

Ending impunity, securing justice

Using strategic litigation to combat
modern-day slavery and human trafficking



In recent decades, human traffickers have created sophisticated transnational networks to ply their trade and profit from their crimes. The time has come to create a new transnational network: one that is committed to ending this scourge.

Our goal is to establish a vibrant network of human rights lawyers, civil rights litigators, non-governmental organizations, investigative journalists, committed donors, and other partners.

Working together, we will use strategic litigation to secure justice for victims, punish perpetrators, and put an end to human trafficking and modern-day slavery.

Contents

2	Executive summary
4	Ending impunity for human trafficking and modern-day slavery
6	Ensuring litigation is strategic
8	Strengthening strategic litigation
11	Sharing lessons to bolster effectiveness
14	A roadmap for ground-breaking litigation
15	Investing in the tools for change

The Freedom Fund is a private philanthropic initiative which aims to mobilize the knowledge and capital needed to tackle slavery in the countries and sectors where it is most concentrated.

The Human Trafficking Pro Bono Legal Center empowers trafficked women, men, and children to seek justice. HT Pro Bono leads national efforts to hold human traffickers accountable for their crimes and to raise awareness of victims' rights. By linking trafficking victims with highly-skilled pro bono attorneys, HT Pro Bono works to obtain criminal convictions, criminal restitution, and civil judgments against traffickers. With pro bono legal assistance, trafficking survivors can rebuild their lives.

Executive Summary

“Sea Slaves: The Human Misery that Feeds Pets and Livestock,”¹ a July 2015 feature in the New York Times, outlined a litany of horrendous abuses against men trafficked into the fishing industry. In March 2015, an Associated Press report asked, “Are Slaves Catching the Fish You Buy?,” describing how fishermen were imprisoned in forced labor camps. A similarly shocking article appeared in The Guardian in 2014: “Trafficked into Slavery on Thai Trawlers to Catch Food for Prawns.”² The stories sparked an international outcry.

Around the world, investigative reporters regularly unearth stories of human trafficking and modern-day slavery. Human rights organizations document forced labor abuses in report after report. These stories dominate headlines and inspire editorials. They provoke community outrage.

But how can outrage be turned into action? How can we break the scandalous trade in human lives? How can we put an end to modern-day slavery?

In recent years, strategic litigation has been used to hold both states and private actors accountable for these gross violations of human rights.

It is one of the most promising mechanisms - if not the most promising method - to secure justice for victims, punish perpetrators and drive lasting reform.

A number of landmark cases heard by civil courts, as well as by regional and international human rights bodies, have resulted in significant verdicts. In one case, a United States company found to have used forced labor was pushed into bankruptcy.

Most importantly, strategic litigation greatly increases the risks to those involved in human trafficking. It is a direct challenge to the impunity they currently enjoy and establishes a potent deterrent to would-be traffickers.

Courts are helping to draw a line in the sand, putting their judicial weight behind international human rights standards and national laws that prohibit human trafficking and slavery in any form. However, the courts can only adjudicate on matters that are brought before them.

We must build on this early momentum.

The time has come to build an international network of lawyers and advocates who have the tools they need to bring the right cases to the right courts.

In May 2015, the Freedom Fund and the Human Trafficking Pro Bono Legal Center brought together leading human rights lawyers, advocates, and litigators from around the world for a meeting in London. The conversation centered on how best to bring strategic litigation against states and private actors in order to combat trafficking and modern-day slavery.

This document shares many of the key issues discussed at the meeting, including important lessons learned from successful litigation. It also highlights a number of persistent gaps that must be bridged in order to identify, prepare, and successfully prosecute cases that can lead to systemic change. Strategic litigation is not just the domain of human rights lawyers and civil litigators. It is founded on close partnerships with all those committed to ending human trafficking and modern-day slavery: investigative journalists, human rights researchers, academics, and grassroots non-governmental organizations, to name just a few.

Foundations and individual donors, who share this vision for change, are also integral partners. As this document explains, high-impact investment has the potential to reap enormous dividends in the fight to end impunity and secure justice and dignity for the millions of men, women, and children forced into servitude around the world.

Right: Cases of slave labor have been found in the production of charcoal in Brazil. In some cases, workers toil in hot, smoky and dangerous conditions with no protective gear. Image: Free the Slaves / Kay Chernush

BUILDING NEW ALLIANCES

In May 2015, leading lawyers from across the globe gathered in London to discuss the enormous potential that strategic litigation offers in the fight against human trafficking and modern-day slavery. The expert meeting brought together advocates targeting two separate categories of defendants. The first group of advocates – human rights lawyers litigating in international and regional tribunals – seeks to hold states accountable for their actions or inaction. The second group – civil litigators at private law firms and non-profit organizations – targets corporate and individual defendants for money damages. During the meeting, participants discussed their diverse experiences, shared strategies for effective litigation, and developed new alliances. Both communities of lawyers also expressed their commitment to redouble their efforts in the fight against impunity.

AN UNPUNISHED CRIME

Even by the most conservative estimate, the obvious lack of risk for perpetrators of human trafficking and forced labor is astounding. The International Labour Organization estimates that 20.9 million people are held in servitude worldwide. The U.S. State Department Trafficking in Persons Report estimates that there were just 10,051 prosecutions worldwide in 2014. This translates to just one criminal case being prosecuted for every 2,079 individuals held in modern-day slavery. Using Walk Free's estimate of 35.8 million people held in modern-day slavery, prosecutors bring just one case for every 3,561 people held in servitude.



Ending impunity for human trafficking and modern slavery

Hear No Evil: Forced Labor and Corporate Responsibility in Eritrea's Mining Sector⁴

TRAPPED IN QATAR: THE MIGRANTS WHO HELPED BUILD THE 'TOWER OF FOOTBALL'⁵

How Migrants Were Trafficked to Work on Britain's Free-Range Egg Farms⁶

Investigative journalists and human rights researchers regularly document cases of modern-day slavery and human trafficking, which occur in all corners of the globe. Their reports reveal the horrendous violations endured by people held in servitude: torture, beatings, intimidation, being forced to work crushing hours in dangerous or appalling conditions. More shocking, though, is that such cases rarely result in criminal prosecutions.

States are failing miserably to combat human trafficking. More than a decade after the Palermo Protocol⁷ was adopted by the international community, criminal prosecutions have barely dented the global trade.

According to the 2015 Trafficking in Persons Report, prosecutors worldwide brought just 10,051 criminal cases against traffickers in 2014, obtaining 4,443 convictions.⁸ And although experts agree that millions are held in forced labor, only 418 criminal cases around the world in 2014 included charges against this crime, with 216 ending in convictions.

There are a number of significant factors that continue to undermine efforts to bring criminal prosecutions, including:

- Widespread corruption
- Botched investigations
- Failure to protect victim-witnesses
- Lack of political will
- Structural economic barriers, including business models that flourish through forced labor and trafficking
- Insufficient state resources
- States' economic reliance on migrant remittances from abroad.

Prosecutors tend to bring cases against sex traffickers much more often than against those engaged in labor trafficking. In the United States, for example, only 18 of the 208 federal indictments in human trafficking cases in 2014 alleged forced labor. In Europe, just 197 of the 4,199 human trafficking prosecutions in 2014 alleged forced labor. And in South and Central Asia – a region awash in forced labor and indentured servitude – prosecutions for forced labor crimes numbered a mere 12 for all of 2014.⁹

Traffickers currently face little or no risk that the human rights violations they commit will result in criminal penalties. The dearth of criminal prosecutions effectively results in impunity. Moreover, the high potential for profit and the low risk of sanctions guarantee legions of willing perpetrators.

STRATEGIC LITIGATION: A POWERFUL TOOL FOR CHANGE

Strategic litigation can be a catalyst for genuine, long-term change.¹⁰

It offers a powerful means to hold both states and private actors accountable for gross human rights violations. It can help victims obtain compensation, force government action, drive legal reform, punish perpetrators, and compel action by businesses to end or prevent abuses.

Most importantly, strategic litigation greatly increases the risks to perpetrators. It is a direct challenge to the impunity they currently enjoy. It also serves as a genuine deterrent to would-be traffickers in an environment where other deterrents are sorely lacking.

WHAT CAN STRATEGIC LITIGATION ACHIEVE?

- Hold states accountable for their failure to combat trafficking/modern-day slavery
- Punish individuals who engage in trafficking/modern-day slavery
- Obtain justice and compensation for victims
- Force changes in government policies and responses
- Increase risks for private actors
- Deter potential traffickers
- Force corporations to eliminate trafficking/modern-day slavery in supply chains
- Push defendants into bankruptcy through crippling damages awards.

IS WINNING EVERYTHING?

As *David v. Signal* demonstrates, winning cases prompts glowing opinion editorials and commentary, which propels public opinion in the right direction. However, strategic litigation does not necessarily require a string of victories to be effective. In some instances, merely bringing a case is enough to trigger change. Headlines and public awareness can be enough to prompt state and private actors to alter their behavior.

DRAWING ON HISTORICAL SUCCESS

Strategic litigation to end slavery is not new. *Somerset v. Stewart*, a habeas case brought in 1772 on behalf of a brutally abused former slave in London, marked the first legal salvo in a decades-long campaign to end Britain's involvement in the slave trade. The *Somerset* case grew into a total of five sequential cases over a period of years. Granville Sharp, the mastermind behind the litigation, was not a lawyer. However, the litigation he launched sparked the beginning of the end of the slave trade.¹¹ Strategic litigation has the potential to achieve similar transformative outcomes today for the millions of people held in modern-day slavery.

Ensuring litigation is strategic

Strategic litigation aims to deliver justice for victims of trafficking and hold states and private actors accountable for human rights abuses. However, the fundamental goal is to drive systemic reforms that will put an end to trafficking and modern-day slavery.

Cases of human trafficking rarely just drop onto the desks of strategic litigators. And when they do, they may not necessarily be the right cases to bring. To be strategic, litigation must be part of a larger plan.

Determining the right cases to bring, and the most effective approaches to employ, lies at the heart of strategic litigation.

Human rights attorneys and civil litigators have an array of choices with respect to venue, tribunal, and even causes of action. For example, a civil litigator reviewing a case file could, depending on the fact pattern at hand, choose to file:

- A trafficking civil case
- A tort case for other injuries
- A breach of contract case
- A shareholder strike suit to protest bribes paid by a corporate entity to facilitate trafficking
- An administrative action, such as a labor complaint
- A lost wages action
- A consumer class action.

Moreover, the civil litigator could choose to file that case in the country of origin, the country of destination, or a third country with extraterritorial jurisdiction under the relevant statute.

Similarly, a human rights attorney could also choose to pursue criminal penalties, demanding that the state prosecute an entity under the bribery statutes, criminal trafficking statutes, money-laundering statutes, or even criminal fraud provisions. In common law countries, counsel for victims could pursue a mandamus action to try to force prosecutors to act.

Investment to create a network of trusted partners is the key to success, as litigators build strong and trusted transnational relationships for case referrals, evidence-gathering, and information-sharing to bolster and harmonize their efforts.



THE STORY SO FAR

Efforts to counter human trafficking and modern-day slavery through strategic litigation remain in their infancy. Only a relatively small number of cases have been filed around the world. However, their impact has been significant.

David v. Signal, Adikhari v. Daoud & Partners, et al., and Araya, et al. v. Nevsun Resources, Ltd, along with a host of civil cases filed in New Zealand alleging trafficking into the fishing industry, have provided insights into the potential for strategic litigation to hold corporations to account.

Lawyers filing through regional and international human rights mechanisms and tribunals have also made significant strides. *Rantsev v. Cyprus & the Russian Federation*, for example, broke new ground in pressing for state accountability to combat human trafficking. Similarly, *Mani v. Niger*, a case brought before the Community Court of Justice of the Economic Community of West African States, ended with a judgment that Niger was obliged to take positive measures to protect its citizens from slavery.

Above: CIW members conduct a Fair Food Program worker-to-worker human rights education session on a tomato farm in Immokalee, Florida. Image: Coalition of Immokalee Workers.

Right: Nepali migrant workers at a construction site. Image: Anti-Slavery International / Pete Pattison



DAVID V. SIGNAL INTERNATIONAL, LLC, ET AL. (UNITED STATES)

In one of the largest human trafficking and forced labor cases in United States history, a jury awarded \$14 million to five victims of labor trafficking. Signal International, a Gulf Coast-based marine construction company, was required to pay \$12.25 million in compensation and punitive damages. The jury awarded \$915,000 to the plaintiffs from two additional defendants. In the aftermath of Hurricane Katrina, Signal brought more than 500 Indian workers to the United States to work as welders, pipe fitters, and marine fabrication workers. Signal and its agents admitted to authorizing false promises of green cards to workers and charging victims \$11,000-25,000 in recruiting fees. Instead, victims were brought over on guestworker H-2B visas, limiting

their ability to change jobs or pursue permanent residency once in the United States. Victims were forced to work for wages below the minimum wage. An economist who examined the records concluded that the scheme saved Signal more than \$8 million in labor costs. Workers lived in “man camps”, with 24 men housed together in deplorable conditions in double-wide trailers. Workers were required to pay \$1,050 a month for room and board, regardless of whether they lived in the man camps or found their own accommodations. In July 2015, Signal reached a \$20 million dollar settlement with the Indian workers, resolving the David case and 11 related cases against the company. Signal then filed for bankruptcy protection.

Strengthening strategic litigation

The fight to end human trafficking and modern-day slavery must target the actions of states, private actors, corporations, and individuals, engaging human rights lawyers and civil litigators alike.

The primary question underpinning any litigation is fundamental: what do advocates seek to accomplish through litigation? Is the goal deterrence, a change to state policy, a change in corporate behavior? That goal will drive the question of which defendants to target. These decisions will likely drive which lawyers handle a particular matter – and in which venue. However, the battle for accountability starts long before a case reaches the court. And it also needs to extend beyond the courtroom to build public understanding of the issues and marshal community support for change.

CREATING A PIPELINE FOR CASES

One significant barrier to strategic litigation is the lack of a “pipeline” to identify suitable cases. While local non-governmental organizations (NGOs) may carefully document cases of trafficking or modern-day slavery, they may not necessarily have contact with lawyers – either at home or abroad – who can bring the matter to the court. Similarly, the path from an investigative journalist’s award-winning exposé to strategic litigation is not always clear-cut.

Building relationships between NGOs, investigative reporters, international human rights advocates, and capable local litigators is an essential first step in identifying cases that have the potential to produce significant outcomes.

SHAPING PUBLIC OPINION THROUGH ADVOCACY

What happens in the courtroom is just one element of litigation that is truly strategic. Legal cases must be married with effective advocacy in order to build community understanding of the nature of human trafficking, as well as the deep human suffering that accompanies modern-day slavery.

Sophisticated advocacy is necessary to translate dull court dockets into compelling demands for change in the court of public opinion. With a handful of notable exceptions, few people know of the important lawsuits that have been filed. Much more needs to be done to leverage courtroom victories into policy change and law reform.

Strategic litigation requires partnerships between parties who are, in many ways, like fish and fowl: lawyers who instinctively prefer confidentiality, and public advocates who favor transparent, direct action. These interests can be reconciled, but communication and trust are required.

Some international NGOs do participate in legal cases, adding an important advocacy presence. However, these NGOs seldom manage the litigation in-house. Rather, their work centers on building public awareness of human trafficking as a crime, identifying violations, publicizing key legal cases, and advocating for legislative and administrative bodies to implement legal decisions once a court has ruled.



THE POWER OF INVESTIGATIVE REPORTING

Investigative journalism underpins some of the most ambitious modern slavery litigation currently pending in the courts. E. Benjamin Skinner’s articles for Bloomberg/Business Week on forced labor in fisheries led directly to multiple civil suits in New Zealand’s courts.¹² Reporting by Cam Simpson of the Chicago Tribune prompted a human trafficking lawsuit brought by Nepali plaintiffs against KBR, the United States government contractor tasked with logistical support for American troops in Iraq. And, most recently, New York Times, Associated Press, and Guardian articles on the Thai fishing industry¹³ gave rise, in part, to a series of consumer lawsuits in California, including cases against Costco,¹⁴ Nestle and Mars.

ADHIKARI V. DAOUD & PARTNERS, ET AL. (UNITED STATES)

In October 2005, Cam Simpson, an investigative reporter for the Chicago Tribune, published a prize-winning series, "Pipeline to Peril." The articles described allegations of forced labor and trafficking of third-country nationals to United States military bases in Iraq, highlighting the stories of 12 men executed by insurgents. In 2008, family members of the twelve Nepali men profiled in the series filed a lawsuit in federal court in the United States against Kellogg Brown & Root (KBR), a United States military contractor, and Daoud & Partners, a labor broker. The plaintiffs' complaint alleged that KBR and Daoud & Partners had engaged in racketeering, forced labor, slavery, and false imprisonment. The case alleged that labor brokers recruited the victims in Nepal to work in a luxury hotel in Jordan, with promises of \$500 a month in salary. The plaintiffs alleged that the workers had paid large brokerage fees to secure their employment. The families of the victims, joined by one surviving worker, alleged that Daoud & Partners, a Jordanian subcontractor of KBR, had instead confiscated the men's passports and trafficked them into Iraq to work at the Al Asad Air Base. In August 2004, en route to the worksite in an unsecured caravan, 12 of the victims were captured by insurgents of the Ansar al-Sunna Army. The insurgents later executed the Nepali men, recording and posting a video of the executions on their website. Gurung, the surviving victim, alleged that he was forced to work in a KBR warehouse in Iraq for 15 months after the attack. In January 2014, the presiding judge held that the plaintiffs could not retroactively pursue a claim under the Trafficking Victims Protection Reauthorization Act (TVPRA) for extraterritorial events that occurred before 2008. The case is currently on appeal on the jurisdictional issue; plaintiffs have also filed a new complaint in federal court.

Left: Myanmar workers on a fishing boat at a pier in Prachuabkhirikhan province, southern Thailand.
Image: AP Photo/Apichart Weerawong.

MAKING THE DECISION: HUMAN RIGHTS LITIGATION OR CIVIL RIGHTS LITIGATION?

Litigators available to represent victims of human trafficking fall into two categories: human rights lawyers, who generally focus on governments and other institutions of the state, and civil lawyers, who generally target private actors, such as corporations and labor brokers.

Cases brought by human rights lawyers typically seek to expose the failures of government. Of course, states have a critical role to play in combating human trafficking and modern-day slavery. As such, the goal in litigating against the state is to press for reform and implementation of effective laws, policies, and practices.

Human rights lawyers may rely on local lawyers to bring a case to court in the country where the abuses have occurred, in order to meet the requirement to exhaust domestic remedies. Then, in cooperation with the domestic legal team, the matter can be presented to an international body or regional court, such as the European Court of Human Rights.

In contrast, civil lawyers tend to work independently when they conduct litigation against private actors engaged in modern-day slavery. These cases can produce significant damages awards for victims, allowing private firms to cover their fees and costs. However, some firms, particularly in the United States, are willing to run cases pro bono, providing significant time and resources without collecting fees. Unfortunately, the impact of these cases often fails to reach beyond the individual litigants.

Human rights lawyers commonly have one major advantage in strategic litigation. They tend to work in partnership with NGOs that understand how to run powerful advocacy campaigns. For strategic litigation to succeed, NGO advocates and civil litigators must work together so that ground-breaking verdicts are not left to gather dust on unexamined dockets. *David v. Signal* demonstrates the power of litigation when coupled with NGO advocacy. The case ended with a \$20 million settlement for hundreds of skilled workers brought to the United States from India to repair shipyards after Hurricane Katrina. The litigation was spearheaded by an NGO - the Southern Poverty Law Center - in partnership with nearly a dozen pro bono law firms. The case ultimately forced the defendant corporation, Signal International, into

bankruptcy. It generated major headlines in the United States and abroad, sending a clear message to all companies: “the moral bankruptcy of engaging in human trafficking can lead to financial bankruptcy too”.¹⁵

BRIDGING THE GAPS

What is holding strategic litigation back? What could be done to bolster the litigation currently underway and create a critical mass of cases? At the meeting in London, experts identified a series of gaps that must be addressed in order to make strategic litigation efforts more effective.

In addition to the advocacy gap, the experts expressed concern about:

- The **communication gap** between NGOs, human rights researchers, investigative journalists and litigators
- The **legal training gap** for partners on the ground
- The **NGO capacity gap** to identify and refer cases to qualified counsel
- The **funding gap** between donors and litigators.

One potential solution could help bridge some of these persistent gaps: supporting intermediary “NGO hubs” that could provide legal training for local partners, identify strategic cases, refer those cases to appropriate litigators, and advise funders on cases entering the pipeline. Indeed, some hubs already exist and operate with success. Creating an explicit mandate and providing dedicated funding for this purpose would deliver much-needed support and cohesion to our strategic litigation efforts.

USING INTERNATIONAL HUMAN RIGHTS MECHANISMS

As one legal expert at the London meeting pointed out, the international law on human trafficking has changed radically since the adoption of the Palermo Protocol.¹⁶ Before 2000, forced labor was a stranger to the international human rights system. The International Labour Organization dealt exclusively with forced labor, while international human rights instruments remained vague. Palermo changed everything. The Rantsev case would not have been possible without the Palermo Protocol. Today, almost every country in the world has a criminal law prohibiting forced labor and human trafficking. The United Nations human rights machinery has also changed, with seven of the main human rights treaty monitoring bodies now able to receive complaints from individuals. Unfortunately, compliance rates with the decisions of these bodies are quite low. Nevertheless, litigation in these bodies fulfils an important role: shaping international jurisprudence on the issue.

Sharing lessons to bolster effective litigation

Over the past decade, litigators have made significant strides in accountability litigation by targeting both states and private actors. In doing so, we have learned a host of valuable lessons.

Sharing successes, as well as failures, provides the basis for developing and refining strategic litigation efforts to secure better outcomes, both for the victims of abuse and those at risk of trafficking and forced labor.

LESSON 1: INVESTIGATIVE JOURNALISTS ARE IDEAL PARTNERS

Documenting forced labor requires a significant investment of resources, time, and meticulous research. With their ability to uncover fact patterns that may give rise to human trafficking litigation, investigative journalists are ideal partners for lawyers. They are able to gather and present the initial evidence that can lead to a lawsuit. Attorneys must, of course, conduct their own in-depth due diligence. However, human rights reporting and investigative journalism are often essential launching pads for strategic litigation.

LESSON 2: STRATEGIC LITIGATION REQUIRES STRONG LOCAL PARTNERS

Local NGO partners play a key role in any litigation initiative. This is particularly true when litigation is transnational. Local NGO partners can communicate legal developments to the clients, manage local media attention, assist in complying with discovery demands, explain the legal system to the clients filing the suit, and provide social services and counseling for the clients. Without adequate moral support for victim-plaintiffs, a case may falter. Moreover, experience has shown that community involvement in – and support for – these suits is essential to their success.

LESSON 3: CORPORATE SUITS CAN BE COSTLY

Corporate defendants facing human rights litigation are able to hire a regiment of lawyers. The ensuing battle may not seem like a fair fight, with legions of well-paid counsel squaring off against vastly smaller litigation teams. In addition, corporate defendants frequently resort to hardball litigation tactics, such as challenging the ethics of the plaintiffs' counsel. These attacks divert scarce resources from the primary case. Litigators should be braced for sanctions motions and ethics complaints and prepare accordingly, for

example, by establishing a reserve fund or arranging outside counsel in advance to defend on these grounds.

LESSON 4: ANTICIPATE RETALIATION AGAINST TRAFFICKING VICTIM PLAINTIFFS

Defendants occasionally retaliate against victim plaintiffs and their families to undermine transnational litigation. For this reason, it is vital to have a network of pro bono attorneys on call to respond to these intimidation tactics. This network can handle urgent requests for legal assistance when defendants file false criminal claims or bogus civil suits in the trafficking victims' countries of origin.

LESSON 5: INVEST IN IMPARTIAL INTERPRETERS

The costs of translation and interpreting services can be a major financial commitment in litigating transnational cases. But the difficulties extend far beyond the expense. In one civil case in the United States, for example, attorneys for trafficking victim-plaintiffs had struggled to find interpreters who could speak their clients' language. They learned after the case had ended that the interpreters they engaged had colluded with the defense. All interpreters should sign a confidentiality agreement and be screened for conflicts. Clients must always have the right to refuse to work with a particular interpreter.

LESSON 6: "TRAFFICKING" CONFOUNDS JURIES

Litigation in United States federal courts has led experts to conclude that use of the term "trafficking" can undermine cases. Experienced litigators call this the "Taken" effect – a reference to a sensationalized Hollywood version of trafficking that bears little resemblance to the actual abuses that advocates seek to prosecute. Attorneys have found that it is better to talk about "forced labor," a term less burdened by popular misconceptions about human trafficking.

LESSON 7: EXTRATERRITORIAL JURISDICTION MATTERS

The United States has extraterritorial jurisdiction to litigate foreign trafficking and modern slavery cases in its courts. However, the United Kingdom does not, except in cases where a British-headquartered firm is implicated in the activity. Legal reform to create extraterritorial jurisdiction is a critical investment, with the potential to deliver long-term dividends.

LESSON 8: BE IN IT FOR THE LONG HAUL

Strategic human rights litigation can take many, many years. The barriers to securing justice for trafficking victims and modern-day slaves are legion. In Mauritania, for example, where human rights advocates have brought multiple cases, some judges have slaves themselves. Exhausting domestic remedies in order to access international human rights mechanisms can take years of litigation in local courts. Similarly, aggressive tactics used by defense counsel in civil cases – such as filing for bankruptcy, demanding stays, and launching sanctions motions against plaintiffs’ counsel – can lead to lengthy delays. Commencing litigation against diplomats who traffic domestic workers into forced labor at their foreign posts can also take years, requiring the diplomat to depart the post and surrender his or her immunity from civil suit. Strategic litigation can drive genuine change, but it cannot promise immediate results.

LESSON 9: CREATIVE LAWYERING REAPS REWARDS

Human rights lawyers have begun using an obscure provision in U.S. law to obtain evidence in United States jurisdictions for cases underway in courts abroad.¹⁸ One international NGO, after observing the defense bar’s effective use of this evidence-gathering tool, introduced Section 1782 to the human rights bar. The innovation has already paid dividends in cases in Africa. Similarly, attorneys in California have brought litigation on behalf of consumers allegedly harmed by forced labor tainting the supply chain of products purchased by plaintiffs. In New Zealand, litigators have seized ships and filed cases against fishing companies on behalf of workers allegedly held in forced labor in the fishing industry. Sharing creative legal strategies can lead to genuine breakthroughs, such as requiring governments to make ex gratia payments to cover judgments against diplomats alleged to have trafficked their domestic workers into forced labor. Other creative approaches, particularly for civil law countries, include shareholder actions and competitors’ actions for false advertisement.

LESSON 10: ENSURING A CONSISTENT FOUNDATION IN TRANSNATIONAL LITIGATION

Civil litigators and common law lawyers approach the law quite differently. Collection of evidence, court proceedings, discovery, depositions, privilege, ethics rules, and even expectations diverge. Successful strategic litigation on behalf of victims of trafficking will require cross-training attorneys from both systems on seemingly straightforward topics, such as “what is a document” and “what is evidence.” In fact, misunderstanding these legal terms – so much a part of the vernacular – has the potential to cause transnational cases to unravel.

LESSON 11: MONEY MATTERS - BUT IT IS NOT JUST ABOUT THE MONEY

Human rights litigation seeks to remedy the failures of states and press for reforms to state laws and policies. However, financial recovery under regional human rights tribunals tends to be paltry. In contrast, strategic litigation has the potential to produce significant damages, drawing commercial litigators to the legal team. Debates rage over whether litigation is worthwhile if there is no money to collect at the end of the case. For victims, financial recovery may be important, especially if the victim risks financial punishment for taking part in a suit. In addition, transparency is fundamental; victim-litigants should know whether their attorneys are working pro bono or on a contingency basis.

LESSON 12: DO NO HARM

In civil and common law countries alike, the fundamental tenet of strategic litigation must be to “do no harm.” However, the risk of harm can be difficult for outside attorneys, thousands of miles away from their clients, to assess. NGO partners and community members can describe the situation on the ground to counsel, but counsel must listen. In all litigation, the best interests of the victims should be paramount.

SUD V. COSTCO WHOLESALE CORP.; WIRTH, ET AL. V. MARS, INC.; BARBER V. NESTLE USA, INC. (UNITED STATES)

Consumers in California have filed three separate lawsuits against corporations that allegedly failed to disclose slave and forced labor in their supply chains. Costco, Mars, and Nestle all source seafood-based products from Thailand-based companies. These Thai companies allegedly source from fishing boats that harvest using slave labor. In his 2015 *New York Times* series, "The Outlaw Ocean"¹⁷, reporter Ian Urbina investigated allegations that the Thai fishing sector relied on scores of migrant children and men trafficked into slavery on Thai fishing boats. Victims allegedly worked up to 20-hour shifts, some for several years. Trafficking victims reportedly suffered regular beatings and torture. Many were shackled. The articles alleged that some men were murdered execution-style in front of other workers. The lawsuits claim that Costco, Mars and Nestle sold products to customers without notifications that the products could be the result of slave labor. If true, this would be a violation of California law, which requires companies to be transparent about illegal conduct in their supply chains. Additional claims include violations of consumer protection laws, false advertising, and unfair competition practices. The lawsuit against Costco also seeks an injunction to prevent Costco from selling products of slave labor.

HOLDING CORPORATE DEFENDANTS TO ACCOUNT

As one litigator at the London meeting noted, we have reached a pivotal moment in history. It is time to ask whether any corporation should financially benefit from modern-day slavery.¹⁹ Some corporations have taken tentative steps to examine their supply chains, although few, if any, have made meaningful change. Creative litigation can intensify the pressure for corporate accountability to go beyond check-the-box audits and other window-dressing exercises. Some advocates suggest challenging the rosy disclosures on supply chain issues made by corporations in their public filings. Others seek to shame corporations through negative publicity and litigation, prompting divestiture by shareholders. Convincing investors and shareholders that a corporation has a problem that could give rise to significant risk can prompt corporate action faster than a public boycott.

BY THE NUMBERS: CIVIL LITIGATION IN THE UNITED STATES

Civil litigation in the United States did not become possible until 2003, with an amendment to the Trafficking Victims Protection Act. Since then, trafficking victims have filed just 152 cases nationwide. Of those, 141 cases allege trafficking into forced labor. Just 11 cases allege sex trafficking. A large proportion of the cases – nearly 41 percent – alleged domestic servitude. Many of these cases, brought by domestic workers trafficked into the United States, also include allegations against labor recruiters. Of the total 152 cases, 87 include corporate entities as defendants. Most of these corporate entities are labor recruiters, who are in large part responsible for the abuses in the labor supply chain.

A roadmap for ground-breaking litigation

Strategic litigation is one of the most promising mechanisms – if not the most promising one – to secure justice for victims, punish perpetrators, and drive genuine, lasting reform.

With experienced human rights lawyers and civil litigators entering the arena, the time to launch a cohesive, transnational litigation movement has arrived.

Extensive on-the-ground research – sourced by investigative journalists, human rights organizations, local NGOs, and others – can provide invaluable insights into potential plaintiffs and cases.

And drawing on the lessons learned from previous litigation, advocates have a clear view of the need to better collaborate and prepare for the challenges that will arise when bringing cases of human trafficking and modern-day slavery before the courts.

In conducting this analysis, we have identified ten key elements to underpin litigation that is truly strategic.

- 1 Identify key defendants and target locations for strategic litigation
- 2 Research the law and legal system in the country of abuse
- 3 Train local partners in the principles of strategic litigation
- 4 Build relationships with communities of survivors and potential litigants
- 5 Collect intelligence through investigative reporting coverage and conduct due diligence
- 6 Establish and support skilled litigation and advocacy teams
- 7 Develop budgets and identify funding sources to support litigation efforts
- 8 Communicate and collaborate with other litigation teams to share creative tactics, as well as successes – and failures – in prior litigation
- 9 Support regional “umbrella” NGOs to encourage local activism and litigation
- 10 Develop powerful advocacy strategies to press for enforcement of court decisions

HADIJATOU MANI V. NIGER

In 2008, the Community Court of Justice of the Economic Community of West African States (ECOWAS) delivered a judgment in the case of Hadijatou Mani v. Niger. Local lawyers brought the case with assistance from INTERIGHTS, the International Centre for the Legal Protection of Human Rights, Anti-Slavery International, and the Niger NGO, Timidria. Niger had criminalized slavery in 2003, but the practice persisted. The Court determined that Ms. Mani was held in slavery for nearly nine years. After finding Niger in breach of its own laws and international obligations, the Court ordered compensation to Ms. Mani in the amount of approximately US\$19,000.

Helen Duffy, then-Legal Director at INTERIGHTS and co-counsel on the case, said: “During her testimony before the Court, [Ms. Mani] said she was treated like a goat. Today’s judgment reasserts her rights as a human being. For the tens of thousands of others trapped in slavery across Niger, the ruling sends an unequivocal message that the long standing provisions on slavery must be given meaning in practice.”

Investing in the tools for change

Funding is absolutely critical to our efforts to end human trafficking and modern-day slavery. Committed donors, who share our vision for change, are integral partners in our work.

Four key investments would propel global strategic litigation efforts forward, allowing expert lawyers to bring the right cases, in the right courts.

First, additional **expert meetings** to bring litigators and partners together would provide opportunities for key individuals to build relationships and share innovative strategies. In light of confidentiality and security concerns, it is best for these meetings to occur face-to-face in neutral locations.

Second, investment in **NGO intermediary partners** would support the legal training essential to effective litigation. The key focus of these regional organizations would be to train local NGOs to provide litigation support for local and international lawyers. They would also provide support in cases before the courts, building long-term relationships with local partners and providing expert guidance on litigation rules. In some cases, the organizations may serve as co-counsel.

Third, investment in a secure **platform for communication** among lawyers would allow them to share documents and materials. Current listservs are clunky and insecure. Creating a dedicated, invitation-only platform would promote open communication, ensure security, and enhance litigation outcomes.

Finally, working with litigators and NGO partners to develop an **evaluation and monitoring plan** would educate all parties on expectations and goals. The creation of key benchmarks will also help shift litigation away from the current opportunistic model and deliver a framework for litigation to become truly strategic.

Below: a worker member and her son during the 2014 Now is the Time Tour, which ended in Lakeland, Florida. Image: Coalition of Immokalee Workers



Endnotes

- 1 Ian Urbina, "Sea Slaves: The Human Misery that Feeds Pets and Livestock," *The New York Times*, July 27, 2015, available at <http://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html> (accessed September 23, 2015).
- 2 Robin McDowell, Margie Mason, and Martha Mendoz, "AP Investigation: Are slaves catching the fish you buy?," Associated Press, March 25, 2015, available at <http://bigstory.ap.org/article/ap-investigation-are-slaves-catching-fish-you-buy> (accessed October 28, 2015).
- 3 Kate Hodel and Chris Kelly, "Trafficked into Slavery on Thai Trawlers to Catch Food for Prawns," June 10, 2014, available at <http://www.theguardian.com/global-development/2014/jun/10/-sp-migrant-workers-new-life-enslaved-thai-fishing> (accessed October 15, 2015).
- 4 Human Rights Watch, *Hear No Evil: Forced Labor and Corporate Responsibility in Eritrea's Mining Sector*, January 15, 2013, available at <https://www.hrw.org/report/2013/01/15/hear-no-evil/forced-labor-and-corporate-responsibility-eritreas-mining-sector> (accessed September 23, 2015); see also Mark Andersen, "Canadian Mining Company Accused of Exploiting Eritrea's Forced Labour," *The Guardian*, August 19, 2015, available at <http://www.theguardian.com/global-development/2015/aug/19/eritrea-mining-nevsun-forced-labour> (accessed September 23, 2015).
- 5 Robert Booth, et al., "Trapped in Qatar: The Migrants Who Helped Build the 'Tower of Football,'" July 28, 2014, *The Guardian*, available at <http://www.theguardian.com/global-development/2014/jul/28/-sp-qatar-migrants-tower-football-world-cup> (accessed September 23, 2015).
- 6 Tom Silverstone, et al., "How Migrants were Trafficked to Work on Britain's Free-Range Egg Farms," *The Guardian*, available at <http://www.theguardian.com/world/video/2015/aug/10/migrants-trafficked-work-britain-free-range-farms-video> (accessed September 23, 2015).
- 7 The "Palermo Protocol" is the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, which requires states to criminalize human trafficking in all its forms. The Protocol is available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx> (accessed September 23, 2015).
- 8 U.S. Department of State, 2015 Trafficking in Persons Report, July 27, 2015, p. 48, available at <http://www.state.gov/j/tip/rls/tiprpt/2015/> (accessed September 23, 2015).
- 9 U.S. Department of State, Trafficking in Persons Report 2015, p. 59. This region includes Kazakhstan, Uzbekistan, Turkmenistan, Kyrgyzstan, Tajikistan, Afghanistan, Pakistan, India, Nepal, Bhutan, Bangladesh, Sri Lanka, and the Maldives. The U.S. Government cautions that the statistics in the report are estimates only "given the lack of uniformity in national reporting structures."
- 10 Definitions of strategic litigation vary, but one useful definition is "the intentional deployment of legal action to transform a targeted social, economic, political, or legal issue."
- 11 For an excellent analysis of the abolitionist movement in Great Britain, see Adam Hochschild, *Bury the Chains: Prophets and Rebels in the Fight to Free an Empire's Slaves* (Boston: Houghton Mifflin Harcourt) (2005).
- 12 E. Benjamin Skinner, "The Fishing Industry's Cruellest Catch," *Bloomberg/Business Week*, February 23, 2012, available at <http://www.bloomberg.com/bw/articles/2012-02-23/the-fishing-industrys-cruellest-catch> (accessed October 27, 2015).
- 13 Ian Urbina, "Sea Slaves: The Human Misery that Feeds Pets and Livestock," *The New York Times*, July 27, 2015, available at <http://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html> (accessed October 27, 2015).
- 14 Felicity Lawrence, "Costco and CP Foods face lawsuit over alleged slavery in prawn supply chain," *The Guardian*, August 19, 2015, available at <http://www.theguardian.com/global-development/2015/aug/19/costco-cp-foods-lawsuit-alleged-slavery-prawn-supply-chain> (accessed October 27, 2015).
- 15 Kathleen Burke, "Signal Bankruptcy Shines Light on Human Trafficking in the US," *Marketwatch*, July 14, 2015, available at <http://www.marketwatch.com/story/signal-bankruptcy-shines-light-on-human-trafficking-in-the-us-2015-07-13> (accessed September 23, 2015).
- 16 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), G.A. Res. 55/25, 2237 U.N.T.S. 319 (Nov. 15, 2000). The Palermo Protocol currently has 166 states parties.
- 17 See <http://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html> (accessed on October 27, 2015).
- 18 Section 1782 of the United States Code allows for collection of evidence in the United States to aid foreign courts in adjudicating cases. See 28 U.S. Code § 1782 - Assistance to foreign and international tribunals and to litigants before such tribunals.
- 19 On the issue of corporate accountability for human rights violations more generally, see the European Center for Constitutional and Human Rights, *Holding Companies Accountable: Lessons from Transnational Human Rights Litigation*, November 2014, available at <http://www.ecchr.eu/en/documents/publications.html> (accessed September 23, 2015).

Cover: A day wage laborer carries a load of bricks in the brick kiln in Baruhuaa village in Chandauli district of Uttar Pradesh, India. The workers are entitled to get INR180 (\$3) per 1,000 bricks but the contractor only gives INR 80 - INR 100 (\$1.25 - \$1.7).
Image: Sanjit Das (c) Legatum Limited 2015.

Author: Martina E. Vandenberg

Particular thanks for editorial and publications support to Nick Grono, Alexandra Levy, James Iliffe, Meghan Walsh, Laura Harrington, Attanayake Design.

None of the individuals depicted in this report is a victim of human trafficking. Images are provided to illustrate sectors into which individuals may be trafficked and held in forced labor.



The Freedom Fund (US)

Six West 48th Street
10th Floor
New York, NY 10036
United States
☎ +1 212 812 4330

The Freedom Fund (UK)

Lighterman House
26-36 Wharfdale Road
London N1 9RY
United Kingdom
☎ +44 20 3077 2222



**The Human Trafficking
Pro Bono Legal Center**

1718 M Street, NW #104
Washington, DC 20036
www.htprobono.org
info@htprobono.org