Rule it out! Law, lawyers and the climate emergency

Kate Cook Matrix Chambers 5 July 2019

How does the legal profession ensure that it is part of the solution to the climate emergency and not part of the problem? In my view, lawyers can, and must, ensure that they are part of the solution by addressing the emergency as a human rights issue. They have this responsibility under the business and human rights framework, whether they are employed as in house counsel, working in law firms or in independent practice. Government lawyers also have this responsibility as they advise the state on its legal obligations to respect, protect and fulfil human rights.

In order to make the case for treating the climate emergency as a human rights issue, I will start by looking at the human right to life. I will argue that this fundamental right, the right on which all others depend, must be the starting point for lawyers advising on activities that have an impact on climate change. Adopting a right to life based approach to advising on relevant issues increases the likelihood of proactive, informed and timely action by states and also by businesses. It also requires us to face up to the human and planetary cost of conducting business as usual.

I will then look at responsibilities of lawyers under the business and human rights framework set out in the UN Guiding Principles. The UNGP apply to lawyers and law firms as businesses in their own right, as well as to their business clients. The implications of the UNGP in this area are significant given the impact of decisions on investment on the prospects for preventing dangerous climate change. I want to explain why professional ethics and codes not only do not prevent, but in fact require, lawyers to address the climate emergency as a human rights issue.

Finally, I will look briefly at an issue which lurks at the centre of all discussion of climate change but the legal implications of which are still being grappled with. That is the question of the global carbon budget. If current laws do not support, or even frustrate, the collective effort to keep within the global carbon budget, it is unlikely that dangerous climate change can be prevented. Again I will look to human rights law as a way of re-establishing the rule

of law in this area by restricting action which jeopardises our chances of preventing dangerous climate change and failing to achieve the Paris goals.

Given the potential impact of legal advice on our response to the climate emergency, it is in my view inevitable and appropriate that the conduct of the legal profession will fall under the spotlight in a similar way to the scrutiny being applied to the financial sector, the pension industry and lobbying firms. It is of course true that lawyers are subject to professional and ethical rules which give them a distinct role and responsibility but that does not mean that the legal sector is unaccountable and it does not mean that lawyers have no responsibilities in this area. In some ways, the nature of their responsibilities reinforce the need for particular scrutiny.

Lawyers should promote a response by governments and business which safeguards the rule of law by respecting human rights and does not shy away from identifying laws and policies which obstruct an effective response to the urgent threat of climate change. Lawyers can also advise on the human rights implications of proposed solutions to the emergency, including those which themselves may pose risks to human rights.

There will of course be areas that are highly contested. Some issues will be resolved in court, some must be addressed by Parliament but others may simply require lawyers to provide their clients with full and frank advice on the law thus fulfilling their professional responsibilities.

Before I turn to the first of the three issues, I want to say a brief word about the legal status of the Climate Emergency. The declarations of a climate emergency by the UK Parliament, the Scottish government and the Welsh Assembly are political declarations but they also reflect the urgency enshrined in the international legal framework. The states adopting the Paris Agreement explicitly recognised that climate change represents an urgent and potentially irreversible threat to human societies and the planet and acknowledged that deep reductions in global emissions would be required in order to prevent dangerous climate change. They also emphasised their serious concern at the significant gap between

the aggregate effect of Parties' mitigation pledges and the emission pathways consistent with preventing dangerous climate change.[1]

That was the basis for the adoption of the Paris Agreement in 2015, a declaration of emergency if ever there was one.

In a report published last week, the UN Special Rapporteur on extreme poverty and human rights stated: Climate change threatens to undo the last fifty years of progress in development, global health, and poverty reduction,[2] thus confirming that climate emergency is also unquestionably a human rights emergency.

The recent governmental declarations of a climate emergency by the UK and other states are not a political gloss on the legal framework, they reflect the international legal position.

I: The Law: RTL

The risk to life posed by the climate emergency is not in doubt. The significant risk which is created by even 1.5 C of warming is starkly presented in the IPCC's Special Report of 2018 which addresses deadly risks, including those posed by heat, impacts on food security and extreme events. The report makes clear that the threat to human life is on a vast scale: "twice as many megacities … could become heat-stressed, exposing more than 350 million more people to deadly heat by 2050 …". Climate change will negatively affect undernutrition-related childhood mortality, with the largest risks in Asia and Africa. Overall, "the magnitude of projected heat-related morbidity and mortality is greater at 2 C than at 1.5 C".

National courts have acknowledged this threat to life. In the *Urgenda* case, the Hague Court of Appeal held that:

> "… it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life … it follows from [art.2 of the ECHR] that the State has a duty to protect against this real threat."

[1] See 5th,6th and 9th recitals to Decision CP.21/1.

[2] See his report of 25 June 2019, A/HRC/41/39, para 13.

It is to be expected that UK courts will, in an appropriate case, take a similar approach. As Lord Bingham made clear in *ex parte Amin*, a profound respect for the sanctity of human life underpins the common law of the UK, as it underpins the jurisprudence under articles 1 and 2 of the Convention:

> This means that a state must not unlawfully take life *and must take appropriate legislative and administrative steps to protect it*….[[2003] UKHL 51 30]

The Human Rights Committee has explicitly addressed the relationship between the right to life and the threats posed by climate change in its recent GC No 36 on the right to life. GC No.36 reiterates that the right to life is non-derogable, should not be interpreted narrowly and requires states to take positive measures. GC No.36 also states that the right to life concerns the entitlement of individuals to be free from acts and omissions that may be expected to cause their unnatural or premature death. All these elements are clearly relevant in the context of threats posed by climate change.

Para.62 provides that state obligations under international environmental law should inform the contents of [the right to life] and that the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law". This mutually informed approach serves to highlight the relevance of well-established regulatory tools, including risk assessment and impact assessment for proposed plans and projects. Also relevant are principles of international environmental law, including the precautionary principle, the principle of prevention and public participation. Human rights jurisprudence has underlined the importance of these approaches as part of a requirement of responsiveness and proactive engagement with risk. All of these principles and tools should be deployed to assess the risk to the right to life from carbon emitting activities.

The European Court of Human Rights has ruled that art.2 of the ECHR places a primary duty on the state to put in place "a legislative and administrative framework designed to provide effective deterrence against threats to the right to life". This applies in the context of dangerous activities ~~in relation to which:~~

~~"… special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives". [Oneryildiz 2005]~~

The production of fossil fuels and the emission of greenhouse gases clearly fall within the scope of dangerous activities for the purposes of A 2 of the Convention. Furthermore, since delayed action on cutting emissions poses an increased threat to life by jeopardising the attainment of the PA temperature goals, delayed or regressive action in meeting targets should also be subject to regulatory and judicial scrutiny.

As the European Court of Human Rights stated in *Budayeva*, the state's positive obligation to put in place a framework which is deterrent against threats to the right to life applies in the context of "any activity, whether public or not, in which the right to life may be at stake It follows that states should take positive and ambitious measures to secure climate mitigation in order to address the threat to life posed by climate change. GC 36 states that the protection of the right to life: "depends, inter alia, on measures taken by States parties to preserve the environment and protect it against …climate change caused by public and private actors.

In light of the requirements laid down under A 2 ECHR and the guidance set out in the General Comment, lawyers advising the government and the private sector should ensure that proposed action which may increase greenhouse gas emissions should include a RTL assessment which measures the contribution of the proposed measures to an increased risk to life. Relevant measures include fossil fuel subsidies, export credit for fossil fuel projects and the grant of new production licences. Where there is evidence of an increased risk to life, the burden of showing that the right to life is not breached by such action should pass to the state entity or business proposing the action in question.

The fact that mitigation is required to protect the lives of those beyond a state's jurisdiction, *as well as those within it*, should not prevent scrutiny of state action. The GC confirms that states *should take appropriate measures to ensure* that all activities taking place within their territory, but having a direct and reasonably foreseeable impact on the right to life of

individuals outside their territory, are consistent with the right to life. The supreme and fundamental nature of the right to life should inform assessment of mitigation action, having regard to the fact that the mitigation measures necessary for the protection of those within the state's jurisdiction *cannot be separated* from the protection of those outside it for these purposes.

II: Lawyers: Business and human rights:

Lawyers and law firms, as well as their business clients, have a responsibility, under the UN Guiding Principles on Business and Human Rights, to respect human rights and I want to look briefly at what that entails in the context of climate change.

UNGP 13 states that businesses must:

> **(a) avoid causing or contributing to adverse human rights impacts through their own activities, and addressing such impacts when they occur;**
> **(b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.**

The implications of the UNGP for the legal sector have attracted increasing attention and professional bodies, including the IBA and the Law Society, have issued practical guidance on how the business and human rights framework affects lawyers.[3]

The IBA guidance states that neither the UNGPs, nor its own guidance, are intended to override professional standards but that the UNGPs may nevertheless be 'highly relevant' to the advice or services to be rendered the client. The guidance then examines the ways in which lawyers can meet their responsibilities under the UNGP including by acting as a wise counsellor who identifies and advises on potential legal risks that may arise for the client. The IBA looks at the potential for lawyers to influence a client to avoid or mitigate human rights impacts. The Law Society guidance makes a number of recommendations, including that firms

[3] IBA. 2016. Practical Guide for Business Lawyers on Business and Human Rights. *Reference Annex to the IBA Practical Guide on Business and Human Rights for Business Lawyers.* Law Society of England and Wales. 2016. *Business and human rights: a practical guide.*

raise and explore with the client human rights issues that may be relevant to legal advice and integrate potential outcomes of human rights due diligence into retention letters, legal advice and case management.

It is clear from this and similar guidance issued by other professional bodies that law firms and lawyers need to adopt a proactive approach in order to meet their responsibilities to avoid and address contributing to adverse human rights impacts and to prevent or mitigate such impacts as are linked to the services they provide to clients.

Law firms increasingly recognise the importance of their responsibilities under the UNGP, in particular by referring to them in policy statements. The operational integration of UNGP standards into all aspect of the work of the firm obviously requires much more than this and extends to ensuring that all relevant policies and procedures are adequate to this responsibility. This may require a review of allocation of responsibility for UNGP compliance across the relevant departments of the firm, and of appropriate resourcing and training so that human rights risks across all areas of work are identified and addressed.

So what does this mean in the context of climate change related work? Clearly there is a very wide range of business activities that may have impacts on climate change and may therefore pose risks to human rights.

Attention (and litigation) is increasingly focussed on fossil fuels. Investment in new coal fired power stations, fracking and offshore oil and gas production have all been subject to recent challenge. They fall to be assessed for the risks they pose to human rights by locking in high emitting infrastructure and reliance on fossil fuels, thereby jeopardising attainment of the Paris temperature goals. I have already addressed the right to life but there are many other human rights that are likely to be impacted including the right to health, the right to adequate food, the right to protection of property and the right to self-determination. The specific human rights of the child, of women and of indigenous communities faced with loss of homes and livelihoods from extreme events and slow onset impacts are all at issue.

Under UNGP 15(b), business enterprises should have in place a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights. This has both an internal and external dimension for the law firm. The firm

must undertake due diligence of its own policies and processes as well as assisting the client in conducting its own due diligence. Clearly the two processes are related and it is difficult to see how the firm can address the risks faced by the client unless it has made sure its own internal processes are effective.

Where, for example, a law firm is advising on due diligence related to a new coal fired power station or fracking licence, the potential human rights impacts must be raised with the client and addressed. It is not tenable for legal professionals to disregard the human rights impacts of these and a range of other high emitting activities in circumstances where the human rights implications of climate change have been signalled in the Paris Agreement, in numerous cases being brought around the world, in UN Reports and in reports emanating from many other bodies. The need to be proactive where these issues are not raised by the client is clear from the professional guidance issued by the IBA and others.

If a law firm does not address human rights risks in respect of the way in which it provides legal services to clients, there is a real risk that it will have actually contributed to adverse impacts caused by the client, as well as failing to prevent or mitigate those impacts.

It is worth remembering that, under the UNGP, compliance with national laws is not necessarily sufficient in this regard. UNGP 23(a) states that business enterprises should 'comply with all applicable laws and respect internationally recognised human rights, wherever they operate'. However, where national law is in tension with internationally recognised human rights, the UNGPs state that a business should seek ways to honour the principles of internationally recognised human rights 'to the greatest extent possible' without violating applicable laws. This indicates that authorisation under national law for an activity which poses a serious risk to human rights does not remove all responsibility for the business concerned.

III: The Emergency: Carbon budget:

The Paris Agreement does not refer explicitly to a global carbon budget but the need to remain within that budget follows from the overall objective of preventing dangerous

climate change and from the temperature goals set in Article 2, reinforced by references to the need for progression and the best available science. Both the IPCC and UNEP have referred to the overall carbon budget in their reports. The rate at which we get on track to do this is also criticalas also confirmed by the IPCC ~~notes that in order to achieve no or limited overshoot of 1.5°C, global CO2 emissions must decline by about 45% from 2010 levels by 2030, reaching net zero around 2050.~~

States have agreed to adopt progressive nationally determined contributions (NDCs) setting out mitigation measures. As has been recognised from the outset however, there is a gap between those national contributions and what is needed to meet the goals of the Agreement. UNEP's 2018 report indicates that this emissions gap has widened. The issue I want to address is whether action which increases the risk that the gap will not be closed and that we will not stay within the carbon budget can be challenged under human rights law. This issue underlies many of the climate cases being brought around the world.

The Paris Agreement has signalled that parties should:

> …when taking action to address climate change, respect, promote and consider their respective obligations on human rights…

So what does it mean to respect, promote and consider human rights obligations, as the UK and other parties have pledged to do, when addressing policies and actions which pose risks to adherence to the global carbon budget? Some will argue that the UK is only required to ensure that it meets its national territorial targets as set under the CCA but it is increasingly clear that such an approach will not prevent dangerous climate change and that compliance with our human rights obligations requires something more than this. The fact that national law may not prescribe specific action on consumption emissions or prohibit the provision of export credit to fossil fuel energy projects, does not mean that human rights law has no traction on these issues.

One way to address what is required would be to undertake an urgent review of key areas of legislation and policy. The commentary to UNGP 3 calls on states to review laws to ensure that they provide an environment conducive to business respect for human rights. Such a review will need to take into account the evidence that specific actions or policies will

prevent states from remaining within the overall carbon budget, and therefore pose a risk to human rights. I want to finish by highlighting a couple of areas of concern.

In April this year, Global Witness reported on the evidence that any production from new oil and gas fields, beyond those already in production or development, is incompatible with limiting warming to 1.5°C. The report also urged caution in relying on CCS as a mitigating factor in assessing the prospects of staying within the carbon budget, describing this as 'enormously risky' given the current outlook for the technology. In the face of this evidence, and the risks posed to human rights by dangerous climate if the 1.5 goal is not met, one area for the UK to consider is the statutory principle laid down in Part 1A of the Petroleum Act 1998 (s 9A). That principle, known as the MER principle, sets as the principal objective of Oil and Gas Authority (OGA) the maximisation of the economic recovery of the UK's offshore oil and gas resources.

The issue of the consistency of MER with the UK's climate change goals was raised before the Scottish Affairs Committee earlier this year. Friends of the Earth Scotland pointed out that under the current MER strategy:

> "economic" depends on the price of oil. If the price of oil reflected the true cost of burning that oil to society, then we would have a very different equation in working out what maximising economic recovery was"

The Committee concluded that MER was the right approach for the sector. They acknowledged environmental concerns, but agreed with the Government that as oil and gas looked likely to form a substantial part of the UK's energy mix for at least the next 15 years it made sense to meet as much of this need as possible from domestic sources.

There does not appear to have been a consideration of the risk posed to human rights by the MER principle and strategy, nor any assessment as to whether the UK has in fact respected, promoted and considered its human rights obligations in maintaining MER, notwithstanding the clear risk that it may jeopardise attainment of current climate goals.

Another area which has come under recent scrutiny is the extent to which UK Export Finance (UKEF) subsidises fossil fuel energy projects overseas. The Environment Audit Committee's

recent report states that UKEF's support for fossil fuel energy projects is unacceptably high, particularly in low- and middle-income countries. The Committee found that:

> This level of support for fossil fuel energy projects does not respect the Paris Agreement, which commits signatories to "[Make] finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

The Committee called on the Government to introduce a strategy to end support to new fossil fuel energy projects by 2021. However it is not clear whether the current policy has been subject to a human rights risk assessment either by government, or by the businesses involved.

Any review of the human rights risks should have regard to the massive differential impact even as between 1.5 and 2 degrees: the IPCC's 2018 report states that limiting global warming to 1.5°C, compared with 2°C, could reduce the number of people both exposed to climate-related risks and susceptible to poverty by up to several hundred million by 2050 (B5.1).

These climate change impacts will be directly related to the extent to which state parties, including the UK, use up what is left of the global carbon budget, not only through domestic use of fossil fuels, but also through consumption emissions, exports of fossil fuels or the provision of financial support for fossil fuel use in other countries. The UK should accordingly assess and consider the impact on human rights of support for fossil fuel use, both in the UK and overseas. The UK should address the question of whether these decisions deter other countries from switching to low carbon fuels thus jeopardising achievement of the Paris goals.

A current case being brought in Norway by Greenpeace explores some of these issues in the context of Norway's oil and gas licensing regime. A key issue in the case is whether Norwegian constitutional protections on human rights and the environment require the Norwegian government to address the impact of Norwegian oil and gas exports on climate change.

The Greenpeace case was unsuccessful at first instance and is currently under appeal. Rejecting the claim, the Oslo Court held that under international law, each country is responsible for greenhouse gas emissions on its territory and that neither Norway nor countries in the same situation have any duty to take measures to compensate for the effect from oil and gas exported to other countries. The claimants have appealed arguing that such

a fragmented approach is inconsistent with the international framework and the science. The fragmented approach criticised by Greenpeace in the Norway case is inconsistent with human rights law. There is nothing in the Paris Agreement which prevents states looking at the impact of exports and external investment and recent developments in human rights law indicate that they should address these.

Lawyers in the private sector and in government have the opportunity and, I have argued, a professional obligation, to address these issues proactively with clients. That may prove to be the dividing line between complicity in climate breakdown and safeguarding human rights and the rule of law itself from the impacts of climate change.

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