

The Legal and Human Rights Case for Universal Child Benefits

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UNIVERSAL CHILD BENEFITS RESEARCH PROJECT

Universal Child Benefits (UCBs) are increasingly discussed as a policy instrument to achieve universal social protection and progress towards the Sustainable Development Goals.

The paper has been commissioned by UNICEF as part of the UCB research project, that aims to explore the global evidence on design, implementation and impact of UCBs on child well-being outcomes.

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	3
I. INTRODUCTION	4
II. THE RIGHT TO SOCIAL PROTECTION AND OTHER CHILDREN’S RIGHTS	7
1. The right to social protection under the International Covenant on Economic, Social and Cultural Rights	7
2. The specificity of the Convention on the Rights of the Child and other children’s rights legislation	9
3. Which children should enjoy these rights?	11
III. ARE UNIVERSAL CHILD BENEFITS BETTER POSITIONED THAN OTHER POLICY INTERVENTIONS TO ENSURE COMPLIANCE WITH HUMAN RIGHTS, INCLUDING THE CHILD’S RIGHT TO SOCIAL PROTECTION?	18
1. Principle of equality and non-discrimination	18
A. Scope and content	20
B. Is it justified to give priority to children? Would UCBs imply a violation of the principle of equality and non-discrimination by giving children priority over other groups?	22
C. Complying with the standards of accessibility, affordability, adaptability and gender sensitivity	23
D. Are universal programmes the only option under human rights law?	28
E. The challenges of ensuring equality and non-discrimination through targeted programmes	31
F. Are targeted methods better at reaching the most income-deprived children?	36
G. Are special measures in favour of particularly vulnerable and excluded children in line with the principle of equality and non-discrimination?	37
2. Principle of the ‘best interests of the child’	39
A. Scope and content	39
B. Using the “best interests of the child’ to assess social protection policies and programmes	40
3. Respect for dignity and avoidance of stigma	43
4. Ensuring compliance with other children’s rights and avoidance of adverse impacts on the exercise of those rights	47
IV. CONCLUSION	52
List of text boxes	55
References	55
Case law	62

THE LEGAL AND HUMAN RIGHTS CASE FOR UNIVERSAL CHILD BENEFITS

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EXECUTIVE SUMMARY

Often, decisions regarding the design and implementation of social protection programmes do not include comprehensive assessments of the compatibility of the programme design or implementation features with human rights norms and standards which are included in diverse legal frameworks.

This is a major shortcoming. These legal frameworks are designed to ensure the protection of rights. While human rights obligations do not provide precise policy recommendations, they do limit the discretion of policy-makers. Not complying with these legal standards not only violates rights but can also impact the effectiveness of social protection programmes and may open the possibility for legal challenges at the domestic level or before an international human rights monitoring body.

In order to assess whether Universal Child Benefits are better positioned than other policy intervention to ensure compliance with children's rights, the paper compares the ways in which several cash transfers programmes comply with four principles which are essential for the protection of children:

- i. The principle of equality and non-discrimination;
- ii. The principle of "best interests of the child";
- iii. Respect for dignity and avoidance of stigma;
- iv. Compliance with other children's rights and avoidance of adverse impact on exercise of those rights.

These principles are enshrined in several international human rights instruments, including the Convention on the Rights of the Child (CRC), which is binding on almost all States in the world. Moreover, these principles are often protected under domestic constitutions or bills of rights, as well as national legislation and even through the operational guidelines of various social protection programmes around the world.

The study first briefly reviews the children's right to social protection. Then, it examines the scope and content of these four principles. Using these legal principles as an analytical tool, the study then examines how specific cash transfers programmes comply with them.

The assessment is designed to serve as a guide for policy makers. When deciding on social protection interventions, decision-makers must choose among those policy options that maximize the protection of children's rights and disregard those which have a negative impact on those rights.

Increasingly, when social protection practitioners ignore these legal principles, national courts, regional human rights tribunals and United Nations treaty monitoring bodies request corrective measures. The paper therefore includes diverse examples of such landmark cases.

I. INTRODUCTION

The ‘right to social security’ or ‘social protection’ is enshrined in several international instruments.¹ The first international instrument that enshrined social security as a right was the Declaration of Philadelphia – under the auspices of ILO – adopted in 1944. In 1948, the right to social security of every human being, as a member of society, was officially recognized in the Universal Declaration of Human Rights (UDHR, Articles 22 and 25). Subsequently, it was included in various human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR (1966), Articles 9 and 10); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD (1979), Article 5.e.iv); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW (1979), Article 11.1e); the Convention on the Rights of the Child (CRC (1989), Article 26); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW (1990), Article 27); and the Convention on the Rights of Persons with Disabilities (CRPD (2006), Article 28).

Additionally, this right is enshrined in several conventions adopted within the framework of the International Labour Organisation (ILO), such as Convention 102 (1952), Convention 118 (1962), and Convention 157 (1982). ILO Convention No. 102 on Social Security enshrines minimum standards – which can be established in relation to the countries' wage levels – for social security benefits and conditions for access to them. At a regional level, the right to social security is enshrined in several human rights treaties, such as the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Article 9); the European Social Charter (Article 12); and the Arab Charter on Human Rights (Article 36).

At the domestic level, the right to social security is enshrined in many constitutions as well as national laws. Moreover, many countries have adopted comprehensive child rights legislation that includes several economic, social and cultural rights, the prohibition of discrimination against children, the principle of best interests of the child and the child's right to participation.

Today there is a renewed emphasis on the right to social security. World leaders have put it at the centre of the 2030 Agenda for Sustainable Development. While the Millennium Development Goals were silent about social protection, the 2030 Agenda gives it unique prominence by including it in several targets (e.g. targets 1.3, 3.8, 5.4 and 10.4). Under Sustainable Development Goal (SDG) 1, for example, States commit to ‘implement nationally appropriate social protection systems for all, including floors’ for reducing and preventing

¹ Following the position of ILO and human rights treaty bodies, this study uses the terms ‘right to social protection’ or ‘right to social security’ interchangeably to refer to the right of all people, without discrimination, to enjoy a set of policies and programmes designed to reduce and prevent poverty, vulnerability and social exclusion throughout the life cycle. This right therefore includes all the components of social protection: non-contributory social protection (‘social assistance’, the object of this analysis), contributory social protection (‘social insurance’), labour market regulation and care systems. See, for example, UN Committee on Economic, Social and Cultural Rights (CESCR): *General Comment No 19, The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19 (Thirty-ninth session, 2007), para. 4 (hereafter, ‘CESCR, General Comment 19’); and ILO World Social Protection Report 2017-2019: *Universal social protection to achieve the Sustainable Development Goals*, ILO, Geneva, 2017.

poverty (SDG 1.3). This is an extraordinary recognition of the universal character of the right to social protection.

Moreover, governments, employers and workers from 185 countries unanimously adopted Recommendation 202 concerning National Floors of Social Protection (hereafter, ILO Recommendation 202)² at the 101st session of the International Labour Conference in 2012. This landmark Recommendation not only reaffirmed social protection as a human right for all persons but was critical in providing guidance to States on how to progressively achieve universal protection of the right and in establishing its minimum core content.

Therefore, by virtue of the multitude of international human rights treaties, ILO treaties, domestic legal frameworks as well as political commitments, States have extensive human rights obligations regarding social protection. These obligations relate to the outcome (e.g. putting in place social protection systems to ensure compliance with this right) as well as to the process in which it is used (e.g. guiding States in the way social protection schemes should be established). Thus, States have obligations of both conduct and result.

A human rights approach will not necessarily prescribe precise policy measures as States have the discretion to formulate those public policies which are most appropriate for their circumstances. However, it limits the policy options that States have. When confronted with alternative policy options, State authorities must choose those which do not violate human rights and are best aligned with their human rights obligations.

Social protection measures may assist States in complying with other human rights obligations, including the obligations to ensure children's rights to the highest attainable standard of physical and mental health; to food; and to education. These beneficial impacts of social protection measures on the enjoyment of a range of children's rights add further weight to the claim that there is a strong relationship between human rights realization and social protection.

Human rights create legal obligations to implement social protection systems and establish standards for the design, implementation and evaluation of such systems. In turn, the implementation of social protection facilitates fulfilling several other human rights obligations, most importantly those related to the enjoyment of minimum essential levels of economic, social and cultural rights. Nonetheless, the success or failure of social protection systems in realizing human rights rests heavily on whether such systems are established and operated according to the standards that human rights require.

It is not the intention of this paper to set up the human rights-based framework for designing, implementing, and evaluating social protection systems, which is well established elsewhere.³ This paper will focus on how Universal Child Benefits (UCBs) compare with various cash transfers in their compliance with human rights norms and standards. The potential advantages and limitations of different policy options are discussed in relation to the international and domestic normative frameworks regarding human rights. The aim is to

² Recommendation concerning National Floors of Social Protection, adopted in Geneva, on 14 June 2012.

³ See, for example, the joint United Nations Human Rights and Social Protection electronic platform, available at <http://socialprotection-humanrights.org> (last accessed April 2019). See also Sepúlveda, Magdalena and Nyst, Carly: *The Human Rights Approach to Social Protection*, Ministry of Foreign Affairs of Finland, Erweko Oy, 2012.

establish which model of social protection intervention or specific design and implementation features have the potential to best advance children's rights. By comparing UCBs with other types of cash transfers in their compliance with the legal frameworks regarding human rights, the paper will highlight the potential advantages or limitations of various social protection interventions.

Decisions regarding the design and implementation of social protection programmes are often based on technical assessments or choices made by social protection authorities, within financial and administrative constraints and political or ideological parameters.⁴ Sometimes, such decisions do not include comprehensive assessments of the compatibility of the programme design with critical standards and laws applicable to the country concerned. This is a major shortcoming.

Existing legal frameworks related to human rights such as equality and non-discrimination, the principle of 'best interests of the child' and respect for dignity, among others, provide compulsory norms that should guide social protection decision makers and practitioners in designing, implementing and evaluating social protection programmes. This normative rights-based approach should complement technocratic, knowledge-based policy decisions, if the provision of social protection programmes aims to respect existing normative frameworks and the rights of beneficiaries.

Human rights standards do not provide answers to all the challenges faced by policymakers when designing social protection programmes. They do, however, impose legally binding obligations governing the discretion of States. Thus, some policy options which are not in compliance with human rights obligations should be disregarded.

Before proceeding, some clarifications are required. First, there are considerable variations in the methodologies used by the empirical studies referred to in this paper. Moreover, the evidence refers largely to cash transfers. Due to the widespread evaluation of such programmes, there is a consistent body of evidence available on cash transfers. Second, the analysis will focus on the compliance of social protection interventions with children's rights. Thus, other human rights principles and standards which have been used to evaluate social protection interventions, such as transparency, the right to privacy and data protection, will not be included⁵. Third, legal frameworks containing human rights obligations vary considerably. They are contained in a variety of instruments, such as international treaties,

⁴ Devereux, Stephen; Roelen, Keetie; Béné, Christophe; Chopra, Deepta; Leavy, Jennifer and McGregor, J. Allister: "Evaluating Outside the Box: An Alternative Framework for Analysing Social Protection Programs", IDS Working Paper, No. 431, August 2013, p. 15. It is interesting to note that this paper proposes an alternative, holistic methodological approach to evaluating social protection. As explained by the authors, this is achieved by taking into account programme processes, by focusing on social dynamics and other less measurable and more political impacts and by introducing two feedback mechanisms – 'recursive causality' (how programme impacts might reinforce or undermine each other) and a 'learning loop' (to feed lessons learned back into programme design and delivery). This alternative framework recognizes that social protection programmes may have an impact on discrimination, which can reinforce or undermine the desired changes that the programmes are aiming to achieve.

⁵ For an analysis from a privacy and data protection perspective, see Sepúlveda, Magdalena: "Is Biometric Technology in Social Protection Programmes Illegal or Arbitrary? An Analysis of Privacy and Data Protection", Extension of Social Security, Working Paper No. 59, International Labour Organization, June 2018.

national constitutions, domestic laws and even operational guidelines of programmes themselves. The following sections includes text boxes with examples of laws, regulations and case law from countries from different regions and levels of development. These examples should enable the reader to assess the importance of legal frameworks in designing social protection programmes.

II. THE RIGHT TO SOCIAL PROTECTION AND OTHER CHILDREN'S RIGHTS

1. The right to social protection under the International Covenant on Economic, Social and Cultural Rights

The most prominent protection of the right to social protection is Article 9 of the ICESCR. Over the years, this right has been further clarified by the Committee on Economic Social and Cultural Rights (CESCR), the supervisory body of the treaty. As elucidated below, the CESCR General Comment 19 on the right to social security⁶ is particularly relevant. Through this general comment, CESCR has clarified the scope and content of this right, which is compulsory for all States parties to ICESCR. ILO Recommendation 202, has come to complement this general comment in defining the content of this right⁷. This is particularly relevant in light of the recognized expertise of ILO, which was established in 1946, before the UN human rights instruments and monitoring bodies and which has 'primary responsibility' for the realization of the right to social protection and broad support from States and other stakeholders. Academia has also contributed greatly to developing a more systemic analysis of the right to social protection⁸.

Thanks to this collective effort, there is now an enhanced understanding of the scope and content of the right to social protection, as well as of the implications of a rights-based approach to social protection. The key characteristics of this right are the following:

Universal right

⁶ CESCR, General Comment 19, *supra* note 1. The so called 'General Comments or Recommendations' issued by the UN treaty monitoring bodies are generally accepted as authoritative interpretations of their respective treaties. See e.g. Craven Mathew: *The International Covenant on Economic, Social and Cultural Rights: a perspective on its development*, Clarendon Press, Oxford, 1995.

⁷ During the drafting process of the ICESCR, there is evidence of the drafters' intention for ILO standards to operate as the special law (*lex specialis*) in respect of the content of the right to social security enshrined in Article 9. See B. Saul, D. Kinley and J. Mowbray: *The International Covenant on Economic, Social and Cultural rights. Commentary, cases and materials*, Oxford, Oxford University Press, 2014.

⁸ See, for example, Riedel, Eibe (ed.): *Social Security as a Human Right. Drafting a General Comment on Article 9 ICESCR. Some Challenges*, Springer, 2007; Sepúlveda and Nyst, 2012, *supra* note 3; Kaltenborn, M.: "The Human Rights-Based Approach to Social Protection", in Bender, K.; Kaltenborn, M. and Pfeleiderer, C. (eds.): *Social Protection in Developing Countries. Reforming Systems*, Routledge, Oxon, 2013; and Goldblatt, B. and Lamarche, L. (eds.): *Women's Rights to Social Security and Social Protection*, Hart Publishing, Oxford, 2014. See also Dijkhoff, T. and Mpedi, L.G. (eds.): *Recommendation on Social Protection Floors. Basic Principles for Innovative Solutions*, Kluwer Law International BV, The Netherlands, 2018.

The universality of human rights means that human rights must be the same everywhere and for everyone.⁹ The principle refers to the claim of the validity of human rights across cultures and times¹⁰. The second one, which is the one to focus on here, refers to the set of people who are the owners of these rights (right holders). Thus, universality means that all persons should enjoy the right to social protection (through contributory and non-contributory schemes), in particular individuals belonging to the most disadvantaged and marginalized groups.¹¹

Progressive realization using the maximum available resources

In acknowledging the constraints that stem from limited available resources, international human rights treaties provide for the progressive realization of economic, social and cultural rights, including the right to social protection (e.g. Articles 2.1 ICESCR and 4 CRC)¹². This means that State parties are obliged to progressively ensure the right to social protection for all individuals within their territories using the maximum of available resources (including resources that could reasonably develop).¹³

CESCR notes that this right imposes various obligations on State parties which are of immediate effect. This includes guaranteeing such a right will be exercised free from discrimination of any kind, ensuring the equal rights of men and women, and an obligation to take deliberate, concrete and targeted steps towards its full realization.¹⁴

Minimum essential level of benefits

As they progressively advance in ensuring the right to social protection, States have a minimum 'core' obligation to provide a *minimum essential level of benefits* for all individuals and families. Such benefits must enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs and the most basic forms of education.¹⁵ If a State party cannot provide this minimum level for all risks and contingencies within its maximum available resources, CESCR recommends that the State party, after a wide process of consultation, select a core group of social risks and contingencies to prioritize.¹⁶

If a State attributes its failure to meet minimum core obligations to a lack of available resources, it must demonstrate *every effort* has been made to use all resources at its disposal

⁹ Henkin, L.: "The Universality of the Concept of Human Rights", in *The Annals of the American Academy of Political and Social Science Vol. 506, Human Rights around the World*, Sage Publications, November 1989, pp. 10-16.

¹⁰ The question on the 'universal' or 'relative' character of the rights enshrined in human rights instruments has been a source of debate for decades and falls outside the scope of this study.

¹¹ CESCR, General Comment 19, *supra* note 1, para. 23.

¹² Article 2.1 ICESCR reads 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.' Similarly, Article 4 of the CRC reads 'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.'

¹³ CESCR, General Comment 19, *supra* note 1, para. 31.

¹⁴ CESCR, General Comment 19, *supra* note 1, para. 40.

¹⁵ CESCR, General Comment 19, *supra* note 1, para. 59.

¹⁶ Ibidem.

to satisfy these minimum obligations as a matter of priority.¹⁷ Moreover, whatever the level of protection provided, States must ensure that there is no discrimination in accessing social protection programmes. This means that no person or group of persons are unfairly excluded from accessing the existing schemes.

The notion of a minimum essential level is in line with the concept of social protection floors. According to ILO Recommendation 202, the benefit levels should be sufficient to ensure access to nutrition, education, care, and other necessary goods and services for children. The adequacy of a social protection intervention to ensure a minimum level of protection of other economic, social and cultural rights also depends on other benefits and services which would be available alongside the social protection interventions.

Prohibition of deliberate retrogressive measures

According to CESCR, there is a strong presumption that retrogressive measures -any measure implying a step back in the protection levels accorded to economic, social and cultural rights - are incompatible with the obligations imposed by ICESCR. States wishing to claim a lack of available resources to implement the right to social protection must demonstrate that (a) there was reasonable justification for their actions; (b) alternatives were comprehensively examined; (c) there was a genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were not directly or indirectly discriminatory; (e) everyone still enjoys a minimum essential level of the right to social protection; and (f) there was an independent review of the measure at the domestic level.¹⁸

2. The specificity of the Convention on the Rights of the Child and other children's rights legislation

Human rights instruments are for all, children therefore are protected by all of them. However, the Convention on the Rights of the Child (CRC) is specifically tailored to them. CRC is compulsory for almost all States in the world.¹⁹ It aims at ensuring that children can develop their personalities, abilities and talents to the fullest potential, and that they are informed about and participate in achieving their rights in an accessible and active manner. In addition to civil and political rights, CRC includes several economic, social and cultural rights, such as the right to health (Article 24 CRC), the right to an adequate standard of living (Article 27) and the right to education (Article 28 CRC).

CRC expressly refers to the right to social protection (Article 26 CRC)²⁰. Three considerations are in order. First, as in the case with all human rights, this right is universal and must therefore

¹⁷ CESCR, General Comment 19, *supra* note 1, para. 60. See also CESCR: *General Comment No. 3 on the Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, Document E/1991/23, para. 12; *No. 12 on the Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999, E/C.12/1999/5, para. 28; and *No. 14 on the Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, para. 18.

¹⁸ See CESCR, General Comment 19, *supra* note 1, para. 42.

¹⁹ Up to January 2019, there are 196 States parties to CRC.

²⁰ Article 26 reads: 1. 'States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in

be ensured and protected for all children equally. Second, human rights are indivisible, thus there is no hierarchy among them. While social protection programmes have an important role to play to ensure enjoyment of all rights included in CRC²¹, all rights are equally important and must be respected in the process of implementing this right. Third, rights are interdependent, that is, to ensure fulfilment of the right to social security, fulfilment of the others must also be ensured.

The rights enshrined in CRC apply to all children without discrimination of any kind (Article 2 CRC) and State parties are obliged to take all appropriate measures to ensure that children are protected against all forms of discrimination (see section III.1)). According to CRC, no child should be treated unfairly on any basis. Specific articles address the needs of child refugees, children with disabilities and children of minority or indigenous groups.

One of the guiding principles of CRC is the ‘best interests of the child.’ According to this principle, children must be the primary concern in making decisions that may affect them. This particularly applies to budget, policy and laws (Article 3 CRC). In other words, this principle must be respected at all stages of adopting laws, policies, strategies, programmes, plans, budgets, legislative and budgetary initiatives, and guidelines concerning children in general or as a specific group.²² Thus, it is particularly important in regard to social protection policies (see section III.2).

Another key principle is the respect for the views of the child. Children are entitled to have a say in matters affecting their social, economic, religious, cultural and political life (Article 12 CRC) Thus, State parties must involve children, when they wish, in designing, implementing and evaluating the social protection policies and programmes that affect them. The views of children should be giving due consideration in accordance with their age and maturity. This obligation must be understood in conjunction with their rights to express their opinions and be heard, to access to information and to freedom of association. Compliance with the Convention rights and corresponding obligations within social protection systems and programmes requires, *inter alia*, ensuring that their design and implementation (a) address children’s vulnerabilities in a lifecycle approach, recognizing that risks and vulnerabilities are different for children depending on their age and gender, from early childhood to adolescence; (b) have an intergenerational approach, recognizing the critical role of caregivers in children’s lives; (c) take special measures to reach children who are particularly vulnerable and excluded, including children without parental care and those who are marginalized within their families or communities due to their gender, disability, ethnicity, HIV/AIDS status or other factors; and

accordance with their national law. 2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.’

²¹ Kaplan, Josiah and Jones, Nicola: *Child-sensitive Social Protection in Africa: Challenges and Opportunities*, African Child Policy Forum and Overseas Development Institute (ODI), 2013.

²² UN Committee on the Rights of the Child (CRC): *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3 of the Covenant)*, 29 May 2013, CRC/C/GC/14, para. 1.

(d) include the voices and opinions of children and their caregivers in designing, implementing and evaluating programmes.²³

Children's rights are not only covered by international law and standards. Many national constitutions and laws around the world establish obligations related to children, including regarding their economic, social and cultural rights. For example, the Colombian and South African Constitutions enshrined children's rights to health and housing (Articles 44 and 28 respectively)²⁴, which are immediately enforceable.

In many countries, it is also common to find specific laws - which are often human rights-based - providing the framework for overall protection of children's rights including their right to social protection and health care. This is the case, for example, of countries that have adopted comprehensive child rights legislation such as South Africa²⁵, Ghana²⁶, Kenya²⁷ and Namibia²⁸. In Kyrgyzstan, for example, Child Code No. 100 (2012) includes social protection clauses setting out children's rights to health care, education, housing and other social services. Accordingly, child protection issues were integrated into the broader framework of Kyrgyzstan's social protection system and mainstreamed into social protection programmes.²⁹ Similarly, the Code on Children and Adolescents (2004) in Uruguay protects a wide range of rights and reaffirms the rights set forth in CRC.

3. Which children should enjoy these rights?

CRC states that *all* children should enjoy the right to social protection. Thus, several questions should be addressed:

- Who is a child under international law?
- What happened if a domestic law defines children differently (e.g. up to 15 years of age)?
- Are refugees, migrants or stateless children in the country entitled to the right to social protection?
- Are undocumented migrants also included? If so, under which circumstances?

²³ See DFID, HelpAge International, Hope & Homes for Children, Institute of Development Studies, International Labour Organization, Overseas Development Institute, Save the Children UK, UNDP, UNICEF, World Bank and World Vision: "Joint Statement on Advancing Child-sensitive Social Protection", 2009, Policy Brief. Available at: www.unicef.org/socialpolicy (last accessed April 2019).

²⁴ For further information see Sepúlveda, Magdalena: "Colombia", in Langford, Malcolm (ed.): *Social rights Jurisprudence. Emerging trends in International and Comparative Law*, Cambridge University Press, 2008; and Chirwa Mzikenge, Danwood: *Child Poverty and Children's Right of Access to Food and Basic Nutrition in South Africa. A contextual, jurisprudential and policy analysis*, Community Law Centre, University of the Western Cape, 2009.

²⁵ South Africa: *Children's Act*, 2005, Act No. 38.

²⁶ Ghana, *The Children's Act*, 1998, Act No. 560.

²⁷ Kenya, *The Children Act*, 2001.

²⁸ Namibia, *The Child Care and Protection Act*, 2015, Chapter 16.

²⁹ See, ILO: *Social Protection Assessment-Based National Dialogue: Towards a Nationally Defined Social Protection Floor in the Kyrgyz Republic*, 2017. Available at: https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-moscow/documents/publication/wcms_623030.pdf (last accessed April 2019).

This section responds to these questions. It also includes text boxes with examples of laws and case law where courts and human rights bodies have addressed these issues.

Age requirement

Under CRC, a child is defined as persons up to the age of 18 years old. Under CRC, all children under 18 shall thus enjoy all rights, including the right to social protection, without discrimination of any kind. Even if in a country the age of majority - the age at which a child attains the status of adulthood - is below the age of 18 years, the State party is obliged to ensure that all children benefit from protection and enjoy their rights under the Convention up to the age of 18 years.³⁰

Text box 1. Influencing national social protection systems through international law: Expanding the protection to all children

South Africa's Child Support Grant (CSG), established in 1998, was initially conceived for children below the age of seven. However, in line with obligations of CRC, the Government of South Africa has been expanding the age threshold with the aim of providing support to all South African children in poverty, eliminating any sort of discrimination in the selection of the beneficiaries. Today, all children up to 18 years of age are now eligible for the grant. This change reflects the advocacy efforts from civil society organizations regarding accessibility and shows that the government has been open and responsive to human rights criticism.

Source: Budlender, D.; Burns, J.; and Woolard, I.: *Analysis of Survey Data on the Impact of Social Security Grants*, prepared for National Department of Social Development, South African Department of Social Development, Pretoria, 2008.

Legal status

Under human rights treaties, rights are granted to 'all', and not only to nationals of the State parties. Legal norms enshrining the principle of equality and non-discrimination in international treaties generally prohibit discrimination in terms of nationality.³¹ This means that States party to international treaties must ensure equal treatment in the enjoyment of all rights, including the right to social protection, both to nationals and non-national children, including refugees, asylum seekers and migrants, regardless of their legal status and the documentation they possess.³² Likewise, affirmative measures or actions must be taken to ensure, as a matter of priority, that the most disadvantaged and vulnerable groups can enjoy this right.³³

It should be noted that, in accordance with paragraph 6 of ILO Recommendation 202, 'subject to their existing international obligations, Members should provide the basic social security guarantees referred to in this Recommendation to *at least all residents and children*, as defined

³⁰ See UN Committee Rights of the Child, CRC/C/58/Rev.3, para 22.

³¹ UN Committee on Economic, Social and Cultural Rights (CESCR): *General Comment No. 20: Non-discrimination in economic, social and cultural rights* (Art. 2, para 2, of the International Covenant on Economic, Social and Cultural Rights, 2 July 2009, E/C.12/GC/20 (hereafter: CESCR, General Comment 20), para. 30 and General Comment 19, *supra* note 1, para. 29. See also, UN the Committee on the Elimination of Racial Discrimination (CERD): *General Recommendation No. 30 (2004), on the rights of non-citizens*, 4 May 2005, CERD/C/64/Misc.11/rev.3.

³² *ibidem*.

³³ CESCR, General Comment 19, *supra* note 1, para. 31.

in national laws and regulations’ (emphasis added). Unfortunately, this formulation is unclear and seems to contradict the universal concept of social protection floors. The formulation was subject to intense debate and several amendments during the 2012 International Labour Conference, when the Recommendation was being fleshed out and finally adopted.³⁴ Although this formulation would not imply universality at first sight, since the word *residents* refers exclusively to people who legally reside in the country, three clarifications are required.

First, States parties to international human rights treaties, such as ICESCR, CRC and CRPD, have voluntarily assumed international obligations to expand the coverage of the right to social protection to the entire population without distinction based on the person's migratory status. Thus, the relevant part is the reference to ‘as defined in national laws and regulations’. The fact is that there is no distinction between national and international law in many countries. In broad terms, two systems can be identified. In some States there is an automatic incorporation of treaty provisions once they have been ratified and published in the official *gazette* (e.g. France, Mexico and the Netherlands). These legal systems are referred to as ‘monist’, in that both domestic and international law are considered together and as having the same effect. Other States require express legislative enactment of treaty provisions before they become domestic law (e.g. the United Kingdom, other Commonwealth countries and Scandinavian countries). These legal systems are referred to as ‘dualist’, in that a strong distinction is maintained between domestic and international law, meaning the latter must be written into the former in order to carry substantial and enforceable weight.³⁵

Second, paragraph 6 Recommendation 202 makes a distinction between ‘residents’ and ‘children’. The requirement of legal residency refers only to the former. Thus, according to the ordinary meaning of the text,³⁶ States should provide the basic social security guarantees referred to in Recommendation 202 to *at least all children*, without discrimination of any kind. Despite the debate at the International Labour Conference of 2012 and the different legal requirements for being considered a ‘resident’ that exists in different countries, the meaning of paragraph 6 in relation to children should not be subject to dispute. Under Recommendation 202, basic income security must be ensured for any child within the country, regardless of their origin or legal status. This seems to be the interpretation most commonly held of paragraph 6 Recommendation 202.³⁷

Finally, the inclusion of ‘at least’ suggests two things: (a) Providing basic social security guarantees to all residents and to children without discrimination are the bare minimum and (b) a broader scope can be sought but is not a requirement.

³⁴ Deacon, Bob: *Global Social Policy in the Making. The foundations of the social protection floor*, Policy Press, 2013.

³⁵ Sepúlveda, Magdalena; van Banning, Theo; Gudmundsdottir, Gudrun; Chamoun, Christine and Genugten, Willen: *Human Rights Reference Handbook*, The Icelandic Human Rights centre and University for Peace, fourth edition, 2009.

³⁶ According to the general rule of interpretation of treaties, ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and the light of their object and purpose’ (Art. 31 Vienna Convention of the Law of Treaties).

³⁷ See, e.g., Dijkhoff, Tineke and Mpedi, Letlhokwa George: *Recommendation on Social Protection Floors. Basic Principles for Innovative Solutions*, Kluwer Law International, 2018.

In some countries, there are laws that expressly ensure that refugees, asylum seekers and migrants shall enjoy the right to social protection on an equal basis with nationals (see text box 2). In other cases, domestic courts as well as regional human rights tribunals have determined that excluding non-nationals (i.e. refugees, asylum seekers and migrants) from the enjoyment of the right to social protection is discriminatory. Therefore, they have ordered the respective governments to resolve the situations in their countries and include non-nationals in their social protection programmes (see text box 3). Human rights treaty monitoring bodies, often emphasize that documented or undocumented migrants shall enjoy all rights on an equal basis with nationals. A recent case law of the Human Rights Committee, the supervisory body of the International Covenant on Civil and Political Rights (which is compulsory for the 172 States parties), has emphasized that the obligation to ensure equal protection of rights regardless of migration status includes the right to social protection (see text box 4).

Text box 2. Good practice: Enshrining the right to social protection for refugees, asylum seekers and migrants in Uruguay

According to Uruguayan legislation, refugees have the same rights as nationals. According to Article 20 of the 2006 Refugee Law, 'The State must guarantee refugees and asylum seekers the enjoyment and exercise of civil, economic, social, cultural and all other rights inherent to the human person recognized for the inhabitants of the Republic in international human rights instruments subscribed to by the State, as well as in its internal regulations' (author's translation). Likewise, according to the Migration Law (2008) (Law No. 18.250), 'Migrants and their families shall enjoy the rights to health, work, social security, housing and education on an equal footing with nationals. These rights will have the same protection and safeguards in both cases' (Article 8). Article 3 defines 'migrant' as 'any foreign person who enters the territory with the intention of residing and settling permanently or temporarily' (free translation).

Source: Migration Law, Law No. 18.250 (2008)

Text box 3. Judicial enforcement of the right to social protection of non-nationals: South Africa, Switzerland, Brazil and Austria

*In several countries, the judiciary has enforced the equal access of non-nationals to social protection. In 2004, the Constitutional Court of **South Africa** ruled that the principle of non-discrimination applies to the enjoyment of the right to social protection by foreign residents in the country. In the case of *Khosa and Others v The Minister of Social Development*, the applicants were Mozambican citizens who had acquired permanent residency in South Africa. They challenged the constitutionality of the Social Assistance Act, which reserved cash transfers (or 'social grants') for South African citizens.*

Although the applicants met all other requirements established by law (except nationality), they were denied social assistance benefits because they were not South African citizens. The applicants argued in the High Court that the citizenship requirement infringed on their Constitutional rights to equality, social protection and the rights of children. The Government argued that the State has an obligation toward its own citizens first, and that granting cash transfers only to citizens creates an incentive for permanent residents to naturalize. However, the Constitutional Court considered that the Constitution vests the right to social protection in 'everyone' and that permanent residents are holders of this right. The exclusion of permanent residents from the programme is not a reasonable way to achieve the realization of the right to social protection and it was discriminatory.

In this same ruling, the Court noted that, based on the principle of non-discrimination enshrined in the South African Constitution, children who are South African citizens, but born to non-South African parents with permanent residency, should also have access to transfers, even if their parents or primary caregivers are not (given that their cash transfers are delivered through their parents or caregivers). The Court emphasized that denying these South African children access to benefits because of their parents' nationality would be unconstitutional.

Since 2010, all South African social assistance transfers, such as those for children, persons with disabilities and non-contributory pensions for older people, are not limited to citizens. Permanent residents and refugees can benefit from them.

The Federal Supreme Court of **Switzerland** has ruled that non-citizens with irregular migratory status must also have access to social assistance programmes without discrimination. The Swiss case refers to three brothers, originally from the former Czechoslovakia (now the Czech Republic), who were denied social assistance benefits due to their status as irregular migrants. The brothers had lived in Switzerland since 1980 but were expelled from this country to Czechoslovakia in 1987 for committing criminal offences. They returned to Switzerland in 1991. Despite their lack of documentation, the brothers could not be returned to the Czech Republic as the latter had rescinded their citizenship. The Federal Court considered that denying them social assistance benefits violated the most minimum prerequisites for survival implicitly guaranteed in the Swiss Constitution. The Court ruled that without that minimum subsistence entitlement, they would not achieve full enjoyment of other rights, such as the right to life, human dignity and equality. The Court determined that this minimum level of subsistence could be claimed by citizens and non-nationals. Subsequently, a revised Swiss Constitution in 2000 explicitly provides for a right to aid in distress that applies to all within the country regardless nationality or migratory status. The Constitution recognizes the 'Right to assistance when in need' that states that 'persons in need and unable to provide for themselves have the right to assistance and care, and to the financial means required for a decent standard of living' (Article 12).

In **Brazil**, foreign nationals have gone to courts several times to demand that they be given the same protection as nationals in the enjoyment of social assistance. In a landmark case, a non-national requested access to the cash transfer programme *Benefício de Prestação Continuada da Assistência Social (BPC)* (Continuous Cash Benefit Program), which had been denied precisely because he was not a Brazilian national (Extraordinary Writ 587.970).

According to the Brazilian Constitution (Article 203, clause V), the BPC must be granted to any person with a disability or to older persons, who demonstrate that they have no means to provide for their own maintenance and do not receive support from their family. In order to determine if the foreign petitioner was entitled to the BPC, which is a non-contributory benefit, the court had to examine whether Brazilian nationality was a requirement to receive social protection benefits. The ruling determined that the constitutional provision should be interpreted in line with the principles of human dignity, social solidarity, eradication of poverty and assistance to the destitute. In this sense, the Court concluded that, according to the Constitution, social assistance should be provided to any person who needs it, regardless of nationality. The ruling states that 'since the creation of the Brazilian nation, the presence of foreigners in the country has been encouraged and tolerated. It would not be consistent with our history to establish differentiations based solely on nationality, especially when dignity is at stake in times of human frailty'. The ruling then refers to the "vital minimum" (*mínimo vital*) doctrine, according to which 'human beings must receive a series of essential benefits to simply have the ability to survive, and access to such goods constitutes a subjective right of a public nature'. The ruling expressly rejects the argument that giving benefits to non-nationals would deprive nationals of their access to them. It also emphasizes that the provision makes no distinction and that the principle of equality enshrined in Article 5 of the Constitution would not allow such a distinction. Therefore, it was determined that the BPC should be given to non-nationals on equal terms with nationals, which in turn includes migrants, asylum seekers and refugees.

At the regional level, the European Court of Human Rights has also unanimously concluded that the denial of social protection benefits solely based on a different nationality constitutes a violation of the European Convention on Human Rights. In the case of *Gaygusuz v Austria*, the Court considered that the difference in treatment between Austrians and non-Austrians regarding the right to receive emergency assistance was not based on any 'objective and reasonable justification'.

(CC); 2004 (6) BCLR 569 (CC) (4 March 2004), Judgment of 14 March 2004; Reg. 6(1)(g) of Regulations Relating to the Application for and Payment of Social Assistance. See also, South African Social Security Agency (SASSA), www.sassa.gov.za/index.php/social-grants (last accessed April 2019); Swiss case *Vv Einwohnergemeinde X. und Regierungsrat des Kantons Bern*, case No. BGE / ATF 121 I 367, 1997 ruling; Brazilian, Specialized Federal Court of the 3rd Region sentenced the National Institute of Social Security (Instituto Nacional do Seguro Social, INSS) to grant foreign residents the benefit enshrined in Article 203 paragraph V of the Constitution and European Court of Human Rights, *Gaygusuz v. Austria*, Application No. 177371/9, Judgment of 16 September 1996.

Text box 4. Are undocumented migrants also protected under the right to social protection?

In 2018, the Human Rights Committee concluded that Canada violated the rights of an undocumented irregular migrant by denying her essential health care (case Toussaint v. Canada).

The petitioner, challenged Canada's denial of health care coverage to undocumented immigrants under the federal government's programme of health care to immigrants, called the Interim Federal Health Benefit Programme. In its decision, the Human Rights Committee affirmed the positive obligation of States to ensure that everyone has access to the essential health care necessary to prevent foreseeable risks to life, regardless of migration status.

The Committee requested Canada to provide adequate compensation to Ms I Toussaint, the plaintiff, for the harm she had suffered. It also requested the authorities to review its national legislation to ensure that irregular migrants have access to essential health care.

Source: CCPR/C/123/D/2348/2014, 2018 of 24 July 2018.

III. ARE UNIVERSAL CHILD BENEFITS BETTER POSITIONED THAN OTHER POLICY INTERVENTIONS TO ENSURE COMPLIANCE WITH HUMAN RIGHTS, INCLUDING THE CHILD'S RIGHT TO SOCIAL PROTECTION?

In order to assess whether Universal Child Benefits (UCBs) are better positioned than other related policy interventions to ensure compliance with human rights obligations, we first need to outline what these obligations are. Subsequently, we must show how they apply to social protection interventions.

For the analysis, this paper uses the definition provided by ILO and UNICEF in their Joint Report on Social Protection for Children: UCBs or Universal Child Grants (UCGs) are defined 'as programmes anchored in national legislation that provide regular cash payments (i.e. monthly, quarterly or yearly) to all families with children. UCGs are paid in cash (or as a tax transfer) to the primary caregiver for dependent children under 18 years of age.'³⁸

It is outside the scope of this study to cover all the obligations under human rights law that are relevant to designing, implementing and evaluating social protection programmes³⁹. The analysis focuses on the compliance of cash transfer programmes with children's rights. To this end, it examines 4 key aspects:

- v. Compliance with the principle of equality and non-discrimination
- vi. Compliance with the principle of the 'best interests of the child'
- vii. Respect for dignity and avoidance of stigma
- viii. Compliance with other children's rights and avoidance of adverse impacts on exercising those rights.

1. Principle of equality and non-discrimination

This is a key principle of international human rights law. Most countries – if not all- have legal frameworks that oblige all branches of the State (i.e. the executive, legislative and judicial branches) to ensure equality and to take measures for levelling the playing field for the most vulnerable and disadvantaged groups. These obligations may arise from these countries being parties to international human rights treaties, but they are often part of national constitutions, bills of rights or domestic legislation as well.

Domestic legal frameworks

The great majority of constitutions enact guarantees of non-discrimination and of equality before the law.⁴⁰ Some constitutions also include the obligation to take positive measures (affirmative actions) aimed at achieving substantive equality for specific groups that have

³⁸ ILO-UNICEF: *Towards Universal Social Protection for Children: Achieving SDG 1.3 - ILO-UNICEF Joint Report on Social Protection for Children*, ILO and UNICEF, NY, 2019. 'Universal Child Grants' (UCGs) is an alternative term for 'Universal Child Benefits' (UCBs) with the same meaning.

³⁹ For a comprehensive analysis of a rights-based approach to social protection, see references *supra* note 3.

⁴⁰ See, Database: Oxford Constitutional Law (OXCON). Available at: <http://oxcon.oup.com>. Examples range from the Constitution of the Russian Federation (1993) (Art. 19) to the Constitution of India (1949) (Arts. 14-18) (last accessed April 2019).

suffered structural discrimination, such as children, women, indigenous peoples, persons with disabilities, older persons, persons with a different sexual orientation or persons living with HIV/AIDS.⁴¹

The recognition of the principle of equality and non-discrimination in national constitutions or bills of rights gives individuals a legal claim, guaranteeing non-discrimination and equality even in those cases where the remainder of the legal framework results – sometimes unintentionally – in discrimination. Constitutional provisions are often further developed by anti-discrimination legislation. Moreover, in countries that have adopted comprehensive children's rights legislation⁴² it is common to find that this type of laws prohibits discrimination against children, including sometime in the enjoyment of the right to social protection.

International human rights standards

In addition to a national legal framework, the great majority of countries have assumed obligations to promote equality and prohibit unfair discrimination under binding treaties and customary international law in the field of human rights. International human rights treaties are often incorporated as part of the domestic legal order of States parties.⁴³ In some countries, international human rights treaties take precedence over domestic laws and, in some cases, even over the constitutional provisions themselves.⁴⁴

Under the auspices of the United Nations, several treaties guarantee the right to equality and non-discrimination, such as the International Covenant on Civil and Political Rights (ICCPR, Articles 2, 3 and 26); the International Covenant on Economic, Social and Cultural Rights (ICESCR, Articles 2(2) and 3); and the Convention on the Rights of the Child (CRC, Articles 2 and 28). Regional human rights treaties also prohibit discrimination, such as the American Convention on Human Rights (Article 1), the African Charter on Human and People's Rights (Articles 2, 3, 18 and 28) and the Arab Charter on Human Rights (Articles 2, 9, and 35).

Better compliance with the human rights obligations related to the principle of equality and non-discrimination results in more inclusive social protection interventions.⁴⁵ Thus, it is possible to use this principle to assess and compare different models of cash transfers as well as specific design and implementation features. Increasingly, this principle has been used by domestic courts to assess the legality of specific design and implementation modalities in social protection programmes (see text boxes).

⁴¹ See, for example, the Constitution of Colombia (Arts. 7, 10, 23, 47, 68 and 70), the Constitution of the Philippines (Art. III, section 5 and Article XIII section 11), the Constitution of India (Arts. 15-17), the Constitution of South Africa (Art. 9.2) and the Canadian Charter of Rights and Freedoms (Art. 15).

⁴² See, for example, *supra* notes 20 to 24 above.

⁴³ See text accompanying *supra* note 36.

⁴⁴ This is the case in most Latin American countries, see for example the Constitution of Chile (1980), Art. 5.2; the Constitution of Guatemala (1986), Art. 46; the Constitution of Nicaragua (1995), Art. 46; the Constitution of Brazil (1998), Art. 4; the Constitution of Colombia (1991), Art. 93; the Constitution of Argentina (1994), Art. 75; the Constitution of Ecuador (2008), Art. 11; the Constitution of the Bolivarian Republic of Venezuela (1999), Art. 2; the Constitution of Paraguay (1992), Art. 137; the Constitution of Costa Rica (2001), Art. 7; and the Constitution of El Salvador (2000), Art. 144.

⁴⁵ Sepúlveda, Magdalena: "Ensuring inclusion and combatting discrimination in social protection programmes: The role of human rights standards", *International Social Security Review*, Vol. 70, Issue 4, December 2017.

A. Scope and content

From a rights perspective, all persons are equal before the law and must enjoy all human rights, without discrimination of any kind. Prohibited grounds of discrimination include race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and geographical location.

However, the principle of equality does not mean that all persons should be treated equally and that all distinctions in treatment constitute discrimination. There may be situations in which different treatment is justified.

Under international law a *distinction, exclusion, restriction or preference* is compatible with the principle of equality when:

- (1) It has an objective and reasonable justification
- (2) It pursues a legitimate aim under human rights law
- (3) There is a reasonable relationship of proportionality between the means employed and the aim sought to realize.⁴⁶

Differential treatment that complies with the criteria mentioned above is not discriminatory and does not infringe on the principle of equality and non-discrimination. Nonetheless, these criteria significantly limit the discretion of States in designing and implementing social protection programmes. These criteria have been increasingly used by domestic courts to decide on cases related to social protection.

Affirmative actions

The principle of equality and non-discrimination does not only entail a negative obligation to not discriminate (i.e. differential treatment on unreasonable grounds), but also an obligation to recognize differences between individuals and to take positive actions to achieve substantive equality.⁴⁷ Thus, taking specific measures (affirmative actions) to guarantee access for the most vulnerable and disadvantaged groups, such as those who face structural or historic discrimination in the country concerned (e.g. ethnic minorities and indigenous peoples), or have specific difficulties in enjoying the right to social protection, such as children, people with disabilities, older persons, domestic workers, refugees, the unemployed, workers inadequately protected by social security and persons working in the informal economy, cannot be considered discriminatory. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination.⁴⁸

⁴⁶ These requirements have been developed by some of the major human rights supervisory bodies. See, e.g. *Marckx v. Belgium*, Application No. 6833/74, Judgement of 13 June 1979, para. 33; I/A Court HR Advisory Opinion No. 4 'Proposed amendments to the naturalization provisions of the Constitution of Costa Rica', OC-4/84 of January 19, 1984, para. 57; Human Rights Committee: *General Comment No. 18: Non-discrimination*, 10 November 1989, para. 13 and CESCR, General Comment 20, *supra* note 32.

⁴⁷ See Human Rights Committee General, Comment, No. 18 para. 10 and CESCR, General Comment 20, *supra* note 32, para. 9.

⁴⁸ See e.g. CESCR, General Comment 20, *supra* note 32, paras. 8 and 9.

Similarly, affirmative actions in favour of children with specific vulnerabilities related to their age, gender, disability status or belonging to specific groups, do not violate the principle of equality, provided that the specific treatment or preference is objective, reasonable and proportional. On the contrary, not providing special support to the most vulnerable and disadvantaged may imply a violation of the principle of equality and non-discrimination.

Indirect discrimination

A critical challenge in ensuring that social protection programmes comply with the principle of equality and non-discrimination is that a discriminatory impact is often not self-evident. What appears to be a neutral law, policy or practice at first sight, may turn out to have an unintended discriminatory impact on certain groups (i.e. indirect discrimination). For example, a conditional cash transfer may have a discriminatory impact on young girls from the participating household, if they end up being responsible for performing the household tasks of adults (mothers). Similarly, requiring a proof of residency for registering for a programme may unintentionally make it harder for internal migrants to participate, given the migration-intensified disadvantages in procuring documents.

Sometimes, failing to understand the ways in which children are exposed to discrimination in the delivery of a programme might prevent it from achieving its objectives. For example, an evaluation of the *Palestinian National Cash Transfer Programme* showed that children from poor families benefiting from the programme were experiencing discrimination from teachers at school (in some cases because they were programme beneficiaries), which deterred them from going to school. Since one of the aims of the programme was to promote children and adolescents' school attendance, this factor was undermining the success of the programme as well as constituting an important source of child and adolescent ill-being.⁴⁹

⁴⁹ Perezniето, Paola; Jones, Nicola; Abu Hamad, Bassam and Shaheen, Mohammed: "Effects of the Palestinian National Cash Transfer Programme on children and adolescents: A mixed methods analysis", ODI, April 2014, p. 42.

Text box 5. Eligibility requirements that indirectly discriminate against children in Ireland

In 2018, the Irish Supreme Court determined that the requirement that only parents who were married or in a civil partner relationship could claim the Widowed Parent's Allowance (a contributory, non-means-tested, social protection benefit), discriminated against children based on the marital status of their parents.

The case was submitted by Ms. McLaughlin, whose partner, the father of their four children, had died in 2014. They were not married but had lived together for 23 years. He had made sufficient contributions for Ms. McLaughlin to be able to claim WPA, had she been married to him. However, her claim was refused.

In brief, the Court needed to decide whether the denial of benefits to her - as an unmarried surviving partner - was discriminatory, whether there was an objective justification for that difference in treatment, And, if so, if there was a legitimate and proportionate aim. The Court argued that the promotion of marriage and civil partnership is a legitimate aim but that denying the benefit to children whose parents were not married to each other was not a proportionate means of achieving this legitimate aim.

Source: Case: *In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland)* [2018] UKSC 48.

- B. Is it justified to give priority to children? Would UCBs imply a violation of the principle of equality and non-discrimination by giving children priority over other groups?

While everyone has the right to social protection, the principle of equality and non-discrimination under international human rights law requires States to pay special attention to persons or groups who are in a disadvantaged position. In this regard, focusing on child grants (over e.g. social pensions) may be justified by the fact that children are overrepresented among the poorest segments of society,⁵⁰ have higher levels of vulnerability compared to adults and are affected differently by poverty compared to adults.⁵¹

Thus, if children in a country face higher poverty risks than other population groups, this factor could be a legitimate reason for giving priority to them. For example, a recent study observed that poverty and extreme poverty in most Latin American countries affect children, adolescents and young people more than other age groups.⁵² Moreover, children, by dint of the condition of being a child, cannot be responsible for providing for their income security, as they are prohibited from work until age 16 in most countries. Whereas adults (unless severely impaired) and the elderly can contribute to their own income security or were able to when they were active. Thus, it is reasonable to focus on children.

⁵⁰ Newhouse, D., Suarez-Becerra, P. and Evans, M.C.: "New Estimates of Extreme Poverty for Children", World Bank Group Policy Research Working paper 7845, Washington DC, 2016.

⁵¹ UNICEF and World Bank: *Ending Extreme Poverty: A Focus on Children*, Nations Children's Fund and World Bank, New York and Washington, DC, 2016.

⁵² Economic Commission for Latin America (ECLAC): *Social Panorama of Latin America 2018*, Santiago, 2019, p. 12.

Other arguments, such as the importance of breaking the intergenerational transmission of poverty⁵³ or the positive impact of investing in children in economic terms,⁵⁴ might also serve to argue in favour of a social protection intervention addressed to children.

The obligation to give priority to the most vulnerable and disadvantaged may require that social protection interventions make special provisions in relation to age-specific vulnerabilities (e.g. during early childhood) or for children belonging to specific groups, such as refugee children (e.g. Article 22 CRC), disabled children (Article 23 CRC) and children belonging to a minority or an indigenous group (Article 30 CRC).

Other factors, such as gender (e.g. programmes only for girls) and territoriality (e.g. programmes aiming at children living in isolated places) may also justify specific measures. For example, the Government of Bihar in India launched a universal cash transfer programme for girls, the *Mukhyamantri Kanya Utthan Yojana* (Chief Minister's Girl Child Upliftment Cash Transfer), in 2018. In this context, focusing only on girls has been justified due to their poor social indicators and the high levels of gender inequality in the State.⁵⁵

In other words, the design of the programme must consider the context-specific vulnerabilities of children to ensure everyone is reached. In some cases, it would be necessary to provide affirmative action measures to ensure equality (e.g. programmes only for girls or an increased level of benefits for children with disabilities, refugee children or those living in isolated or remoted areas of the country). In all cases, the specific treatment or preference must be justified with evidence and be objective, reasonable (proportional) and pursuing a legitimate aim under human rights law.

Due to child-intensified vulnerabilities⁵⁶ and the fact that it would be difficult to determine what child is more vulnerable in some contexts (e.g. children living in poverty, children in rural or isolated communities, indigenous children, children with disabilities and migrant children), universal programmes benefiting all children may be the policy option most in compliance with the principle of equality and non-discrimination.

C. Complying with the standards of accessibility, affordability, adaptability and gender sensitivity

It is difficult to address unintended discriminatory impacts - which are covert forms of discrimination - in programme design, implementation and evaluation. The standards of accessibility, affordability, adaptability, and gender sensitivity are an analytical tool that can assist in determining whether a programme has an unintended discriminatory impact is⁵⁷.

⁵³ Dercon, S.: "Social Protection, Efficiency and Growth", CSAE Working paper WPS/2011-17, Oxford, 2011.

⁵⁴ Asian Development Bank: *Social Protection in Asia and the Pacific*, Asian Development Bank, Manila, 2001; and Roetten, K. and Sabates-Wheeler, R.: "A Child sensitive Approach to Social Protection: serving practical and strategic needs, paper presented at the conference 'Social Protection for Social Justice'", Institute of Development Studies, London, 13-15 April 2011.

⁵⁵ <http://pmjandhanyojana.co.in/mukhyamantri-kanya-utthan-scheme-bihar/> (last accessed April 2019).

⁵⁶ Sabates-Wheeler, R.; Devereux, S. and Hodges, A.: "Taking the Long View: What does a child focus add to social protection?", Institute of Development Studies (IDS) Bulletin, 40(1), 2009, 109-119.

⁵⁷ See Sepúlveda, 2017, *supra* note 57.

These standards are adapted from those developed in international human rights law in relation to economic, social and cultural rights.⁵⁸

Table 1

Checklist of compliance with equality and non-discrimination in targeted programmes

Standards	Stages	Accessibility	Affordability	Adaptability	Gender sensitivity
Outreach, intake, registration		✓	✓	✓	✓
Enrolment decision		✓	✓	✓	✓
Programme delivery		✓	✓	✓	✓
Grievance and redress		✓	✓	✓	✓

Social protection programmes must be **accessible** to all. Obstacles such as lack of information (e.g. about the existence of the programme, who can register and how to do it), physical barriers (e.g. the long distance to the registration office or to the pay/service delivery point) and procedural barriers (e.g. complex administrative processes, long application forms or requiring too many documents) prevent the most vulnerable and disadvantaged children and their caregivers from registering for programmes or enjoying their benefits on an equal basis with the rest of the population. For example, the lack of documentation is one of the most important drivers of self-exclusion from the Child Support Grant in South Africa.⁵⁹ These barriers must be removed to ensure compliance with the principle of equality and non-discrimination.

Universal programmes may outperform targeted programmes regarding some of these accessibility barriers. In principle, beneficiaries of universal programmes have a lower information burden, as the screening would be far less strict than for targeted programmes. The procedures tend to be easier for beneficiaries to understand and the requirements are easy to fulfil.⁶⁰ As UCBs are less concerned with preventing fraud (as all children are potential beneficiaries), they require the submission of fewer documents. In most countries where UCBs

⁵⁸ CESCR has recommended these standards through several General Comments, including No. 13, 14 and 19. Often, these standards are presented as the AAAQ (adding quality). Yet, due to the importance of compliance with a standard on 'gender sensitivity' in social protection systems, this study has adapted these commonly used standards to better fit to the right to social security (protection).

⁵⁹ Department of Social Development, SASSA and UNICEF: *Removing Barriers to Accessing Child Grants. Progress in reducing exclusion from South Africa's Child Support Grant*, UNICEF, South Africa, Pretoria 2016.

⁶⁰ Orton, Ian and Steward, David: "Is it time for universal child grants?", in: International Policy Centre for Inclusive Growth: *Social Protection: meeting children's rights and needs*, Policy in Focus, volume 15, Issue 3, December 2018.

are in place, a birth certificate is the only necessary documentation.⁶¹ While access to birth registration is still a considerable barrier to accessing social protection for many children around the world, the lower the number of the documents required, the higher the access for the most vulnerable and disadvantaged children. In addition, evidence from South Africa shows that the requirement that a birth certificate be presented in order to obtain social protection benefits is a major incentive for early registration, including a Child Support Grant.⁶² Moreover, UCBs would also simplify the process for the verification of documents and shorten the time this takes compared to targeted programmes.

Targeted programmes are inherently more administratively burdensome than universal grants for which governments do not have to verify income. They require complex administrative processes to verify eligibility and reassess when living circumstances change for beneficiaries.

Thus, there is a higher risk of exclusion of the most vulnerable and disadvantaged in targeted programmes. These individuals tend to have more difficulties in gathering documents and dealing with administrative authorities. For example, a 2006 evaluation of the child support grant in South Africa⁶³ showed that, even though it is an unconditional grant, officials requested several documents that were not expressly required by the regulations, such as clinic cards (as proof of immunization), photographs of children and letters confirming the child's school attendance. These requirements were not only outside the law, but they disproportionately burdened the poorest applicants applying for grants, *de facto* excluding several children whose caregivers were not able to provide them. In Kazakhstan, a 2017 survey showed that the large amount of documentation required for registration for the social assistance programme was a considerable deterrent from applying.⁶⁴

While universal programmes are potentially better positioned to include vulnerable and disadvantaged children and families than targeted programmes, in both type of interventions specific measures or affirmative actions are required to overcome accessibility barriers. Providing comprehensive information about a programme is not enough to ensure the inclusion of the most vulnerable and disadvantage. They require specific procedures to actively assist them with the registration process (e.g. mediators, social workers and flexibility in documentation).⁶⁵

Social protection programmes must be **affordable or economically accessible** to all. The processes of registering for a social protection programme, collecting its benefits or submitting

⁶¹ Bradshaw, Jonathan and Hirose, Kenichi: *Child benefits in Central and Eastern Europe: A comparative review*, International Labour Organization, ILO DWT and Country Office for Central and Eastern Europe, Budapest, 2016.

⁶² United Nations Children's Fund, *Every Child's Birth Right: Inequities and trends in birth registration*, UNICEF, New York, 2013.

⁶³ Goldblatt, Beth; Rosa, Solange and Hall, Katharine: *Implementation of The Child Support Grant A study of four provinces and recommendations for improved service delivery*, Children's Institute, University of Cape Town, January 2006.

⁶⁴ Babajanian, Babken and Scott, Lucy: "Accessing social assistance and special social services in Kazakhstan", in: International Policy Centre for Inclusive Growth: *Social Protection: meeting children's rights and needs*, Policy in Focus, Vol. 15, issue 3, December 2018.

⁶⁵ Gupta, Sarika: "Perils of the Paperwork: The Impact of Information and Application Assistance on Welfare Program Take-Up in India", unpublished paper, November 2017. Available at: https://scholar.harvard.edu/files/sarikagupta/files/gupta_jmp_11_1.pdf (last accessed April 2019).

a complaint should not be costly for the beneficiaries. Any extra costs will have a disproportionately negative impact on the poorest beneficiaries. They might impede (prospective) beneficiaries from being able to register or collect programme benefits due to the inability to pay for the direct or indirect costs associated with it.

Targeted programmes often have a cost from the user perspective (e.g. for gathering the necessary documents). In Kazakhstan, the registration process for social assistance programmes takes between 32 and 120 days and requires up to 6 trips to the registration offices.⁶⁶ Even in South Africa – a country that has a well-established and resourced administrative institution in charge of social assistance programmes – an informal survey showed that the average queuing time when applying for a Child Support Grant was twenty hours of cumulative time spent at various offices.⁶⁷

Universal approaches have an advantage over targeted programmes, to the extent that costs related to the registration for a programme or to the collection of its benefits could be reduced by universal programmes (e.g. through less administrative barriers). Under universal programmes, fewer people will be excluded due to their inability to pay indirect or direct costs associated with the programme.

Social protection programmes must be **adapted** to the varying needs of the population that they are trying to reach and take into account local contexts and lived experiences. Barriers related to cultural values (e.g. of indigenous peoples), entrenched traditions and technological challenges (e.g. electronic methods of payments or biometric systems) require attention.

In the Philippines, for example, indigenous women beneficiaries of the Conditional Cash Transfer (CCT) programme *Pantawid Pamilyang* have difficulties complying with the programme condition requiring women to give birth supervised by a trained professional in a health facility. Indigenous women perceive birth facilities as impersonal and dehumanizing so they do not attend. As a consequence, they do not receive the grant⁶⁸ Some cultural barriers relate to long-practiced traditions and beliefs among the prospective beneficiaries. For example, in the North West of South Africa, some new mothers do not leave their houses until their babies are older than three months due to strong cultural beliefs. This has prevented them from registering for the *Child Support Grant* during this period.⁶⁹

Similarly, some women have been prevented from registering and receiving the benefits from the *Bihar Child Support Programme* in India, because they traditionally migrate from their

⁶⁶ Babajanian and Scott, 2018, *supra* note 77.

⁶⁷ SASSA and UNICEF: *Preventing Exclusion for the Child Support Grant: A Study of Exclusion Errors in Accessing CSH Benefits*, UNICEF, South Africa, 2013, p. 47.

⁶⁸ University of the Philippines Population Institute (UPPI): *Assessment of the Modified Conditional Cash Transfer Program for Indigenous People in geographically isolated and Disadvantaged Areas: Final report*, University of the Philippines, UNICEF, Department of Social Welfare and Development and Australian Aid, 2017.

⁶⁹ SASSA and UNICEF: *Preventing Exclusion for the Child Support Grant: A Study of Exclusion Errors in Accessing CSH Benefits*, UNICEF, South Africa, 2013, p. 55.

resident village to the home where they were born during pregnancy. Therefore, their benefit entitlements are not suitably mobile to fit their child birth preferences.⁷⁰

While both targeted and universal programmes should take cultural norms and the specific circumstances of the beneficiaries into account, the relative simplicity of universal programmes might put them in an advantaged position. Universal programmes, in particular when they are unconditional, can have more flexible procedures regarding where and how to receive the grants, which would be more inclusive. Yet, they would not remove all impediments to entitlements automatically.

Social protection programmes must be **gender-sensitive**, meaning that they must consider the many forms of discrimination that girls and women face, ensuring that they are able to benefit from the programme on an equal basis with boys and men. This includes ensuring that gendered social norms and patriarchal attitudes do not impede girls and women benefiting from a specific programme. Particular attention should therefore be paid to the many forms of discrimination that can emerge at the intersection of gender with age, race, class, disability and other factors.

Obstacles to gender equality vary. They might be eligibility criteria that exclude women from benefiting from programmes, such as health insurance enrolment criteria that only consider heads of households as eligible. They might also be the result of registration processes that take too long. Long registration time has a disproportionately negative impact on certain groups of women, such as women with mobility restrictions, e.g. those with care responsibilities, new mothers with infants and pregnant women.

Whether a UCB is in a better position than other interventions to achieve gender equality or to address the gender impact of mothers/guardians, which has an impact on children's well-being, depends on the specific design features of the programme. Nonetheless, there is evidence that suggests that some specific programmes, such as CCTs, are particularly problematic from a gender point of view.⁷¹ CCTs have been criticized for not addressing gender vulnerabilities and infringing on gender equality.⁷² The additional demands on women's time created by conditionalities might also have a negative impact on children's rights and well-being (see Section III.4). For example, they may imply reducing time for caring and raising children. Moreover, where there are very busy mothers trying to comply with conditionalities, this might imply more work for girls within the household (e.g. taking care of younger children),

⁷⁰ Viswanathan, Shruti and Newton-Lewis, Tom: "Conditional cash transfers for improving nutrition outcomes: lessons from Bihar Child Support Programme", in: International Policy Centre for Inclusive Growth: *Social Protection: meeting children's rights and needs, Policy in Focus, volume 15, Issue 3*, December 2018.

⁷¹ See e.g. Economic Commission for Latin America (ECLAC): *Los Bonos en la Mira. Aporte y carga para las Mujeres, Informe Anual Observatorio Igualdad de Género de América Latina*, ECLAC, 2012; Gender Equality Observatory of Latin America and the Caribbean: *Annual Report 2012*, LC/G.2561/Rev.1, ECLAC, Santiago, Chile, 2012; Martínez Franzoni, J. and Voreend, K.: (Transferencias condicionadas, regímenes de bienestar e igualdad de género: ¿blancos, negros o grises?) *Revista de Ciencias Sociales*, 4(122), 2010; and UN-Women: *Progress of the World's Women 2015-2016. Transforming Economies, Realizing Rights*, UN-Women, New York, 2015.

⁷² See e.g. Economic Commission for Latin America and the Caribbean (ECLAC): *Gender Equality Observatory of Latin America and the Caribbean: Annual Report 2012 – A Look at Grants, Support and Burden for Women*, ECLAC, Santiago, Chile, 2013.

whereby negatively impairing girls' rights to education or their chances to progress at school on equal basis to boys.

The risk of negative gendered outcomes is reduced with UCBs. They have less or none of the negative gender features of CCTs, which reduces the risk of negative gendered outcomes. Another critical aspect is that there are no work-activation policies in universal programmes. Such policies, which are common place in European countries, tend to negatively impact single parents (the majority of whom are single mothers), as they are forced to engage in paid work even when there is no adequate provision of care facilities for their children (see section III.4).

Arguably, universal programmes can better support women's participation in wider society and the labour market, as they do not have work conditions and are non-withdrawable. Nonetheless, both universal and targeted social protection programmes require the establishment of complementary gender-sensitive policies to address gender vulnerabilities. For example, if care is not actively recognised, reduced and distributed, care deficits tend to be filled by women and girls, perpetuating unequal relations within the family and societies. Higher-quality, affordable, and publicly funded care services would allow more women to earn an income or take part in education or training. Evidence shows that access to subsidized child and elderly care is associated with increases in the number of hours women spend on paid work. In developing countries, it also boosts the participation of female workers in formal employment. In contrast, where care options are not available, the lack of childcare pushes mothers from formal into informal employment.⁷³

In sum, it is not evident that UCBs would automatically remove all accessibility, affordability, adaptability and gender-sensitivity barriers. In both targeted and universal programmes, wider social policies are required to overcome these barriers. Nonetheless, it is reasonable to assume that universal programmes will have a comparative advantage over targeted programmes in complying with these standards, as they have a lower risk of exclusion. They are procedurally more straightforward and easier to understand than is the case for attaining benefits from targeted programmes. In any case, both universal and targeted programmes must include affirmative measures to ensure that the most vulnerable and disadvantaged can benefit on an equal basis with those who are better off.

D. Are universal programmes the only option under human rights law?

Universal programmes - those which provide benefits to all children without conditions - are the best way to ensure that States meet their obligations regarding the selection of the beneficiaries under the principle of equality and non-discrimination.⁷⁴ Yet, as a general rule, the principle of equality and non-discrimination is not compromised by the use of targeted programmes as a form of prioritizing the most vulnerable and disadvantaged groups when progressively trying to achieve universal coverage.

However, targeting mechanisms must always abide by the principle of equality and non-discrimination. This means that any targeting mechanism must be justified on objective and

⁷³ World Bank: *World Development Report 2012*, World Bank, Washington, DC, 2012.

⁷⁴ CESCR, General Comment 19, *supra* note 1, para. 4.

reasonable facts (e.g. when evidence suggests that a group is poorer than the rest of the population), pursue a legitimate aim under human rights law (e.g. trying to benefit political supporters is not a legitimate aim under human rights law) and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see section III.1.A).

Sometimes, an apparently objective design or implementation feature may not be in line with human rights law. For example, when *Familias en Accion* began operating in phases in 2001, the targeting took place in two stages. First, 622 out of the 1,098 municipalities in Colombia were deemed eligible to qualify for the programme, on the basis of satisfying the following criteria: (i) The municipality has fewer than 100,000 inhabitants and is not a departmental capital; (ii) The municipality has basic education and health infrastructure; (iii) The municipality has a bank and (iv) The municipality administrative office has relatively up-to-date welfare lists and other important official documents. Next, eligible households were identified in qualifying towns on the basis of a six-level welfare indicator elaborated by the Sistema de Identificación de Potenciales Beneficiarios de Programas Sociales (SISBEN).⁷⁵ While the first criteria were probably chosen based on the administrative capacity to deliver the programme, it is hard to argue that these were the most vulnerable or disadvantaged municipalities in the country. In fact, it is quite likely that the municipalities which were left out of this first implementation phase (e.g. those without a bank or healthcare facilities) were those where the most vulnerable population was living. Moreover, the municipalities in which the programme first began were not chosen based on objective criteria, but rather on a random process determined by the order in which the paperwork had been administered in the central office.⁷⁶

A wide range of factors need to be considered to assess proportionality, including the suitability of a distinction to achieve the aim pursued by the programme, the availability of alternative means and whether the disadvantage suffered by those found ineligible is excessive in relation to the aim of the programme. From a human rights perspective, targeting based on administrative convenience, prevailing views in society or the convictions of local populations, are not sufficient to justify a distinction.⁷⁷ Similarly, imposing conditionalities on a programme with the sole aim to gain broader political support from taxpayers and median voters is not justified under human rights law. Moreover, a failure to remove differential treatment based on a lack of available resources is not an objective and reasonable justification.⁷⁸

Thus, in order to determine whether a targeting mechanism complies with the principle of equality and non-discrimination, there should be transparency at least in the following elements:

⁷⁵ Attanasio, Orazio; Fitzsimons, Emla; Gomez, Ana; Gutierrez, M. Isabel; Meghir, Costas; and Mesnard, Alice: *Children's Schooling and Work in the Presence of a Conditional Cash Transfer Program in Rural Colombia*, University of Chicago Press, 2010, p. 184. Available at: <http://www.homepages.ucl.ac.uk/~uctpjrt/Files/edccfamilias.pdf> (last accessed April 2019).

⁷⁶ Ibidem, p. 186.

⁷⁷ Moeckli, Daniel: (Equality and non-discrimination), in: Moeckli et al. (editors): *International Human Rights Law*, Oxford University Press, 2010, pp. 189-208.

- i. The reasons for using a targeting method
- ii. Whether the criteria are objective and reasonable (e.g. is the targeted group the most vulnerable and disadvantaged? Is the programme effectively reaching them?)
- iii. Who are the winners and losers (e.g. what are the unintended consequences of this targeting)
- iv. What are the alternatives (e.g. is there a more effective methodology to minimize exclusion errors?).

Social protection authorities should assess the different policy choices considering not only fiscal or economic factors, but also the impact on equality and the enjoyment of other human rights. The debate should be open and inclusive and the authorities should bear the burden of justifying the decision and ensuring compliance with their legal obligations regarding equality and non-discrimination.

In all cases, progressive expansion of coverage should be pursued proportionate to fiscal and administrative capacity. Additionally, adequate grievance mechanisms and monitoring processes should be put in place, so people have recourse in case of the violation of the principle of equality and non-discrimination when selecting of beneficiaries. These mechanisms should be impartial and have the competence to provide effective and efficient redress.

While there is no ‘perfect’ targeting mechanism, ‘inclusion errors’ (providing the benefit to someone who is not in the target group), and ‘exclusion errors’ (failure to provide the transfer to those targeted and considered eligible), do not have the same significance from a rights perspective. Exclusion errors are much more serious, as they entail a violation of beneficiaries’ right to social protection. Those excluded are often people who have suffered from structural discrimination and will thus find it most difficult to articulate a claim for their inclusion.⁷⁹ On the other hand, due to poverty dynamics and high rates of vulnerability to poverty in most developing countries, inclusion errors tend to affect children and their families who are still living in hardship or are vulnerable to falling into poverty,⁸⁰ given the dynamic and often fluctuating nature of people’s poverty status in such contexts.

From a rights perspective, policy choices that lead to fewer exclusion errors – even at the price of higher ‘inclusion’ errors - are preferable to choices that lead to higher number of exclusions. While excluding those who are entitled to the benefit would violate their right to equal enjoyment of the right to social protection, giving a benefit to a person that might not be targeted by the programme would hardly qualify as a violation.

Still, universal programmes can also have unintended discriminatory impacts. For example, a school assistance programme that provides textbooks to all students might benefit only the academically strongest students (e.g. if the textbooks are too difficult for the average student), or only the elites (e.g. if the textbooks are in a language spoken mainly by city dwellers or

⁷⁹ Sepúlveda and Nyst, *supra* note 3, p. 40.

⁸⁰ UNICEF Regional Office for South Asia: *Assessing child-sensitivity in social protection. A Toolkit for Social Transfers*, Nepal, December 2014.

people from higher economic strata).⁸¹ In such cases, it would be necessary to adapt the programme or adopt measures to ensure that the most disadvantaged can also benefit .

E. The challenges of ensuring equality and non-discrimination through targeted programmes

Even when a rights-based approach might not exclude the possibility of having targeted programmes,⁸² the way in which targeting methods are implemented in individual programmes raises several human rights concerns in practice. While a programme's targeting mechanism may encompass one or more targeting methods,⁸³ below are some indications of the challenges to comply with the principle of equality and non-discrimination by using some targeting methods.

Means-tested methods may result in indirect forms of discrimination in social protection programmes. For example, qualifying conditions that take into account the household income without addressing how resources are distributed within the household, can put girls and older women in a disadvantaged position. Moreover, means-tested methods are often complex and opaque, making the eligibility criteria very difficult for the rights holder to grasp. This severely impedes the ability of intended beneficiaries to scrutinize the targeting process, claim their entitlements and hold administrators of the programmes accountable for mistakes or errors.

Evidence from South Africa shows that, misunderstanding about the means test criteria and income thresholds in the *Child Support Grant* (CSG) has excluded a substantial number of eligible caregivers from applying for and obtaining the grant since 2008.⁸⁴ This has in fact been the leading cause of exclusion among eligible applicants and beneficiaries to the CSG.

From the point of view of equality and non-discrimination, the use of proxy-means test methods is particularly worrying⁸⁵. Proxy means testing might fail to reach standards of appropriate objectivity or transparency, particularly in developing countries with large informal

⁸¹ See, for example, Glewwe, Paul; Kremer, Michael and Moulin, Sylvie: "Many Children Left Behind? Textbooks and Test Scores in Kenya", *American Economic Journal: Applied Economics*, American Economic Association, vol. 1(1), January 2009, pp. 112-35.

⁸² Here, the distinction employed by the World Bank (WB) is used. According to WB, targeted programmes refer to programmes that by design select beneficiaries using means-tested, proxy-means-tested, community-based and geographical targeting as well as self-targeting approaches. Non-targeted programmes refer to universal and categorical programmes. World Bank: *The State of Social Safety Nets 2015*, Washington, 2015, p. 29.

⁸³ For example, a programme may target poor households that live in geographic areas with high poverty rates and families from these areas are selected based on a proxy means test.

⁸⁴ Department of Social Development, SASSA and UNICEF: *Removing Barriers to Accessing Child Grants. Progress in reducing exclusion from South Africa's Child Support Grant*, UNICEF, South Africa, Pretoria 2016.

⁸⁵ In the determination of indirect means (proxy means test), a series of variables are used as a welfare indicator, e.g. income, consumption, income generation capacity, the quality-of-life index or the vulnerability index. This estimate is calculated using variables statistically associated with the level of welfare. Typically, it includes demographic variables (e.g. household size), socioeconomic variables (e.g. adult education level, asset holding and housing characteristics) and geographic variables (e.g. place of residence). The proxy generates a score that allows households to be sorted by estimated level of welfare. Together with the proxy formula, an eligibility threshold is determined for each programme Ibararán Pablo; Medellín, Nadin; Regalia, Ferdinando and Stampini, Marco (eds.): *How Conditional Cash Transfers Work Good Practices after 20 Years of Implementation*, Inter-American Development Bank, Washington, 2017, pp. 15-20.

sectors, weak administrative capacity and low fiscal space.⁸⁶ Proxy means tests are inherently obscure as eligibility is based on a score from many different variables, which are difficult to understand for ordinary citizens. Moreover, the formula is kept secret to avoid prospective beneficiaries from manipulating or misrepresenting their assets. Therefore, it is very difficult to verify whether a proxy means test programme is being implemented properly.⁸⁷

Lack of clarity about targeting mechanisms can trigger a lack of trust and suspicion about the programme. If registered applicants do not understand how the mechanism works (e.g. what the role of social workers or household surveys is), they could think that they were unfairly excluded and become suspicious of other community members who were selected. In Gaza, the lack of transparency in the eligibility criteria for the *Social Hardship Case* (SHC) made community members suspicious of favouritism and nepotism in the selection of beneficiaries, which negatively impacted its implementation.⁸⁸ Studies have also shown that, when there is transparency regarding the targeting system and eligibility criteria, beneficiaries tend to appreciate it.⁸⁹

Evidence also suggests that proxy means tests can create tensions and divisions within the community, weakening their social cohesion, largely as a result of people's perception of them as lotteries.⁹⁰ Community members cannot understand why some people living in poverty are selected while others who are equally deserving are excluded.⁹¹ The likelihood of intra-community tensions and divisions is especially high when targeting methods are used in communities where everyone lives in a situation of poverty, and almost imperceptible differences separate the poorest from those who are marginally better off.⁹²

Community-based targeting should also be implemented with caution. Despite the advantages that this mechanism may have in reaching those most in need, community targeting has the potential to reinforce power structures, patron-client relations and local gender norms. It has been found that community targeting sometimes reinforces patterns of discrimination, as the lifestyles and livelihoods of the most vulnerable are often seen as a threat to social codes and

⁸⁶ Kidd, Stephen and Wylde, Emily: *Targeting the Poorest: An Assessment of the Proxy Means Test Methodology*, Australian Aid, Canberra, 2011, Available at: http://www.aid.gov.au/publications/pubout.cfm?ID=7044_2239_6308_4104_9028 (last accessed April 2019).

⁸⁷ Hanna, Rema and Olken, Benjamin A.: "Universal basic Incomes versus Targeted Transfers: Anti-Poverty programs in Developing Countries", *Journal of Economic Perspectives*, volume 32, Number 4, 2018, pp. 201-226.

⁸⁸ Abu Hamad, Bassam and Pavanello, Sara: *Beneficiary and community perspectives on the Palestinian National Cash Transfer Programme*, Overseas Development Institute, Transforming Cash Transfers, Part 1, December 2012, p. 15.

⁸⁹ See e.g., Bukuluki, Paul and Watson, Carol: *Beneficiary and community perspectives on the Senior Citizen Grant (SCG) in Uganda*, Overseas Development Institute, Transforming Cash Transfers, December 2012, p. 82, and Bagash, Thabet; Pereznieta, Paola; and Dubai, Khalid: *Beneficiary and community perspectives on the Social Welfare Fund in Yemen*, Transforming Cash Transfers, Overseas Development Institute, December 2012.

⁹⁰ See e.g., Bagash et al, *supra* note 102, p. 46.

⁹¹ Kidd, S.; Gelders, B.; Bailey-Athias, D: "Exclusion by design: An assessment of the effectiveness of the proxy means test poverty targeting mechanism", *Extension of Social Security*, Paper Series No. 56, ILO and Development Pathways, Geneva, 2017.

⁹² Sepúlveda and Nyst, 2012, *supra* note 3, p. 39.

norms.⁹³ It can also have the perverse effect of completely excluding the poorest and most vulnerable if, for example, community leaders choose those who are most likely to benefit from social assistance, rather than those most in need of support.⁹⁴ In some cases, community-targeted programmes have resulted in further excluding already socially marginalized women, for example.⁹⁵ Community-based targeting involves public discussion about people in the community with the potential to generate or contribute to stigmatization.

The role of community leaders in the targeting process also creates opportunities for bribery and the abuse of power, thus further marginalizing those who cannot pay a bribe or suffer from pre-existing discriminatory attitudes and reproducing arbitrary social hierarchies. This is particularly the case in communities where poverty is widespread and identifying those most in need is difficult. Compliance with the principle of equality and non-discrimination through community targeting would require investing in building the capacity of the community to undertake this task while avoiding/minimizing discriminatory attitudes and opportunities for corruption.

In societies where discrimination and stigmatization against certain groups is entrenched (e.g. single mothers accused of promiscuity or older women accused of practising witchcraft), avoiding discriminatory decisions against them would be difficult to overcome. Moreover, community targeting also raises the issue of volunteerism⁹⁶: Who is doing the work? Under what conditions? And what are the implications?

Geographical targeting should also be approached with caution, as it creates opportunities for strategic political manipulation by both policymakers and politicians, who have greater incentives to channel social assistance benefits to politically important electoral divisions rather than to the communities most in need. These potential abuses raise serious concerns regarding compliance with the principles of equality and non-discrimination, which require that the selection of beneficiaries must be made based on objective and reasonable criteria and pursue a legitimate aim. Thus, when a decision to target a specific geographical area (region, district or municipality) is not based on such criteria but on political considerations (e.g. where the government has its stronghold), there would be a violation of the principle of equality and non-discrimination.

Exclusion during retargeting

Targeted programmes require periodic retargeting to assess ongoing eligibility. Retargeting not only implies additional costs for the programme, but, from a legal point of view, it implies that some eligible beneficiaries would be excluded from the programme, simply because the retargeting has not taken place. In countries with low administrative capacity, delays in

⁹³ Edström, Jerker: "Rethinking 'Vulnerability' and Social Protection for Children Affected by AIDS", Institute of Development Studies (IDS), Bulletin Volume 38 Number 3, May 2007, p. 103.

⁹⁴ McCord, A.: "Community-based targeting in the Social Protection sector", Overseas Development Institute, Working Paper 514, London, 2017.

⁹⁵ See Davies, M: *Social Transfers Evaluation. Summary Report*, DFID and Institute for Development Studies, Sussex, 2009.

⁹⁶ United Nations Children's Fund (UNICEF): *Social Protection Strategic Framework. Integrated Social Protection Systems Enhancing equity for children*, New York, May 2012. (hereafter: UNICEF Social Protection Strategic Framework), Chapter II, p. 30.

retargeting may entail families/children not receiving the benefits that they are entitled to for years.⁹⁷ Even in some medium-income Latin American countries, where there is administrative capacity and long-time experience with cash transfers, eligible beneficiaries are excluded from the programmes for a significant period, as retargeting of CCTs might take four or five years in Colombia and Ecuador and two years in Brazil.⁹⁸

In legal terms, those who meet the requirements should be admitted to the programme at any time without waiting for retargeting to take place. The fact that this retargeting has not occurred or is due to occur in the near future, is not an objective, reasonable and proportional distinction between those who comply with the requirement during the registration window and those who comply with the requirement after registration was closed. Excluding eligible beneficiaries simply because retargeting has not taken place would be discriminatory (see text box 6).

In contrast, universal approaches have little need for periodic reappraisal. In most circumstances, it will be a once-in-a-lifetime event (and children would automatically leave the programme when they turn 19). As such, universal programmes would diminish excluding prospective beneficiaries – often up to several years - until retargeting is taking place. However, universal programmes would also present similar problems in some cases. Some low-income countries might not have the resources or capacity to keep the registration window for registration for a UCB open on a rolling basis throughout the year.

⁹⁷ Jhabvala, R. and Standing G.: “Targeting to the ‘poor’: Clogged Pipes and Bureaucratic Blinkers”, *Economic and Political Weekly*, 45 (26-27), 26 June 2010, pp 239-46.

⁹⁸ Grosh, Margaret: “On the Always vexing Question of targeting: how are Latin American and the Caribbean CCTs Doing?”, paper presented at International Symposium: The Contribution of CCTs to the Creation of Rights-Based Social Protection Systems, SEDESOL and World Bank, Mexico City, 28-30 September 2016.

Text box 6. Lack of retargeting as a violation of the principle of equality and non-discrimination: Argentina

In 2002, the government of Argentina launched a cash transfer programme called Plan Jefes y Jefas de Hogar Desocupados (for Unemployed Male and Female Heads of Households) as a rapid response to the financial crisis experienced by the country at the end of 2001, which was accelerating unemployment. The programme targeted all unemployed heads of households aged 60 or older, or with dependent children below age 18 or with disabilities. However, had to register before 17 May 2002 to become a beneficiary of the programme applicants. No one could join the programme after that date and no institutional mechanisms were foreseen to ensure the inclusion of other eligible beneficiaries once the registration was closed.

In practical terms, this time-bound registration implied that those who missed the registration window as well as those who became unemployed after the registration was closed (17 May 2002) were excluded from the programme. An NGO initiated strategic litigation representing two eligible beneficiaries that had been prevented from accessing the programme. Both cases (case Molina and case Sales) challenged the legality of the imposition of a deadline for registration. The plaintiffs argued that all those who meet the requirements should be admitted to the programme without discrimination. Thus, excluding eligible beneficiaries simply because they did not register on time was discriminatory. A programme that is an entitlement should be open for enrolment on an ongoing basis as and when a need/contingency arises.

In both cases, the courts agreed with the plaintiffs and they ordered their admission into the programme. The rulings argued that the programme was part of the State's obligation to grant social security benefits and found that the decision to deny coverage to those who did not register before the deadline was arbitrary.

While the rulings recognized that the decision of closing the registration significantly reduced the overall costs of the programme, the judgments did not find these arguments compelling. On the contrary, the Courts noted that accepting the State's arguments regarding budget constraints and administrative problems would have threatened the victims' rights to life, health and food and would give priority to material aspects of implementation over human rights enshrined in the Constitution.

Source: Decree 565/02 of 4 April 2002 establishing the programme, which was later regulated by the resolution of 312/02 of the Ministry of Labour; Case Molina María Elvira Silvana c/Estado Nacional – Ministerio de Trabajo s/ amparo, case No. 22.268/03, Juzgado Federal de Primera Instancia de la Seguridad Social N. 8 and Case Sales, Andrés Julio y otros c/Estado Nacional – Ministerio de Trabajo s/amparos y sumarisimos, No. 8992/04, sentencia interlocutoria of 17 June 2004, Juzgado Federal de Primera Instancia de la Seguridad Social No. 9.

In sum, targeting methodologies used across social protection interventions would not be in compliance with the principle of equality and non-discrimination, to the extent that generate exclusion of children and their caregivers. Attention should also be paid to the exclusion of children and caregivers as a result of the lack of frequency in the retargeting process. From a rights perspective, families must be able to access social protection when they need it.

In this regard, universal programmes are best positioned to comply with this principle since all children are expected to be included. Universal programmes are also more transparent and easier to understand, while diminishing the risks of exclusion through confusion over eligibility and of potential tensions in the community. Additionally, as universal approaches have little need for periodic reappraisal, they are best positioned to ensure that near- or newly poor people are included.

The challenge that remains is the affordability of the programmes and the level of benefits that concrete UCB proposals would be able to offer. These questions should be answered on a case-by-case basis while putting the whole spectrum of human rights at the centre of the discussion.

F. Are targeted methods better at reaching the most income-deprived children?

If a human rights framework requires giving priority to the most excluded and disadvantaged, are targeted methods the way to do it? In theory, targeted programmes might be considered an appropriate way by which social policies achieve this requirement. However, evidence shows that several targeted programmes are in fact not reaching the poorest segments of society.⁹⁹ If targeted programmes are not reaching the poorest, this raises a serious concern as to the legal justification of a targeted programme *vis-a-vis* the principle of equality and non-discrimination. To justify the use of targeting methods under human rights law, the programme must be fit for the intended purpose and effectively reach the most vulnerable and disadvantaged.

Using data for nine African countries, a study has shown that, despite being a popular method of poverty targeting, proxy means testing methods are particularly deficient in reaching the poorest.¹⁰⁰ In Namibia, a study found inefficiencies in the means testing for child grants, leading to large errors of inclusion and exclusion and showing that the poorest children are less likely to receive grants than those who are not as poor.¹⁰¹

Data from CCTs in Latin America shows that the largest conditional transfer programmes in the region (i.e. in Brazil, Colombia and Mexico) only cover an estimate of 50-55% of the poor population¹⁰². Likewise, CCTs in Latin America on average cover only 50.6% of the extremely poor in households with children under 18 years of age due to this targeting mechanism.¹⁰³ In 2012, the exclusion error for the Mexican Opportunities (*Oportunidades*) programme (previous to Prosperity (*Prospera*) programme) was estimated at approximately 70%, not reaching the expected coverage of the poorest 20% of the population.¹⁰⁴ A more in-depth study of the *Prospera* programme (cancelled in January 2019), shows that it continues to have high exclusion errors in 2016, not even reaching 44.5% of the extremely poor.¹⁰⁵

⁹⁹ Kidd, Stephen and Athias, Diloá: (Hit and Miss: An assessment of targeting effectiveness in social protection), Development Pathways and Church of Sweden, Working paper, March 2019.

¹⁰⁰ Brown, Caitlin Susan; Ravallion, Martin; Van De Walle, Dominique: "A poor means test? Econometric targeting in Africa", Policy Research working paper; No. WPS 7915, 2016.

¹⁰¹ Levine, S., Van Der Berg, S. and Yu, D.: "Measuring the Impact of Social Cash Transfers on Poverty and Inequality in Namibia", Stellenbosch Economic Working Papers: 25/09, 2009.

¹⁰² Stampini, M. and Tornarolli, L.: "The growth of conditional cash transfers in Latin America and the Caribbean: did they go too far?", Inter-American Development Bank, Policy Brief No. 185, 2012.

¹⁰³ Robles M., Rubio, M. and Stampini, M.: "Have Cash Transfers Succeeded in Reaching the Poor in Latin America and the Caribbean?", Policy Brief No. IDB-PB-246, Social Protection and Health Division, Inter-American Development Bank, Washington D.C, September 2015.

¹⁰⁴ Veras Soares, F.; Perez Ribas, R. and Guerreiro Osorio, R.: "Evaluating the impact of Brazil's Bolsa Família: cash transfer programmes in comparative perspective", IPC Evaluation Note, No. 1, Brasilia, International Policy Centre for inclusive Growth, December 2007.

¹⁰⁵ Scott, John: "Efectividad Redistributiva de PROGRESA-Oportunidades-Prospera", CIDE, 2017 (on file with the author).

This contrasts with universal programmes, which by design do not exclude the poorest. Nonetheless, even when benefits are universal or go to a larger segment of families than those categorized as income poor, the access is not guaranteed for the poorest segments. The take-up rate of family benefits among poor families is lower than for wealthier families, often because they do not know how to access the benefits.¹⁰⁶ As mentioned above, overcoming accessibility barriers to social protection programmes requires concrete additional measures, such as social worker support and using a range of communication channels.

G. Are special measures in favour of particularly vulnerable and excluded children in line with the principle of equality and non-discrimination?

As noted above (section III.1.A), the principle of equality and non-discrimination also requires taking affirmative actions to ensure that the most excluded and disadvantaged can enjoy their right to social protection on an equal basis with the rest of the population. This means that special measures to benefit children who are marginalized within their communities or families due to their gender, disability, lack of parental care, ethnicity, HIV/AIDS status or other factors are not discriminatory. For example, a cash transfer programme that provides higher transfers for school-aged girls who are more likely to drop out of school or a programme that provides an increased level of benefits to children with disabilities to overcome additional expenses would not be discriminatory, but rather be an enabler.

However, targeting children's that are discriminated against might not be the best way to reach them and to ensure all children enjoy their right to social protection in some circumstances. For example, Nepal's Child Grant targets Dalit children. Still, non-Dalit children who are poor and vulnerable – and equally in need of this benefit – may be excluded. Thus, it is always critical to assess whether the measure is objective, reasonable and proportional.

In most cases, affirmative actions in the form of additional level of benefits or a programme specifically targeted to vulnerable and disadvantaged children will be necessary to ensure equal enjoyment of the right to social protection. If existing interventions have been unable to protect the most vulnerable children, then additional steps to ensure inclusion are necessary. This was the case, for example, with *Bolsa Familia*. Although it may be thought of as implicitly having a child-centred approach, as most conditionalities are directly related to children accessing health or education services, it became apparent that more direct actions were needed in order to reverse the enduring inequality traps affecting children a decade after it was introduced.¹⁰⁷ In spite of *Bolsa Familia*'s positive impacts on health, nutrition and education indicators, poverty kept disproportionately affecting children, with little variation over the years. According to data from the 2010 Census, 42% of the extremely poor were aged under 15, a population representing almost half of the total coverage of *Bolsa Família*.¹⁰⁸ To address these challenges, the government established the *Brasil Carinhoso*¹⁰⁹ ("Brazil Cares")

¹⁰⁶ OECD: "Poor children in rich countries: why we need policy action", Policy Brief on Child Well-Being, OECD Publishing, Paris, 2018.

¹⁰⁷ Robles, Claudia and Mirosevic, Vlado: *Social protection systems in Latin America and the Caribbean: Brazil*, ECLAC, Santiago, Chile, February 2013.

¹⁰⁸ Idem.

¹⁰⁹ *Brasil Carinhoso* is part of Brazil Without Extreme Poverty (*Brasil sem miseria*) See <http://www.brasilsemmiseria.gov.br/brasil-carinhoso/brasil-carinhoso> (last accessed April 2019).

programme, which was designed to provide additional support (affirmative actions) to children up to six years old whose families are beneficiaries of the *Bolsa Familia* programme, yet still living in extreme poverty. This programme was established with a firm political commitment to reversing the persistent poverty and inequality that were still shackling the children of Brazil.

In Panama, special measures have been included in the CCT programme *Red de Oportunidades*, to ensure that the added vulnerabilities of indigenous children are addressed. While the rest of the population need to undergo a proxy means test to qualify for the programme, those living in *comarcas* (indigenous reserves) are exempted. They automatically qualify for the programme. Moreover, the services provided include identifying local community liaison officers that accompany families in the process, helping and supporting their compliance with co-responsibilities.¹¹⁰

Affirmative action measures are particularly important to ensure that children with disabilities enjoy the right to social protection on an equal basis with other children. Families living with a disabled child face additional costs associated with equipment, care, time and limited possibilities to engage in income-generating activities. Lack of public services may further exacerbate the impact of disability.¹¹¹ Argentina's Universal Child Allowance, for example, provides a benefit to children with disabilities that is four times as high as that given to those without.¹¹² Thus, compliance with the principle of equality and non-discrimination requires affirmative action measures (e.g. additional levels of benefits) in both universal and targeted programmes, in recognition of the higher costs associated with disabilities

Some targeted programmes specifically designed to reach children with disabilities have been effective in recognizing their added vulnerabilities, such as Jamaica's Programme of Advancement through Health and Education (PATH). However, as mentioned above, targeting children facing discrimination is not necessarily the best approach. For example, in a country with high levels of stigma and discrimination associated with disability, family members might refrain from registering for the programme or reporting that their child has a disability.¹¹³ Thus, UCBs may be better than targeted programmes to ensure the inclusion of children with disabilities.

Moreover, UCBs will be simpler to implement. While it is necessary to adjust programme design to respond to the characteristics of children with disabilities and their families in all type of programmes (e.g. linking the programme with healthcare services or providing an additional level of benefits), targeted programmes require higher levels of scrutiny. Adjustments need to be made at various levels, from including the extra cost of families with disabled children in means test targeting to adapting conditionalities (e.g. frequency).

¹¹⁰ UNICEF Strategic Framework, *supra* note 109, p. 84.

¹¹¹ *Ibid*, p. 82.

¹¹² See <https://www.anses.gob.ar/informacion/montos-de-asignacion-universal-por-hijo-y-por-embarazo-para-proteccion-social> (last accessed April 2019).

¹¹³ *Ibid*, p. 83.

2. Principle of the 'best interests of the child'

The principle of the best interests of the child is a paramount principle under the Convention on the Rights of the Child (CRC). The principle is also included in regional human rights instruments, such as the African Charter on the Rights and Welfare of the Child (Article 4) and the American Convention on Human Rights (ACHR).¹¹⁴ While the European Convention on Human Rights does not contain a similar provision, the European Court has applied it as an interpretative principle.¹¹⁵

Article 3(1) CRC states,¹¹⁶

'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

A. Scope and content

According to the United Nations Committee on the Rights of the Child (UN CRC Committee), the best interests of the child is a three-fold concept: a substantive right, an interpretative principle and a rule of procedure.¹¹⁷ This provision has been described as an 'umbrella' provision prescribing the approach to be followed 'in all actions concerning children'. As such, this principle can serve to evaluate laws, practices and policies relating to children.¹¹⁸ It is important to stress that, as recognized by the UN CRC Committee, the best interests of the child principle is a dynamic concept that encompasses issues that are continuously evolving.¹¹⁹ Thus, it requires an assessment appropriate to the specific context. The concept must be interpreted and applied in a manner consistent with the evolving human rights standards.

According to the UN CRC Committee, the best interests of the child should be respected not only in judicial and administrative decisions, but also in all stages of the adoption of laws, policies, strategies, programmes, plans, budgets, legislative and budgetary initiatives and guidelines concerning children in general or as a specific group.¹²⁰ This includes upholding the child's best interests in designing, implementing and evaluating social protection

¹¹⁴ While the best interests of the child principle is not expressly included in the text of the American Convention on Human Rights, the Inter-American Commission and the Court consistently apply this principle in their work. See, for example, IACHR, Advisory Opinion OC-17/2002 of 28 August 2002, para. 65.

¹¹⁵ See e.g. cases *Johansen v. Norway*, Application No. 24/1995/530/616, of 7 August 1996; *S.C. v. The United Kingdom*, Application No. 60958/00, Judgement of 16 June 2004 and *C. v. Finland*, Application No. 18249/02, Judgement of 9 May 2006.

¹¹⁶ The CRC also refers to the best interests of the child in other provisions, such as articles 9(1)(3), 18(1), 21, 37© and 40(2)(iii), as a reference point to ensure effective realization of all rights contained in that instrument.

¹¹⁷ United Nations Committee on the Rights of the Child (CRC): *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (Art. 3, para. 1), 29 May 2013, CRC/C/GC/14, para. 11.

¹¹⁸ See e.g. Detrick, Sharon: *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers, 1999, pp. 90–92 and Alston and Gilmour-Walsh, 1996, p. 37.

¹¹⁹ UN CRC Committee, 2013, *supra* note 134, para. 6(d).

¹²⁰ *Ibid.*, para. 10.

programmes.¹²¹ This principle should also be reflected and implemented in all social protection laws, operational programme guidelines and rules governing the provision of public services.¹²²

As a rule of procedure, the best interest of the child means that ‘whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the principle has been explicitly considered. In this regard, State parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations, be they broad issues of policy or individual cases.’¹²³

B. Using the “best interests of the child” to assess social protection policies and programmes

Social protection policymakers and practitioners must use the ‘best interests assessment’ when making decisions regarding various policy options and the design and implementation features of social protection programmes. The UN CRC Committee has acknowledged that the concept of the child's best interests is complex, and that its content must be determined on a case-by-case basis.¹²⁴

Within the context of the specific programme, decision makers should evaluate the various policy options, assign a weight to each and choose those which are best aligned with the child’s or children’s interests. Key questions include: Is this design feature or implementation modality in the best interests of the beneficiary and non-beneficiary children? Are all rights of children from the beneficiary household duly protected? Is there any element of the design/implementation modality that may adversely impact children’s rights? Is there any alternative that would better protect children’s rights? What complementary measures would be necessary to ensure the protection of children’s rights? Among the various policy options, decision makers should then opt for those which maximize the enjoyment of children’s rights and minimize any adverse impact.

There are several design features that must be assessed using this test. For example, whether to impose conditionalities requiring benefiting children to attend school or attain certain grades. While the assessment must be done in light of the specific circumstances of the programme, some general considerations are possible¹²⁵.

¹²¹ See Detrick, 1999, *supra* note 136, p. 92.

¹²² UN CRC, 2013, *supra* note 134, para. 15.

¹²³ *Ibid.*, para 6(d).

¹²⁴ *Ibid.*, para. 32.

¹²⁵ The imposition of conditionalities in social protection programmes has been criticized from a range of human rights perspectives, see e.g. Sepúlveda and Nyst, 2012, *supra* note 3 and UN-Women *Progress of the World’s Women 2015-2016: Transforming Economies, Realizing Rights*, UN-Women, 2014, pp. 140-141. Here, the analysis is limited to criticism from the perspective of the principle of the best interest of the child.

The imposition of conditionalities often increases power imbalances and the opportunity for abuses by those who are involved in monitoring compliance, such as teachers or healthcare providers. Conditionalities also provide teachers with additional means to exert authority over students and parents on issues not related to the quality of instruction.

Conditionalities might infringe on several rights. For example, while it is in the best interests of the child to have access to quality education, there may be increased access to education resulting in a reduction in its quality, if conditionalities are not matched with an increase in resources and teachers. Conditionalities might also have a negative influence on the school environment. They might create incentives for children or teachers to cheat on attendance figures and exam performance, so that households can continue receiving benefits. In such cases, the conditionality may impart wrong lessons to children: that it is possible, and acceptable, to cheat local authorities to access public resources.¹²⁶ Thus, there are significant moral and immoral hazards that come with conditionalities.

Conditionalities often increase time spent in school. However, without proper prevention and monitoring mechanisms, more time spent in school might increase childhood violence risks, as teachers and peers may be perpetrators of various types of violence.¹²⁷ Children, in particular girls, may be at risk of sexual abuse and harassment on the way to and from school.¹²⁸

Programme features that might be considered simple administrative requirements, such as automated application processes, mandatory waits for the receipt of a grant or sanctions for not complying with behavioural requirements, might also have a detrimental impact on children. Thus, these type of design elements are also subject to an assessment and determination of the child's best interests. Generally, it is not in a child's best interests when parents or guardians are subject to unnecessary requirements or behavioural conditions that have a negative impact on their parenting, as these lead to negative coping mechanisms or create unnecessary stress within the household.

Evidence shows, for example, that the mandatory wait of five weeks for receiving the initial payment and the difficulties encountered in the processing of Universal Credit in the United Kingdom have had adverse impacts on children. Such requirements have pushed families into debt, into the domain of the exploitative loan industry with exorbitant interest rates, rent arrears and food insecurity as well as negatively impacted the physical and mental health of claimants and their families.¹²⁹

¹²⁶ Pierri, Gastón and Assaad, Ragui: "The Impact of Argentina's Asignación Universal Por Hijo Cash Transfer Program on Children's Educational Outcomes", Working Paper, February 2015.

¹²⁷ See e.g. Ogando Portela, M.J.; Pells, K.: "Corporal punishment in schools: longitudinal evidence from Ethiopia, India Peru and Viet Nam", Innocenti Discussion Papers No. 2, UNICEF Office of Research Innocenti, Florence, 2015; Jones, H., and Pells, K.: "Undermining learning: multi-country longitudinal evidence on corporal punishment in schools", Innocenti Research Brief No. 6, UNICEF Office of Research Innocenti, Florence, 2016; and Perezniето, Paola; Jones, Nicola; Abu Hamad, Bassam and Shaheen, Mohammed: "Effects of the Palestinian National Cash Transfer Programme on children and adolescents: A mixed methods analysis", Overseas Development Institute and UNICEF, April 2014.

¹²⁸ Dunne, M.; Humphreys, S.; and Leach, F.: "Gender violence in schools in the developing world", Gender and Education 18, 2006, pp. 75–98.

¹²⁹ See e.g. Cheetham, Mandy; Moffatt, Suzanne; and Addison, Michelle: "'It's hitting people that can least afford it the hardest' the impact of the roll out of Universal Credit in two North East England localities: a qualitative

Assessing the child's best interests should help decision makers to determine the most appropriate features for a specific programme. For example, a cash transfer experiment targeted at households with adolescent girls in Malawi included two groups: one for which the transfer was conditional on attending school regularly (CCT arm), and another which received unconditional cash transfers (Unconditional Cash Transfer - UCT arm). While CCTs were more cost-effective than UCTs in increasing school enrolment and attendance, they were ineffective in deterring adolescent girls from getting married or bearing children. In contrast, the UCT had the effect of significantly delaying both.¹³⁰ Thus, in countries with high adolescent fertility rates, no requirement to attend school to receive the monthly cash transfers might be a better policy option to ensure adolescents' rights and to bring benefits to future generations.

States parties to CRC must ensure that the child's best interests have been a primary consideration in designing and implementing social protection interventions. According to the UN's CRC Committee, States must be able to describe how the best interests have been examined and assessed, and what weight has been assigned to them in the decision.¹³¹ Social protection decision makers should always choose those programmes or those design features that best protect children's rights. For example, having to choose between conditional or unconditional programmes, unconditional benefits are better aligned with the principle of the best interests of the child, as they diminished opportunities for abuse against children.

While all assessments must be context-specific, universal programmes would generally be more in line with the principle of the best interests of the child than targeted programmes. Universal programmes better comply with the obligation to ensure that all rights are protected without discrimination of any kind (section III.1). As discussed below, universal programmes are also better than targeted programmes at respecting the dignity of children and their families (section III.3) and at preventing violations of other rights (section III.4).

study", November 2018. Available at https://www.gateshead.gov.uk/media/10665/The-impact-of-the-roll-out-of-Universal-Credit-in-two-North-East-England-localities-a-qualitative-study-November-2018/pdf/Universal_Credit_Report_2018pdf.pdf?m=636778831081630000 (last accessed April 2019).

¹³⁰ Baird, S., McIntosh, C. and Ozler, B.: (Cash or Condition? Evidence from a Cash Transfer Experiment), Policy Research Working Paper 5259, The World Bank Development Research Group, March 2010 doi:10.1093/QJE/QJR032.

¹³¹CRC General Comment No. 14 (2013), *supra* note 134, para 14.

Text box 7: Assessing a ‘benefit cap’ in welfare benefits in the United Kingdom

In March 2015, the UK Supreme Court stated that a benefit cap, which limited the amount of welfare that a person can claim, including housing benefits, was not aligned with the principle of the best interests of the child. In its judgement, the Court stated that ‘it cannot possibly be in the best interests of the children affected by the cap to deprive them of the means to provide them with adequate food, clothing, warmth and housing, the basic necessities of life’.

However, the final decision in the case was very controversial. The case challenging the cap was brought by two single mothers who were forced into temporary accommodation in London. They argued that the cap discriminated against women because the majority of non-working households receiving the highest levels of benefits are single parent households, and most single parents are women (indirect discrimination). They relied on the right to non-discrimination in Article 14 of the European Convention on Human Rights (ECHR), in conjunction with the right to peaceful enjoyment of one’s possessions under Article 1 of Protocol 1 of the ECHR.

The Supreme Court accepted that the provisions on the cap indirectly result in differential treatment of men and women in relation to welfare benefits, and that the benefits constitute ‘possessions’ falling within Article 1 of the First Protocol to the ECHR. The question was whether the difference in treatment could be justified as a proportionate means of meeting legitimate aims (see section III.1). By a small majority (3-2), the Court rejected the challenge and held that the ‘benefit cap’ was justifiable and lawful. While the Court also examined the relevance of the best interests of the child principle (Article 3 CRC), the majority decided that CRC was not applicable in this case. After the decision, several organizations have continued to collect evidence on the negative impact of the benefit cap on families.

Source: Case R (on the application of SG and others (previously JS and others)) (Appellants) v Secretary of State for Work and Pensions (Respondent) [2015] UKSC 16, para. 226; the oral evidence presented to the Work and Pensions Committee of the House of Commons on 10 October 2018. Available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/work-and-pensions-committee/benefit-cap/oral/91648.html> (last accessed April 2019) and Women’s Budget Group: End Violence Against Women, and Surviving Economic Abuse, Universal Credit and Financial Abuse: Exploring the links, Women’s Budget Group, June 2018..

3. Respect for dignity and avoidance of stigma

From a human rights perspective, respecting the dignity of the child must inform all public policies related to children. Human dignity is at the very foundation of human rights law and a foundational value in many constitutions (e.g. Article 7 South African Constitution and Article 1 Constitution of Brazil). It is inextricably linked to the principles of equality and non-discrimination and the best interests of the child.

When actions or omissions by public actors are derived from stigma and directed towards the stigmatized, there is an infringement on the dignity and the equality of the person.¹³² Thus, social policies must avoid exposing children and their caregivers to any form of personal, social

¹³² See, e.g., Concluding Observations of the CESCR [E/C.12/PAK/CO/1 \(CESCR, 2017\)](#), [E/C.12/LBN/CO/2 \(CESCR, 2016\)](#) and [E/C.12/UGA/CO/1 \(CESCR, 2015\)](#).

or institutional shame or stigmatization.¹³³ The UN Committee CRC has expressed concern, in particular regarding stigmatization of children with disabilities, children living with or affected by HIV/AIDS, street children, pregnant teenagers and adolescent mothers.¹³⁴

States have a duty to create the conditions for human rights compliance and to prevent their violations. Thus, social protection decision makers must ensure that those entitled to social protection programmes are treated with dignity.¹³⁵ They must avoid any design or implementation feature that exposes children and their caregivers to stigmatization. At the same time, they must ensure that the programme actively reduces any unintended negative impact. For example, in designing a school feeding programme, the range of options should go from those that do not generate stigmatization (e.g. providing to all children in a school) to those who reduced their impact (e.g. using pre-paid cards, so that children receiving free meals could not be distinguished from those who are purchasing their meals, neither by other students nor by school staff). From a human rights perspective, any option that stigmatizes children (e.g. programme targeted to the 'poorest' children that directly or indirectly exposes them to students or school staff) must be excluded from the potential options.

The stigmatizing impact of targeting programmes is always problematic from a human rights perspective. Targeted programmes are often accompanied by negative stereotyping and discrimination that transform the shame of those receiving them into stigma.¹³⁶ As a seven-country study has shown, beneficiaries of social assistance programmes are often considered 'undeserving'. As the study notes, *Thozilurappu Paddhathi* (the 'work guarantee scheme'; NREGA) in India is often referred to as *Thozhiluzhappu Paddhathi* (the 'lazy work scheme'), while the 'education for all' policy *Bonabasome* in Uganda is widely known as *Bonabakone* ('illiteracy for all'; 'food you cannot eat').¹³⁷

When programmes are not well designed, they might inadvertently reinforce stigmatization, even when they are introduced with the express aim of overcoming social exclusion of particularly discriminated groups. For example, it has been reported that the school stipends for Dalit children, in Nepal, have not been able to contribute to the deep structural transformation required to address socioeconomic security of this vulnerable group, and may potentially contribute to their stigmatization.¹³⁸

In communities where most of the people live in poverty, targeted programmes are not only stigmatizing but also impact the social cohesion of the community¹³⁹. In Malawi, for example,

¹³³ As described by Walker, personal stigma is a person's own feeling that claiming benefits is shameful. Social stigma is a process entailing attitudes, thoughts and actions on the part of the majority group and the perceptions and responses to these by the people stigmatized. Institutional stigma is evidenced in the framing, structure and or delivery of benefits. It can be an intentional component of policy or an inadvertent element of it. Walker, Robert: *The Shame of Poverty*, Oxford University Press, 2014, pp. 54-58

¹³⁴ See e.g. Concluding Observations of the Committee CRC, in [CRC/C/VCT/CO/2-3 \(CRC, 2017\)](#); [CRC/C/GEO/CO/4 \(CRC, 2017\)](#); [CRC/C/WSM/CO/2-4 \(CRC, 2016\)](#) and [CRC/C/KEN/CO/3-5 \(CRC, 2016\)](#).

¹³⁵ See e.g. Concluding Observations of the CESCR, in E/C.12/JPN/CO/3 (2013).

¹³⁶ Walker, 2014, *supra* note 152, p. 150.

¹³⁷ Ibidem.

¹³⁸ Koehler, Gabriele: "Social Protection and Socioeconomic Security in Nepal", Institute of Development Studies (IDS) Working Paper, Volume 2011 Number 370, August 2011, p. 15.

¹³⁹ See e.g. Kidd, Stephen: *Social Exclusion and Access to Social Protection Schemes*, Government of Australia, Department of Foreign Affairs and Trade, 2014.

beneficiaries of a social cash transfer pilot programme reported that they were more likely to feel jealousy from other households in their communities and, on average, community members were less likely to help them since receiving the cash transfer.¹⁴⁰ By contrast, universal programmes are usually seen as entitlements and thus do not stigmatize nor engender conflict induced by targeting mechanisms. With simpler application processes, universal programmes neither require means tests nor impose conditionalities on the beneficiaries. As such, they are less likely to be degrading than targeted programmes.

Stigmatization may also compromise the effectiveness of programmes. Institutional stigmatization (stigmatizing and stereotyping beneficiaries' dealing with social protection authorities, social workers, teachers and healthcare providers)¹⁴¹ discourages people from taking up their rights.¹⁴² Studies suggest that perceptions of unfriendly social protection staff and stigma associated with a programme can be deterrents to seeking registration.¹⁴³ For example, a study found that a substantial number of SASSA staff in South Africa were of the view that teen mothers should not receive the Child Support Grant (CSG). These teen mothers were accused of having fallen pregnant just to get the grant. The prevalence of this attitude was found to be a common 'push factor' prompting several teenagers, as well as young women who have more than one child, not to apply for the CSG for their infants.¹⁴⁴ If individuals do not take up a programme because they feel stigmatized by a targeting method that characterizes them as being from the poorest households or living with HIV/AIDs or with a disability, the programme will not reach their intended beneficiaries.

Stigmatization is also a problem in developed countries. In many European countries, the public discourse concerning the framing of social protection programmes is stigmatizing.¹⁴⁵ The use of expressions such as 'handout', 'benefit scrounger' and 'welfare dependent' - contrasted with 'hard-working responsible citizens' - are becoming increasingly common among politicians. The dignity of those receiving welfare benefits is also impacted by imposing behavioural conditions on applicants (e.g. being required to actively seek work), applying sanctions for non-compliance with conditionalities and establishing complex systems of collecting information and intrusive checking of beneficiaries (e.g. searching their homes for evidence of fraudulent activity). This adds to queues, delays and different forms of ill-treatment that welfare recipients received from - an often under resourced - welfare staff.¹⁴⁶

These intrusive measures undermine beneficiaries' personal independence, seriously interfere in their right to privacy and family life (e.g. Articles 16 CRC and 17 ICCPR) and make them even

¹⁴⁰ Miller, Candace; Tsoka, Maxton; and Reichert, Kathryn: *Impact Evaluation Report External Evaluation of the Mchinji Social Cash Transfer Pilot*, Center for International Health and Development (CIHD) at Boston University for the Government of Malawi, USAID and UNICEF Malawi, June 2008.

¹⁴¹ Walker, 2014, *supra* note 152, p. 188.

¹⁴² See e.g. Wodon, Quentin: *Improving the Targeting of Social Programs in Ghana*, World Bank Publications, 2012, p. 36.

¹⁴³ Stephens, Jessica and Artiga, Samantha: *Key Lessons from Medicaid and CHIP for Outreach and Enrollment Under the Affordable Care Act*, Issue Brief, The Kaiser Commission on Medicaid and the Uninsured, June 2013, p. 7.

¹⁴⁴ SASSA and UNICEF: *Preventing Exclusion for the Child Support Grant: A Study of Exclusion Errors in Accessing CSG Benefits*, UNICEF, South Africa, 2013, p. 56.

¹⁴⁵ Linchao, Yang and Walker, Robert: "Universal Child Grants and Dignity and Shame", forthcoming 2019.

¹⁴⁶ Walker, 2014, *supra* note 152, p. 154.

more vulnerable to abuse and harassment. Moreover, evidence shows that welfare conditionalities push some beneficiaries into negative behaviours, from disengagement from the social security system to survival crime¹⁴⁷, which might have devastating consequences for children.

The infringement on the dignity and stigmatization of parents and guardians has - at the very minimum - an indirect negative impact on children's well-being. Parents' financial and psychological distress can negatively affect family relationships and parenting behaviours, increasing the risks of violence against children.¹⁴⁸ It is particularly concerning when behavioural requirements and sanctions are applied to those who had sole caring responsibilities for young children, mainly single mothers, without access to child care.¹⁴⁹

Children can also be placed in potentially stigmatizing positions, in particular when social protection interventions are not sensitive to their specific vulnerabilities such as HIV/AIDS status, disability or ethnicity. UNICEF experience in Southern Africa, for example, demonstrates that AIDS-exclusive targeting, although well-intentioned, is problematic due to issues related to stigma and similar levels of poverty and deprivation among AIDS-affected households and their neighbours.¹⁵⁰ Thus, if the objective is to mitigate the impact of AIDS on children and households instead of targeting based on HIV and AIDS status, which would be stigmatizing, it may be better to implement a universal programme. A programme targeting poor households would not include all HIV- and AIDS-affected households but all poor HIV- and AIDS-affected households. Nonetheless, a universal programme would reach all households in the country and would therefore include all HIV- and AIDS-affected households regardless if they are poor or not.¹⁵¹

The stigmatization caused by targeted and conditional programmes is one of the critical human rights arguments in favour of universal programmes. When programmes are designed to reach only the 'deserving poor' – without taking into account the dignity of the recipients – they treat prospective beneficiaries as if they were the subject of charity, instead of rights holders entitled to the right to social protection and to the enjoyment of all their rights on an equal basis with the rest of the population. Moreover, when targeted or conditional programmes impose excessive requirements on beneficiaries to access benefits and services or severe sanctions for non-compliance, States punish, humiliate and undermine the autonomy of persons living in poverty.¹⁵² In contrast, universal programmes tend not to stigmatize and, by promoting benefits take-up, also contribute to the enforcement of the right to social protection.

¹⁴⁷ Welfare Conditionality Project: *Final Findings Report*, Department of Social Policy and Social Work, University of York, June 2018. Available at: http://www.welfareconditionality.ac.uk/wp-content/uploads/2018/06/40475_Welfare-Conditionality_Report_complete-v3.pdf (last accessed April 2019).

¹⁴⁸ Butchart, A. and Hillis, S.: *INSPIRE: Seven Strategies for Ending Violence Against Children*, World Health Organization, Geneva, 2016.

¹⁴⁹ Ibidem.

¹⁵⁰ UNICEF Social Protection Strategic Framework, *supra* note 109, Chapter II, p. 29.

¹⁵¹ Schubert, Bernd; Webb, Douglas; Temin, Miriam and Masabane, Petronella: *The Impact of Social Cash Transfers on Children Affected by HIV and AIDS: Evidence from Zambia, Malawi and South Africa*, UNICEF East and Southern Africa Regional Office, Nairobi 2007.

¹⁵² International Council on Human Rights Policy: *Modes and Patterns of Social Control Implications for Human Rights Policy*, Geneva, 2010.

However, in societies where prejudices and discriminatory practices against certain groups are entrenched, universal programmes alone would not overcome them. Additional measures (e.g. capacity-building of staff and monitoring mechanisms) are necessary to ensure inclusion and prevent direct or indirect discrimination against them. Studies in the United States have shown that, where welfare staff have been trained to reduce stigma and prejudices, eligibility offices of Medicaid have undergone cultural changes with significant positive results in enrolment and the retention of beneficiaries.¹⁵³

4. Ensuring compliance with other children's rights and avoidance of adverse impacts on the exercise of those rights

Human Rights are indivisible and interdependent. This is particularly true for children, as evident from the Convention on the Rights of the Child. The right to social protection cannot be considered in isolation from other rights, such as the rights to survival and development (Article 6 CRC); birth registration (e.g. Article 7 CRC); respect for the views of the child (Article 12 CRC); protection of privacy (Article 16); access to appropriate information (Article 17 CRC); parental responsibilities, the principle that both parents have common responsibilities for the upbringing and development of the child, family assistance and services for children of working parents (e.g. Article 18 CRC); health and health services (e.g. Article 24 CRC); an adequate standard of living (e.g. Article 27 CRC); education (e.g. Article 28 CRC); leisure and recreation (Article 31 CRC); and protection against economic exploitation (Article 32 CRC).

Being indivisible means that there is no hierarchy among rights. Being interdependent means that to ensure fulfilment of one right, fulfilment of the others must also be ensured. For example, if children are not registered (Article 7.1 CRC), they will be invisible to any programme. The indivisibility and interdependence of all rights means that social protection interventions must (a) comply with children's rights in their implementation (e.g. respect the right of children to be heard); (b) avoid adverse impacts on other children's rights (e.g. the rights to education, health and to be free of violence) and (c) seek to maximize the enjoyment of children's rights (e.g. use interaction with communities to address any prevailing harmful traditional practice, such as domestic violence, female genital mutilation or early marriage, and foster change).

There is plenty of evidence on how different social protection interventions may assist States in complying with several children's rights, including the rights to education, health and food.¹⁵⁴ For example, a range of social protection interventions improve children's access to **education**. Cash transfers programmes or school feeding programmes, for example, can increase school enrolment.¹⁵⁵ Social protection interventions may also protect children's rights

¹⁵³ Stephens, Jessica and Artiga, Samantha: *Key Lessons from Medicaid and CHIP for Outreach and Enrollment Under the Affordable Care Act*, Issue Brief, The Kaiser Commission on Medicaid and the Uninsured, June 2013, p. 7.

¹⁵⁴ See e.g. Bastagli, F.; Hagen-Canker, J.; Harman, L.; Barca, V.; Stuge, G and Schmidt, T.: *Cash transfers What does the Evidence Say? A Rigorous Review of Programme Impact and of the Role of design and Implementation Features*, Overseas Development Institute, London 2016.

¹⁵⁵ Ibidem.

by preventing households from resorting to negative coping strategies that are harmful to children (e.g. pulling them out of school).

However, when social protection interventions are not well designed, they may have a negative impact on the enjoyment of other rights, such as the rights to health (Article 24 CRC); quality education (Article 28 CRC); protection against economic exploitation (Article 32 CRC); protection against sexual abuse (Article 34 CRC); protection against other forms of physical, or emotional violence (Articles 37 CRC and 7 ICCPR); and leisure and recreation (Article 31 CRC).

For example, there is evidence that social protection interventions have a positive impact on **reducing child labour**. However, a wrongly designed programme may have the opposite effect, at least for some beneficiary children.¹⁵⁶ Any increase in child labour will threaten the enjoyment of several rights, such as the rights to be protected against economic exploitation, education (e.g. lower children's participation in school), health (e.g. impacting their mental wellbeing or exposing them to physical hazards), rest and leisure (e.g. unreasonable working hours for a child) and equality (e.g. treating girls in an unequal manner to boys).

There is evidence that participation in a public work programme may induce a substitution of child labour for adult labour, at home and in income-generating activities reducing schooling.¹⁵⁷ A study of the Productive Safety Net programme (PSNP) in Ethiopia found evidence of both positive and negative outcomes, depending on the gender and age of children from participating households. While the programme contributed to reducing the average number of hours worked by boys with different impacts depending on their age, measured effects were weaker for girls. Moreover, younger girls (aged 6-10) from participating households showed a negative impact, with lower school attendance on average and an increase in child labour.¹⁵⁸ If a social protection intervention decreases child labour but has a considerably larger reduction for boys than girls, as has been the case of the Benazir Income Support Programme (BISP) in Pakistan,¹⁵⁹ then the principle of gender equality is compromised.

Social protection interventions might also have a negative impact on the rights of children to **leisure and recreation**. For example, an evaluation of the CCT programme *Familias en Acción* in Colombia found evidence suggesting that the increased time at school may be drawn from children's leisure time and not from reducing the hours dedicated to work.¹⁶⁰

¹⁵⁶ de Hoop, Jacobus; Friedman, Jed; Kandpal, Eeshani and Rosati, Furio: "Child Schooling and Child Work in the Presence of a Partial Education Subsidy", IZA Discussion Paper Series, September 2017. Available at: <http://ftp.iza.org/dp10992.pdf> (last accessed April 2019).

¹⁵⁷ Porter, C. and Dornan, P.: "Social Protection and Children: A synthesis of evidence from young lives longitudinal research in Ethiopia, India and Peru", Young Lives Policy Paper 1, September 2010 Available at: <http://www.younglives.org.uk/sites/www.younglives.org.uk/files/YL-PP1-Social-Protection-and-Children.pdf> (last accessed April 2019).

¹⁵⁸ Hoddinott, John; Gilligan, Daniel; Taffesse, Alemayehu Seyoum: "The Impact of Ethiopia's Productive Safety Net Program on Schooling and Child Labor", SSRN Electronic Journal 45, March 2009.

¹⁵⁹ A 2014 evaluation found that BISP cash transfer had reduced the likelihood of boys engaging in child labour but that there was no impact for girls. Cheema, I.; Farhat, M.; Hunt, S.; Javeed, S.; Pellerano, L. and O'Leary, S.: *Benazir Income Support Programme: first follow-up impact evaluation report*, Oxford Policy Management, Oxford, 2014.

¹⁶⁰ Attanasio, Orazio; Fitzsimons, Emla; Gomez, Ana; Gutierrez, Martha Isabel; Meghir, Costas; and Mesnard, Alice: *Children's Schooling and Work in the Presence of a Conditional Cash Transfer Program in Rural Colombia*,

Data about the impact of social protection programmes on *intrahousehold time allocation* (in activities such as market work, domestic labour, school and leisure for children and adults) is also essential to assess the impact of social protection programmes on children's rights. While boys and girls should benefit equally from social protection programmes, design problems may result in improvements in the enjoyment of rights for boys but not for girls. They could even lead to improvements for some children at the expense of others. For example, a 2015 study of *Familias en Acción* found that the programme had increased the leisure time of boys and reduced their time spent on paid work. However, it had reduced the leisure time of girls and increased their domestic labour.¹⁶¹

Any significant difference in the time girls and boys spend on unpaid care and domestic work as a result of a social protection programme would not be in line with the principle of gender equality. Similarly, programmes that fail to overcome gender stereotyping, exacerbate traditional gender roles or discourage men from taking greater responsibility in the upbringing and development of children would not be in line with international obligations. They might violate the obligation of States to ensure that both parents have common responsibilities for the upbringing and development of the child (Article 18 CRC) and to modify stereotype roles for men and women (Article 5 CEDAW).

Assisting parents in providing care and ensuring that all family members enjoy equal rights and duties within the family requires States to play a critical role in guaranteeing that care is not only effectively redistributed from women (or from the primary caregiver in same-sex couples) to men but also from households to the State. In any case, social protection programmes alone are not enough to better distribute care responsibilities. Infrastructure and services are also critical.

Social protection programmes may impact the rights of children in a variety of additional ways. However, little information is available on some aspects which are critical for assessing their impact on children's rights. For example, the failure to systematically assess **time use among girls versus boys** within beneficiary households prevents us from determining whether there is any discriminatory impact particularly against girls.

Limited evidence on the impacts of social protection programmes in **childhood violence** prevents us from having a comprehensive assessment on programme impact on children's rights. Any increase or decrease in intrahousehold violence as a result of a social protection intervention has a direct impact on children's rights. However, little attention has been paid to whether social protection interventions affect childhood violence positively or negatively. There are no studies comparing targeted interventions and (quasi) universal programmes in regard to impact on preventing and reducing violence against children. Similarly, there are no

University of Chicago Press, 2010. Available at: <http://www.homepages.ucl.ac.uk/~uctpjrt/Files/edccfamilias.pdf>. (last accessed April 2019). It is worth noting that the level of the grant was chosen so as to substitute, at least in part, the income the household would forgo if increased schooling involved reductions in income-generating activities.

¹⁶¹ Canavire, Gustavo and Ospina, Mónica: "Intrahousehold Time Allocation: An Impact Evaluation of Conditional Cash Transfer Programs", Centro de Investigación Económicas y Financieras (CIEF), No. 15-17, 2015. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2645096 (last accessed April 2019).

studies on the impact of different social protection interventions on the root causes of violence against children.¹⁶²

The extent to which social protection interventions incorporate specific considerations related to the age, gender and other specific vulnerabilities of children and caregivers into their design and implementation can have a significant impact on the enjoyment of rights. For example, data shows that the child grant in South Africa correlates with the beneficiary attending school. Yet, according to a study, when the grants are received by women, they have a higher impact on children's school attendance than when men received the grant.¹⁶³ Thus, issues, such the age and gender of the children, the gender of the caregiver as well as the level of the grant, are all important factors that may assist in assessing the impact of specific social protection interventions on children's right to education.

A social protection intervention may not benefit all children equally. For example, if the level of the grant is lower than the opportunity costs to attend school, a caregiver might choose to use the money received from the grant on younger children, while the older children are sent to work. Ensuring that any different impacts on children are not discriminatory requires compliance with the criteria mentioned above (section III.1.A): objective and reasonable justification, pursuing a legitimate aim under human rights law and a reasonable relationship of proportionality between the means employed and the aim sought to be realized.

There is limited evidence available on the way in which various social protection interventions or certain design and implementation features impact children's rights overall. Ensuring children's rights and putting the principle of the best interests of the child as a primary consideration require that social protection authorities regularly assess and monitor the (potentially unintended) impacts of programmes on children's rights (e.g. the rights to education, health and leisure). Such assessments should include participant children's own perspectives on the programme.

Assessing the impact of a social protection intervention in the enjoyment of other children's rights should be done at the individual and not at the household level. Each child in a household might be impacted differently depending on his/her gender, age and context-specific needs and vulnerabilities.

Ensuring that social protection interventions avoid adverse impacts on other children's rights and maximize their enjoyment requires more than simply providing cash. Cash alone is unlikely to comprehensively address the indivisibility and interrelatedness of children's rights. From a rights perspective, the integration of other types of support, so-called 'cash-plus' interventions,¹⁶⁴ are likely to be necessary.

¹⁶² Peterman, A.; Neijhoft, A. N.; Cook, S.; and Palermo, T. M.: "Understanding the linkages between social safety nets and childhood violence: a review of the evidence from low- and middle-income countries", in: *Health policy and planning*, 32(7), 2017, 1049-1071.

¹⁶³ Santana, Maria Isabel: "An Evaluation of the Impact of South Africa's Child Support Grant on School Attendance", CEDLAS, September 2008. Available at: http://www.cedlas-er.org/sites/default/files/aux_files/santana.pdf (last accessed April 2019).

¹⁶⁴ Roelen, Keetie; Devereux, Stephen; Abdulai, Abdul-Gafaru; Martorano, Bruno; Palermo, Tia; and Ragno, Luigi Peter: "How to Make 'Cash Plus' Work: Linking Cash Transfers to Services and Sectors", Innocenti Working Paper 2017-10, UNICEF Office of Research, Florence 2010.

IV. CONCLUSION

Existing legal frameworks related to human rights at the national, regional and international levels should guide social protection decision makers and practitioners in designing, implementing and evaluating social protection programmes. While all rights apply to everyone, including children, there are some international instruments, such as CRC, and domestic laws that specify these rights in relation to children. These legal frameworks are compulsory for social protection decision makers and are key for ensuring that social protection interventions respect the rights, dignity and best interests of children.

In order to determine whether Universal Child Benefits (UCBs) have a comparative advantage over targeted programmes from a human rights perspective, this study has assessed the compliance of cash transfer interventions - that directly or indirectly seek to benefit children - with critical children's rights. The study has focused on the principle of equality and non-discrimination, the principle of the best interest of the child, the respect of dignity and avoidance of stigma as well as on the impact of social protection interventions on other children's rights.

From a human rights perspective, social protection systems must aim at progressively realizing full coverage of children without discrimination of any kind. States are obliged to remove all obstacles that impede or limit children's enjoyment of the right to social protection. In some circumstances, it also implies an obligation to take specific measures (e.g. additional level of benefits or specific programmes for certain groups of children) to ensure that children that suffer from structural or historical inequalities can access their right. Nonetheless, any form of prioritizing the most vulnerable and disadvantaged children must be done in compliance with the requirement of being objective, being reasonable and having a legitimate aim (taking into account the whole spectrum of rights). As discussed in the paper, mechanisms that select beneficiaries based on their income or poverty level have difficulties in complying with this principle. Thus, they are more problematic from a human rights point of view.

While specific UCB proposals need to be assessed in line with the norms and standards examined in this paper, there are strong reasons to suggest that UCBs are better positioned than targeted programmes to ensure children's rights.

UCBs are more in line with the **principle of equality and non-discrimination** than targeted programmes. In general, higher coverage means lower exclusion errors. Being comparatively easier to implement than targeted programmes, UCBs are also more inclusive. There is a greater likelihood that the most vulnerable and disadvantaged children and families will be included. Simpler and more straightforward implementation increases the chances of parents or guardians having the necessary information about the programme. Requiring less documentation (e.g. only a birth certificate) facilitates access for the most vulnerable and disadvantaged, although such access is not guaranteed.

Targeted programmes tend to focus only on poor families, although they often fail to reach the poorest. They suffer from low take-up as a result of the failure to fully overcome accessibility, affordability, adaptability and acceptability barriers. Some targeted programmes, such as conditional cash transfers, also fail to address women's and girls' disadvantages.

In both targeted and universal programmes, full compliance with the principle of equality and non-discrimination would require ensuring that certain groups of children who are more

vulnerable and disadvantaged (e.g. children with disabilities) also benefit from affirmative actions (e.g. higher levels of transfer) to ensure substantive equality.

While the assessment must be context-specific, UCBs tend to better respect the **principle of best interests of the child** than targeted programmes. In both universal and targeted programmes, there are asymmetries of power that might have an adverse impact on children's rights. However, the more discretion is given to programme staff and implementers, the higher the risk of abuses committed against beneficiaries or potential beneficiaries. For example, in conditional programmes, those supervising compliance with conditions (e.g. teachers supervising school attendance) may be able to take advantage of beneficiaries (e.g. school children), by threatening to report them as not fulfilling conditions.

The higher the number of administrative requirements for providing children with their right to social protection, the higher the need to put monitoring mechanisms in place to ensure that everyone is effectively enjoying the right without adverse impacts on the enjoyment of other rights.

The likelihood of abuse by staff in universal programmes is lower than in targeted programmes owing to their simplicity of design and eligibility. In universal programmes there is limited discretion and fewer dimensions of the programme that can have a detrimental impact on children. Generally, it is not in a child's best interests when parents or guardians are subject to unnecessary requirements or behavioural conditions that have a negative impact on their parenting, which may lead to negative coping mechanisms or create unnecessary stress within the household.

Universal programmes are also better positioned than targeted programmes to respect the **dignity** of those entitled to social protection programmes. They are less likely than targeted programmes to expose children and their caregivers to **stigmatization**. Simpler application processes are less demeaning than means testing or conditionalities.

When targeted programmes stigmatize parents or guardians, there is also an adverse impact on children's well-being. Parents' financial and psychological distress can negatively affect family relationships and parenting behaviours, increasing the risks of violence against children.

Children's rights must be seen in their indivisibility. Efforts to ensure compliance with their right to social protection, or their right to an adequate standard of living, should not undermine other rights. Thus, any social protection intervention or design feature that harms other rights of children (e.g. the right to education, the right to be free from violence or the prohibition of harmful child labour) should be avoided. While there is limited evidence on the impact of social protection intervention on children's rights, the widespread evaluations of cash transfer programmes suggest that design and implementation modalities have violated some children's rights in some cases.

In general, human rights law does not provide precise policy recommendations. Nonetheless, it limits the discretion of policymakers. From the various policy options, they are required to choose among those programmes or those design features that best protect children's rights. For example, having to choose between conditional or unconditional programmes, unconditional benefits are better aligned with human rights, as they diminish the opportunities for abuse.

To better assess the potential advantages or limitations of cash transfers, including UCBs, with human rights norms and standards, more information is often needed. Decisions regarding the design and implementation of social protection programmes should be more transparent. Policymakers should publicly respond to, explain and justify policies and decisions regarding social protection. In this regard, a national dialogue is an essential first step to ensure rights-based social protection systems. They provide an opportunity to assess coverage gaps, discuss priorities, explore alternatives and justify actions.

In developing countries, the lack of systemic evaluation of the impact of social protection programmes in the whole spectrum of children's rights is also a major gap. Moreover, it is necessary to strengthen the evidence based on the design and implementation features of existing cash transfers and their consistency with the principle of the best interests of the child. Children's rights should feature more prominently in designing, implementing and evaluating social protection interventions.

Still, as this paper has shown, existing evidence suggests that while governments might be able to ensure the child's right to social protection through a multi-tiered, mixed-system, some design features of social protection programmes have the potential to negatively impact children's rights. Therefore, policymakers should always assess the way in which the key design features of a programme impact children's rights. Such assessment should inform design and policy choices by preventing and remedying adverse effects on children's rights. Human rights impact assessments can help to identify the best policy choice among competing options for social protection interventions, identify both positive and negative impacts on children's rights and help policymakers prioritize those options that can contribute to the protection of all children's rights. The process of setting priorities and managing trade-offs in social protection interventions should be transparent, inclusive and participatory.

Assessing the impact of a social protection intervention on children's rights should not be limited to an ex-ante assessment. Once a programme is implemented, social protection authorities should regularly assess the different impacts that the programme has on children's rights, taking due account of the multiple forms of discrimination that might arise at the intersection of age, race, gender, class, disabilities and other factors. Moreover, programme authorities should have the operational flexibility to adjust the design and the delivery of a programme to rectify unintended negative impacts as they appear. While different types of interventions may benefit children, all must comply with human rights norms and standards and avoid adverse impacts on their rights.

States must move towards a comprehensive child rights strategy. Thus, in addition to better assessing the impact of social protection interventions on children's rights and to adapt them accordingly, they must put complementary policies, such as 'cash plus', interventions in place. Other policies, such as employment and labour market policies as well as measures to guarantee access to high quality public services, including health, education and care, also play a critical role in determining the impact of social protection policies on children's rights.

List of text boxes

Text box 1: Influencing national social protection systems through international law: Expanding protection to *all* children

Text box 2: Good practice: Enshrining the right to social protection for refugees, asylum seekers and migrants in Uruguay

Text box 3: Judicial enforcement of the right to social protection of non-nationals: South Africa, Switzerland, Brazil and Austria

Text box 4: Are undocumented migrants also protected under the right to social protection?

Text box 5: Eligibility requirements that indirectly discriminate against children in Ireland

Text box 6: Lack of retargeting as a violation of the principle of equality and non-discrimination: Argentina

Text box 7: Assessing a “benefit cap” in welfare benefits in the United Kingdom

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