

Litmus Tests as Tools for Tribunals to Assess State Human Rights Obligations to Reduce Greenhouse Gas Emissions

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How much does an individual state have to do reduce emissions within its jurisdiction and by when? This is one of the most challenging questions raised by climate litigation, and it is difficult for tribunals to address, as they are often concerned by the prospect of straying beyond their legal function into policy-making. However, this debate is essential; without it, there can't be an effective remedy for affected complainants or a way to hold states accountable for their obligations through litigation. What, therefore, are the criteria by which a tribunal can objectively assess the adequacy of states' efforts to reduce emissions?

This chapter proposes five tests, building on the practice of the UN Committee on Economic, Social and Cultural Rights (CESCR), for such an assessment. Among international human rights treaty bodies, the CESCR has had to grapple the most with the question of the progressive realization of rights, rather than more binary questions of law, and thus has developed useful guidance in this sphere. A sixth test addresses the 'how' question, rather than 'how much or how fast' and, more specifically, whether the measures proposed are themselves rights-respecting.

These tests should be examined separately as well as cumulatively. They are designed to apply state obligations set out under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and may be applicable to other national or international standards that explicitly or implicitly require states to reduce carbon emissions.

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They can therefore be used in periodic monitoring by the CESCR and for complaints brought under the Optional Protocol to the ICESCR and could also potentially be used in other national or international courts or accountability mechanisms, if and to the extent that the relevant applicable standards contain similar obligations to reduce emissions. To be clear, these tests may not be useful in certain jurisdictions, beyond simply assisting litigators in their scoping of relevant legal arguments.

Before setting out the tests, I will touch on the legal basis for obligations to reduce emissions. Under international human rights law, states have obligations to protect the enjoyment of human rights from harm (within their borders and in other countries) caused by conduct or omissions within their territory or jurisdiction, whether committed by state or non-state actors, including businesses.¹ According to CESCR, ‘a failure to prevent foreseeable human rights harm caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach of this obligation’.² It has further indicated that, as a matter of obligation, states’ nationally determined contributions (NDCs) ‘should be revised to better reflect the “highest possible ambition” referred to in the Paris Agreement (article 4.3)’.³ The following six tests will speak to assessing whether the highest possible ambition has been achieved and whether a state has taken sufficient and adequate steps to prevent greenhouse gas emissions.

8.1 TEST ONE: HAS EVERY FEASIBLE STEP TO REDUCE EMISSIONS BEEN TAKEN?

This test assesses whether a state has taken – or is taking – all of the rights-respecting steps that it can to reduce and eliminate carbon emissions in the present, whether through introducing alternative clean energy or by reducing the extent of activities that yield emissions. Its NDC would need to propose a clear plan to phase out all forms of these emissions from its jurisdiction and all

¹ ‘Climate Change and the International Covenant on Economic, Social and Cultural Rights: Statement of the Committee on Economic, Social and Cultural Rights’, Committee on Economic, Social and Cultural Rights, 8 October 2018, ¶5. For an analysis of the legal basis for extraterritorial obligations under international human rights standards, see Olivier De Schutter et al., ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights’ (2012) 34 *Human Rights Quarterly* 1084.

² *Ibid.* ¶6.

³ *Ibid.*

possible ways it can take steps within its jurisdiction to remove carbon from the atmosphere, including by preventing deforestation and ensuring afforestation, within the shortest time frame possible. As part of this obligation, high-income states must take all feasible steps to cooperate with and provide assistance to developing countries to help them reduce emissions.⁴

With this, an immediate question arises: what level of resources and other costs is a state required to expend in order to meet the above obligations? Whilst a state is obliged to ensure adequate priority to the realization of human rights in its resource allocation, CESCR has clarified that a state should be accorded a ‘margin of appreciation’ to determine the optimal use of its resources in how it meets its rights obligations.⁵ CESCR has described some of the considerations that it would use to determine whether steps taken by states are adequate or reasonable. These include:

The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights . . . whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner . . . where several policy options are available, whether the State party adopts the option that least restricts Covenant rights . . . whether the steps had taken into account the precarious situation of disadvantage and marginalized individuals and groups and . . . whether they prioritized grave situations or situations of risk.⁶

These criteria can be used to review individual resource allocation decisions. The second and third tests, discussed below, also can address resource challenges.

A state may argue that the necessary technology is not yet available to mitigate emissions, for example, emissions from air travel, fully. Where a high-income state makes such an argument, it would need to show that it has taken all feasible steps to help develop such technology, including funding research and development and ensuring that pricing and tax policies create an incentive for the development of such technology.

⁴ For an assessment of how the extent to which international cooperation can be measured, see Ashfaq Khalfan, ‘Division of Responsibility amongst States’ in Malcom Langford et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013).

⁵ See CESCR, ‘An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant’, Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/2007/1, 10 May 2007, ¶12.

⁶ *Ibid.* ¶8.

The question that next arises is whether a state has taken steps to prevent activities that lead to emissions where a switch to clean energy cannot end such emissions. A case can be made that a state should phase out 'luxury emissions' or 'convenience emissions', permitting only those that are strictly necessary to realize human rights (in a manner that is proportionate to the impact of the emissions on the rights of others) and other essential public goods and services.⁷ Examples may include frequent air travel for reasons other than, for example, family reunification or migration. Furthermore, where emissions may be needed to realize human rights such as the right to an adequate standard of living and work (and this would be the majority of them, even in cases such as tourism), states would need to ensure that such emissions are necessary and proportionate to the impact that they have on the rights of affected people. The state bears the burden of proving that there are no other feasible alternatives to permitting such emissions and that it is taking steps to phase out such emissions as quickly as possible. A state could not justify permitting harm to the minimum essential realization of rights of persons in another state in order to secure economic, social, and cultural (ESC) rights above the minimum essential realization of ESC rights and preferences of persons within its territory. In most cases, such emissions could only be justified as a transitional measure, permissible due to the potential economic harm and corresponding negative impact on the minimum essential realization of rights that would result from the immediate cessation of emissions as opposed to the phasing out of such emissions with appropriate just transition measures.

One part of the feasibility test is assessing whether pledges made within the NDC have been met. A pledge can be seen as at least setting out some of the reasonable steps that a government can take. If the given government has not met a pledge, it would be its burden to demonstrate that it was unable to do so for reasons beyond its control, such as the COVID-19 pandemic or its population's failure to reduce food waste and set out steps it will take to overcome these challenges. Needless to say, meeting a pledge does not, by itself, demonstrate compliance with state obligations.

⁷ Article 4 of the ICESCR indicates that the state may subject such rights only to such limitations as are determined by law and only insofar as it is compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society. The test of necessity and proportionality would apply to emissions justified for non-human rights goals as much as for human rights goals.

8.2 TEST TWO: IS THE STATE SUBSIDIZING EMISSIONS, DISPROPORTIONATELY ALLOCATING RESOURCES TO NON-PUBLIC BENEFIT COSTS, OR FAILING TO MOBILIZE RESOURCES?

A state's overall resource use can be reviewed to determine whether it demonstrates that adequate priority has been given to the realization of human rights, including whether it has devoted sufficient spending to climate measures (or to addressing its claim that it has insufficient resources to phase out emissions in the short-term). CESCR has noted with concern circumstances in which a state has allocated significantly more funds to areas unrelated to ESC rights or that do not target the realization of ESC rights as compared to ICESCR objectives. For example, such a situation may arise when more funding is dedicated to military defence compared to health or education, to the development of the oil industry (in contexts where these would benefit only a small number of workers) compared to the small- and medium-scale enterprises needed to ensure the livelihoods of major segments of the population and to ornamental public works compared to housing projects.⁸

It could also be suggested that any use of resources for purposes that do not provide reasonable public benefit constitutes a failure to use available resources for the realization of the ICESCR. An example would be the procurement of goods and services at inflated prices, whether through officially sanctioned high-level corruption or through poor price management. Similarly, subsidizing or funding fossil fuels, and thereby contributing to an increase in emissions, implies a violation of state obligations, except potentially where such subsidies are a strictly temporary transitional measure to ensure affordable access to energy as alternative clean energy supplies are being put into place. Relatedly, a failure to mobilize resources (through overall low and regressive levels of taxation compared to peer states or a high level of tax exemptions for private parties that are not justified by any public policy measure) could demonstrate a failure to utilize available resources.

8.3 TEST THREE: IS THE CLIMATE PLAN REASONABLY AMBITIOUS IN COMPARISON TO PEER STATES?

This test allows a tribunal to apply tests one and two above while taking into consideration conditions in peer states – that is, states that have broadly similar levels of wealth and access to other relevant resources, such as natural

⁸ See Magdalena Sepúlveda, *The Nature of the Obligations under the ICESCR* (Cambridge: Intersentia, 2003), pp. 317–18.

resources like wave power or consistent solar power. This test would apply a method used by CESCR to assess territorial obligations to fulfil ESC rights, according to which it compares the proportion of a country's budget spent on a particular sector, such as health and education, against corresponding amounts spent by states at the same level of development. Where the percentage of the national budget is considerably lower than that of other states at a similar level of development, it is treated by CESCR as indicative of the non-use of the maximum of available resources.⁹ Budgetary spending is of course only one measure of whether a state has taken adequate steps – the standards that it adopts are also critical – and indeed may reduce the extent of public finances required. For example, a state that institutes robust standards for energy efficiency and the use of non-fossil fuel energy sources in housebuilding will thereby reduce the eventual amount of public finance required to subsidise energy efficiency and installation of electric heating and cooling in houses.

Applying CESCR's practice by analogy in assessing whether a state has met its obligation to reduce emissions to the greatest extent possible, a state should be given a narrow margin of appreciation when it fails to take steps carried out by the majority of its peers or – with respect to quantifiable steps – in comparison to the average performance of its peers, unless it can offer a reasonable explanation for the difference in performance. A state can also be compared to those peer states (taking into account relevant differences, such as GDP per capita and geographic conditions that facilitate the use of renewable energy such as wind and solar) that are the best performing with respect to climate change; states can then be required to provide evidence that they cannot take steps comparable to those best performers.

8.4 TEST FOUR: HAS THERE BEEN A PROGRESSIVE INCREASE IN AMBITION AND AVOIDANCE OF ANY RETROGRESSION?

This test would assess whether a state has progressively increased steps to mitigate climate change and avoided retrogressive steps without cause. Such a criterion is used in the context of the territorial fulfilment of ESC rights, where CESCR expects states to enhance the enjoyment of ESC rights territorially as their economic situations improve.¹⁰ As there is a presumption that any retrogressive step is contrary to the ICESCR, after the state takes a retrogressive step, the burden shifts to a state to show that it has fully used

⁹ See *ibid.* at 317.

¹⁰ See *ibid.* at 322–23.

available resources.¹¹ In addition, such retrogressive steps require reasonable justification; the comprehensive examination of alternatives; genuine participation by affected groups in the examination of the proposed measures; refraining from direct or indirect discrimination; no sustained, unreasonable impact on economic, social and cultural rights; and no deprivation of the minimum essential realization of the rights for any individual or group, whilst also including independent review of the measures at the national level.¹²

CESCR has further stated that where a state explains and seeks to justify retrogressions due to resource constraints, it will assess such explanations by taking into account, inter alia, the country's level of development, its economic situation, and the extent to which it had sought or rejected international assistance.¹³

8.5 TEST FIVE: IS THE STATE PLANNING TO REDUCE EMISSIONS IN LINE WITH KEEPING THE GLOBAL TEMPERATURE BELOW 1.5 DEGREES CELSIUS?

While the four tests above are contextual and mostly qualitative, this test provides a specific numeric target, though it, as discussed below, must be applied with reference to points one through four above. Although states have not committed to collectively limiting the temperature rise to 1.5 degrees Celsius (only to pursuing efforts to that end), CESCR has nonetheless indicated that states should treat a global temperature rise of 1.5 degrees Celsius above pre-industrial temperatures as 'a limit'.¹⁴ This is a justified reading of the ICESCR given that the impact of a 1.5 degrees Celsius rise in temperature, as compared to 2 degrees Celsius, would have far less devastating consequences for human health, livelihoods, food security, and water supply.¹⁵ For example, around 420 million fewer people would be frequently exposed to extreme heatwaves at a temperature increase of 1.5 degrees Celsius, compared to 2 degrees Celsius.¹⁶ With global warming of 2 degrees Celsius, more than

¹¹ See 'General Comment No. 3: The Nature of States Parties' Obligations', Committee on Economic, Social and Cultural Rights, UN Doc. E/1991/23, 14 December 1990, ¶9.

¹² This set of criteria were set out in regard to the right to social security in CESCR, 'General Comment No. 19', para. 42, but presumably would apply to other ESC rights particularly given that is one of the most recent to address individual substantive rights in the Covenant.

¹³ See CESCR, 'Obligation to Take Steps to the "Maximum of Available Resources"', above note 5 at ¶10.

¹⁴ See *ibid.* ¶2.

¹⁵ Myles Allen et al., 'Global Warming of 1.5°C: Summary for Policymakers' (2018) IPCC 9.

¹⁶ See Valérie Masson-Delmotte et al. (eds.), 'Global Warming of 1.5°C' (2018) IPCC 177.

one billion people could suffer from a severe reduction in water resources.¹⁷ Limiting this rise to (at the very least) 1.5 degrees Celsius could reduce the number of people exposed to climate-induced water stress by 50 per cent, compared to those exposed at two degrees Celsius of warming.¹⁸

Limiting the increase in temperature to 1.5 degrees Celsius would require the reduction of emissions on an accelerated time frame and scale. The IPCC has shown that it is feasible for states to do this by collectively reducing greenhouse gases by 45 per cent globally from 2010 levels by 2030 and to net zero by 2050.¹⁹ This implies that global emissions must be cut by 7.6 per cent per year until 2030.²⁰

The IPCC did not provide a breakdown of how fast individual states should reduce emissions to net zero, and, thus, the only questions here are the extent to which the 2030 target reductions of 45 per cent must be distributed among states and which countries, if any, could legally emit net carbon in 2050. However, on the basis of human rights standards and the principle of common but differentiated responsibilities, it would be unreasonable and unrealistic to expect that developing countries make this transition at the same pace as developed countries. Developed countries emit approximately one-third of global emissions.²¹ Even if developed countries were to reach zero carbon emissions by 2030, in order to meet the IPCC targets, developing countries would need to reduce their emissions by at least one-third below 2010 levels by 2030 – a deeply difficult task, for which many will require significant financial assistance and technical cooperation.

Looking at the global picture, tribunals should therefore ask developed countries for strong justifications for their failures to put in place plans to achieve carbon emissions that are as close as possible to zero by 2030. Thus, the considerations listed in tests one through four apply to this test as well; however, the tribunal would need to stipulate that the burden of proof rests on the state to demonstrate that it cannot meet this target and that the necessity and proportionality tests will be applied strictly, given the scope of the human rights harms caused by failing to limit global warming to 1.5 degrees Celsius.

¹⁷ See 'AR5, WGII Report: Impacts, Adaptation and Vulnerability' (2014) IPCC.

¹⁸ See Masson-Delmotte et al. (eds.), 'Global Warming of 1.5°C', above note 16 at 179.

¹⁹ See Allen et al., 'Global Warming of 1.5°C: Summary for Policymakers', above note 15 at 12.

²⁰ See 'The Emissions Gap Report 2019' (2019) United Nations Environment Programme, <<https://www.unenvironment.org/resources/emissions-gap-report-2019>>.

²¹ This is based on the figures for production based emissions, see Hannah Ritchie and Max Roser, 'CO₂ Emissions', <<https://ourworldindata.org/co2-emissions#co2-emissions-by-region>>. These countries have emitted approximately three fifths of historical cumulative emissions.

Tribunals should also assess the extent to which such countries are planning to introduce ‘negative emissions’, in a way that does not have negative human rights consequences, to make up for the inability of low-income countries to reduce emissions as quickly as needed.²² With regard to developing countries, tribunals should also hold them accountable for any failures to plan to reduce emissions by 45 per cent from 2010 levels by 2030, taking into account the relevant capacities they have. For example, China would be expected to achieve a reduction much faster than Fiji. Tribunals, when dealing with low-income countries, should also consider whether they sought international assistance to achieve such an emission reduction.

8.6 TEST SIX: IS THE MANNER IN WHICH EMISSIONS ARE BEING LIMITED CONSISTENT WITH HUMAN RIGHTS STANDARDS?

It should go without saying that emission reductions must be carried out in a manner consistent with human rights, including, for example, the obligation of non-discrimination and the obligation to refrain from harming human rights, like the right to an adequate standard of living and the rights of Indigenous peoples. Carbon taxes, for example, should be designed in a manner that does not prevent low-income people from being able to heat their homes, thus undermining their right to adequate housing. Indigenous people should not be denied their right to enjoy their ancestral lands and territories on the basis of climate mitigation. This test both stands alone and intersects with the others. This requirement for human rights consistency helps preclude purported alternatives to the rapid phase-out of fossil fuels. For example, one possible state argument against the obligation to speedily reduce emissions is the assertion that emissions can be reduced through new technologies, such as bioenergy with carbon capture and storage (BECCS). Such arguments can be rebutted on the basis that these technologies would have very substantially negative consequences on the enjoyment of human rights by requiring the use of large areas of agricultural land, thereby reducing access to food and likely resulting in forced evictions.

Furthermore, all policymaking relating to emissions reduction should take into account the full range of state human rights obligations, not just the obligation to prevent harm to human rights. For example, in regulating and subsidizing the renewable energy industry, states should give effect to obligations to ensure, for example, just and favourable conditions of work as the industry grows.

²² This is not only a matter of fulfilling a primary obligation but also a matter of remedy for harms caused by those states’ historic emissions.

8.7 CONCLUSION

This chapter has discussed and set out six tests that can be used by tribunals to assess whether states have taken sufficient steps to reduce emissions within their jurisdictions. The first test: has every feasible human-rights consistent step been taken by the state to reduce emissions? The second: is the state subsidizing emissions, disproportionately allocating resources to non-public benefit costs, or failing to mobilize resources? The third: is the climate plan reasonably ambitious in comparison to peer states? The fourth: has there been a progressive increase in ambition and avoidance of any retrogression? The fifth: is the state planning to reduce emissions in line with limiting the global temperature increase to 1.5 degrees Celsius? And the sixth and final test: is the manner in which emissions are being limited consistent with human rights standards?

These tests are stringent and may be contested by states and those sceptical of rapid climate action on the basis that no state could pass all or even most of these tests. Yet these tests reflect the standards that are contained in human rights law, which can, by definition, never be said to be fully realized, as they explicitly aim towards the 'continuous improvement of living conditions'. Equally, some climate activists may think that these tests give states far too much leeway to argue that they cannot carry out the actions required to preserve a safe climate. Such leeway may delay or drag out proceedings and potentially result in tribunal decisions that do not contain robust, monitorable targets. These are indeed dangers. But they reflect the standards that are contained in human rights law, which allow states significant leeway in the implementation of their obligations; this is thus a limit to what can be achieved through litigation alone. Only new binding international or national standards can fully fix this defect. Litigation that achieves partial successes in at least in some jurisdictions will increase the political incentive for states to advocate for or accept such standards.

Not all of these tests will be useful in all climate litigation. Some are plainly easier to monitor and apply than others. Only experience in the coming decades can tell us which will be most impactful practically. Yet, if there is one thing that can be said with total confidence, it is that, given the scale of the climate crisis and the extent to which jurists around the world are throwing themselves into this challenge, the field of climate litigation as a field is well-positioned to consider every possible argument. My hope is that this chapter will be of some use towards that end.