast is emphasised in the VG, where it says in para. 4 that in General Comment No. 12, the CESCR provided "its experts' views on the progressive realization of the right to adequate food".

75 The comprehensive recommendations in the Guidelines range from general affirmations of good governance and the rule of law, to legal and institutional issues, economic governance and market systems, social policies and the vulnerable, nutritional aspects, and the international dimension.

member states.[76] The choice of such a specialized forum allowed the drafting process to benefit from FAO's technical expertise, brought together professionals from a wide range of disciplines, and thereby depoliticized the difficult negotiations to a certain extent.[77] Finally, the Right to Food Unit, established in the follow-up at FAO to assist member states in the implementation of the right using the Guidelines, provides an institutional setting for promotion, capacity building and technical assistance.[78]

Therefore, what has been achieved for the right to adequate food has been considered a "major breakthrough in the development of social, economic and cultural rights" as a whole.[79] A "human rights-based practical tool", the VG lay out a promising approach to bridge the gap between abstract legal obligations and policies required for implementation. The question as to their legal impact on existing obligations remains, however, open.

II. Impacts of the Soft Law Guidelines on the Legal Right to Food

The Guidelines constitute soft law: they establish a set of behavioural standards to guide states "in their implementation of the progressive realization of the right to adequate food", but not legally binding obligations.[80] However, their designation as policy tool should not lead to the fallacy that they are devoid of any (soft) legal effects on obligations under the right to food.

The level of obligations under the right to food varies for different FAO member states, and the Guidelines have accordingly different implications for each, depending on whether they (partly) restate or exceed its existing obligations. For example, all states are bound by

76 *Rae/ Thomas/ Vidar*, note 71, p. 458, 467.

77 E.g. *Barbara Ekwall*, Voluntary Guidelines on the Right to Food: The perspective of a development agency, SCN News 30 (2005), p. 28. FAO's role consisted in providing a secretariat, servicing the IGWG and offering technical assistance, e.g. by producing background reports. As a stakeholder in food and agricultural policies, FAO naturally had an interest in the outcome of the process, but did not go beyond expressing some positions, anxious to remain a neutral forum. *Margret Vidar*, The Right to Food in International Law, available online: http://www.fao.org/Legal/Rtf/statemts/vidar03.pdf (accessed 24.08.09), p. 15.

78 Right to Food Unit, see www.fao.org/righttofood/about_en.htm (accessed 14/08/08).

79 For example, *Ekwall*, note 77, p. 28.

80 VG, para 6 and 9. Though partly restating existing obligations, they do not form a "zebra law" that blends non-binding and binding substance, as was argued by *Sven Söllner*, The "Breakthrough" of the Right to Food: The Meaning of General Comment No. 12 and the Voluntary Guidelines for the interpretation of the Human Right to Food, Max Planck UNYB 11 (2007), p. 409. At most, they could be seen to create good faith obligations to respect for FAO member states, or for parties to the ICESCR that foresees a role for specialized agencies in promoting compliance.

customary law in relation to the right and general duties of international cooperation to promote human rights under the UN Charter, but each has not ratified the ICESCR. During the negotiation of the Guidelines, some states insisted on a clear demarcation between states parties and non-parties to the ICESCR, whereas others hoped that more vague formulations would allow creating additional obligations for non-parties.[81] The final document refers to Art. 25 UDHR and Art. 55 and 56 of the Charter to acknowledge that all states are subject to obligations under the right to food, but that obligations of parties to the Covenant are more comprehensive.[82]

How can the soft law Guidelines impact on obligations of parties to the Covenant? It has been noted by FAO experts and others that the understanding of the right to food adopted in the Guidelines can shape future interpretations of Art. 11 ICESCR, at the international level and potentially in domestic courts.[83] The definition contained in the Guidelines is authoritative in that it is authored by states. At the same time, General Comment No. 12 already offers a definition of the right to food addressed to (but not binding on) parties to the Covenant. If an interpretation provided by an authoritative treaty body such as the CESCR would stand against an interpretation unanimously adopted by state parties, it could be assumed that the latter was more compulsive, particularly as the CESCR is not formally mandated by states to deliver authoritative interpretations.

Such considerations are rather hypothetical in the case of the Guidelines, as the definition agreed upon by governments closely follows the one adopted by the CESCR.[84] However, it is striking that discrepancies appeared with regard to elements of the right that are usually most contested among states. For instance, the Guidelines recognize the "respect" and "protect" dimension of obligations, but there is no explicit recognition of the "fulfil" dimension, arguably the most demanding in the tripartite typology adopted by the

81 An information paper provided by FAO some months before the conclusion of the final draft suggests that the IGWG considers whether it wants to restate or interpret existing customary or treaty obligations, progressively develop the right to food as contained in the ICESCR, or reaffirm interpretations suggested in General Comment No. 12. FAO Information Paper, Implications of the Voluntary Guidelines for parties and non-parties to the ICESCR, Rome 2004, para 28.

82 VG, para 17.

83 E.g. FAO Information Paper, note 81, para 3; *Söllner*, note 80, p. 14. According to the Vienna Convention on the Law of Treaties, Art. 31 (3) b): "any subsequent agreement between parties regarding the interpretation of a treaty or application of its provisions" shall be taken into account when interpreting it.

84 Supported by *Ekwall*, note 77, p. 29 ("retains the major elements") or *Ziegler/Way/Golay*, note 67, p. 17. Meanwhile, an earlier draft of the Guidelines was considered by representatives from NGOs and UN human rights as a step backwards compared to the standard in existing documents.

CESCR.[85] The Guidelines focus clearly on policies required for progressive implementation, and do not encompass a notion of immediate or core obligations. Further, no agreement could be reached on the inclusion of a comprehensive guideline on international responsibilities going beyond a mere "do no harm"-commitment already pronounced in different contexts. The fact that recommendations concerning the international level had to be included in a separate section of the document conveys the impression that they are of somewhat secondary importance.[86] On the other hand, with the respective legal framework still rudimentary, the mere inclusion of international responsibilities in the document could be regarded as a success, and positively influence the future normative debate on international obligations under the ICESCR.[87]

Beyond providing an express definition agreed upon by states, the legal significance of the Guidelines rests in the elaboration of detailed measures required to implement the right to food. For states bound by the ICESCR, they constitute an "important orientation of national policies", and the CESCR already stated that it would refer to the Guidelines when examining state reports.[88] But does a state orientating its policies along the non-binding Guidelines automatically fulfil its obligations under the right to food? Members of the Right to Food Unit made clear that "[a]pplying the Guidelines does not equate to implementing the right to food".[89] As soon as states apply the Guidelines in a consistent and widespread manner amounting to subsequent state practice interpreting a treaty, deviations from hard law to either side could then signify an opportunity (i.e. supplementing) or challenge (i.e. diminishing) for existing standards.

Similar assumptions can be made regarding the development of customary law. Considered through the prism of theories on soft law, the Guidelines are quite likely to attract compliance: they are precise rather than ambiguous in wording, their recommendations are suitable for practical implementation, and they derive legitimacy from state-ownership and the link to established legal norms.[90] A consistent state practice could thus emerge from

85 The difference becomes apparent by comparing para. 17 of the VG with para. 15 of General Comment No. 12. Despite the omission of "fulfil", it must be recognized that major elements of the dimension are there, e.g. in the required establishment of safety nets. See *Eide/Kracht*, note 46, p. 156.

86 VG, Section III: International Measures, Actions and Commitments.

87 Argued by *Ziegler/Way/Golay*, note 67, p. 19; and *Federica Donati/ Margret Vidar*, International Legal Dimensions of the Right to Food, in George Kent (ed.), Global Obligations for the Right to Food, New York 2007.

88 *Windfuhr*, note 70, p. 23.

89 *Rae/ Thomas/ Vidar*, note 71, p. 487.

90 The Guidelines cite a number of "basic instruments" in the introduction: most prominently, Art. 25 UDHR, Art. 11 ICESCR, and Art. 55 and 56 of the Charter.

states' conduct in compliance with the Guidelines, a soft law document conceivable as expression of *opinio juris*. However, the fact that most states not only constantly reaffirmed the non-binding nature of the Guidelines, but were also determined to foreclose any norm-generating development, limits their potential to generate customary law reaching beyond existing standards.

Finally, for states not parties to the ICESCR, the level of legal obligations relating to the right to food is respectively lower.[91] Without the link to an established legal norm, the VG seem to carry comparatively less weight or authority. On the other hand, the soft law Guidelines take on a greater role in providing benchmarks where they had been missing, so that the recognition on parts of non-parties of an individual human right to adequate food is significant by itself. Also, while it is hard to foresee whether the Guidelines will contribute to making accession to the Covenant more palatable, they can certainly reduce misconceptions as to the nature of the right to food, and other rights contained therein.[92]

III. Summary and Outlook – The Opportunities and Challenges of the Guidelines

The opportunities of the Guidelines for the advancement of the right to food have been shown to be manifold. Possibly the most valuable contribution of the state-owned Guidelines consists in overcoming traditional misconceptions about the nature of the right, and its negative stigma of impracticability in particular.[93] The consequences are not just seen at the policy level, where effective implementation has improved and the right to food been placed squarely on FAO's food security agenda.[94] At the normative level, the standing of the ICESCR is likely to rise where perceptions of infeasibility are gradually being abolished, and monitoring is facilitated based on the benchmarks established in the Guidelines. Further, customary law could spread and harden, and the future legal discourse benefit from

91 Except for circumscribed provisions applicable in certain situations (e.g. armed conflict) or to specific groups of persons (e.g. women), obligations for non-parties derive from a rudimentary norm in customary law, and general provisions in the UN Charter.

92 E.g. a common misconception regarding the right to food is that it equates to a "right to be fed."

93 On misconceptions, see *Asbjørn Eide*, The Human Right to adequate Food and Freedom from Hunger. In: Right to Food in Theory and Practice, FAO Publication, Rome 1998, p. 3.

94 A member of the Right to Food Unit noted that it is often difficult to track the impact of the Guidelines on national policies as they mention the "right to food" rather than "the Guidelines". Nonetheless, there has been progress in introducing the right in national laws, which can partly be credited to the work of the Unit in facilitating implementation on the basis of the Guidelines.

renewed self-commitment of states and a close dialogue between the development and human rights community.[95]

Yet some words of caution are needed before labelling the soft law approach taken with the Guidelines as a model path for the realization of other Covenant rights. The challenge of such an approach consists in the fact that states in a sense renegotiate content and policy implications of existing binding obligations, albeit in a soft law document. With view to familiar pitfalls of intergovernmental negotiations, and states' often weak conceptual understanding paired with considerable scepticism concerning socio-economic rights, it was *prima facie* not clear whether the state-owned Guidelines would be grounded in, and not detract from existing obligations.[96] Such preliminary unease was fuelled by observations of the drafting process and outcome, displaying certain discrepancies between the standards set out in General Comment 12 and the Guidelines. Certainly, the finalized Guidelines are largely congruent in substance with hard law, and legal consequences assumedly more supportive than detrimental. Nonetheless, certain insufficiencies remain, causing human rights proponents to advise that the normative dimension of the right – its ability to empower and to establish accountability – should not be lost in the process, or that gaps in the Guidelines "could be filled by using [them] always within the context of well-established and internationally-accepted human rights norms and principles.[97]

To avoid the effect of making "voluntary what is already obligatory", perhaps the main lesson to be drawn from the Right to Food Guidelines is the need for clarity on the legal effects of such an instrument on established obligations.[98] In more practical terms and as *Wenche Barth Eide* remarked, "the quality control of people knowledgeable in the legal dimensions" is still necessary to assist in the translation of legal obligations into policy recommendations.[99]

95 Not only the Special Rapporteur and the CESCR announced they would refer to the Guidelines in monitoring, but also NGOs, e.g. FIAN (*Windfuhr*, note 70, p. 25).

96 As insisted on in advance, see FAO Information Paper, note 81, para 25.

97 *Carlos López*, Voluntary Guidelines on the right to food Overview of the process and outcome, SCN 30 (2005), p. 13. *López* notes further that "the most noticeable insufficiency concerns accountability", after earlier drafts of the VG that were stronger on accountability did not survive the negotiation phase. Similarly, *Oshaug*, note 46, p. 269.

98 As clarified by the OHCHR, CESCR, and others during the negotiations. See: Summary Report of Issues Raised during the Second Session of the IGWG, Rome 27-29 October 2003 (2nd Session), p. 2.

99 Note 62. Similarly *Oshaug/Eide*, note 47, p. 369 noting before negotiations started on the Guidelines: "Central in this new approach could be the opportunity to claim the right to adequate food and to hold states accountable for their obligations. The forces against are many. Both intellectual skill and practical diplomacy will continue to be needed from an alert right to food movement."

E. Conclusion

The opportunities and challenges resulting from the use of soft law as a tool to complement, develop, or supersede economic and social rights are as multifaceted as soft law itself. Having considered some of the ways in which non-binding and binding norms interact and blend into a normative regime wherein soft law instruments often elaborate and advance, and sometimes contest and replace socio-economic rights, it seems advisable to conclude on a suggestive, rather than judgemental note.

From a theoretical perspective, soft law has not yet received sufficient attention in its function as supplement rather than precursor or alternative to hard forms of legalisation. Relying on the general rule that a norm can only be modified by a norm of the same status, soft law may too easily be discounted as a tool of certainly political, but not legal effects. The potential of soft law to develop into hard law, or in other cases, its advantages over hard law in the first place, have thus been better understood than the significant ways in which soft law impacts on the substance and scope of obligations already undertaken.

From a practical perspective, such observations are of particular interest with view to economic and social rights. Partly due to discernible weaknesses, partly to regrettable misconceptions, the disparity in this field between established legal norms and political reality is so great that "hard" law appears alarmingly soft. The role of subsequently adopted soft law is thereby enhanced: it is strongly needed to tackle the limitations of the regime, but could also more easily accomplish its demise. As a result, it seems advisable to confront soft law with a reasonable combination of impartiality and caution, each time grounded in the cognition of its normative impact.

This is what has been attempted above with view to the Voluntary Guidelines. On a cautious note, it was considered necessary to question the extent of congruence between voluntarily agreed policy implications and legal obligations under the right to food. After all, having states negotiate the content of an already established right does not constitute a step forward in itself, and it is surprising that a greater effort has not been made to explore the normative impact of the Guidelines. Taking an impartial stand, it was nonetheless found that the complementing soft law track to advancing the right to food adopted by the Guidelines can serve as a model approach for other economic and social rights.

To conclude what has in parts been a rather legalistic enterprise, it must be remarked that acknowledging the challenge soft law may pose to international legal norms where it promotes the retrenchment rather than spread of legalization is not intended to constitute a value judgement on the preference of hard over soft law. Whereas the distinguishing normative dimension of socio-economic rights, their ability to establish accountability and empower, is worth defending, the many ways in which soft law has shown to usefully

complement binding standards alone speak against such a conclusion.[100] Where hard law remains ineffective, the emergence of soft law as an alternative, rather than complement to hard law might present a challenge to existing standards, but an opportunity for the regulatory objectives once sought and never achieved.

[100] As notes *Asbjørn Eide,* who's contribution to the advancement of the right to food remains unmatched: "What counts, in the end, is whether human rights are realized in practice […] There is a constant need to check the reality and to move forward with determination when it can be shown that reality falls short of the promises contained in the international instruments." Quoted by *Oshaug/Eide*, note 47, p. 365.