

## A framework law on the right to food — An international and South African perspective

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### Summary

*It is a well-known fact that millions of people all over the world do not have access to food on a daily basis or face hunger, malnutrition and starvation, despite the fact that their governments have ratified international treaties in which the right to food takes a prominent place. There is thus a big gap between rhetoric and reality, between theoretically having the right to food and enjoying it in practice. The present contribution deals with ways in which to realise the right to adequate food. It suggests the adoption of a framework law as a means of strengthening the implementation of the right to food at the domestic level. In the first part, the article discusses the right to adequate food from an international human rights perspective. It deals, amongst others, with the background, aim and contents of a national framework law on the right to food. In the second part, attention is given to the role of civil society in the promotion of a framework law. This is illustrated by using the example of South Africa, where the lack of availability and accessibility of food to the poor would justify the adoption of a framework law.*

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## 1 Introduction

The right to food has a solid basis in international human rights law. It is part of the right to an adequate standard of living which has been laid down in the Universal Declaration of Human Rights (Universal Declaration) (article 25), and in treaties such as the United Nations (UN) Convention on the Rights of the Child (article 27) and the African Charter on the Rights and Welfare of the Child (articles 14 and 20). However, the key international provision on the right to food is article 11 of the International Covenant on Economic, Social and Cultural Rights (CESCR). This treaty was concluded in 1966 and came into force in 1976.<sup>1</sup> Article 11(1) stipulates that state parties recognise the 'right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, housing, and to the continuous improvement of living conditions'. State parties shall take appropriate steps to ensure the realisation of this right. In addition, article 11(2) provides that state parties recognise the fundamental right of everyone to be free from hunger. Moreover, states shall take measures to improve methods of food production, conservation and distribution. Within the context of the UN, the meaning of the right to food, as contained in article 11, has been clarified. The first UN Special Rapporteur on the right to food has given substance and meaning to article 11 by identifying the nature of states' obligations (positive and negative obligations to respect, protect and fulfil).<sup>2</sup> In addition, the UN Committee on Economic, Social and Cultural Rights (Committee or Committee on ESCR), which monitors the implementation of CESCR by state parties, has given an authoritative interpretation of article 11 in its General Comment on the right to adequate food.<sup>3</sup> According to the Committee, 'the right to food is realised when every man, woman and child, alone or in community with others, has physical and economic access to adequate food or means for its procurement'.<sup>4</sup> A second UN Special Rapporteur on the right to food has further developed the definition of this right. He defines the right to food as<sup>5</sup>

<sup>1</sup> International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, entered into force 3 January 1976, 993 UNTS 3. 148 states have ratified or acceded to this treaty (status as at 2 November 2003). South Africa is not yet a state party to CESCR. For the reasons for the delay in the ratification process, see C Heyns & F Viljoen *The impact of the United Nations human rights treaties on the domestic level* (2002) 546.

<sup>2</sup> See below. See A Eide *The right to adequate food as a human right*, UN Doc E/CN4/Sub2/1987/23, and an update study on the right to food, UN Doc E/CN4/Sub2/1999/12.

<sup>3</sup> General Comment No 12 on the right to adequate food, UN Doc E/C12/1999/5.

<sup>4</sup> As above, para 6.

<sup>5</sup> J Ziegler Preliminary report of the Special Rapporteur of the UN Commission on Human Rights on the right to food UN Doc A/56/210 (2001) para 22.

the right to have regular, permanent and unobstructed access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free from anxiety.

In terms of entitlements and obligations, this international framework on the right to food must inspire and guide the implementation of this right at the domestic level.

## 2 Background of the proposal for a framework law

As part of the process of strengthening the implementation of the right to food, the Committee suggested in its General Comment on the right to adequate food that state parties to CESCR adopt a national strategy to ensure food and nutrition security for all, based on human rights principles, that defines the objectives, the formulation of policies and corresponding benchmarks.<sup>6</sup> The process of drawing up such a strategy requires compliance with the principles of accountability, transparency, people's participation, decentralisation of decision-making and implementation<sup>7</sup> and the protection of vulnerable groups.<sup>8</sup> Prerequisites for implementing a national strategy on the right to food include political will, organisational and managerial capacity and allocation and appropriate use of adequate resources.<sup>9</sup> Particular attention should be given to guaranteeing non-discrimination in access to food or resources for food production, such as guaranteeing equal access to land, property, credit and technology for women.<sup>10</sup> Part of this strategy is the need to have reliable information on the nature and extent of under-nourishment, the identification of those in need, their socio-economic and demographic characteristics (income, age, gender, ethnicity), the factors which place people at risk of suffering from starvation and the means people have to cope with these risks. Currently, work is being done, with the support of the UN Food and Agriculture Organisation (FAO), to develop standards for food security information systems, which should contribute to setting up Food Insecurity and Vulnerability Information Mapping Systems (FIVIMS) that could provide the necessary information on hunger and malnutrition.<sup>11</sup>

<sup>6</sup> Para 21.

<sup>7</sup> Decentralisation means allocation of responsibility and budgets for the delivery of services and reaching food-insecure population groups to local authorities. See Report on the Third Expert Consultation on the Right to Food UN Doc E/CN4/2001/148 para 28.

<sup>8</sup> n 3 above, para 23.

<sup>9</sup> n 7 above, para 20.

<sup>10</sup> n 3 above, para 26. See also art 14 UN Convention on the Elimination of All Forms of Discrimination Against Women.

<sup>11</sup> For more information, see <<http://www.fivims.net>> (accessed 31 May 2004).

Furthermore, the Committee is of the view that:<sup>12</sup>

States should consider the adoption of a framework law as a major instrument in the implementation of the national strategy concerning the right to food. The framework law should include provisions on its purpose; the targets or goals to be achieved and the time-frame to be set for the achievements of those targets; the means by which the purpose could be achieved described in broad terms, in particular the intended collaboration with civil society and the private sector and with international organisations; institutional responsibility for the process; and the national mechanisms for its monitoring, as well as possible recourse procedures.

From a general legal perspective, a framework law is meant to cover the whole spectrum of cross-sectoral issues related to a specific subject (such as food security) and to facilitate a more cohesive, co-ordinated and holistic approach to a specific issue. Such legislation lays down the basic legal principles and competences without a detailed codification. Usually it includes a declaration of objectives and policies, the establishment of relevant institutions and a definition of procedural principles. It may also lay down rules and principles for responsibility and accountability of actors involved.

Although a state party to CESCR must decide for itself which means are most appropriate to implement each of the substantive rights of the Covenant, it should be emphasised that national legislation may be desirable and sometimes indispensable.<sup>13</sup> Article 2(1) of CESCR explicitly mentions legislative measures as suitable means to realise the rights listed in the Covenant. Legislation may be indispensable to comply with the obligation to take steps towards the full realisation of rights, as provided for in article 2(1), and to eliminate discrimination *de jure* and *de facto*. Measures taken should produce results that are consistent with the discharge of a state party's obligations under the Covenant.<sup>14</sup> Part of such a national strategy could also be to repeal or amend laws incompatible with the right to adequate food, for example limitations on land ownership of women. The UN Special Rapporteur on the right to food has also given attention to the adoption of domestic legislation on the right to food.<sup>15</sup> He is of the view that every government should develop a national framework law conforming to the need to respect, protect and fulfil the right to food, thereby recognising obligations under international human rights law.<sup>16</sup>

<sup>12</sup> n 3 above, para 29.

<sup>13</sup> General Comment No 3 on the Nature of States Parties Obligations (1990), UN Doc E/1991/23 para 3.

<sup>14</sup> General Comment No 9 on the Domestic Application of the Covenant (1998), UN Doc E/C12/1998/24 para 5.

<sup>15</sup> Ziegler (n 5 above) paras 89–96, discussing the proposals made by FIAN International.

<sup>16</sup> As above, para 124.

### 3 The aims of a framework law

A limited number of countries explicitly recognise the right to adequate food in their constitutions, while a few other countries have a reference to the responsibility of the state for the provision of basic necessities of life, such as food, in their constitutions. In the majority of countries, however, the right to food is not part of the constitution.<sup>17</sup> It has been argued by some governments and commentators that a normative expression of the right to food in national legislation is not necessary, because promotion of the right to work and the right to social security is already sufficient to guarantee that people have access to food. In other words, if a person is employed, or is supported by a social security scheme, the threat of hunger should not arise. It has also been argued that recognising the right to food at the domestic level as a normative legal expression would bring to light the often stark contrast between government rhetoric and social reality, constituting a potential danger for governments. It could lead to social unrest and food riots when the masses face hunger and malnutrition. Seen from this perspective, governments do not feel a need to adopt the right to food as a legal norm in the domestic legal order.

This kind of reasoning fails to appreciate that providing for the right to food at the national legal level could serve the purpose of establishing and accentuating relationships between rights, such as the right to life, the right to water, the right to health, to work, land, social security and the right to food. It could show that guaranteeing access to food is a complex matter, underscoring the need for an integrated nutritional and health care-based approach that is mutually supportive. In other words, it would highlight the interdependence of rights and reflect a holistic human rights-based approach to food availability and accessibility issues. Legislation constitutes the foundation for more specific implementation measures. Legislation is required by the principle of the legality of administration by government and is a cornerstone of the rule of law. It is also of particular importance for the recognition and status of economic, social and cultural rights in domestic law. However, the adoption of a framework law should not be abused for window-dressing purposes: It should not be an excuse for a lack of more specific implementation measures. On the contrary, the law should inspire and stimulate the drawing up of implementation policies and measures.

A framework law would cover a broad spectrum of subjects, related directly or indirectly to the right to an adequate standard of living, of

<sup>17</sup> See the brief overview in the brochure *The right to food in theory and practice*, published by the FAO, Rome (1998) 40–45.

which access to food through production or access to the market is a central element. Another aim of a framework law is to harmonise existing, often fragmented, national regulations, policy and administrative measures on food availability and accessibility from an overall perspective in order to achieve coherence and transparency. A framework law could also serve as a formal safeguard against abrupt and sudden changes in governmental policy, because the law would stipulate the basic principles of the national food policy that may only be amended with the legislature's approval. It should contribute to the entrenchment of the right to food in the domestic legal order and help to strengthen the justiciability of the right to food in individual cases.

#### 4 The content of a framework law

Prior to drafting a framework law, an accurate and comprehensive analysis of the causes of hunger and malnutrition should be undertaken as part of a national strategy to ensure food availability and accessibility. A national framework law on the right to food would 'translate' the constitutional and international provision on the right to food into concrete targets, concepts and definitions, guidelines, powers and policies for implementation in terms of food availability and accessibility. Such a framework law would start by reaffirming the commitment to the right to food as a human right. It would make the right to food operational by identifying target groups, relevant sectoral issues, relevant governmental and non-governmental actors, minimum levels of nutrition and minimum income levels. As a basic requirement, a framework law should give effect to the *core content* of the right to food. The core content of a right should be understood as the minimum essential level without which a right loses its significance as a human right. According to the UN Committee on ESCR, the core content of the right to food includes<sup>18</sup>

the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other rights.

This definition of the core content has two key elements. The first one is the availability of food. This might be secured by either feeding oneself directly from productive land or other natural resources, or by well-functioning processing, distribution and market systems.<sup>19</sup> The second element is access to food, which may be interpreted further as economic access and physical access.<sup>20</sup> Economic access relates to

<sup>18</sup> n 3 above, para 8.

<sup>19</sup> As above, para 12.

<sup>20</sup> As above, para 13.

personal or household financial costs for the acquisition of food for an adequate diet. Physical access implies that adequate food must be accessible to everyone, including the most vulnerable groups.

The core content of the right to food gives rise to minimum core obligations for states.<sup>21</sup> As a minimum, states have a core obligation, regardless of their level of economic development, to ensure subsistence rights for all. This means an obligation on a state to secure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure freedom from hunger.

The normative content of the right to food should be translated into concrete targets and related benchmarks to be achieved on the national and local level. Time-frames for achieving targets should be set in the law. In addition, the law should give an overview of the measures to be used (subsidiary legislation, administrative decisions, income policy, agricultural and agrarian policy, financial grants, tax policy, etc). It is also crucial that the framework law creates a legal basis for the allocation of legal powers to central and local authorities. It is thus important that the law identifies duty holders at the central and local level. It could provide for co-ordination of responsibility for the implementation of the law by assigning responsibility to the different government agencies involved, and define overall responsibility for one particular organ that could perform an overarching function.<sup>22</sup> Political monitoring mechanisms (by parliament), to hold these duty holders accountable, and legal mechanisms (by administrative and/or judicial bodies) for review of their decisions, should be provided for. A framework law would also include the type and nature of government obligations that would give substance to implementation of the right to food (see below). This may also entail identifying the concrete steps to be taken immediately and progressively.

Furthermore, a framework law should take stock of existing sectoral legislation and policy on food related issues. This may be a very broad spectrum of sectoral areas, such as land reform legislation, land tenure regulations, agricultural policy, access to credit regulations and programmes, access to water regulations, employment policy, housing policy, environmental policy, regulations on food production, food marketing, food quality and food safety, food prices, wage policy and social safety nets. These regulations and policies should be scrutinised from a rights-based perspective. Possible conflicts and gaps should be

<sup>21</sup> n 13 above, para 10 and D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002).

<sup>22</sup> See M Vidar (Legal Officer FAO) 'Implementing the right to food achievements, shortcomings and challenges: Advantages of framework law' (February 2003) 11 at <<http://www.fao.org/Legal/rf/state-e.htm>> (accessed 31 March 2004).

identified with a view to harmonisation and filling these gaps. Such a stock-taking exercise should ideally identify the major structural obstacles, such as unequal access to land, an uneven income distribution, high food prices, marginalisation and vulnerability of specific social groups (landless peasants, agricultural workers, rural women, urban poor) or a lack of training opportunities in the agricultural sector. It could also highlight a lack of adequate implementation of existing legislation.

In order to strengthen the justiciability of the right to food in individual cases, it is important that the framework law provides for a reference to effective recourse procedures in case of alleged violations and which specifies those aspects of the right to food that are actionable under the law.<sup>23</sup> One may think of court proceedings, administrative review procedures, ombudspersons or national human rights institutions.<sup>24</sup> Finally, the framework law should include mechanisms for participation of civil society organisations in policy and planning on food-related issues.<sup>25</sup>

It should be recognised that a framework law on the right to food includes elements that are alien to an ordinary framework law that usually relates to the allocation of legal powers and responsibilities and lays down procedural principles and concepts. These alien aspects include such non-legal elements as benchmarks, time frames, policy goals and targets that are usually and traditionally part of policy frameworks instead of legal frameworks. The point here is that these elements need periodic review and adjustment in order to assess progress and provide for policy changes. This is problematic if these dynamic concepts are part of a static instrument, which a framework law actually is. This would require that a framework law should provide for a mechanism for periodic review of achievements and goals, but it is doubtful whether a text could be drafted that is flexible enough to deal with this. It may also be questioned whether a framework law is the proper instrument to deal with such policy issues. Finally, there is a risk that a framework law will develop into a complex legal construction, because it tries to deal with a great number of different matters in a comprehensive way in one single document. As a consequence, it may become obscure and unworkable in practice. However, we think that these disadvantages and uncertainties do not outweigh the advantages of a law that is meant to make the human right to food more tangible in the domestic legal order.

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<sup>23</sup> As above.

<sup>24</sup> See B von Tigerstrom 'Implementing economic, social and cultural rights: The role of national human rights institutions' in I Merali & V Oosterveld (eds) *Giving meaning to economics social and cultural rights* (2001) 139–159.

<sup>25</sup> See below.

## 5 The role of civil society in the promotion of a framework law on the right to food

### 5.1 A broad civil society coalition as a precondition<sup>26</sup>

For activists from non-governmental organisations (NGOs), but even more so for those belonging to mass-based organisations and social movements, international human rights law and its workings within the UN system are often far removed from their own level of work, irrespective of how strongly international human rights law legitimises national struggles for a better livelihood. Promoting a framework law can therefore only be embedded in a wider process of mobilisation towards the right to food within civil society, in which education about human rights in general, and the right to food in particular, plays a primordial role. The process leading towards a national framework law must be driven by civil society and involve a broad coalition of different actors and stakeholders — community and mass-based organisations, NGOs and academia. The objective of the effort is not only to get such a law through parliament, although the final support of the legislature is of course the *sine qua non* of the success of such a process. Also, large sectors of the administration must lend their support to the framework law in order to ensure its implementation once it is passed. Strategies on how to trigger the process may vary from country to country. In states in which the right to food has a strong legal status or is even constitutionally entrenched, people working for the right to food may find it easier to find representatives of NGOs (with a particular emphasis on community and mass-based organisations), activist-lawyers, politicians, representatives of state or semi-state institutions (such as national human rights commissions), and, most importantly, people affected by violations of the right to food, to form a national task force or steering group.

### 5.2 Four phases of civil society involvement

Such a task force would be able to secure broader societal and political acceptance of the objectives, bring together the necessary expertise and foster political acceptance of the idea of a framework law. The concrete tasks of the steering group would involve action on different levels: In the first phase, public awareness about the right to food and the pertinent issues surrounding it need to be raised through a broad campaign of sensitisation and *human rights mobilisation*. Factors such as the

<sup>26</sup> The authors rely on Rolf Künemann, General Secretary of FIAN International, who first developed the following four-phased model of civil society mobilisation in his FIAN International Working Paper 'From legislative framework to framework legislation' (2002).

distribution of agricultural land, access to social programmes, or the impact of a state's trade policies on the availability and price of staple foods within the country might serve as concrete examples around which civil society can be mobilised with the aim of heightening awareness about the right to food. Educational activities related to the right to food of people threatened by violations, workshops for decision-makers in civil society and the political sphere, rallies and protest actions against violations, a co-ordinated media strategy, intense lobbying with government authorities are all elements of a civil society strategy of mobilisation for the right to food, setting the stage for the second phase of the framework law process: *stock-taking*.

The actual task of shaping the contents of a framework law begins with a *stock-taking* exercise. During this phase, all social groups that have an interest in the implementation of the right to food are called upon to assess the realisation of this right in the country when measured against the three state obligations: to respect, to protect and to fulfil. The 'respect' and 'protect' obligations address violations of the right to food, such as the destruction of certain groups' ability to feed themselves, that have occurred, are occurring or are imminent. The violation that is being committed is committed either directly by a state organ or by a third party, for example a large landowner or a private company. The 'fulfil' obligation goes beyond that, by compelling the state to proactively design and implement laws, policies and programmes towards the eradication of hunger (for example effective agrarian reform, a basic income grant, enforcing minimum wage legislation), while ensuring the accessibility of any such programme to every vulnerable<sup>27</sup> individual. Accessibility entails an additional criterion — justiciability, the availability of redress in a court of law in the event of a *prima facie* violation of an individual's right to food. Accordingly, the following non-exhaustive list of criteria could be used as a yardstick in measuring the state's compliance with the obligations emanating from CESCR:<sup>28</sup>

Obligation to *respect*:

- the prohibition of forced evictions of vulnerable groups from their lands, homes, fishing-grounds;
- mechanisms for compensation in cases where forced evictions have taken place;

<sup>27</sup> 'Vulnerable' refers to individuals and groups of individuals whose right to food is particularly prone to violations due to their legally, socially and economically insecure position. Examples of vulnerable people are small-holders, landless people, farm workers, day labourers. Examples of cross-cutting categories are gender, ethnicity, caste and geographical isolation.

<sup>28</sup> The authors thank Martin Wolpold-Bosien, Central America & Mexico Coordinator of FIAN International for providing many of the elements of the list of criteria.

- the establishment of transparent, fair and reasonable procedures for state appropriation of land or water resources;
- the revision of all forms of discrimination of vulnerable groups in legislation and budgetary policies.

Obligation to *protect*:

- creating mechanisms for the protection of vulnerable groups against evictions from their bases of subsistence by third parties;
- creating mechanisms of sanction and compensation for evictions already effected;
- implementing the security of land tenure and other productive resources in accordance with cultural preferences such as communal use or ownership;
- effective protection of workers' rights and enforcement of minimum wage legislation;
- effective protection of women against discriminatory practices and institutional structures at the workplace and as regards the ownership and use of productive resources;
- guaranteeing indigenous communities their traditional rights of ownership, use and access to their natural and productive resources;
- guaranteeing vulnerable and disadvantaged ethnic groups access to, use and ownership of natural and productive resources.

Obligation to *fulfil*:

- identification of vulnerable groups and establishing the causes of their vulnerability;
- ensuring the long-term application and enforcement of legislation for a minimum wage which covers the basic food basket;
- enforcing the payment of a basic income grant to every citizen, and vulnerable groups in particular, irrespective of his or her employment status;
- enforcing legislation that guarantees the maximum use of available resources to improve access to productive resources (for example through agrarian reform) of social groups affected by malnutrition (for example the landless rural population);
- applying social security legislation;
- ensuring the application of legislation that guarantees food aid or other direct material support to groups threatened by or suffering from malnutrition and hunger during food emergencies.

Finally, an essential part of any framework law should deal with the modalities of progressive realisation — the establishment of concrete steps to achieve coherence in national legislation with the requirements of the obligations resulting from the right to food.

During the *legislative process* the third phase of mobilising civil society sets in. The legislative process begins with the formulation of a draft law

on the basis of the stock-taking exercise. Once again, a broad coalition of civil society organisations, especially community based organisations and those representing vulnerable sections of society, should participate in the process by scrutinising draft versions of the bill before they are tabled, by educating the public about how the framework law would give more latitude to exercising one's right to food, and, most importantly, by exerting constant pressure on the legislature to pass the bill in due course.

Once the bill has been passed, a fourth phase sets in. During this phase, civil society is called upon to *monitor its application* — a phase in which the pressure on every level of the executive and judiciary (national, regional, and local levels) needs to be sustained. Firstly, the institutional arrangements that have been created by the framework law need to be tested against the real-life situation as to their actual ability to guarantee long-term accountability, transparency and people's participation. Secondly, weaknesses of the substantive and procedural provisions of the framework law might transpire soon after its coming into effect and would need to be remedied through a constructive engagement between civil society and the state. For example, such an engagement would demand the creation of precedents by litigating right to food cases to do justice to people whose right to food had been violated. In this way, the effectiveness of the protection guaranteed by legislation created through the framework law is tested. In addition, periodic assessment by NGOs, possibly co-ordinated by the task force mentioned above, of the actual impact of such legislation on the right to food on vulnerable groups, could underline the necessity of amending subsidiary legislation and the framework law itself. As can be seen, the drafting, application and implementation of a framework law demand permanent and long-term monitoring and vigilance by all sectors of civil society.

## 6 The right to food in South Africa

In South Africa the right to food is entrenched in several sections of the Bill of Rights in the Constitution,<sup>29</sup> not surprisingly, given the comprehensiveness of the catalogue of rights contained in the Constitution, and the references in it to international human rights law.<sup>30</sup> In fact, the wording of section 27, the principal section dealing with the right to

<sup>29</sup> Sections 27 & 28 Constitution of the Republic of South Africa Act 108 of 1996.

<sup>30</sup> South Africa is not yet a state party to CESCR. However, according to sec 39(1)(b) of the Constitution, a South African court must consider international law when interpreting the Bill of Rights.

food, mirrors that of article 11 of CESCR.<sup>31</sup> According to section 7(2) of the Constitution, the South African state must respect, protect, promote and fulfil the rights contained in the Bill of Rights.

The right to food is of increasing importance due to a widespread and growing feeling of discontent amongst the South African poor that the end of the racist apartheid regime in 1994 has not ushered in a new era of peace and prosperity for the African masses. In fact, the extent of poverty, malnutrition and hunger has reached alarming proportions.<sup>32</sup> In particular, the daunting task of rectifying the massive dispossession of Africans during a century of land evictions and forced removals has proven to be a failure. The land reform policy, while not being the only element of the ANC programme aimed at empowering the African people, certainly has the strongest symbolical value of the reform programme of the ANC. Yet, of the targeted 30% announced by the first democratically elected government in the history of South Africa, less than 1,2% of farm land currently used for commercial agriculture was redistributed or restituted to black South Africans from 1994 to 2001.<sup>33</sup> Some 14 million rural Africans are still crowded into the infertile badlands of South Africa, the former homelands, while some 60 000 white commercial farmers own over 80% of the prime agricultural land.<sup>34</sup> Against such a background, the right to food is emerging as a powerful legal concept capable of lending legitimacy to the gathering call for an effective solution to the land question that will guarantee Africans lasting access to their lands.

Other policy areas show similar deficiencies in dealing with destitution and hunger. South Africa has a social security system that is extensive by the standards of developing countries. However, a high percentage of those qualifying for cover does not access social security payments. The majority of these are the poorest of the poor, particularly those residing in the rural areas — exactly those vulnerable groups that

<sup>31</sup> Section 27(1)(b) reads: 'Everyone has the right to have access to sufficient food and water.' Section 27(2) stipulates that '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.

<sup>32</sup> Between 45% and 55% of South Africans are estimated to be poor, while 70% of rural South Africans live in poverty; see Aliber 'Chronic poverty in South Africa' (2003) 31(3) *World Development*. Additionally, ethnic inequality has risen since the end of apartheid: The average income of white South Africans has grown from four times in 1995 to six times that of black South Africans in 2000. Within the same period, the number of people below the poverty line also grew substantially (Department of Statistics South Africa, 2002). In 1994, 39% of the population could not meet the daily energy requirement of 2000 calories per day (Project for Statistics on Living Standards and Development, South African Labour and Development Research Unit). Given the growth of poverty, this figure should be higher by now.

<sup>33</sup> South African Department of Land Affairs (2002).

<sup>34</sup> Sustainable livelihoods in Southern Africa (2001) *Research Briefing 1 'The politics of land reform in Southern Africa'*.

suffer most from hunger and malnutrition. A combination of factors is the cause of this, some of which are the lack of money for transport to payment points, geographical isolation due to spatial planning inherited from the apartheid era, organisational inefficiencies in the payment system and presumptuousness and arbitrariness by civil servants in means testing and disbursement.<sup>35</sup> The failings of the system were a major impetus for the formation of a civil society coalition in favour of a universal Basic Income Grant, the BIG campaign.<sup>36</sup> Under the BIG scheme, a sum of R100 (\$15) per month would be paid to every South African, irrespective of his or her employment status, age or income, while payments to salary earners above a certain threshold would be recouped through taxation. Proponents of the scheme argue that it would immediately alleviate the poverty of the poorest quartile and significantly improve the food situation of the most vulnerable groups. Given the poor delivery of the existing social security system based on means testing, the BIG campaign has considerable support throughout South African civil society.<sup>37</sup>

The situation is equally gloomy with regard to the application of minimum wage legislation. Although collective bargaining mechanisms constitute an important element of the post-apartheid political set-up and have been given effect through legislation, agreements struck at the negotiation table are often not adhered to by employers. This holds true particularly for the commercial agriculture sector. The five million strong, nearly exclusively African army of agricultural workers is arguably the poorest and most deprived segment of the South African working class. The owners of large commercial farms are notorious for their total disregard for workers' rights and their use of oppression, intimidation, violence and illegal evictions in subduing the workforce and preventing unionisation — regardless of the existence of laws destined to protect farm workers against such human rights abuses.<sup>38</sup>

<sup>35</sup> See the final report of the Committee of Inquiry into a Comprehensive Social System for South Africa (2002), the so-called 'Taylor Committee', which outlines some of the inadequacies mentioned above.

<sup>36</sup> In fact, one of the findings of the Taylor Committee was that a basic income grant would be an effective means of reducing destitution and poverty.

<sup>37</sup> More information on the BIG campaign can be obtained at <<http://www.Blacksash.org.za>> (accessed 31 May 2004).

<sup>38</sup> The Inquiry into Human Rights Violations in Farming Communities (2003) by the South African Human Rights Commission (<<http://www.sahrc.org.za>>) documents the extent of these practices.

## 7 Towards a framework law in South Africa

The deficiencies described above attest to the peculiar South African combination of a progressive constitutional text that entrenches the right to food, a Constitutional Court that has tended towards a constructive interpretation of socio-economic rights,<sup>39</sup> and the existence of social programmes with a potentially positive impact on the food situation, on the one hand, and the near total lack of actual, effective availability of these dispositions for those affected daily by hunger and malnutrition, on the other. The lack of coherence in legislation and policies with an impact on the food situation, the fragmentation, poor implementation and inadequacy of existing programmes and measures, their inaccessibility to vulnerable groups, who should be the prime beneficiaries — these are factors that make a strong case for a framework law as an additional legal *and* political commitment to the implementation of the right to food in the country. It should be recalled that the South African Constitutional Court endorsed the notion of framework legislation as part of a comprehensive and reasonable programme to implement socio-economic rights in the *Grootboom* case.<sup>40</sup> The Court said that national framework legislation may be required to meet obligations under section 26 of the Constitution. In the *TAC* case, the Constitutional Court restated the progressive realisation obligation by noting that '[t]he state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society'.<sup>41</sup> With regard to the South African perspective, we think a framework law is necessary to comply with the requirement of comprehensive and reasonable measures as interpreted by the Court. In this respect, the case law of the Court is more compelling than the persuasive nature of the recommendations of the UN Committee.

South African civil society is gradually beginning to develop awareness for the significance of the strong constitutional position of the right to food as a justiciable, individual entitlement. So far, the term 'food security' has been dominating both the language of government and of civil society when discussing solutions to hunger and malnutrition in South Africa. 'Food security' simply implies the general 'availability' of food in a given region, country or household. But the notion of 'food security' does not confer rights on individuals with the corresponding obligation of states to guarantee every vulnerable citizen access to the

<sup>39</sup> In the well-known *Grootboom* case on housing rights, see *The Government of the Republic of South Africa & Others v Grootboom & Others* 2001 1 SA 46; 2000 11 BCLR 1169 (CC).

<sup>40</sup> *Grootboom* judgment, para 40.

<sup>41</sup> *Minister of Health v Treatment Action Campaign & Others (No 2)* 2002 5 SA 721; 2002 10 BCLR 1033 (CC).

means to feed herself and her family.<sup>42</sup> It is therefore a term that can serve to distract from the rights approach to the struggle against hunger, hence its popularity in official discourse. Nevertheless, sectors of the South African state apparatus are well aware of the magnitude of the hunger problem and government has been planning to propose a 'Draft Food Security Bill' to parliament for quite some time now.<sup>43</sup>

The well-intentioned bill, which was drafted at the behest of the Ministry of Agriculture, exemplifies the trappings of policies and legislative measures intended to combat hunger that have been shaped uniquely within the state apparatus without the participation of civil society. Essentially, the draft bill limits itself to creating three government appointed institutions with advisory, monitoring and managerial responsibility for 'food security implementation and management plans' as well as outlining the institutional procedures of co-operation between different government departments and delineating competences. These food security plans consist in policies, the details of which are to be elaborated by the relevant government departments, aimed at achieving 'food security'. The draft bill therefore falls short of the purpose of a framework law, the central elements of which are, on the one hand, the scrutiny of existing legislation with regard to its compliance with the respect-, protect- and fulfilment-bound obligations of the South African state and if found to be in breach, the repealing thereof, and, on the other hand, a commitment to the drafting of additional legislation to further the implementation of the right to food, all of which within clearly set time frames.

Beyond that, any institutionalised process of consultation of civil society is conspicuously absent from the draft bill. Knowledge is superficial about the draft bill, even within sectors of civil society directly involved in work linked to the right to food. If the bill is one day passed in its current form, it is likely that the institutions created by it are doomed to play an insignificant role within the labyrinth of overlapping competences of government offices, whose functions are opaque to all but the most informed outsider. Since there has been little movement in the legislative process on the 'Food Security Bill' since it was first proposed, it must, however, be suspected that there is little political will to even pass this piece of legislation, which already leaves much to be desired.<sup>44</sup>

<sup>42</sup> See R Künnemann 'Food security — Evading the human right to food?' (2002/01) *Hungry for what is right*, FIAN Magazine 3–4.

<sup>43</sup> The bill has not yet been published in the *Government Gazette* and the Ministry of Agriculture, which commissioned its drafting, has been reluctant to disclose information about when it will be tabled.

<sup>44</sup> Compare the Report of a Seminar on *Critical Issues in the Realisation of the Right to Food in South Africa*, hosted by the Socio-Economic Rights Project, Community Law Centre, University of the Western Cape, 14 November 2003 7; available at <[http://www.communitylawcentre.org.za/docs\\_2003/foodseminar.doc](http://www.communitylawcentre.org.za/docs_2003/foodseminar.doc)> (accessed 31 March 2004).

## 8 Concluding remarks

In March 2003, a seminar organised by several civil society organisations took place in Johannesburg, South Africa, in which the concept of a framework law for South Africa was explored.<sup>45</sup> During the seminar, it transpired that any future framework law would have to result from a broad consultation within civil society and constructive debate and engagement with the state and be grounded in a bottom-to-top approach to the strengthening of the right to food. It would also have to be embedded in a political campaign involving diverse forms of action, ranging from constitutional litigation in an exemplary right to food case to mass mobilisation towards an effective agrarian reform. So far, the obligations of the South African state under the right to food have mainly been of interest to South African academic jurists. Yet, the Treatment Action Campaign (TAC), which was launched in 1998 and has since then been mobilising for greater access to HIV treatment, has already set standards with respect to what a concerted and well-organised campaign for the implementation of a Constitutional right can achieve on the ground.

A national right to food campaign might also go a long way in disseminating knowledge about the right to food amongst vulnerable groups and the general public. Under its umbrella, it could unite sections of civil society with an interest in the implementation of the right to food and channel otherwise fragmented activities towards clearly determined objectives. In such a context, the need to debate and spell out the contents of a framework law might be useful in structuring demands and directing the strategies of a broad civil society campaign for the right to food. In fact, such a campaign appears to be necessary on the path to a better implementation of socio-economic rights. With the deficiencies regarding the realisation of socio-economic rights that have been outlined above, South Africa is no different from other states with an extensive and far-reaching body of national human rights law. However, the disparity between the 'the most admirable constitution in the history of the world'<sup>46</sup> and an increasingly harsh reality for common South Africans is probably as wide as it can get. The limitations of exclusive lobbying for new legal instruments in the face of inertia indicate that civil society and popular mobilisation remain the most important means to move the state apparatus into action. Such mobilisation could take place within a right to food campaign, in which the call for a framework law would play an important role.

<sup>45</sup> The seminar entitled *Implementing the Right to Food in South Africa — Towards a Framework Law on the Right to Food* was organised by FIAN International in co-operation with the Black Sash, NALEDI, NKUZI, NLC, SAHRC and TRALSO, 7–8 March 2003.

<sup>46</sup> Quote from Cass Sunstein, a US constitutional lawyer who was involved in the South African Constitution-making, in *Designing democracy — What constitutions do* (2001).