

Providing Evidence to Support Strategic Climate Enforcement and Litigation

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13.1 INTRODUCTION

Courts are critical – but often overlooked – components of the global response to the climate emergency. Courts are crucial because judicial proceedings are particularly apt to address long-term challenges, such as climate change, where the most severe impacts will only be felt by the next generations. Constitutionally guaranteed independence and impartiality releases judges from the pressures of short-term political gain or special interests' lobbies. At the same time, judgments are legally binding and enforceable. In many instances, addressing climate change through courts is also legally uncontroversial because they focus on violations of existing law, even if applied to different contexts.

To make more and better use of courts to address the climate emergency, a few hurdles need to be overcome. Notwithstanding recent examples of successful strategic climate litigation and law enforcement, laws and regulations that could be used to address some of the key causes of climate change have still not been enforced sufficiently for this purpose. This applies, for instance, to illegal deforestation, the direct and illegal harm caused by the extraction and use of fossil fuels, and to methane emissions from oil and gas, from coal mining and from landfills. Enquiries with prosecution and police authorities suggest that this is mostly because they do not have access to the high quality information and support that would enable them to trigger and conduct effective proceedings with the means available to them. Similarly, the authorities indicated that NGOs not only need to bring more strategic climate

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litigation cases, but they must also do so based on strong evidence. Judicial climate action – whether enforced through criminal, administrative, constitutional, or civil courts – can only be successful if it is based on relevant and probative evidence. Generally, this evidence must establish that a person (natural or legal) engaged in illegal conduct or caused an illegal harm. The lack of access to high quality information establishing those facts prevents police, prosecutors, and courts from fully exploiting their collective potential to enforce laws capable of addressing the climate emergency.

This problem can be fixed. Recent developments in information and communication technology have created new and unprecedented possibilities for private organizations and individuals to generate, access, verify, and disseminate information. This allows NGOs and private citizens to trigger and support judicial proceedings. In fact, even if they do not have investigative powers like a government authority, they can still employ some information collection and analysis techniques more effectively than government authorities. This is because, collectively, they have more people to carry out such tasks, more immediate and direct access to certain kinds of information, more diverse expertise, and the ability to share relevant information swiftly and across borders without being restricted by jurisdictional limitations or narrow procedural rules. If mobilized in a coordinated and strategic way, NGOs and private citizens can bring stronger and more frequent cases before judicial authorities.

The Center for Climate Crime Analysis (CCCA) – to which the author of this chapter belongs – is a group of prosecutors and law enforcement professionals aiming to harness the collective potential of investigative NGOs and experts to support climate action. By collecting and analyzing all necessary information in collaboration with a broad and diverse network of partners, and by sharing that information with the competent law enforcement authorities or advocacy organizations, CCCA seeks to support and scale up judicial and other advocacy action against illegal activities related to climate change.

The following sections will identify the under-enforcement of laws relevant to discrete sources of greenhouse gas (GHG) emissions as the underlying problem; demonstrate how recent developments in information and communication technology (ICT) and related sociological developments enable a proposed solution; show how, through coordinated action, investigative NGOs, expert organizations, and private citizens can effectively support climate relevant law enforcement, litigation, and advocacy action; and illustrate the practical application of the proposed solution on the basis of a case study focusing on illegal deforestation and its drivers.

13.2 THE PROBLEM

While most GHG emissions are legal, a significant share results from, or is associated with, conduct that violates existing laws. National law enforcement authorities are therefore already equipped with the necessary statutory authority to effectively address some of the driving causes of climate change. For instance, virtually every country around the world criminalizes or otherwise outlaws, in one way or another, conduct that causes large-scale environmental damage or environmental degradation where it directly impacts the health and the lives of people.

Currently, however, national laws are inadequately enforced in these areas, resulting in a law enforcement gap. This prevents national law enforcement authorities from fully exploiting their vast collective potential to address some of the causes of climate change. While some observers suspect that this gap may be the result of a lack of political will to enforce the law more rigorously, this is not the real reason for the relatively low number of climate relevant cases, especially not in functioning democracies. Instead, the law enforcement gap in climate relevant cases is primarily the result of the following factors.

First, for any form of law enforcement or litigation to be successful, it must be based on credible and reliable evidence through which the allegations can be substantiated to the required standard of proof. No matter how ingenious an applied legal theory may be, legal action will fail unless the underlying facts are proven. In practice, however, the competent authorities often lack access to the high quality information and support that would enable them to conduct effective investigations and proceedings with the means available to them. This is particularly the case where some or all the required information can only be obtained by investigating conduct that occurred abroad. While law enforcement authorities could obtain such information through mutual legal assistance from foreign authorities, the underlying proceedings are often lengthy, cumbersome, and ineffective.

Second, national law enforcement authorities must frequently balance competing priorities with the limited means available to them. This means that 'hard' cases or cases based on fact-patterns or legal theories that fall outside the general practices of an authority, even if strategically significant, fail to get the attention they deserve.

And third, there is not enough coordination among national law enforcement authorities to address the illegal causes of climate change. While the authorities of different countries are well coordinated and cooperate effectively in some areas – for instance in combating terrorism or organized

crime – no such coordination is apparent in the fight against the illegal causes of climate change.

Efforts by investigative NGOs to trigger law enforcement action in areas such as environmental destruction do not achieve the desired result. This is because the quantity and quality of the information provided by them is often not enough for the law enforcement authorities to overcome the above challenges. Many NGOs conduct investigations with the aim of supporting public advocacy, instead of legal enforcement, which applies strict standards of proof. Their investigations are also often limited to specific facts that do not cover all aspects that need to be established in a legal case. NGOs, further, do not always readily cooperate with each other or share information. However, there is now an opportunity to break this deadlock by making effective use of the collective potential of investigative NGOs and private individuals to generate, preserve, and collect information and to strategically use that information to support climate enforcement and litigation.

13.3 ENABLING TECHNOLOGICAL AND SOCIOLOGICAL DEVELOPMENTS OF THE PROPOSED SOLUTION

Recent developments in ICT have created new and unprecedented possibilities for citizens to communicate and to generate, access, verify, and disseminate information. This empowers private citizens and other non-state actors to build legal actions, which can significantly enhance the role of law enforcement in addressing the illegal causes of climate change. The paragraphs below illustrate the relevance of these technological developments for these purposes.

The International Telecommunication Union estimated that, in 2019, about 4.1 billion people used the Internet. The percentage of mobile-broadband subscriptions was particularly high, including in developing countries and in the Least Developed Countries.¹ This transforms billions of people from passive recipients of information into active participants in a globally interconnected information community. Virtually every person who has access to the Internet can share information and ideas, and every person with a smartphone can preserve information by taking pictures or videos or by communicating through social media or other technological means.

¹ See 'Measuring Digital Development: Facts and Figures' (2019) ITU <<https://www.itu.int/en/ITU-D/Statistics/Documents/facts/FactsFigures2019.pdf>>.

Tailor-made, online applications such as Witness² or the Eye Witness Project³ assist citizens in preserving information such that it can be used by law enforcement as evidence.

People are also more connected. Not only can they share information and ideas, but they can also coordinate their actions. The experiences of open-source investigation platforms, such as Bellingcat⁴ or the Citizen Evidence Lab,⁵ have shown that people are willing to lend their talent, expertise, and free time to participate in investigative projects that they believe are socially beneficial and that are coordinated by a steering body. This form of expert-led social crowd-sourcing is an immense resource for law enforcement. It not only enables law enforcement to access expertise that it does not possess or often cannot afford, but it also allows for investigations to be conducted in real time – as opposed to official *ex post facto* investigations – and through global citizen participation. Thus, instead of being confined to a small number of official investigators that have specific but limited skills and resources, information may be generated, collected, and verified through thousands of persons who have immediate access to information and who have a broad range of relevant expertise.

Similarly, civil society organizations, scientific and educational institutions, health professionals, media organizations, and private sector corporations are increasingly active in collecting and publicizing information that is relevant to fighting climate change simply because this is consistent with their organizational or corporate sustainability objectives. During the annual RightsCon⁶ meetings, many of these organizations and corporations present their approaches and applications – some based on cutting edge technology – to generate, access, verify, and disseminate information. These entities harbour a huge amount of talent, expertise, and commitment. They represent invaluable sources of information, and are ideal first responders, because they often have access to information and the ability to preserve information long before government officials can conduct an official inquiry. In addition, they often have relevant expertise to verify information. Cooperation with these entities taps into a vast pool of information and expertise that is currently unavailable to most law enforcement entities. Law enforcement authorities increasingly appreciate the potential that cooperating with civil society organizations has for supporting their own work. Some have therefore issued guidelines on how

² See Witness, <<https://www.witness.org/>>.

³ See EyeWitness, <<https://www.eyewitness.global/>>.

⁴ See Bellingcat, <<https://www.bellingcat.com/>>.

⁵ See Amnesty International: Citizen Evidence Lab, <<https://citizenevidence.org/>>.

⁶ See RightsCon, <<https://www.rightscon.org/>>.

civil society organizations should proceed when preserving and collecting information.⁷

Developments in ICT have also revolutionized the types of information that can be made available to law enforcement. While in the past, most communication took place orally – either face-to-face or over the phone – today people increasingly communicate in writing or by sharing other forms of documentary information. For instance, by the end of 2019, some 2.95 billion people worldwide communicated through social media – which includes social networks, chat apps, blogs, forums, business networks, and photo-sharing platforms.⁸ Unlike oral interactions, this form of communication is generally preserved. Because most of it is publicly available or otherwise accessible through the crowd, it can be a vital source of information for law enforcement, provided that it is lawfully obtained and properly verified and analyzed.

13.4 SEIZING THE OPPORTUNITY TO SUPPORT AND SCALE CLIMATE ENFORCEMENT AND LITIGATION

There is a need – and an opportunity – to bridge the gap between the many investigative NGOs or individuals with access to information or expertise and law enforcement authorities and advocates who have the power to enforce the law or to advocate for it. If done effectively, providing the relevant actors with high quality information to support their work can strengthen and scale climate relevant enforcement and litigation.

CCCA has set out to do exactly that.⁹ It uses its law enforcement expertise to strategically support, advise, and coordinate existing efforts by NGOs, scientific/expert organizations, and private citizens fighting climate change in order to generate, preserve, and collect information that is relevant, probative, and admissible in court. CCCA then conducts legal and forensic analyses of the information and prepares case files to share with competent law enforcement or regulatory authorities or with NGOs in support of strategic climate litigation and advocacy. These authorities or NGOs are thus provided with information and analysis that would otherwise not be available to them or only at a substantial cost.

⁷ See Eurojust & Office of the Prosecutor of the International Criminal Court, “Documenting international crimes and human rights violations for criminal accountability purposes – Guidelines for civil society organisations”.

⁸ See ‘Number of Social Network Users Worldwide from 2010 to 2023’, Statista, <<https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/>>.

⁹ See Center for Climate Crime Analysis (CCCA), <<http://www.climatecrimeanalysis.org/>>.

CCCA is guided by the following core principles:

Focus on affected communities: Each CCCA project focuses on the communities affected by climate crime and human rights violations and actively involves them throughout the process. As part of its case selection process, CCCA assesses the affected communities' needs and interests and their willingness to cooperate. CCCA also does a community risk assessment and develops a strategy to minimize community risk resulting from their cooperation with CCCA.

Network approach: At each phase of a case, CCCA cooperates with organizations and individuals who have access to relevant information or expertise. CCCA's law enforcement experts advise, support, and coordinate the activities of these organizations, thereby building strong cases together. This has a force multiplier effect. First, it enhances the effectiveness and impact of the investigations conducted by CCCA's partners. CCCA achieves this by focusing on collecting information, consolidating information from different groups, providing legal analysis of the information, and using CCCA's expertise and connections to put the right case files before the right authorities or litigation groups. Second, CCCA's approach empowers law enforcement authorities and advocacy organizations to pursue their mandates, including to address climate change.

Innovative investigative techniques and alternative forms of evidence: CCCA explores innovative investigative techniques and relies on alternative forms of evidence, including scientific evidence, cutting edge technological evidence (such as remote sensing satellite data), and modern open-source investigation techniques. Members of the affected communities provide valuable lead information or documentary/electronic evidence and assist in the collection and analysis of evidence on the ground. While victim testimonials collected by NGOs are effective in public advocacy, judges rarely rely on privately gathered statements to establish criminal or other responsibility. Witness-based investigations also present greater risks to victims and investigators, and they are more expensive. CCCA therefore prioritizes other forms of evidence and generally does not rely on victim testimonials.

Legality: CCCA strictly operates within the framework of national laws. Although information from legitimate 'whistle-blowers' can be properly accepted, the solicitation or knowing acceptance of illegally obtained information is not consistent with CCCA's approach.

Flexibility and pragmatism to maximize impact: While CCCA uses criminal law investigation and analysis techniques, it does not only promote criminal prosecution. CCCA strategically chooses and creatively promotes both legal and non-legal mechanisms to maximize the impact and benefits for the climate and the protection of human rights. By using criminal law's stringent standards for evidence and proof, CCCA's case files can be used for all forms of judicial or regulatory enforcement, civil litigation, and other

forms of advocacy. This means that the enforcement of 'hard law' through courts and regulatory authorities is combined with efforts to persuade corporate actors to better manage legal and reputational risks or comply with their corporate climate, human rights, or sustainability standards.

13.5 CASE STUDY: ILLEGAL DEFORESTATION AND ITS DRIVERS

The above approach has numerous potential climate-relevant applications. These include the targeting of GHG emissions generated by deforestation and forest degradation. The following case study examines both the underlying situation and the impact that an evidence-based approach can have.

13.5.1 *Situation Analysis*

Deforestation and forest degradation are major climate concerns. The Intergovernmental Panel on Climate Change, in its recent report on Climate Change and Land,¹⁰ estimated that deforestation accounts for about 12 to 15 per cent of global GHG emissions. It recommends the urgent reduction of deforestation and forest degradation as a key mechanism to achieve the Paris Agreement's primary objective of limiting the global temperature increase to well below two degrees Celsius. It further found that preserving existing tropical forest coverage is the most cost-effective way to achieve this objective through land use. It also poses the least competing land pressures, has additional positive impacts on the human rights of Indigenous people, and preserves high biodiversity ecosystems.

Most tropical deforestation is illegal: Reports from the World Bank,¹¹ the United National Environmental Program (UNEP), and INTERPOL,¹² indicate that up to 90 per cent of logging in key producer countries of tropical timber is illegal. These organizations all argue that law enforcement plays a critical role in addressing illegal deforestation. The experience of Brazil bears out this thesis: a combination of government policies with enforcement

¹⁰ See 'Special Report on Climate Change and Land: Summary for Policymakers' (2020) IPCC.

¹¹ See 'Justice for Forests: Improving Criminal Justice Efforts to Combat Illegal Logging' (2012) The World Bank 2, n. 2, and n. 10.

¹² See C. Nellemann et al. (eds.), 'A Rapid Response Assessment: Green Carbon, Black Trade – Illegal Logging, Tax Fraud and Laundering in the World's Tropical Forests' (2012) UNEP-INTERPOL 6, 13, and 49; see also C. Nellemann et al. (eds.), 'The Rise of Environmental Crime: A Growing Threat to Natural Resources, Peace, Development and Security' (2016) UNEP-INTERPOL 51.

actions by prosecutors generated a positive response by the soy and beef industries – the main drivers of deforestation – which, in turn, resulted in a reduction of tropical deforestation in Brazil by 70 per cent within ten years.¹³ Unfortunately, recent policy changes and the slowing of enforcement action have led to a significant increase in the rate of deforestation in Brazil. In fact, the Brazilian organization MapBiomas has noted that approximately 90 per cent of the current deforestation in the Amazon is not authorized and, thus, is illegal.¹⁴

Deforestation is linked with other illegal activities. Deforestation is also often associated with other illegal activity: 50 to 90 per cent of deforestation in tropical countries is, for example, associated with organized crime. This can include violent offences like attacks on local or Indigenous communities, their leaders, and environmental or human rights defenders to gain access to land and prevent accountability for illegal deforestation. It can also include slave labour or financial offences such as corruption, fraud, and tax evasion.¹⁵ These offences provide additional options for accountability and advocacy, regardless of whether the deforestation can be proven to be ‘illegal’ under the relevant domestic environmental or forestry laws. For example, the US Department of Treasury recently issued Global Magnitsky Act sanctions against a corrupt network responsible for illegal logging in Cambodia.¹⁶

Local laws are often not effectively enforced. Enforcement in tropical forest countries is not currently effective at addressing this illegal deforestation, for a variety of reasons. It may be the result of a lack of resources or weak governance in some states hosting major tropical forests. And even when there is some enforcement, this is often not sufficient to prevent continued illegal deforestation (for example, fines are not paid, and strong local political support and profit motives undermine impact).

Foreign enforcement and advocacy can complement local efforts. Approximately 70 to 80 per cent of tropical deforestation is linked to commodity agriculture, including beef, soy, palm oil, and timber. Much of this is for export markets or is financed by international investors, insurers, or lenders. Regulators and law enforcement authorities from foreign countries (i.e., countries other than those where deforestation takes place) have the tools to target commodities derived from illegal deforestation, including legislation prohibiting the import of illegally logged timber (in the United States,

¹³ Doug Boucher, ‘How Brazil Has Dramatically Reduced Tropical Deforestation’ (2014) 5 *The Solutions Journal* 66.

¹⁴ See Mapbiomas, <<http://alerta.mapbiomas.org/>>.

¹⁵ See Nellemann et al. (eds.), ‘The Rise of Environmental Crime’, above note 11.

¹⁶ See ‘Treasury Sanctions Corruption and Material Support Networks’, US Department of the Treasury, 9 December 2019, <<https://home.treasury.gov/news/press-releases/sm849>>.

European Union, Australia, and Japan), legislation requiring due diligence in the foreign operations of multinationals (in France and under development in other European jurisdictions), the authority to impose sanctions on entities and individuals linked with human rights violations and corruption (in the United States, Canada, and United Kingdom, in the European Union and under development in Australia), and money-laundering and proceeds of crime legislation. Investors, banks, other financial enterprises, and customers may also have other obligations from internal social or environmental policies, sector-specific due diligence requirements, or external standards such as the OECD Guidelines for Multinational Enterprises. Actions by these external actors are an important step in addressing the chain of incentives, costs, and risks (financial, legal, and reputational) of illegal deforestation.

But foreign actors lack the information necessary to act. CCCA's enquiries with national and international law enforcement authorities indicate that this law enforcement gap results from a lack of access to high quality information and support that would enable them to conduct effective enforcement proceedings. But this absence of effective proceedings is not reflective of a general lack of willingness by foreign enforcement authorities or a lack of tools that they could use if they had the relevant information. Similarly, international commodity traders and investors have declared the objective to ensure that their clients and supply chain be deforestation free – a policy whose enforcement is contingent on the availability of information linking their clients and supply chain to deforestation.¹⁷

Traditionally, NGOs have not been able to fill this need. NGOs, especially those based in countries where illegal deforestation is taking place, have access to important information. But, in practice, NGOs have often been unable to provide foreign authorities with the sufficient quantity and quality of information that they need to act. NGOs often do not coordinate their action; they lack awareness of what information is required to trigger enforcement action; they may be unaware of the relevant authorities; or they may face competing urgent demands and be unable to prioritize building case files for external enforcement or advocacy. And public authorities in the countries where illegal deforestation is taking place often do not see it as part of their job to encourage foreign enforcement actions, even if they are aware of those options and have the capacity to pursue them.

¹⁷ See 'Unilever Launches €1bn Climate and Nature Fund, Targets Net-zero Emissions by 2039', Edie, 14 June 2020; see also 'Investor Statement on Deforestation and Forest Fires in the Amazon', CERES, <<https://www.ceres.org/sites/default/files/Investor%20statement%20on%20deforestation%20and%20forest%20fires%20in%20the%20Amazon.pdf>>.

13.5.2 *Potential Impact of the Evidence-Based Approach*

The above analysis reveals a gap: important evidence, materials, or existing findings by local authorities identifying illegal conduct are not generating their maximum potential impact. As a result, potentially influential enforcement options and advocacy targets are being under-utilized.

To generate, collect, and analyze all relevant information establishing underlying illegal conduct, supply chains, and financial structures, CCCA cooperates with multiple organizations. These include local grassroots organizations, organizations with national reach, international NGOs, and domestic law enforcement authorities. By rolling out a relatively high number of cases and by employing a variety of enforcement, litigation, and advocacy actions in relation to each case, CCCA intends to reduce deforestation in key tropical forest areas. It aims to do so by effectively cutting off those corporations who act illegally from the international market. They will find it significantly more difficult to sell their products or find international investors, lenders, and insurers. As a result of the activities of CCCA and its many partners, international trading partners will either be legally barred from trading or otherwise dealing with illegal suppliers in deforestation areas, or they will be persuaded to cut ties with their partners due to the financial costs or legal and reputational risks. The illegal actors in the deforestation area, on the other hand, will be incentivized to refrain from further illegal deforestation and related activities in order to stay in business.

As criminal prosecutors and law enforcement experts, CCCA sees on a daily basis that law enforcement – and, more important still, the realistic threat of being subject to law enforcement – has a unique ability to repress, disrupt, and deter the conduct of individuals and organizations. This is particularly true for business actors who generally take a rational approach to assessing risks and considering those risks as part of their decision-making.

13.6 CONCLUSION

Climate change is the defining issue of our time. There is no silver bullet solution to the climate emergency. Instead, it requires an unprecedented and coordinated response from governments, scientific institutions, businesses, NGOs, and many others. The judicial branch of government and law enforcement are a critical component in the global response to the climate emergency. However, to efficiently mobilize and support the judicial branch of government, NGOs, and private citizens must be more strategic in coordinating their action.

Technological developments enable NGOs and concerned citizens to strategically trigger and support legal proceedings by collecting and providing relevant and probative information that establishes the necessary factual foundation for these proceedings. CCCA harnesses this potential to make effective use of the information in judicial climate action and related initiatives. At a time when many political institutions in parts of the world appear paralyzed in the face of the unprecedented complexity of the climate emergency, the decisions of independent and impartial courts are a key component to addressing this unprecedented challenge.