

Fighting impunity, funding justice

Investing in strategic litigation
to end modern slavery



We are at a pivotal moment in the fight to end human trafficking and modern slavery.

Strategic litigation is beginning to deliver on its potential to hold traffickers and their conspirators accountable and to deter others who may seek to profit from this trade.

More and more, decisions from courtrooms are reverberating across corporate boardrooms; executives are increasingly alert to the need to ensure their supply chains are free of human trafficking and forced labour.

We need to capitalise on this success and build a strong, robust global network to counter modern slavery. Donors are vital partners in this work.

Your investment can support strategic litigation that will drive lasting change and return dignity to countless men, women and children.

The Freedom Fund would like to thank all the donors who contributed so much to the discussions at our May 2016 convening. The Freedom Fund also thanks the litigators who presented their remarkable and inspiring work to us.

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Executive Summary

Strategic litigation has always been one of the most promising tools in the fight against human trafficking and modern slavery. Today, it has begun to deliver on that promise.

Litigators filing cases on behalf of victims have recently achieved a number of significant results. This success has reverberated far beyond the individual litigants, far beyond each courtroom.

We are at a pivotal moment in the anti-trafficking movement. Corporations are increasingly alert to the risks of human trafficking, forced labour and slavery in their supply chains. Strategic litigation and criminal prosecution are at the sharp end of this risk, putting these issues at the top of boardroom agendas.

Strategic litigation can propel social change by holding traffickers and their conspirators accountable before the law, as well as deterring others who might seek to profit from these crimes.

Targeted litigation increases risks for traffickers. This in turn can drive corporate action, forcing implementation of existing compliance plans. Real compliance creates mechanisms for whistle blowers and courageous workers to report forced labour. This increased transparency and reporting enhances efforts to prevent modern slavery.

This report presents some of the most promising investment strategies available to donors: most notably through the creation of a specific fund for anti-slavery strategic litigation and the establishment of a “clearing house” to identify the most promising cases and to match victims with lawyers to represent them.

Litigation of significant cases can drive genuine and lasting change. To bring these cases, however, we need coordinated and sustained investment. By investing in strategic litigation, donors can have an impact that reaches far beyond individual cases to support and strengthen the global push to end human trafficking and modern slavery.



CORPORATE FORCED LABOUR: DAVID V. SIGNAL INTERNATIONAL, ET AL.¹

In 2015, the *Signal International* litigation ended in a \$20 million settlement for hundreds of Indian workers trafficked to the United States for forced labour. The men – skilled workers brought to the United States on legal visas – each paid thousands of dollars to labor brokers for jobs in the post-Hurricane Katrina reconstruction boom. They borrowed money to pay the recruiters, unaware of the fraud perpetrated on them. By the time they arrived in the United States, they were heavily indebted and saddled with visas tied to their employer.

The company arranged for the men to live in a labor camp behind a chain link fence, charging them each more than \$1000 per month to share a trailer. Each trailer housed 24 workers, who slept in bunk beds. In addition to the appalling living conditions, Signal assigned the workers some of the most dangerous jobs on the work site.

1 David v. Signal International, LLC, No. 08-cv-01220 (E.D. La. filed Mar. 7, 2008).

The Southern Poverty Law Center (SPLC) brought the original case on the workers' behalf, eventually filing 12 cases with the assistance of pro bono counsel. More than seven years after the workers arrived in the United States, the first case went to trial with five plaintiffs. The four-week trial ended with a \$14.1 million jury verdict for the workers. Signal declared bankruptcy. However, the bankruptcy court ultimately approved the \$20 million settlement for the affected workers.

The legal victory also garnered extensive media coverage, especially among business reporters. The *Wall Street Journal* noted: "[This is] a case that shows that the moral bankruptcy of engaging in human trafficking can lead to financial bankruptcy, too."²

2 Kathleen Burke, "Signal bankruptcy shines light on human trafficking in the U.S.," Dow Jones Company, Marketwatch, July 14, 2015, <http://www.marketwatch.com/story/signal-bankruptcy-shines-light-on-human-trafficking-in-the-us-2015-07-13>

Driving change through strategic litigation

Using the law to fight slavery is not a new strategy. In 1772, Lord Mansfield ruled in the case of *Somerset v Stewart*. He condemned slavery as “odious” and held that “escaped slave” James Somerset could not be sent from London to Jamaica to be re-sold.

The *Somerset* decision heralded the beginning of the end of the slave trade. It formally ended in Britain with the Slave Trade Act of 1807 and the Slavery Abolition Act of 1833. And while litigation alone did not stop the traffic and sale of human beings, it did play an important role in hastening its end in the 19th Century.

Or so we thought. Sadly, slavery, human trafficking, forced labour and other forms of compelled servitude still exist in the 21st Century. Despite being condemned by nearly every State in the world, these practices persist. Impunity remains the norm.

The International Labor Organisation (ILO) estimates that there are 20.9 million people held in all forms of forced labour across the globe. In 2016, the Walk Free Foundation’s Global Slavery Index said that as many as 45.8 million men, women, and children may be held in modern slavery.

These shocking numbers stand in stark contrast with the U.S. State Department’s estimated number of prosecutions for human trafficking in 2014: just 10,051 in the entire world. And while the ILO states that the vast majority of victims are held in forced labour, rather than sexual exploitation, the State Department recorded just 418 prosecutions for forced labour worldwide in 2014.

The utter failure of our criminal justice systems to combat human trafficking and modern slavery raises a fundamental question for donors and advocates alike: how do we press for change when impunity holds sway? Strategic litigation provides a compelling answer, but it also begs another question: how do we fund it?

In May 2016, donors gathered for a two-day meeting to discuss the potential for strategic litigation to drive changes in practice and the different methods to finance these initiatives. Three leading litigators provided insights into landmark anti-trafficking cases brought in U.S. federal courts. Donors with extensive experience in supporting strategic litigation shared

their assessment of its impact, while those who are new to this approach posed pertinent questions. All participants debated the best ways to support and expand this pioneering work.

This report draws together many of the discussions from the meeting, which was sponsored by the Freedom Fund and facilitated by the Human Trafficking Pro Bono Legal Center. The frank, unprecedented discussions between litigators and donors provided compelling insights into the scope and power of strategic litigation, as well as the building blocks needed to make contemporary anti-slavery litigation as potent as that launched by James Somerset in 1772.

ALLEGATIONS OF CORPORATE FORCED LABOUR: *ADHIKARI V. DAUD & PARTNERS, ET AL.*³

In 2008, the family members of 12 Nepali men killed in Iraq and one trafficking survivor filed a suit in a U.S. federal court against the defense contractor giant KBR Halliburton. The case, brought against KBR and its Jordanian subcontractor, Daoud & Partners, alleged that the defendants had engaged in human trafficking and forced labour. The Nepali workers, all young men recruited from remote villages in Nepal, believed that they would be working in luxury hotels in Jordan. Instead, traffickers seized their passports and transported them from Jordan to Iraq. Insurgents kidnapped some of the workers en route, killing all of the captured men. One of the men was in a separate vehicle and survived. Despite his requests to return home, the surviving worker was allegedly forced to stay and work on a U.S. military base in Iraq for 15 months.

Investigative journalist Cam Simpson uncovered the case and documented the facts in a series for the *Chicago Tribune*, "Pipeline to Peril". Without Simpson's investigative reporting, the allegations may never have come to light. NGOs on the ground also provided extensive litigation support.

Although the case remains unresolved – it is currently on appeal on a technical issue of extraterritorial jurisdiction – the litigation has reverberated far beyond the Texas courtroom. It has led to extensive changes to government contractor regulations on human trafficking, with the Obama Administration issuing a sweeping Executive Order.⁴ Federal contractors have started to implement comprehensive anti-trafficking compliance programs. And the publicity surrounding the case has sent a clear warning to all contractors failing to adhere to fair labor standards.

³ *Adhikari v. Daoud & Partners* No. 09-cv-01237 (C.D. Cal. filed Aug. 27, 2008).

⁴ Executive Order, "Strengthening Protections Against Trafficking In Persons In Federal Contracts," <https://www.whitehouse.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe> (Sept. 25, 2012).



Blazing new trails and measuring impact

Donor-funded strategic litigation has had a transformative impact in countries across the globe; school desegregation and gay marriage advocates owe their success to far-sighted strategic litigation. Donors have blazed the strategic litigation trail in other fields, as well.

The Open Society Justice Initiative (OSJI) has invested tens of millions of dollars in strategic litigation over the last decade, spearheading cases to end Roma school segregation in Europe. OSJI has also funded a program to enforce rights in public health systems through strategic litigation.

Unlike other approaches, strategic litigation can take years to conclude and its impact can be harder to measure. However, an independent evaluation of OSJI's litigation efforts to end school desegregation found:

The effects of strategic litigation can ripple outward, from the courthouse to changes in policy to changed practices ... At its most successful, strategic litigation is part of an ongoing cycle in which successful litigation leads to a judgment and the execution of the judgment, which can further galvanise and mobilise the affected group or individual.⁵

Other evaluations have found that the impact of strategic litigation can be felt across a wide range of areas, far removed from the courtroom, including through:

- Stronger and more strategic grassroots movements
- Broader public awareness of human rights violations
- Positive changes to law, policy or practice
- Building the capacity of NGOs to mobilise and advocate
- Organising new partnerships for social change
- Empowering marginalised populations
- Motivating other branches of government to take action
- Strengthening the rule of law and facilitating access to the courts.⁶

5 *Open Society Justice Initiative, Strategic Litigation Impacts: Roma School Desegregation 18* (2016).

6 *Id.* at 15-19

Image, left: © The Freedom Fund

For supporters of anti-trafficking strategic litigation, there is another powerful motivation: ending the barbaric human rights violations associated with forced labour, involuntary servitude, forced prostitution and the commercial sexual exploitation of children.

Despite the power of strategic litigation, those who bring cases to the courts often face serious obstacles to secure substantial, long-term funding for their efforts. Litigation can last years; however, funding cycles do not match up with the cadence of cases.

Donors who succeed in this area have an expansive understanding of success. Even courtroom losses can serve a powerful end by putting the issues in the media spotlight and starting a public debate. In some instances, the mere threat of legal action can galvanise change. However, these effects are less tangible than a courtroom win and can be difficult for some donors to square with their usual methods for measuring impact.



Image: Brent Lewin © The Freedom Fund

HUMAN RIGHTS LITIGATION

In addition to civil cases, trafficking victims and their representatives have made major gains through landmark litigation in regional and international human rights courts.

Rantsev v. Cyprus and the Russian Federation⁷

A father brought a case in the European Court of Human Rights on behalf of his daughter, a Russian sex trafficking victim who died in Cyprus. The case established important legal precedents, underscoring the State's duty to criminalise trafficking and to investigate trafficking allegations.

Hadijatou Mani Koraou v The Republic of Niger⁸

Hadijatou Mani, a woman born into descent-based slavery, brought a case against Niger in the Community Court of Justice of the Economic Community of West African States (ECOWAS). In 2008, the court ruled that Niger had breached international law and its own laws in failing to protect Ms. Mani from slavery. The court awarded her \$19,000 in damages. Afterwards Ms. Mani stated: "Nobody deserves to be enslaved. We are all equal and deserve to be treated the same. I hope that everybody in slavery today can find their freedom."

Workers of Fazenda Brasil Verde v. Brazil⁹

Three hundred and forty men brought a case before the Inter-American Court of Human Rights alleging trafficking for forced labour. The case was brought by the Center for Justice and International Law (CEJIL) and the Pastoral Land Commission, the social arm of the Brazilian Catholic Church. The Inter-American Commission submitted the matter to the jurisdiction of the Inter-American Court on 6 March 2015 because "it deemed that the State of Brazil had not complied with the recommendations contained in the Commission's Merits Report on the allegations." According to lead counsel from CEJIL, this is "the first case of trafficking with a purpose of labor exploitation and the different types of modern-day slavery, including debt bondage and forced labour", ever heard by the Inter-American Court of Human Rights. The Court heard oral argument in February 2016; the case is pending.

7 *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010.

8 *Hadijatou Mani Koraou v The Republic of Niger*, ECW/CCJ/JUD/06/08, Economic Community of West African States (ECOWAS): Community Court of Justice, 27 October 2008.

9 *Workers of Fazenda Brasil Verde v. Brazil*, Case 12.066, Inter-American Court, 6 March 2015.



Practical strategies to strengthen strategic litigation

Strategic litigation works. Efforts to stop the tide of human trafficking typically offer few genuine success stories. But strategic litigation bucks that trend. It has delivered a string of successful courtroom results that have had an impact far beyond those individual cases.

At our meeting for donors in May 2016, litigators presented a number of recent successful cases for discussion: *David v. Signal International, et al.*¹⁰, *Adhikari v. Daoud & Partners, et al.*¹¹, and *Jean-Charles v. Perlitz*.¹² Short summaries of these cases are provided in this publication.

A number of common themes run through all these cases:

- **Litigation support is essential.** Cases - particularly those involving victims outside of the United States - cannot be brought without the necessary support to help victims comply with the demands of litigation. Local NGOs can fulfil this role, although they commonly require training and financial support.
- **Victim services must be available.** Litigation is gruelling. Depositions, producing documents and writing affidavits can all re-traumatise victims. Without appropriate services on the ground, victims can suffer immensely. Many governments have reneged on their commitments to provide these services. This responsibility then falls to local NGOs. These groups need funding to support and stabilise victims.
- **Translation can make or break a case.** An often overlooked part of the process, litigation falters when lawyers and clients cannot communicate effectively. Skilled translators must be included in any litigation budget.
- **Victims and lawyers must find one another.** It is often the case that those who wish to bring a case cannot find counsel. It is also the case that skilled attorneys with the capacity to undertake strategic litigation often find it difficult to connect with those who seek counsel. Funding is required to build a case pipeline to bring parties together.

Investigative journalism can identify egregious abuses ripe for litigation. Journalistic investigations have led to some of the most important cases in the strategic litigation field. In-depth research and investigations can highlight practices and individual cases that might never have come to light.

- **Litigation requires advocacy partners.** Litigators need partners to transform their cases into broader, systemic change. Advocacy partners can engage journalists, mobilise supporters on social media, move courtroom action into the public domain and push companies and law makers to respond. These partners also need financial support.

MEETING THE CHALLENGES TOGETHER

Our discussions identified a number of discrete areas where donors and advocates can work together to deliver significant results.

- **Building a case pipeline:** The absence of a central clearing house for potential cases has hindered litigators. Cases must be selected carefully for their potential impact on the larger movement. Currently, because so few cases come to light - and to the attention of attorneys - litigation is too often reactive rather than strategic. To overcome this, we need to build mechanisms that allow us to identify potential clients and link them with willing litigators.
- **Creating strategic litigation partnerships:** Building a strategic litigation movement requires creating infrastructure to link the site of modern slavery to the courtroom and to the advocacy community beyond. These horizontally integrated partnerships are just beginning to form. Building relationships between grassroots activists, litigators and policy advocates requires time and resources.
- **Establishing an anti-slavery litigation fund:** A chronic lack of funding mechanisms has severely hampered the strategic litigation movement. A revolving anti-trafficking and anti-slavery revolving litigation fund would, however, ensure that victims have their day in court. Such a fund would allow donors to recycle assets that could be devoted to this fight.

¹⁰ *David v. Signal International, LLC*, No. 08-cv-01220 (E.D. La. filed Mar. 7, 2008).

¹¹ *Adhikari v. Daoud & Partners*, No. 09-cv-01237 (C.D. Cal. filed Aug. 27, 2008).

¹² *Jean-Charles v. Perlitz*, No. 11-cv-614 (D. Conn. filed Apr. 18, 2011).

CHILD SEX TRAFFICKING: JEAN-CHARLES V. PERLITZ¹³

From 1998 until 2008, Douglas Perlitz sexually abused minor boys in his care at a residential school program for homeless and destitute children in Haiti. The boys were some of the most vulnerable children in the world – children who, in many instances, lacked basic food, clothing and shelter – and were completely dependent on the program at Project Pierre Toussaint. Perlitz preyed on boys under the age of 18 (much younger, in most instances), demanding sexual favours in exchange for shoes, clothing, money or other necessities.

Perlitz was eventually prosecuted by the United States government. He pleaded guilty in July 2010 and was sentenced to more than 19 years in prison. Following the criminal case, victims filed a civil case against Perlitz and six additional defendants: Fairfield University, the Haiti Fund, the Society of Jesus, the Order of Malta, Father Carrier, and Hope Carter, all of whom were alleged to have been responsible for allowing Perlitz's abuse to take place. That case ended with a \$12 million settlement from the non-Perlitz defendants for 24 victims.

A second group of victims filed suit against the same defendants; the case is currently pending. These victims live mired in poverty. Many are homeless. Further, Haiti, particularly after the earthquake, lacks sophisticated NGOs to support victims and provide litigation support. Despite the difficulties, the litigation has had an enormous public impact. In the words of an attorney familiar with the case, it was "the first time that the Haitian people realised that child victims of sex abuse have rights. The combination of the criminal prosecution and civil remedies opened the door for these children." In addition, Haiti's government passed a new law to prohibit sex abuse and human trafficking.

13 *Jean-Charles v. Perlitz*, No. 11-cv-614 (D. Conn. filed Apr. 18, 2011).

How do we currently fund strategic litigation to fight modern slavery?

Limited funding remains one of the greatest barriers for advocates of strategic litigation in the fight against human trafficking and modern slavery.

Strategic litigation tends to be financed in one of three ways:

- Pro bono litigation by major law firms
- Public interest organisation litigation financed by donations and grants
- Contingency-fee based litigation financed by plaintiffs' firms.

However, these current financing mechanisms have failed to provide adequate support for cases identified by advocates. Challenges abound, limiting the number and type of cases that are brought to court.

Donors can make a significant impact on strategic litigation. Increased funding will not only increase the number of cases, but will multiply the global impact of those cases.



Image: Josh Stride © Humanity United

OBSTACLES TO STRATEGIC LITIGATION

- Large pro bono firms with the resources to finance cases in-house often have significant restrictions on their work. Some firms may be conflicted out, unable to sue particular defendants or even litigate offensively in certain practice areas. In addition, large firms tend to cluster in major metropolitan areas, often far removed from venues where trafficking litigation must be brought.
- Public interest organisations must conduct extensive fundraising to cover the costs of cases. Because the litigation can exhaust their limited resources, these organisations often partner with pro bono firms. These partnerships, while extraordinarily successful when they work, can constrain litigation.
- While private pro bono law firm partners often join civil cases, human rights litigation tends to be brought by public interest organisations operating alone or in partnership with similar organisations. Again, these organisations must scramble to raise money each year to support their litigation before human rights bodies.
- Contingency-fee litigation has not played a significant role in anti-trafficking strategic litigation to date. While the plaintiffs' bar seems to be discovering the potential for suits under the federal trafficking civil cause of action, very few cases have been filed. This may be because these cases are viewed as expensive to litigate, with little opportunity for recovery of costs or fees. Firms that cannot recoup their investment in the litigation are often reluctant to bring this novel cause of action.

TRAFFICKING OF DOMESTIC WORKERS BY FOREIGN DIPLOMATS FOR FORCED LABOUR: *MAZENGO V. MZENGI*.¹⁴

Foreign affairs ministries around the globe have long been aware of the trafficking of domestic workers for forced labour. Almost without exception, impunity has been the rule. But advocates in several countries have fought to end these abuses. And strategic litigation has served as the primary tool for this work.

In the United States, a federal case brought against a Tanzanian diplomat for forced labour ended in a judgment of more than \$1 million. The complaint alleged that the diplomat and his wife trafficked a woman to the United States for forced labour, holding her for four years without wages. The defendants stripped the domestic worker of her passport and visa, forced her to work around the clock and cut her off from the outside world. After suffering psychological and physical abuse, the worker fled. An NGO and a pro bono law firm jointly filed the civil trafficking complaint on her behalf.

The case – and the significant judgment in the woman's favour – garnered extensive media attention. High-level U.S. government officials intervened when the unpaid judgment emerged as an issue prior to a planned visit to Tanzania by the President of the United States. The Tanzanian government ultimately made an *ex gratia* payment to the victim, settling the case.

The litigation contributed to legislative reform and additional protections for domestic workers brought to the United States by diplomats. It also led to a series of meetings to develop best practices in this area, headed by the Organisation for Security and Cooperation in Europe. The following elements are crucial components of a strong, robust and successful approach to strategic litigation. Investment is necessary at each stage of the cycle if we are serious about ending human trafficking and modern slavery.

¹⁴ *Mazengo v. Mzengi*, No. 07-cv-756 (D.D.C. filed Apr. 25, 2007).



Where funding is needed to drive lasting change

STAGE 1: BUILDING A PIPELINE OF CASES

Supporting investigative journalism: Investigative journalists have, in many cases, provided the initial research, evidence and contact with trafficking victims. Most recently, investigative journalists have uncovered widespread abuses in the Thai fishing industry, trafficking and abuse of workers in Qatar, and abuse of workers in the palm oil industry.

Leveraging human rights investigations: Researchers from human rights organisations engage in long-term, meticulous investigations. As with investigative journalists, the evidence they publish in their reports can give rise to litigation. For example, a report by Human Rights Watch on the mining industry in Eritrea prompted a suit brought against Nevsun Mining, a Canadian company, that is ongoing.¹⁵

Assisting NGOs to identify and link cases: Local, regional and international NGOs can play a vital role to identify cases on the ground and then connect victims with counsel. In some instances, NGOs have attorneys on staff to screen cases and conduct local cases. However, these groups commonly need training and technical support in order to better support and contribute to litigation.

Pre-filing due diligence: Courts require significant due diligence before filing a case. Assistance to lawyers to bear the costs of these in-depth, pre-filing investigations is essential. Access to professional translation services is a particular area of need.

STAGE 2: SUPPORTING THE LITIGATION PROCESS

Building strong local NGO partnerships: Successful litigation requires advocates and partners working on the ground. NGOs are well placed to conduct a range of vital activities, including identifying cases, supporting victims over the course of the litigation, and providing ongoing communication with the attorneys. They can also assist with the often extensive discovery requests. These local organisations need funding to do this work, but they also need training on case identification, trauma-informed care, privilege issues, discovery obligations, litigation support and post-verdict advocacy.

Delivering services and support for victims: Victims of trafficking or slavery who have brought a case often require support, either for trauma treatment, counselling, shelter or direct relief. However, ethical rules in many jurisdictions prohibit attorneys from providing any financial support to clients. Therefore, trusted NGOs must be funded appropriately in order to respond to the needs of victims, even as these victims assert their rights in legal proceedings.

Providing ongoing case support: While some plaintiffs' firms finance their anti-trafficking litigation internally, not every lawyer or NGO can afford to do so. In addition, because pro bono attorneys are far less inclined to do litigation abroad, there is a need to provide financial support for extraterritorial cases. Again, translation services are a significant need.

¹⁵ *Araya v. Nevsun Resources Ltd.* (Can.), 2015 BCSC 1209. For an excellent documentary highlighting this ongoing litigation against a Canadian mining company for alleged forced labour in Eritrea, see the Canadian Broadcasting Company's, "Nevsun in Eritrea: Dealing with a Dictator," available at <http://www.cbc.ca/fifth/episodes/2015-2016/nevsun-in-eritrea-dealing-with-a-dictator> (Feb. 12. 2016).

STAGE 3: SUPPORT FOR STRATEGIC LITIGATION IN OTHER COURTS

Conducting human rights litigation: In addition to civil litigation against corporations and individual traffickers, there are times when it is vital to litigate against States and hold them accountable for their human rights obligations. There have been some very important victories in the anti-trafficking field, notably *Rantsev v. Cyprus and the Russian Federation*, the first-ever sex trafficking case litigated before the European Court of Human Rights. Before bringing these cases, a victim commonly needs to exhaust all domestic remedies. Local NGOs need financial support to meet these legal requirements.

Building pressure for criminal prosecution: Despite the grim record for criminal prosecution, advocates must continue to pressure States to hold traffickers criminally accountable. Support is needed for field-based NGO investigators in their work to gather robust evidence on trafficking and/or forced labour to encourage prosecutions. Creativity in prosecutions should be encouraged; criminal anti-bribery statutes may provide another criminal law avenue for prosecution.

Building pressure for administrative complaints: The United States government's recent elimination of the Tariff Act's "consumptive demand loophole" should help block forced labour-produced goods from entering United States markets. Removing the longstanding exceptions to forced labour import prohibitions provides new opportunities for federal administrative action to deter forced labour. However, evidence of forced labour in these supply chains is likely to come from NGOs filing petitions with U.S. authorities. Their vital research work will need greater support.

STAGE 4: STRATEGIC ADVOCACY

Planning strategic communications: Before and after a verdict, advocates must press for the changes to policy and practice that are the real target of the litigation. Without a communications strategy, legal victories will not reverberate beyond the courtroom. Journalists are key allies, but communications strategies should also embrace social media to mobilise supporters for action.

Enforcing action: Without implementation of judgments, litigation is meaningless. The hard work of enforcement can be as challenging as the litigation itself.

Implementing advocacy campaigns: To be truly strategic, litigation must be accompanied by an advocacy strategy to educate policy makers and decision makers about the issues at the heart of the litigation. A single case may free a single victim, but a broad advocacy campaign can counter systemic violations, such as forced labour.

STAGE 5: MEASUREMENT AND EVALUATION

Undertaking objective assessments: Strategic litigation requires long-term investment and patience. It can be difficult to measure success. Investment in independent evaluation is essential in order to quantify our gains and plan further interventions.





Strategic investment for a slavery-free world

INVESTMENT OPTIONS: IMMEDIATE INVESTMENT STRATEGIES

The most immediate impediment to strategic litigation is the case pipeline. There is an urgent need to develop case pipeline infrastructure that begins at the site where human trafficking and slavery occurs, bridges to the courtroom, and then engages the advocacy community. The end goal is to drive changes to law, policy and practice, not just win individual verdicts.

Donors eager to support strategic litigation as a tool for change in the near term can invest in the initial stage of the infrastructure, beginning at the site of the abuse, by funding:

- NGOs supporting victims of human trafficking and forced labour
- Human rights investigations and reporting that can lead to litigation
- Investigative journalism into cases of modern-day slavery
- Public interest lawyers conducting due diligence on potential cases.

INVESTMENT OPTIONS: MEDIUM-TERM AND LONG-TERM STRATEGIES

Building a centralised “clearing house” for cases

Strategic litigation requires a bird’s eye view of potential targets and cases. This intelligence-gathering and evaluation function is indispensable. However, cases identified by advocates on the ground may have difficulties finding counsel. It is clear that we need a “clearing house” to review potential cases. Expert staff would evaluate the merit of each potential case, selecting for litigation only those cases that serve a larger strategic purpose. After determining that a potential case has merit, experts would then match the client with expert counsel. While a global clearing house would be ideal, there is also value in supporting regional entities to perform this role. Whether global, regional or a combination of both, these entities will need financial support to operate.

Image, left: Brent Lewin © The Freedom Fund

Establishing a revolving strategic litigation fund

Over the last decade, the private sector has bankrolled much of the strategic litigation in the anti-slavery sector. NGOs and pro bono lawyers have led many of the cases, but an absence of financial support has constrained their efforts. This lack of resources is a critical barrier to the ongoing effectiveness of strategic litigation. Outside of donations or grants, public interest organisations and lawyers have little access to traditional capital markets.

The current funding model for strategic litigation – to the extent that the haphazard system can be considered a model – places the full risk and burden of litigation on NGOs and private attorneys. Traditional grants from foundations do not match the vagaries of litigation. Moreover, cases can take years to resolve and these timelines simply do not match the funding cycles of foundations.

There is an alternative. In recent years, litigation finance has been made available around the globe as a vehicle to fund litigation. However, almost all of these funds are geared towards returning profit, rather than investing in social impact. Public interest litigation does not fit the existing firms’ investment requirements. Additionally, trafficking cases may include non-monetary remedies, such as an apology, which are alien to these for-profit funding mechanisms. While a few funding vehicles have emerged to support civil rights and environmental justice litigation, there is no similar revolving anti-slavery litigation fund.

From the perspective of donors, such funds have an additional potential benefit. It is possible that investments in a revolving strategic litigation fund might qualify as program-related investment, or PRI, for private foundations.¹⁶ Under United States tax rules, private foundations must distribute a certain

¹⁶ Internal Revenue Service, Program-Related Investments, <https://www.irs.gov/charities-non-profits/private-foundations/program-related-investments>. According to IRS guidance, investments may qualify as program-related if: 1. The primary purpose is to accomplish one or more of the foundation’s exempt purposes; 2. Production of income or appreciation of property is not a significant purpose; and 3. Influencing legislation or taking part in political campaigns on behalf of candidates is not a purpose.

portion of their income each year. Among the distributions that the IRS will recognise are program-related investments. Interest-bearing loans to litigation teams conducting anti-trafficking strategic litigation may qualify under this provision.¹⁷ Repaid loans – and interest – would allow donors to recycle assets, delivering more value out of each charitable dollar distributed.

A revolving strategic litigation fund would bring together external experts to vet potential cases prior to funding. This objective examination of a case's merits would allow an assessment of where the litigation might fit within broader anti-slavery efforts. A strategic litigation fund could also bring litigators together, facilitating communication between legal teams working on similar issues.

Some donors have proposed a hybrid charitable-investment model, with separate grant funding for NGOs working in tandem with attorneys. The litigation team, however, would obtain case financing from the revolving fund for litigation expenses (not legal fees). The expectation would be that the grant would be repaid, with interest, at the successful completion of the case. This quasi-loan would cover expenses such as expert witnesses, travel, discovery costs and court fees. But the loan would reallocate the risk: no recovery, no repayment.

Discussions on establishing a revolving anti-slavery fund are still in the early stages. The model presents multiple benefits, including the potential to use recycled capital. A victory in a trafficking case would effectively “pay it forward”, replenishing the revolving fund for a new case. The model also has the potential to attract additional resources, by creating a platform for donors new to the field to support strategic litigation efforts.

A revolving fund addresses the risk of loss, reallocating that risk from individual litigants to a larger pool of supporters. It also addresses the “time lag” issue, which makes strategic litigation incompatible with the foundation grant cycle. Finally, and perhaps most importantly, a strategic litigation fund would permit more robust due diligence and coordination. In short, it is a model that would offer David a few more weapons to bring down Goliath.

17 Private foundations are encouraged to obtain independent tax advice on this option.



Innovative thinking and forward-looking investment are crucial if we are to make full use of the potential for strategic litigation to drive lasting change.

Image, above: Alice Carfrae © Legatum

The Freedom Fund is a leader in the global movement to end modern slavery. We identify and invest in the most effective frontline efforts to eradicate modern slavery in the countries and sectors where it is most prevalent. Partnering with visionary investors, governments, anti-slavery organisations, and those at risk of exploitation, we tackle the systems that allow slavery to persist and thrive.

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 labour.



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