

## Unpacking the Debate on Social Protection Floors

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## Abstract

Social protection policies have been adopted by numerous international actors and are embedded in a wide array of policy and legislative instruments. Conceptually, social protection is ambiguous. This is also true of its different embodiments, such as the concept of vulnerability, and the idea of protection floors. This article looks at social protection floors as manifested in a human rights-based approach and in the context of the International Monetary Fund (IMF). The article situates protection floors in the protection of socio-economic rights, and uses that regime as a reference point for examining the materialization of protection floors in IMF policy-making. Against this background, this article revisits two ongoing debates around social protection: the dichotomy between universalism and targeting, and the capacity to induce change. The article calls for a more nuanced debate on protection floors.

## A. Introduction

Around 50 per cent of the world's population lives without any social protection.<sup>1</sup> At the same time, informality persists in emerging markets, and the changing nature of work is challenging traditional social protection schemes in advanced economies.<sup>2</sup> For good reason, therefore, social protection is high on the agenda of international actors ranging from the human rights sphere to international financial/economic organizations.

Commonly social protection refers to policies and actions building resilience and a capacity to cope for the poor and vulnerable. However, with social protection manifested as both an economic question as well as a question of human rights, approaches to social protection vary across international regimes. Social protection and its various embodiments, such as protection of vulnerable groups, are conceptually ambiguous and substantively contested.<sup>3</sup> One of the issues where this contestation manifests itself, concerns the question of protection floors.

As a question of human rights, the essence of social protection is captured in the right to social security. As a consequence, the idea of protection floors becomes an embodiment of the idea of a minimum core / essential level of socio-economic protection. As the bedrock of socio-economic rights, this connection raises high expectations also concerning the realization of protection floors. As the Special Rapporteur on extreme poverty and human rights has noted, controversy reigns at the international level especially in terms of whether protection floors should be seen as a matter of human rights, and whether such floors should be universal and unconditional.<sup>4</sup> This controversy also extends to the way in which core principles such as *universality* should be defined. Universal social protection for specific (vulnerable) groups has been noted to be an oxymoron, reflecting the confused State of the debate.<sup>5</sup>

<sup>1</sup> UNICEF, UNDP, UNHCR, ILO, 'Joint Fund Window for Social Protection Floors: A pooled financing mechanism to implement social protection floors, including in fragile and crisis conflicts, and realize Sustainable Development Goal 1.3' (2018), 3.

<sup>2</sup> World Bank, 'World Development Report 2019: The Changing Nature of Work' (2018); M. Rutkowski, 'Reimagining Social Protection', 55 *Finance & Development* (2018) 4, 10.

<sup>3</sup> See e.g. K. Brown, K. Ecclestone & N. Emmel, 'The Many Faces of Vulnerability', 16 *Social Policy & Society* (2017) 3, 497.

<sup>4</sup> Special Rapporteur on extreme poverty and human rights, *Report on the implementation of the right to social protection through the adoption by all States of social protection floors*, UN Doc A/69/297, 11 August 2014, para. 23.

<sup>5</sup> S. Devereux, 'Is Targeting ethical?', 16 *Global Social Policy* (2016) 2, 166, 168.

Among international financial institutions, the International Monetary Fund (IMF) seems to have experienced something of a social awakening, and it has recently adopted a social protection strategy.<sup>6</sup> This emerging *social awakening* comes at a time, when it is seen as the “[...] single most influential international actor not only in relation to fiscal policy but also to social protection, even if both it and its critics might prefer that this were not the case”.<sup>7</sup> The statement not only recognizes the importance of IMF policy-making for the development of social protection frameworks, but also captures the fundamental skepticism that exists towards IMF social protection engagement.

Amidst the growing attention, also critical discourse on the compatibility of conceptions of social protection has gained renewed interest. The IMF is seen to paint too positive an image of its policies; floors are considered weakly enforced compared to economic targets; floors are not considered ambitious enough; their establishment is accused for being non-transparent; and universalism is considered preferable to the IMF practice of targeting.<sup>8</sup>

The effectiveness of floors is also questioned. The nationally defined spending floors required in IMF-supported low-income country programs have been found often to be too broad to be useful in protecting critical spending for social protection.<sup>9</sup> Memoranda of understanding between Governments and IMF also “[...] often lack details on coverage and monitoring, and on reporting arrangements”.<sup>10</sup> Targeting has also been accused of potentially weakening

<sup>6</sup> IMF, ‘A Strategy for IMF Engagement on Social Spending’, IMF Policy Paper, 14 June 2019. The increased attention has been noted also by non-governmental organizations, see e.g. C. Mariotti, N. Galasso & N. Daar, ‘Great expectations: is the IMF turning words into action on inequality?’, Oxfam Briefing Paper (2017).

<sup>7</sup> Special Rapporteur on extreme poverty and human rights, *Report on the International Monetary Fund and its impact on social protection*, UN Doc. A/HRC/38/33, 8 May 2018, para. 55.

<sup>8</sup> Mariotti, Galasso & Daar, ‘Great expectations: is the IMF turning words into action on inequality?’, *supra* note 6, 21. A. Kentikelenis, T. Stubbs & L. King, ‘IMF Conditionality and Development Policy Space’, 23 *Review of International Political Economy* (2016) 4, 543. Further references can be found e.g. in Devereux, ‘Is Targeting Ethical?’, *supra* note 5.

<sup>9</sup> J. Klugman *et al.*, ‘The IMF and Social Protection: Seven Low-Income Country Cases’, Independent Evaluation Office (IEO) Background Document No. BD/17-01/06, 5 July 2017, 7.

<sup>10</sup> IMF, ‘Social Safeguards and Program Design in PRGT and PSI-Supported Programs’, IMF Policy Paper, 6 June 2017, 14.

social protection through exclusion errors, as well as through administrative and political costs.<sup>11</sup>

The present article revisits this discussion on social protection floors. The aim of the article is to critically unpack two of the more principled aspects of the critique directed at the IMF, both of which relate to the scope of the protection offered. The article sets off by situating protection floors in international law and the protection of socio-economic rights in particular, as a mechanism for protecting vulnerable groups. At a second stage the article discusses the social protection policy of the IMF, and the materialization of protection floors in IMF policy making. Against this background, the article turns to two critiques of IMF policy-making: the dichotomy between universalism / targeting in social protection, and an alleged lack of attention to structural concerns. The article claims that these questions are often discussed in an overly polarized manner, this way failing to acknowledge a more complex reality and at worst reinforcing an unhelpful adversarial positioning. By revisiting the protection floor debate, the article calls for a more nuanced approach, as a prerequisite for bridging competing social protection / protection floor approaches.

## B. Social Protection and Protection Floors

There is no universally accepted definition of social protection, nor consensus about what policies social protection includes. As the World Bank has noted:

“The international community has come to consensus that social protection programs and policies have a key role to play in poverty reduction. Traditionally, this has been viewed singularly through the lens of equity and redistribution. The innovation in the last ten years is the linking of social protection to the economic growth agenda. [...] Social protection figures prominently in many international conventions, but there is divergence among agencies as to how this right is actually perceived.”<sup>12</sup>

<sup>11</sup> International Organizations Clinic at NYU School of Law, *The IMF and Social Protection* (2017), 81-84.

<sup>12</sup> World Bank, ‘Resilience, Equity, and Opportunity The World Bank 2012-2022 Social Protection and Labor Strategy’ (2012), 98.

The concept of a social protection floor emerged from the International Labor Organization (ILO) concept of a social minimum, comprising pensions, child benefits, access to health care, and unemployment provision. Global political support for the idea of minimum social protection crystallized in 2009, with the adoption of the UN Social Protection Floor Initiative, which set out to coordinate and improve the efficiency of the UN's development efforts in the area of social protection.<sup>13</sup> The initiative is led by the ILO and the World Health Organization (WHO) but involves many other UN agencies, including the World Bank and the IMF.<sup>14</sup>

The ILO strategy on the extension of social protection (adopted in 2011), aims at the rapid implementation of national social protection floors containing basic social security guarantees that ensure universal access to essential health care and income security, and the progressive achievement of higher levels of protection within comprehensive social security systems. In 2012, the ILO Recommendation 202 on Social Protection Floors was adopted unanimously.<sup>15</sup> The recommendation itself contains two main objectives, which are to guide States: establishing and maintaining social protection floors as a fundamental element of national social security; and implementing social protection floors within strategies for the extension of social security that progressively ensure higher levels of social security to as many people as possible (Article I(1)).

According to the ILO Recommendation 202, social protection floors are nationally defined sets of basic social security guarantees, aimed at preventing or alleviating poverty, vulnerability and social exclusion. These guarantees should ensure at a minimum that all in need have access to essential health care and basic income security, which secure access to goods and services (Article II(4)).<sup>16</sup> The UN Sustainable Development Goals (SDG) similarly underline the extension of social protection and the establishment of national social protection

<sup>13</sup> M. Sepúlveda & C. Nyst, *The Human Rights Approach to Social Protection* (2012), 7.

<sup>14</sup> As well as bilateral partners, research institutes and international non-governmental organizations, see <http://www.ilo.org/global/topics/dw4sd/themes/sp-floor/lang--en/index.htm> (last visited 6 March 2019).

<sup>15</sup> ILO, 'R202 - Social Protection Floors Recommendation' (2012); ILO, *C102 – Social Security (Minimum Standards) Convention*, (1952); E. Durojaye, 'The ILO Social Protection Floors Recommendation 202, and Poverty Reduction', 25 *Development in Practice* (2015) 2, 270.

<sup>16</sup> ILO, 'R202 - Social Protection Floors Recommendation' (2012), Article II(5) further specifies that these floors should comprise *inter alia* access to nutrition and education for children, and basic income security for individuals in vulnerable situations as well as for older persons; ILO, *The Strategy of the International Labour Organization. Social security for all. Building social protection floors and comprehensive social security systems* (2012), 1.

floors as key to reducing and preventing poverty. Target 1.3 of SDG 1 on ending poverty guides States to: “Implement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable.”<sup>17</sup>

The adoption by all States of social protection floors is commonly considered to be the most promising *human rights-inspired* approach to the elimination of extreme poverty. One of the greatest merits of the protection floor idea is seen to derive from its capacity to transcend the assumed incompatibility between human rights norms and economic realities that an advocacy of the right to social security faces. The fact that the initiative is broadly embraced outside the human rights field is also seen to bring with it a capacity to bridge discourses and mobilize broad-based coalitions to promote its implementation.<sup>18</sup> While this does not set aside the fact that protection floors are strongly embedded in human rights (*discussed below*), it raises questions about the *ownership* of social protection discourse at large, and the interaction of regimes in social protection work.

### C. Protection Floors as a Question of Rights

Social protection systems can assist in the realization of several rights, in particular the right to an adequate standard of living (including the right to adequate food and housing), the right to social security, the right to education and the right to the highest attainable standard of health.<sup>19</sup> Article 22 of the Universal Declaration of Human Rights as well as Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognize the right of human being to social security.<sup>20</sup> The Covenant further mandates States to devote the maximum available resources to progressively realize economic and social rights, even during times of severe resource constraints. States are endowed with an immediate minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of all economic, social and cultural rights. These minimum essential levels are those, which are crucial to securing

<sup>17</sup> GA Res. 70/1, UN Doc A/RES/70/1, 21 October 2015.

<sup>18</sup> Special Rapporteur on extreme poverty and human rights, *Report on the implementation of the right to social protection through the adoption by all States of social protection floors*, *supra* note 4, paras 2-3.

<sup>19</sup> Sepúlveda & Nyst, *The Human Rights Approach to Social Protection*, *supra* note 13, 11.

<sup>20</sup> GA Res. 217 A (III), UN Doc. A/RES/3/217 A, 10 December 1948; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS vol. 993, 3 [ICESCR].

an adequate standard of living through basic subsistence, essential primary health care, basic shelter and housing, and basic forms of education.<sup>21</sup> These obligations are echoed in ILO Recommendation 202 which States that national social protection floors should comprise at least the following four social security guarantees: access to essential health care, including maternity care; basic income security for children, providing access to nutrition, education, care and any other necessary goods and services; basic income security for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability; and basic income security for older persons.<sup>22</sup>

While the ILO has adopted a rights based-approach to social security, the human rights community has reciprocally acknowledged the idea of protection floors. The Committee on Economic, Social and Cultural Rights (CESCR) explicitly endorsed the idea in 2015 through a Statement on social protection floors, characterizing General Comment 19 (on the right to social security) and ILO Recommendation 202 as “[...] mutually reinforcing [...]”.<sup>23</sup> The establishment of nationally defined protection floors is by the CESCR regarded as a basic set of essential social guarantees in cash and in kind, “[...] pivotal in promoting basic income security and access to health care, and in facilitating the enjoyment of several economic and social rights by the most marginalized groups of the population”.<sup>24</sup>

Situating the idea of protection floors as a question of rights, brings with it an expectation of compliance with core principles of a human rights-based approach, such as universality and non-discrimination. As to the expectation of universal application, that principle is echoed explicitly in the ILO Recommendation 202 and in the ICESCR.<sup>25</sup> The principles of equality and non-discrimination require, for example, that States eliminate discrimination in law, policy and practice, and take special measures to protect the most vulnerable

<sup>21</sup> *Ibid*; CESCR, *General Comment No. 19, The right to social security (Art. 9)*, UN Doc E/C.12/GC/19, 4 February 2008, para. 59.

<sup>22</sup> ILO, ‘R202 - Social Protection Floors Recommendation’, *supra* note 15, para. 5.

<sup>23</sup> CESCR, *Statement on social protection floors: an essential element of the right to social security and of the sustainable development goals*, UN Doc. E/C.12/54/3, 6 March 2015, para. 4; J. Linarelli, M.E. Salomon & M. Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (2018), 250-252.

<sup>24</sup> CESCR, *Statement on social protection floors: an essential element of the right to social security and of the sustainable development goals*, *supra* note 23, para. 1.

<sup>25</sup> ILO, ‘R202 – Social Protection Floors Recommendation’, *supra* note 15, para 3; ICESCR, *supra* note 20, articles 2(2) and 3.



segments of society as a matter of priority. When applied to social protection programs, these obligations require that social protection systems mainstream inclusiveness, ensure accessibility by all those who suffer from structural discrimination (such as women, children, older persons, persons with disabilities, ethnic minorities, indigenous peoples, and people living with HIV/AIDs), and do not stigmatize beneficiaries.<sup>26</sup> Social protection floors guarantee access to social security by providing, together with adequate access to essential services, a minimum level of benefits *to all*.<sup>27</sup> Universal social protection schemes are also in CESCR General Comment 19 envisaged as the most likely way for States to meet their human rights obligations to ensure that there is no discrimination in the selection of beneficiaries.<sup>28</sup>

Constituting protection floors as a right is of additional importance, because of the link to the idea of a minimum core that is hereby established. The minimum core idea is seen to offer guidance on how to prioritize competing demands arising from human rights obligations; set limits on permissible trade-offs and compliance delay; and to specify a level of immediate compliance with covenant rights.<sup>29</sup> Protection floors thereby become a means by which to protect the minimum core content of rights, a link found to be particularly important during fiscal consolidation.<sup>30</sup> The guarantees provided through protection floors constitute the core of the obligation of States to ensure social security.<sup>31</sup>

Embedding social protection floors in the minimum core doctrine, in combination with universality, infuses protection floors with a sense of absoluteness and general applicability. While this sets the parameters by which to assess the IMF approach to protection floors, it also opens up for a discussion on the meaning of universality and on how the idea of a minimum core can be reconciled with the need to take into account economic realities and the

<sup>26</sup> Sepúlveda & Nyst, *The Human Rights Approach to Social Protection*, *supra* note 13, 32.

<sup>27</sup> CESCR, *Statement on social protection floors: an essential element of the right to social security and of the sustainable development goals*, *supra* note 23, para. 9.

<sup>28</sup> CESCR, General Comment No. 19, *The right to social security* (Art. 9), *supra* note 21, para 4.

<sup>29</sup> J. Tasioulas, 'Minimum Core Obligations: Human Rights in the Here and Now', *World Bank Working Paper* (2017), 14-15.

<sup>30</sup> *Guiding Principles on Human Rights Impact Assessments of Economic Reforms*, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, UN doc. A/HRC/40/57 (19 December 2018), 10, para. 9.5.

<sup>31</sup> CESCR, *Statement on social protection floors: an essential element of the right to social security and of the sustainable development goals*, *supra* note 23, para. 8.

importance of economic productivity.<sup>32</sup> In this context universal aspirations run the risk of creating false dichotomies and raising unrealistic expectations.<sup>33</sup>

## D. The IMF and Protection Floors

### I. The IMF in Social Protection

The idea of protection floors has entered IMF practice as part of an emerging attention to the social dimension of its policy-making, and the need to protect vulnerable groups in particular. By the late 1990's, the Executive Board supported inclusion of social safety nets and related conditionality in IMF-supported low-income country programs. Starting in 1999, the IMF worked to introduce Poverty Reduction Strategies and social spending floors in IMF-supported lending programs. However, at the time, views were divergent among directors as to the desirability of such policies, and their weight among IMF policy goals.<sup>34</sup> The Revised Operational Guidance to IMF Staff on the 2002 Conditionality Guidelines (adopted in 2014) explicitly introduced vulnerability as a parameter to take into account in IMF policy-making by stating that “[...] if feasible, any adverse effects of program measures on the most vulnerable should be mitigated”.<sup>35</sup>

In the aftermath of the 2008 crisis, the IMF Board agreed that Poverty Reduction and Growth Trust (PRGT)-supported programs (that offer interest free financial support to low-income countries) should safeguard and, where possible, increase social spending. PRGT-supported programs were therefore required to include explicit program targets for what is called “[...] social and other priority spending [...]”. The definition of what comprised such spending was to be determined by countries in keeping with national poverty reduction

<sup>32</sup> Special Rapporteur on extreme poverty and human rights, *Report on the implementation of the right to social protection through the adoption by all States of social protection floors*, *supra* note 4, paras 2-3.

<sup>33</sup> N. Kaber, ‘The Politics and Practicalities of Universalism: Towards a citizen-centred perspective on social protection’, 26 *European Journal of Development Research* (2014) 3, 338.

<sup>34</sup> A. Abrams, ‘The IMF’s Role in Social Protection: Fund Policy and Guidance’, IEO Background Document No. BD/17-01/01, 5 July 2017, 3; K. Donald & N. Lusiani, *The Gendered Costs of Austerity: Assessing the IMF’s role in budget cuts which threatened women’s rights* (2017), 6.

<sup>35</sup> IMF, ‘The Revised Operational Guidance to IMF Staff on the 2002 Conditionality Guidelines’, IMF Policy Paper, 23 July 2014, 4.

strategies.<sup>36</sup> In 2009, the IMF became a collaborating agency in the UN Social Protection Floor Initiative that promotes universal access to essential social transfers and services.<sup>37</sup>

Some current research claims that this *awakening* is, in fact, the re-emergence of an idea – the roots of which can be found in the Bretton Woods agreements that established the framework of the post-second world war international economic order. While there are certainly differences to the current social protection floor framework, the two also display many similarities. Helleiner concludes that the idea of instituting worldwide minimum levels of social protection, was an idea originally at the core of the international economic order in particular. This idea, Helleiner claims, is now in the process of being revived in the IMF/World Bank context.<sup>38</sup>

The historical origin of protection floors aside, in 2010, the IMF and the ILO agreed to carry out joint studies on the feasibility of social protection floors for people living in poverty and in vulnerable situations, within the context of a medium to longterm framework of sustainable macroeconomic policies and strategies for development.<sup>39</sup> In an address to the Monetary Authority of Singapore (in February 2011), the IMF Managing Director argued that “[a]dequate social protection, drawing on a basic social protection floor as proposed by the ILO, can protect the most vulnerable from the brunt of the crisis”.<sup>40</sup>

Further, in a 2015 official document, the IMF declared that it is “[...] strongly committed, within the scope of its mandate [...]” to the Sustainable Development Agenda and that it had “[...] started deepening its focus on aspects of economic, social, and gender inclusion, and environmental protection, which are core SDG objectives and vital for balanced and sustained growth”.<sup>41</sup> The

<sup>36</sup> Klugman *et al*, *The IMF and Social Protection*, *supra* note 9, 4.

<sup>37</sup> IEO, *The IMF and Social Protection: 2017 Evaluation Report* (2017), 6.

<sup>38</sup> E. Helleiner, ‘Back to the future? The Social Protection Floor of Bretton Woods’, 14 *Global Social Policy* (2014) 3, 298.

<sup>39</sup> M. Bachelet, *Social Protection Floor for a Fair and Inclusive Globalization* (2011).

<sup>40</sup> D. Strauss-Kahn, ‘The Right Kind of Global Recovery’ (2011), available at <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp020111> (last visited 29 September 2019).

<sup>41</sup> IMF, ‘The Role of the IMF in Supporting the Implementation of the Post-2015 Development Agenda’, 17 August 2015. The document asserts that the IMF will expand its focus on inequality, in particular in developing a framework to analyze the distributional impacts of macroeconomic policies and structural reforms, deepening its analysis of the role of fiscal policy on inequality, creating a template for evaluating the distributional impacts of energy subsidy reform, analyzing the gender dimensions of financial inclusion, and conducting more country-level analysis of policies to raise female labor

Guidance Note on IMF Engagement on Social Safeguards in Low-Income Countries further States that “[m]inimum floors on social and other priority spending should be included, wherever possible [...]”, further relating this policy to SDG Goal 1.3.<sup>42</sup> Under the current review of conditionality and design of IMF supported programs, one of the core issues is whether IMF-supported programs give enough attention to the social impact of program measures.<sup>43</sup> IMF social protection work peaked in June 2019 with the adoption of a Strategy for IMF Engagement on Social Spending. The strategy makes clear that social spending (defined as social protection, health and education spending) is a key policy lever for, *inter alia*, promoting inclusive growth, addressing inequality, and protecting vulnerable groups. Distributional objectives, in other words, are to be seen as compatible with economic growth.<sup>44</sup>

Inter-agency collaboration efforts, however, are illustrative of the difficulties raised by diverging social protection conceptions. IMF-ILO collaboration that sought to identify fiscal space for financing national floors only led to one serious effort (Mozambique), which was soon abandoned. In 2012, the IMF was invited to join a Social Protection Inter-Agency Coordination Board (created for expanding social protection coverage), but reportedly participated in only a few meetings. Various authors have described how there has been a “[...] fundamental clash of approaches, ideologies and policies [...]” between the ILO Social Security Department (now the Social Protection Department) and the Social Protection and Labor Division of the World Bank. Those conflicts have played out especially “[...] in the fields of pension policy, of safety net versus universal cash benefits policies, [and] of even the definitions and purposes of social protection [...]”.<sup>45</sup>

force participation. Also see IMF, ‘The IMF and the Sustainable Development Goals’, September 2016, available at [https://d37djvu3ytnwxt.cloudfront.net/assets/courseware/v1/5a3eed1c5e90f5cbc50b0ce68520545c/asset-v1:WBGx+F4D01x+1T2017+type@asset+block/The\\_IMF\\_and\\_the\\_Sustainable\\_Development\\_Goals\\_.pdf](https://d37djvu3ytnwxt.cloudfront.net/assets/courseware/v1/5a3eed1c5e90f5cbc50b0ce68520545c/asset-v1:WBGx+F4D01x+1T2017+type@asset+block/The_IMF_and_the_Sustainable_Development_Goals_.pdf) (last visited 30 September 2019).

<sup>42</sup> IMF, ‘Guidance Note on IMF Engagement on Social Safeguards in Low-Income Countries’, IMF Policy Paper, 11 July 2018, 3, note 2.

<sup>43</sup> IMF, ‘Consultation on the 2018 Review of Conditionality and Design of IMF Supported Programs’, May 2018, available at <https://www.imf.org/external/np/exr/consult/2018/conditionality/> (last visited 29 September 2019).

<sup>44</sup> IMF, ‘A Strategy for IMF Engagement on Social Spending’, *supra* note 6, 13.

<sup>45</sup> J. Zhou, ‘IMF Collaboration with Partner Institutions on Social Protection’, Independent Evaluation Office, Background Document No. BD/17-01/07, 5 July 2017; Special Rapporteur on extreme poverty and human rights, *Report on the implementation of the right to social protection through the adoption of social protection floors*, *supra* note 4, para 25.

While statistics display a rising trend of including protection floors in lending programs,<sup>46</sup> the IMF is regularly considered as the “odd man out” in its attitude to social protection.<sup>47</sup> The World Bank, ILO and UNICEF, in particular, regard IMF social protection policies with skepticism, and underline that the policies of the IMF stand in contrast with a universal approach to social protection.<sup>48</sup> Also the Independent Evaluation Office (IEO) of the IMF has noted that, there is a tension between the targeting approach traditionally preferred by the IMF and the rights-based approach to social protection.<sup>49</sup> Often this tension is pictured as one between the neoliberal policy preferences of the IMF, and the social justice labor standards of the ILO.<sup>50</sup>

## II. Protection Floors in IMF Policy-Making

Social protection issues can arise in the context of all main tasks of the IMF (i.e., surveillance, financial assistance, and capacity development). As to concessional financing for low-income countries, poverty reduction is the core objective of IMF programs. Since 2009, a *social and other priority spending* target has been required in such programs, which includes minimum floors for social spending, and specific measures to protect vulnerable groups.<sup>51</sup>

According to the Handbook of IMF Facilities for Low-income Countries, social spending is considered to include spending on health, education and social safety nets,<sup>52</sup> which is similar to the emphasis of ILO Recommendation 202.<sup>53</sup> The share of low-income country arrangements with social and other priority spending floors amounted to 93 percent of the 57 arrangements approved during

<sup>46</sup> This trend is illustrated in S. Gupta, M. Schena & S.R. Yousefi, ‘Expenditure Conditionality in IMF-Supported Programs’, IMF Working Paper WP/18/255, December 2018, 22.

<sup>47</sup> The expression used by P. Bakvis, ‘What lies behind the thinking of those driving development at the IMF?’, available at <https://www.developmentpathways.co.uk/blog/what-lies-behind-the-thinking-of-those-driving-development-at-the-imf/> (last visited 11 February 2019).

<sup>48</sup> Demonstrated at length in International Organizations Clinic at NYU School of Law, *The IMF Social Protection*, *supra* note 11.

<sup>49</sup> IEO, *The IMF and Social Protection: 2017 Evaluation Report*, *supra* note 37, 13.

<sup>50</sup> D.F. Frey, ‘Social Justice, Neoliberalism, and Labor Standards at the International Labour Organization’, in G. Mac Naughton & D.F. Frey (eds), *Economic and Social Rights in a Neoliberal World* (2018) 285, 288-289.

<sup>51</sup> IMF, ‘Guidance Note on IMF Engagement on Social Safeguards in Low-Income Countries’, *supra* note 42, 6.

<sup>52</sup> IMF, *Handbook of IMF Facilities for Low-Income Countries* (2017); IMF, ‘Social Safeguards and Program Design in PRGT and PSI-Supported Programs’, *supra* note 10.

<sup>53</sup> See above, note 16 as well as accompanying text.

2010-15.<sup>54</sup> While a few emerging market economy arrangements also included a floor on social spending, there were no social spending floors in advanced economy programs.<sup>55</sup> Spending floors have most often been established as indicative targets, or structural benchmarks, and are as such part of the loan conditions.<sup>56</sup> One of the core guiding principles of IMF social protection policies is the *national ownership* in defining social and priority spending,<sup>57</sup> again, echoing ILO Recommendation 202. Domestic authorities and country teams have flexibility in defining the program targets – only on social spending or on social and other priority spending combined – depending on country circumstances, and in accordance with national poverty reduction strategies.<sup>58</sup>

As a general policy, the Guidance Note on IMF Engagement on Social Safeguards in Low-Income Countries asserts that while in many programs social and other priority spending is based on the aggregate budgets of key ministries (such as education and health), there is merit in defining spending floors more narrowly if this would help ensure that the needs of the most vulnerable are covered. If targeting capacity is low and financial resources are available, country authorities can choose to combine universal access to key social protection with targeting of scarce resources to fill existing education, health and social protection gaps among poor and vulnerable groups.<sup>59</sup> By way of examples, indicative targets (floors) for social spending have included total spending in education, health, HIV/AIDS, infrastructure development, agriculture, rural

<sup>54</sup> However, only 19 percent of these arrangements (10 arrangements in 7 countries) contained indicative targets defined to focus primarily and specifically on social protection. IEO, *The IMF and Social Protection*, *supra* note 37, 21.

<sup>55</sup> See *ibid.* 20-22 for country references.

<sup>56</sup> Gupta, Schena & Yousefi, 'Expenditure Conditionality in IMF-Supported Programs', *supra* note 46, 27. Whereas indicative targets are quantitative measures, structural benchmarks are non-quantifiable reform measures that refer to objectives aimed at improving the social protection system overall. IMF, 'IMF Conditionality', 5 March 2019, available at <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/02/21/28/IMF-Conditionality> (last visited 30 September 19).

<sup>57</sup> The Revised guidelines on conditionality confirm, as general guiding principles, the national ownership of programmes, and that any assessment of a member's policies and IMF advice shall take into account the circumstances of the member, and, to the extent allowed by Article IV, take into account other objectives of the member State, as well as respect domestic and social policies. IMF, 'Decision on bilateral and multilateral surveillance', Decision No. 15203-(12/72), 18 July 2012.

<sup>58</sup> Klugman et al, 'The IMF and Social Protection', *supra* note 9, 4.

<sup>59</sup> IMF, 'Guidance Note on IMF Engagement on Social Safeguards in Low-Income Countries', *supra* note 42, 6-7 (with examples). Also IMF, 'Social Safeguards and Program Design in PRGT and PSI-Supported Programs', *supra* note 10, 19.

development, and governance and the judicial system (Mozambique); health, education, the environment, the judicial system, social safety nets, sanitation, and rural water supply (Senegal); “[...] expenditure on health and education [...]” (Zambia); and “[...] anti-poverty spending [...]” and “[...] social investment spending [...]” (Honduras).<sup>60</sup>

A recent IMF study indicates that social spending floors in low-income country programs have been an ineffective means for safeguarding social protection expenditure. One of the reasons is that the spending categories, as in the examples above, have usually been defined very broadly to include capital and / or current expenditures of several ministries.<sup>61</sup> Such efficiency problems have more lately led to the conclusion within the IMF, that while minimum floors for certain types of spending can be helpful in ensuring allocation for poverty reduction and growth-enhancing programs in the short term, this short-term conditionality should be combined with medium or long-term structural conditionality covering public financial reforms.<sup>62</sup> This is an interesting acknowledgement, given the critique directed at the social protection engagement of the IMF.

## E. Unfolding the Universality v. Targeting Dichotomy

### I. Human Rights and Targeting

Protection floors mainly enter IMF policy-making as spending floors. As a point of departure, this is well in line with the goals of the human rights regime, which recognizes that one of the main challenges of social protection coverage, is the need to increase the aggregate level of public expenditure on social protection.<sup>63</sup> At the same time, as discussed above, a human rights-based conception of protection floors ties the idea to the minimum core doctrine, and brings with it an expectation of universal application.

Universal social protection also constitutes a goal to be reached, in order to achieve the SDGs.<sup>64</sup> When considered in this light, the IMF’s preference for targeting social benefits stands out as problematic (calling into question the

<sup>60</sup> Klugman *et al.*, ‘The IMF and Social Protection’, *supra* note 9, 14-36.

<sup>61</sup> *Ibid.*, 7.

<sup>62</sup> Gupta, Schena, & Yousefi, *Expenditure Conditionality*, *supra* note 46; IMF, ‘A Strategy for IMF Engagement on Social Spending’, *supra* note 6, 29.

<sup>63</sup> ILO, *World Social Protection Report 2017–19: Universal social protection to achieve the Sustainable Development Goals* (2017), xxxiv.

<sup>64</sup> *Ibid.*, 167.

IMF's commitment to the SDGs).<sup>65</sup> At the same time, it should be noted that CESCR General Comment 19 defines the text of article 9 (the right to social security) as indicating that the measures for providing social security benefits can include “[n]on-contributory schemes such as universal schemes (which provide the relevant benefit in principle to everyone who experiences a particular risk or contingency) or targeted social assistance schemes (where benefits are received by those in a situation of need)”.<sup>66</sup>

The UN Development Group has observed that the immediate realization of a social protection floor is not a realistic policy goal for many countries. Instead, countries can build a “[...] social protection path with milestones and timelines best suited to the needs of the people and the national contexts”.<sup>67</sup> While the aim of the UN Social Protection Floor Initiative is to ensure universal protection, this does not mean, however, that every person receives the same benefit. Rather, the goal is to prevent or alleviate poverty, vulnerability and social exclusion, through floors that secure basic social security guarantees for health care, as well as income security for children, older persons and those unable to work (especially in cases of sickness, unemployment, maternity and disability).<sup>68</sup> Targeting, in other words, does not seem categorically incompatible with a human rights-based approach, especially when targeted schemes are used to prioritize the most vulnerable and disadvantaged.<sup>69</sup> Protecting vulnerable groups this way becomes a qualification of the principle of universality.<sup>70</sup>

Taking a more pragmatic approach, truly universal social protection programs that would provide resources to every member of society are in fact rare. Most programs make use of targeting in some form.<sup>71</sup> Pensions target the

<sup>65</sup> Kentikelenis, Stubbs & King, ‘IMF Conditionality and Development Policy Space’, *supra* note 8; Mariotti, Galasso & Daar, ‘Great expectations: is the IMF turning words into action on inequality?’, *supra* note 6, 21.

<sup>66</sup> CESCR, *General Comment 19*, *supra* note 21, article 4(b) (emphasis added).

<sup>67</sup> United Nations Development Group, *UNDG Asia-Pacific Social Protection Issues Brief* (2014), 8.

<sup>68</sup> Special Rapporteur on extreme poverty and human rights, *Report on the International Monetary Fund and its impact on social protection*, *supra* note 7, paras. 35 and 39.

<sup>69</sup> Sepúlveda & Nyst, *The Human Rights Approach*, *supra* note 13, 38.

<sup>70</sup> As also suggested e.g. in A. Timmer, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’, in M. Fineman & A. Grear, *Vulnerability: Reflections on a new ethical foundation for law and politics* (2013), 147, 169, and L. Peroni & A. Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law’, 11 *International Journal of Constitutional Law* (2013) 4, 1056, 1084.

<sup>71</sup> M. Förster & P. Whiteford, ‘How Much Redistribution do Welfare States Achieve? The Role of Cash Transfers and Household Tax’, 35 *Center for Economic Studies* (2009) 3,



elderly, education spending targets children, and public works programs target people willing to work for the wage on offer. A claim can be made that even *universal* food subsidies incorporate a degree of targeting, by subsidizing basic-quality foods that the middle classes prefer not to consume.<sup>72</sup> Conversely, many targeting schemes share the functional principles of universality. For example, unconditional cash transfers that use geographical targeting essentially mean that everyone in a specific and often very large, area receives the same benefits. Universalism and targeting, in other words, are difficult to position as binary poles but instead exist on a spectrum. As a consequence, the debate should rather be about extent and form of targeting.<sup>73</sup>

While simple targeting mechanisms such as categorical targeting, which selects beneficiaries by targeting everyone within a selected age group, (for example, benefits might go to all children under 18 or all persons above 65), do not pose human rights challenges, things change when means-testing is introduced. Mechanisms intended to select beneficiaries on the basis of their income (or, poverty level) are more complex and potentially problematic from a human rights point of view. This follows from the principle of non-discrimination.<sup>74</sup> However, even the prohibition of discrimination does not require the provision of equal benefits for all. Targeting, in other words, is human rights compliant if resources are not available for universal (non-discriminatory) schemes or it is a way to promote substantive equality.<sup>75</sup> In accordance with ICESCR General Comment 20 a failure to remove differential treatment on the basis of a lack of available resources can be justified if “[...] every effort has been made to use all resources that are at the [State party’s] disposition [...]” to eliminate the discrimination.<sup>76</sup> The European Committee of Social Rights, for example, has on its part found

<https://www.cesifo-group.de/DocDL/dicereport309-rr1.pdf> (last visited 6 March 2019).

<sup>72</sup> D. Coady, M. Josh & J. Hoddinott, *Targeting of Transfers in Developing Countries: Review of Lessons and Experience* (2004), available at [http://siteresources.worldbank.org/SAFETYNETSANDTRANSFERS/Resources/281945-1138140795625/Targeting\\_En.pdf](http://siteresources.worldbank.org/SAFETYNETSANDTRANSFERS/Resources/281945-1138140795625/Targeting_En.pdf) (last visited 26 November 2019).

<sup>73</sup> International Organizations Clinic at NYU School of Law, *The IMF and Social Protection*, *supra* note 11, 81-82.

<sup>74</sup> Sepúlveda & Nyst, *The Human Rights Approach*, *supra* note 13, 38.

<sup>75</sup> M. Langford, ‘Social Security and Children: Testing the boundaries of human rights and economics’, in B. A. Andreassen, S.P. Marks & A.K. Sengupta (eds), *Freedom from poverty as a human right: economic perspectives* (2010), 211, 222.

<sup>76</sup> CESCR, *General comment No. 20: Non-discrimination in economic, social and cultural rights (Art. 2, para. 2)*, UN Doc. E/C.12/GC/20, 2 July 2009, para. 13. Also see CESCR, *General Comment 3: ‘The Nature of States Parties’ Obligations (Art. 2, para. 1)*, UN Doc. E/1991/23, 14 December 1990, paras 10-12.

that prioritizations also within vulnerable groups can be made, finding no violation in restricting pension rights, when the impact of that restriction was not too big on the “[...] most vulnerable households [...]”.<sup>77</sup>

## II. Inclusion v. Exclusion Errors

Accepting that the choice between universalism and targeting is always in reality a matter of degree (and recognized as such across regimes), interest is instead turned to the design of protection floors and to an assessment of comparative merits and flaws. In this comparison, a human rights-based approach and the IMF exhibit markedly different points of departure. This difference manifests itself in how the two regimes relate to inclusion errors (providing the benefit to someone who is not in the target group) and exclusion errors (failure to provide the transfer to those intended).

In a human rights-based approach, exclusion errors stand out as more serious, potentially constituting a violation of beneficiaries’ right to social security.<sup>78</sup> Exclusion errors are also potentially discriminatory. This underlines the inclusiveness of the human rights-based approach. As to the IMF, an avoidance of inclusion errors is the very reason for preferring targeted mechanisms. The IMF preference for targeted approaches derives from a conception of targeting as the more efficient way of achieving the aims and purposes of the IMF.

A characterizing feature of intergovernmental organizations, is that they are limited in all their tasks, to the pursuit of their individual aims and purposes (in respect of the IMF: to ensure the stability of the international monetary system, and facilitate the expansion and balanced growth of trade). The threshold of macro-criticality that guide IMF policy-making (and by extension, social protection engagement) is a defining feature of the conferral of powers to the IMF, setting the limits of IMF action. Such a qualification of the social protection engagement with the mandate of the organization, in fact characterizes all organizations. For this very reason the WHO focuses on health insurance and HIV/AIDS, whereas UNICEF focuses on child labor, safety nets, and HIV/AIDS.<sup>79</sup> For the IMF, its limited mandate and the requirement of

<sup>77</sup> European Committee of Social Rights, xiv conclusions 2009, Finland. This argument was also raised by the Greek government in Decision on the merits: Federation of employed pensioners of Greece (IKA-ETAM) v. Greece, Collective Complaint No. 76/2012, para 67.

<sup>78</sup> Sepúlveda & Nyst, *The Human Rights Approach*, *supra* note 13, 40.

<sup>79</sup> The World Bank 2012-2022, *Social Protection and Labor Strategy* (2012), 96.

macro-criticality means that, inclusion errors as a point of departure need to be avoided because of their likely economic implications.

Another issue to be raised in unfolding the *universality versus targeting critique*, is whether the well recorded preference by the IMF for targeted approaches categorically excludes universal schemes. Targeting by definition denies equal benefits to all vulnerable groups. The narrower the targeting approach, the more exclusionary it will also be. Yet, at the same time this need not mean that universal schemes would per definition be incompatible with the financial objectives of IMF programs. The Strategy for IMF Engagement on Social Spending States that use of “[...] *universal and targeted social assistance benefits* [...]” (emphasis in original) depends on country circumstances as well as fiscal and administrative constraints. This means that universal mechanisms are not excluded from the toolbox of policy advice, as long as such mechanisms can be sustainably financed. For example, in respect of Mongolia, country authorities did not implement IMF staff policy advice on targeting. As this deviation was not however considered macro-critical, it did not affect the continuation of the program.<sup>80</sup> A recent analysis published in the IMF *Fiscal Monitor* acknowledges that targeting requires adequate administrative capacity and that, where such capacity is lacking, there is often “[...] undercoverage of the poor and leakage of benefits to the rich”. As a result, the analysis explores the option of universal basic income schemes as a *second-best* alternative to targeted social protection.<sup>81</sup> Universal basic income can be seen as the most radical form of the income component of a social protection floor.<sup>82</sup> Basic income, it should be added, is also among the only truly universal social protection mechanisms.<sup>83</sup>

Finally, to add yet another layer to the discussion, the question should be asked whether any protection floor policy can avoid having an impact on the rights of others. First of all, once it is accepted that all protection schemes in practice target to some degree, avoiding exclusion altogether seems illusory.

<sup>80</sup> IMF, ‘A Strategy for IMF Engagement on Social Spending’, IMF Policy Paper, *supra* note 6, at 30; IMF, ‘A Strategy for IMF Engagement on Social Spending – Case Studies’, IMF Policy Paper no. 19/018, 14 June 2019, 60.

<sup>81</sup> ‘Tackling Inequality’, *Fiscal Monitor* (October 2017). Also see Special Rapporteur on extreme poverty and human rights, *Report on the International Monetary Fund and its impact on social protection*, *supra* note 7, para 41.

<sup>82</sup> I. Ortiz *et al.*, ‘Universal Basic Income proposals in light of ILO standards: Key Issues and global costing’, ESS Working Paper No. 62 (2018), 5.

<sup>83</sup> Devereux, ‘Is Targeting Ethical?’, *supra* note 5, 167. See I. Ortiz *et al.*, Universal Basic Income, *supra* note 82, for a more detailed discussion, suggesting that not all basic income programs however comply with ILO standards such as universality.

Furthermore, as all social protection requires public spending, this spending will always have an impact on the rights of others (especially in a situation of economic crisis). The more costly a protection scheme will be, the higher the impact will also be on the realization of rights in other societal areas. Looking at exclusion solely within a particular vulnerable group (or even an entire segment of society), in other words, can be too narrow an approach to assess the impact on rights of social protection policies.

### III. Minimum Core and Efficiency

The minimum core doctrine constitutes the link that couples the idea of protection floors with the principle of universality.<sup>84</sup> However, the minimum core doctrine also functions as a means of prioritizing individuals and groups most in need. The minimum core doctrine, in this view, does not set absolute standards of protection that could not be derogated from or prioritized among,<sup>85</sup> but is subject to “[...] contextual relativity [...]”, allowing for a margin of appreciation and to a proportionality test (when challenged by countervailing considerations).<sup>86</sup> As such also the design and scope of protection floors is subject to a reasonableness assessment.

Reasonableness, as a “[...] localized expression of the proportionality test”,<sup>87</sup> contextualizes the idea of core obligations and brings with it an element of prioritization where core obligations can be overridden for example in situations where the realisation of the minimum core of a particular right would prevent the realisation of the minimum core of other rights.<sup>88</sup> At the same time the number of parameters (such as degree of poverty, available resources, and administrative structure and efficiency of individual countries) affecting the cost-benefit analysis necessary for weighing universality and targeting, is too vast to be reducible to a simple *economics v human rights* constellation. Instead, it gears attention to efficiency.<sup>89</sup>

<sup>84</sup> CESCR, *Statement on social protection floors*, *supra* note 23, paras. 7-8.

<sup>85</sup> As recognized also in CESCR, *General Comment 3*, *supra* note 76, para. 10.

<sup>86</sup> Tasioulas, *Minimum Core*, *supra* note 29, 28. This is arguably at odds with General Comment No.14, paragraph 47: “It should be stressed, however, that a State party cannot, under any circumstance whatsoever, justify its non-compliance with the core obligations [...] which are non-derogable.” *Ibid*, 17.

<sup>87</sup> K. G. Young, *Constituting Economic and Social Rights* (2012), 125.

<sup>88</sup> D. Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007), 212.

<sup>89</sup> The nature of the enquiries necessary for determining the content of minimum core standards is also the very reason why courts have been unwilling to enter into such an

From an ethical perspective, equity is best achieved through policies that treat every member of a society equally. Universal schemes are also often claimed to be superior in reaching those living in poverty.<sup>90</sup> On the other hand, some developing countries have been noted to be moving to targeting because of poor experiences with and high costs of universal subsidies.<sup>91</sup> Means testing is even defended with the higher overall welfare it generates through concentrating benefits to the poor (compared to the overall costs of a universal scheme). In this light, the universal scheme would only come out ahead in case of significant targeting errors or income inequalities.<sup>92</sup> Whereas some studies, for example, by the ILO show that universal social protection programs are affordable even in the poorest countries,<sup>93</sup> affordability is not sufficient alone to guarantee an ideal social protection outcome. While targeting may be distortive if misapplied, positive discrimination (targeting) can be regarded as more equalizing than universalism, if the latter reproduces societal biases. Frustration with this endless loop of claims and counterarguments has produced concepts such as *progressive universalism* or *targeted universalism*, which above all should be seen as recognitions of the fundamental tradeoffs (both economic, social, and political) that any social protection scheme will contain. Incidentally, the notion of progressive universalism is embedded also in the IMF Social Spending Strategy.<sup>94</sup>

assessment. See *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), paras 37-46. Also see M. Langford, 'Social Security', *supra* note 75, 223 and 230, and M. Wesson, 'Grootboom and beyond: Reassessing the socio-economic rights jurisprudence of the South African Constitutional Court', 20 *South African Journal of Human Rights* (2004) 284, 304.

<sup>90</sup> S. Kidd, *Social Protection: Universal provision is more effective than poverty targeting*, Development Pathways, 9 February 2016.

<sup>91</sup> R. Yemtsov, *Social Protection: Universal & poverty targeting approaches are not in contradiction*, Agence Française de Développement blog, 16 August 2016.

<sup>92</sup> "Put another way, per-beneficiary transfers would have to be much smaller for universal programs than for targeted transfers, usually because of overall budget constraints and competing priorities for government spending [...]" R. Hanna, A. Khan, & B. Olken, 'Targeting the Poor. Developing economies face special challenges in delivering social protection', 55 *Finance & Development* (2018) 4, 28, 30.

<sup>93</sup> See e.g. references in Sepúlveda & Nyst, *The Human Rights Approach*, *supra* note 13, 38.

<sup>94</sup> A. M. Fischer, 'On the Macroeconomics of Universalistic Social Policy and Economic and Social Rights', 16 *Global Social Policy* (2016) 1, 97. B. Leubolt, K. Fischer & D. Saha, 'Are targeting and universalism complementary or competing paradigms in social policy?', 6 *International Journal of Labour Research* (2014) 1, 75. U. Gentilini, 'What lessons for social protection from universal health coverage?', *Let's Talk Development Blog*, 22 August

A turn to efficiency comes with its own set of problems. As a real-life comparison between alternative solutions cannot be done, the critique of targeting is often based on general literature which contains contradictory conclusions about impact.<sup>95</sup> While IMF self-assessments are accused for being self-referential and methodologically flawed,<sup>96</sup> also regression analysis fails to provide closure.<sup>97</sup> If evidence is inconclusive in retrospect, the equation becomes even more complex when a prospective dimension is added that weighs current protection schemes and their costs against future gains both in terms of economic growth and social welfare. The CESCR embodies this tension in General Comment 19, in stating that social security schemes need to ensure that the rights to social security “[...] can be realized for present and future generations”.<sup>98</sup> While efficiency claims have a hard time with squaring the discourse on how to best design protection floors (so as to protect the minimum core of rights) simply because of a lack of agreement on the parameters by which to measure that efficiency, such a focus does however direct interest to the aims of the use of protection floors.

## F. Looking for Lost Ambition

### I. Structural Issues in IMF Policy-Making

Turning to the purpose of protection floors leads into a second strand of debate on the design of social protection mechanisms. The critique directed at the IMF accuses it of not being ambitious enough, that its targeting approach amounts to no more the *poor help*, and that it fails to consider underlying structural issues.

The interest of the IMF has been noted to be in mitigation instead of transformation.<sup>99</sup> Such mitigating measures also typically have a stigmatizing

2018. IMF, ‘A Strategy for IMF Engagement on Social Spending’, IMF Policy Paper, *supra* note 80, at 31.

<sup>95</sup> International Organizations Clinic at NYU School of Law, *The IMF and Social Protection*, *supra* note 11, 41.

<sup>96</sup> T. Stubbs & A. Kentikelenis, *The truth behind IMF’s claims to promote social protection in low-income countries*, Bretton Woods Project, 16 June 2017.

<sup>97</sup> As illustrated e.g. in Langford, ‘Social Security’, *supra* note 75. For multiple references to assessments of the impact of IMF programs, see e.g. Gupta, Schena, & Yousefi, *Expenditure Conditionality*, *supra* note 46.

<sup>98</sup> CESCR, *General Comment 19*, *supra* note 21, para. 11.

<sup>99</sup> Special Rapporteur on extreme poverty and human rights, *Report on the International Monetary Fund and its impact on social protection*, *supra* note 7, para. 36.

effect.<sup>100</sup> For present purposes, two questions could be distinguished in this critique; one concerns how the IMF relates to structural concerns, the other concerns the position of social spending floors among other targets in lending arrangements.

To start with the first of these, when looking at policy advice provided to States, the IMF commonly encourages socio-economic structural reforms. According to the Guidance Note for Surveillance, surveillance should cover structural issues as long as they are macro-critical (affecting domestic, external, or global stability). This includes issues such as public financial management, tax policy and revenue administration, natural resource management, and reforms to energy subsidies, pensions and public health care. Fiscal sustainability also brings in issues of long-term spending pressures (health care, pensions and education), and threats to revenue collection (demographic trends, migration, growth outlook, and international tax arbitrage). While the Guidance note States that potentially macro-critical structural issues cannot be exhaustively defined, it identifies by way of examples jobs and growth, infrastructure, labor markets, social safety nets, public sector enterprises, governance, gender, and climate change.<sup>101</sup> In low-income countries in particular, macro-critical social issues cover for example poverty reduction, economic inclusion, human capital development and macro-critical governance issues.<sup>102</sup>

In respect of corruption, for example, the IMF notes that high levels of corruption can significantly impede a State's ability to carry out other basic functions, which can have macroeconomic impact (and hence, be macro-critical). While deploring many of the social costs of corruption, the IMF also notes that countries with high levels of corruption may achieve rapid economic growth. The impact of corruption on rights (and the fact that vulnerable groups and persons suffer disproportionately from corruption) can only become a matter of engagement for the IMF in cases where corruption risks are severe enough to have a negative impact on the economy. Once that threshold is reached, however, the New Framework for Enhanced Engagement on Governance States that the IMF will address corruption. In such a case, the IMF is envisaged also to proceed into governance issues.<sup>103</sup>

<sup>100</sup> Mariotti, Galasso & Daar, *Great expectations*, *supra* note 6.

<sup>101</sup> IMF, Guidance Note for Surveillance under Article IV Consultations (19 March 2015), para. 81 and note 55.

<sup>102</sup> *Ibid*, para. 11.

<sup>103</sup> See IMF, *Corruption: Costs and Mitigating Strategies* (11 May 2016). IMF, *Review of 1997 Guidance Note on Governance-A Proposed Framework for Enhanced Fund Engagement* (6 April 2018).

As to lending conditionality, it should be noted that the IMF moved away from structural performance criteria in 2009, as a reaction to accusations that structural conditions erode country ownership of lending programs.<sup>104</sup> This resulted in a decrease of total structural conditionality, and a closer focus of structural conditions on IMF's core areas of expertise.<sup>105</sup> The IMF approach to social protection may rightly be characterized as “[...] individualistic [...]”, diagnosing injustice as a result of market failure and vulnerability, failing to address root causes of poverty.<sup>106</sup> A recent IMF working paper, however, finds that while conditionality on specific elements of spending could help achieve a program's short-term objectives, structural conditionality delivers lasting benefits, boosting long-term level of education, health, and public investment expenditures. In fact, the empirical analysis of the IMF working paper suggests that while spending floors may help program countries achieve short-term protection objectives e.g. during economic adjustment, such floors might exert pressure on the rest of the budget and limit allocations to other expenditures (hence, indicating that they might affect the prospect of reaching the long-term objectives). The paper therefore suggests that programs should be cognizant of the trade-off, and combine short-term conditionality (such as spending floors) with long-term structural conditionality covering public financial reforms.<sup>107</sup>

The Strategy for IMF Engagement on Social Spending makes explicit that, subject to being critical for the program's success, programs should consider structural measures to strengthen social safety nets, and in order to improve the quality and efficiency of social spending and outcomes in the medium-term.<sup>108</sup> This coincides well with the approach of the ILO, which proclaims that protection floors are most effective if well-coordinated with employment, labor market, wage and tax policies.<sup>109</sup>

Turning to the position of spending floors among other targets in lending arrangements, there is a built-in structural concern that works to the detriment

<sup>104</sup> C. Andersen, *IMF Survey: New Rules of Engagement for IMF Loans* (13 April 2009). IMF, Press Release: *IMF Overhauls Lending Framework* (24 March 2009).

<sup>105</sup> Independent Evaluation Office, *Structural Conditionality in IMF Supported Programs* (2018).

<sup>106</sup> S. Hickey, 'Relocating Social Protection within a Radical Project of Social Justice', *26 European Journal of Development Research* (2014) 3, 322, 324.

<sup>107</sup> Gupta, Schena, & Yousefi, *Expenditure Conditionality*, *supra* note 46, at 7 and 15 in particular.

<sup>108</sup> IMF, 'A Strategy for IMF Engagement on Social Spending', IMF Policy Paper, *supra* note 80, at 34.

<sup>109</sup> ILO, *World Social Protection Report*, *supra* note 63, 23.



of social spending floors in IMF lending programs. This derives from the non-binding nature of *social and other priority spending* targets, compared to key fiscal and monetary targets. Although the social spending targets appear in the conditionality tables of IMF loan reports, they are commonly defined as so-called indicative targets. An indicative target is assessed in the context of overall program performance. Such targets differ, however, from quantitative performance criteria in that a failure to meet indicative targets does not require a waiver from the IMF Executive Board, and has no impact on loan disbursements.<sup>110</sup>

Across all lending facilities, only 5 percent of social spending floors were set as quantitative performance criteria (since 2012).<sup>111</sup> Nevertheless, in the largest loan in IMF history (Argentina in 2018), a social assistance floor was included as a performance criteria, elevating the spending floor to a full loan condition.<sup>112</sup> As it is up to country teams to set program targets as either performance criteria or indicative targets, the broadening conception of macro-criticality allows defining spending floors as binding targets.

In June 2018 the IMF released a note on Operationalising Gender Issues in Country Work. The note urges country teams to consider the impact on gender and equality of macro-economic policies. It therefore advises IMF staff in such instances to

“[...] consider an alternative policy mix to prevent such negative externalities or – if the former is not feasible – suggest some mitigating measures [...]. In addition, policy design may need to consider potential trade-offs between government conditionality to improve targeting, such as means-testing, and their gender impact”.<sup>113</sup>

<sup>110</sup> Special Rapporteur on extreme poverty and human rights, *Report on the International Monetary Fund and its impact on social protection*, *supra* note 7, para 50.

<sup>111</sup> IMF, ‘A Strategy for IMF Engagement on Social Spending’, IMF Policy Paper *supra* note 80, at 34.

<sup>112</sup> IMF, Country Report No. 18/297, ‘Argentina: First Review under the Stand-By Arrangement; Inflation Consultation; Financing Assurances Review; and Request for Rephasing, Augmentation, Waivers of Nonobservance and Applicability of Performance Criteria, and Modification of Performance Criteria-Press Release; Staff Report; and Staff Supplement’ (26 October 2018). Social spending for the purpose of the program is defined as the sum of all federal government spending on 4 main social protection programs. See report, 77-78.

<sup>113</sup> IMF, ‘How to Operationalize Gender Issues in Country Work’, IMF Policy Paper, 13 June 2018.

This could be another indication of elevating social protection concerns (in this case a gender perspective) to something of a guiding principle, with the potential to override (other) macro-economic considerations.

## II. Protection Floors and Resilience

Eventually the debate on design and scope of protection floors should also be situated in a broader discourse on vulnerability, resilience, and the function of rights as a counterhegemonic force. In this respect, the “[...] technocratic approach [...]” offered by social protection at large has been criticized for situating poverty in the personal characteristics and circumstances of individuals and households.<sup>114</sup> The SDGs have been accused for failing to challenge the global neoliberal economic order, not living up to the promise of tackling inequality and social injustice. In fact, addressing poverty through “[s]ustained, inclusive and sustainable economic growth [...]”, which is the expression used in the SDGs,<sup>115</sup> sounds suspiciously similar to the approach of the IMF.<sup>116</sup> The “[...] innovation [...]” of linking social protection to the economic growth agenda (as noted by the World Bank), then, lies at the heart of the SDGs themselves.<sup>117</sup>

Also the human rights-based approach, as embodied in ILO Recommendation 202, has been noted to fail to address the causes of inequality.<sup>118</sup> There seems to be a lack of attention to how a social protection focus can be reconciled with reform of international economic governance necessary to address root causes. Even when social protection succeeds in confronting economic injustice, it leaves structural issues intact.<sup>119</sup> Human rights lawyers tend to trace this failure to the absence of a clear human right to social security,

<sup>114</sup> S. Devereux & J.A. McGregor, ‘Transforming Social Protection: Human Wellbeing and Social Justice’, 26 *European Journal of Development Research* (2014) 3, 296.

<sup>115</sup> GA Res. 70/1, UN Doc. A/RES/70/1, 21 October 2015, 8.

<sup>116</sup> For a general critique of the Sustainable Development Goals, see C. Williams & A. Blaiklock, ‘Human Rights Informed the Sustainable Development Goals, but ‘Are They Lost in New Zealand’s Neoliberal Aid Program?’’, in MacNaughton & Frey, *Economic and Social Rights*, *supra* note 49, 235, 241-242.

<sup>117</sup> See above, quote attached to note 12.

<sup>118</sup> L. Lamarche, *Unpacking the ILO Social Protection Floor Recommendation from a Women’s Rights Perspective*, in B. Goldblatt & L. Lamarche (eds), *Women’s Rights to Social Security and Social Protection* (2014), 65, 68. Also see K.G. Young, *Introduction*, in Katherine G. Young (ed.), *The Future of Economic and Social Rights* (2019), 13-14.

<sup>119</sup> Linarelli, Salomon & Sornarajah, *The Misery*, *supra* note 23, 254-255.

which would turn social protection into an empowerment instead of a charity.<sup>120</sup> At the same time, there is a growing awareness of the paradox inherent in a right to social security, whereby the right acts as the main discourse for a critique of capitalism, while at the same time having internalized the assumptions of that ideology.<sup>121</sup>

If this critique is accepted, it undermines the idea that rights (and in particular, socio-economic rights), can offer an alternative to the effects of neoliberal economic policies. The very idea of spending floors, irrespective of whether targeted or universal, rather epitomize the subjection of social protection to neoliberal preferences. The problem, then, is not the design of the protection floor opted for. Instead, the far more problematic issue is that the resilience that floors seek actively to build,<sup>122</sup> is in itself an expression of the naturalization of neoliberal systems of governance.<sup>123</sup> This way, social protection approaches, such as protection floors, can serve as a distraction from the larger framework of how vulnerabilities are reproduced.<sup>124</sup> An emphasis on the minimum core and protection floors as a means of coping with vulnerability, can at worst accelerate a “[...] race to the bottom for scarce resources and a narrowing of entitlement [...]”.<sup>125</sup>

The IMF unquestionably pursues a neoliberal agenda – its very purpose is to uphold it. This is reflected in the IMF approach to social protection. At the same time it is important to acknowledge that also international human rights law is “[...] ideologically porous [...]” (to say the least) to the same neoliberal ideology implicated in the production of human suffering.<sup>126</sup>

<sup>120</sup> Special Rapporteur on extreme poverty and human rights, *Report on the implementation of the right to social protection through the adoption by all States of social protection floors*, *supra* note 4, para 30.

<sup>121</sup> Linarelli, Salomon, & Sornarajah, *The Misery*, *supra* note 23, 258.

<sup>122</sup> Statement by UN High Commissioner for Human Rights Michelle Bachelet, ‘The UDHR: A prevention tool to achieve peace and sustainable development’, 26 September 2018, available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23640&LangID=E> (last visited 6 March 2019).

<sup>123</sup> D. Chandler & J. Reid, *The Neoliberal Subject: Resilience, Adaptation and Vulnerability* (2016), 66-67 in particular.

<sup>124</sup> S. Marks, Human Rights and Root Causes, 74 *Modern Law Review* (2011) 1, 57, 71.

<sup>125</sup> Brown, Ecclestone & Emmel, *The Many Faces*, *supra* note 3, 505.

<sup>126</sup> A. Gear, ‘The Vulnerable Living Order: Human Rights and the Environment in a Critical and Philosophical Perspective’, 2 *Journal of Human Rights and the Environment* (2011), 23, 35 (building on U. Baxi, *The Future of Human Rights* (2006)). It should be noted however, that even among economists, critical voices are being raised. See J.D.

None of this is to say that different ways of constructing protection floors should not be critically contrasted and assessed. Yet, if it is accepted that there is a causal link between neoliberalism and deepening human vulnerability,<sup>127</sup> these competing constructions will always be confined within the limits of the neoliberal ideology. To paraphrase Chandler and Reid, it is in fact the recourse to resilience that is the problem (irrespective of whether provided on the principle of universality or through targeting), in that such a discourse fails to provide the means for change.<sup>128</sup> In this light, while protection floors are undoubtedly an important tool for mitigating the effects of poverty and for protecting vulnerable groups, any transformative ambitions seem beyond its reach.

## G. Concluding Remarks

The IMF has not been, and has not become, a primarily humanitarian actor. The emerging IMF social policy engagement needs to be scrutinized, and the regime of rights provides established parameters by which to do that. An altogether different question is whether and how the IMF can contribute to social protection. With the importance of economic sustainability and growth for development and eradication of poverty firmly acknowledged, so too is the central role of the IMF for social welfare.

With the emerging social protection engagement in the IMF, it is of interest what conception of social protection the IMF is propagating, and how it relates to a human rights-based approach. This discussion is characterized by extreme polarization. In order to transcend this polarization, the aim of the article has been to unpack two strands of the protection floor discourse.

A human rights-based approach and the macroeconomic focus of the IMF certainly constitute different points of departure to social protection. These differences have translated into a perceived incompatibility. Yet, the article claims, reality may be more nuanced. To begin with, many of the dichotomies through which this incompatibility is constructed, fail to withstand closer scrutiny. This, in turn, opens up for identifying common elements (as well as common challenges) in the approach to protection floors of the two regimes.

Ostry, P. Loungani, & D. Furceri, 'Neoliberalism: Oversold?', *53 Finance & Development* (2016) 2.

<sup>127</sup> P. Kirby, Vulnerability and Globalization: Mediating Impacts on Society, *2 Journal of Human Rights and the Environment* (2011) 1, 86.

<sup>128</sup> Chandler & Reid, *The Neoliberal*, *supra* note 123, 2.

As IMF endorsement of protection floors is qualified by its mandate, it inevitably operates with a more limited conception of protection floors. However, there does not seem to be any *a priori* reason not to believe that a blend of universal and particular approaches can reach positive results. The emerging social protection interest in the IMF seems too valuable a turn, to be simply dismissed or lost in “naïve assertiveness or a pessimistic bias”.<sup>129</sup> If anything, the interaction of the universal and the particular should invite further exploration of the dynamics and possibilities of social protection. A more nuanced debate on protection floors is a necessity in order not to foreclose that endeavor.

<sup>129</sup> Neil Walker, ‘Universalism and Particularism in Human Rights: Trade-Off or Productive Tension?’, University of Edinburgh, School of Law, *Research Paper Series*, No 2012/10, 24.