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## The Real Impact of Impact Litigation

Susan Wnukowska-Mtonga

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THE REAL IMPACT OF IMPACT LITIGATION

*Susan Wnukowska-Mtonga*\*

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INTRODUCTION

Impact litigation, also known as strategic litigation, is increasingly seen as an important tool for bringing about positive change in the struggle for human rights. In fact, it has been argued that litigation is a key strategy in both the protection of rights and the empowerment of marginalized groups, particularly in cases where other channels of influence are ineffective or unavailable.<sup>1</sup> Impact litigation is being used by human rights lawyers in a variety of fora at the domestic, regional, and international level including through United Nations (U.N.) treaty monitoring bodies. Of course, there are certain risks associated with bringing a case forward to be decided on its merits, namely that the outcome might not be decided in favor of the rights holder whose rights have been violated. This not only affects the rights holder, who may be denied a remedy for the harm they have suffered but may also hamper the

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1. Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 *FORDHAM URB. L.J.* 603, 606 (2009).

legal change being sought through the judicial process.<sup>2</sup> This is because an unfavorable decision may uphold laws that result in human rights abuse. Despite these risks, a case may nevertheless bring about change by bringing attention to human rights issues. In this way, impact litigation can be used as a tactic to mobilize public and political opinion to bring about legislative change to address human rights abuse. It is generally acknowledged that in the context of impact litigation, “. . . cases are as much concerned with the effects that they will have on larger populations and governments as they are with the end result of the cases themselves.”<sup>3</sup> The individual, the general population, and government often have different and competing interests, so this goal of affecting all three necessarily poses the question of how one measures the “effects,” or the “impact,” of litigation in the human rights context. This is precisely what this Article seeks to answer.

There are a number of human rights measures that currently exist. For example, there has been substantial work done in the area of human rights indicators that can be used to measure compliance with, and violations of, human rights law, as well as human rights development generally.<sup>4</sup> Likewise, there is considerable data available on the compliance of states with human rights decisions made by international bodies.<sup>5</sup> There is, however, a gap in the literature on the criteria that should be used to measure the wider effectiveness of human rights impact litigation following a decision by a quasi-judicial human rights body. Such metrics are seen by this author as crucial given that the very *raison d'être* of impact litigation is to effect positive societal and political change that advances human rights. Therefore, this Article proposes a set of criteria

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2. American University Washington College of Law, *Impact Litigation at the American University Washington College of Law* (2016), <https://www.wcl.american.edu/index.cfm?LinkServID=B1E612B7-0D73-2112-D9045D014AF27809>.

3. Patrick Geary, *Children's Rights: A Guide to Strategic Litigation* (2008), [https://www.crin.org/en/docs/Childrens\\_Rights\\_Guide\\_to\\_Strategic\\_Litigation.pdf](https://www.crin.org/en/docs/Childrens_Rights_Guide_to_Strategic_Litigation.pdf).

4. See generally TODD LANDMAN & EDZIA CARVALHO, *MEASURING HUMAN RIGHTS*(2010); Amartya Sen & Sudhir Anand, *Human Development Index: Methodology and Measurement*, in *READINGS IN HUMAN DEVELOPMENT* (Sakiko Fukuda-Parr & A K Shiva Kumar, eds., 2003); P. BALL ET AL., *MAKING THE CASE: INVESTIGATING LARGE SCALE HUMAN RIGHTS VIOLATIONS USING INFORMATION SYSTEMS AND DATA ANALYSIS* (2000); AnnJanette Rosga & Margaret L. Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 *BERKELEY J. INT'L. L.* 253 (2009); UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *HUMAN RIGHTS INDICATORS: A GUIDE TO MEASUREMENT AND IMPLEMENTATION* (2012).

5. See generally James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 *AM. J. OF INT'L L.* 768 (2008); Fernando Basch et al., *The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions* 7, *INT'L J. ON HUMAN RIGHTS* 9 (2010); Sarah McLaughlin Mitchel & Paul R. Hensel, *Compliance with ICJ/PCIJ Decisions*, (2007), <https://www.paulhensel.org/comply.html>.

to measure the effectiveness of human rights impact litigation in the context of the right to reproductive health, specifically the right to a safe abortion. This is done through a case study of a decision by an U.N. treaty monitoring body. The criteria developed in this Article will not only add to the literature on human rights measures but may also be of practical value to human rights lawyers seeking to determine how to measure the actual impact of human rights litigation at several levels, these being: the individual rights holder; the violating state; and the international community more broadly.

This Article will first provide a brief background on the increasing role of impact litigation through U.N. mechanisms. It will then situate reproductive rights, specifically the right to a safe abortion, within the human rights framework and therefore subject to protection by states. Thirdly, this Article will provide a brief case commentary on the views of the Committee on the Elimination of Discrimination against Women (CEDAW Committee), a U.N. treaty body, in the case of *L.C. v. Peru*.<sup>6</sup> Finally, this article will propose three criteria to measure the effect of the outcome of the case on: L.C., the individual rights holder, the Peruvian government, and on the larger international community.

## I. IMPACT LITIGATION

Impact litigation is the method of bringing carefully selected cases before a court with the goal of creating wider changes in society.<sup>7</sup> Typically, the client(s) involved will have suffered a harm or violation that has been experienced by a number of other people, hence the need to create wider societal and legal change through the outcome of the court case.<sup>8</sup> Thus, the goals of impact litigation are broader than serving just an individual client. Even if losing the case is the most likely outcome organizations may still choose to utilize impact litigation as part of their broader strategy to address a human rights violation.<sup>9</sup>

Historically, impact litigation has played a vital role in the struggle for social justice in domestic contexts.<sup>10</sup> With the advent of complaints procedures in the U.N. human rights treaty system, such litigation is now taking place at the international level through the U.N. mechanisms. This allows victims of human rights abuse to hold states party to international human rights treaties to account for violations of their obligations under those treaties. These enforcement mechanisms have the potential to further the recognition and protection of human rights at the state level.

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6. *L.C. v. Peru*, Communication No. 22/2009, U.N. Doc CEDAW/C/50/D/22/2009 (2011).

7. Geary, *supra* note 3, at 6.

8. Geary, *supra* note 3, at 7.

9. *Engage in strategic litigation*, U.N. WOMEN (Dec. 20, 2011), <http://www.endvavnow.org/en/articles/948-engage-in-strategic-litigation.html>.

10. Cummings & Rhode, *supra* note 1, at 604.

Currently, eight U.N. human rights treaty bodies allow individual communications under either an optional protocol to the original treaty,<sup>11</sup> or by the state party making a declaration under a specific article of the relevant treaty.<sup>12</sup>

Individual communications are complaints brought against a state party before the body of experts who monitor that specific treaty. These are brought by an individual who is subject to the state's jurisdiction and alleges a violation of the relevant treaty.<sup>13</sup> As stated, eight treaty monitoring bodies, including the CEDAW Committee, which may consider alleged violations of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>14</sup> accept such complaints. Between the eight human rights treaty bodies, 254 new cases of complaints were registered roughly between 2015 and 2016.<sup>15</sup> While it is debatable whether this number is as extensive as it should be, given the collective number of states that have ratified these treaties, it is unquestionable that since the commencement of the individual complaints mechanisms the number of complaints registered has been rising steadily.<sup>16</sup>

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11. See generally Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Optional Protocol to the Convention on the Elimination of Discrimination against Women, Dec. 10, 1999, 2131 U.N.T.S. 83 [hereinafter Optional Protocol to CEDAW]; G.A. Res. 61/106, annex II Optional Protocol to the Convention on the Rights of Persons with Disabilities, (Dec. 13, 2006); G.A. Res. 63/117 UN GAOR, 63 Sess., 107th plen. mtg., Supp No. 49, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, (Mar. 5, 2009); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, UN Doc A/RES/54/263; Optional Protocol on the involvement of children in armed conflict, May 25, 2000, UN Doc A/RES/54/263.

12. See generally G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 Convention on the Rights of the Child, Nov. 20, 1989 (*entered into force* Sept. 2, 1990); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 22, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85 (*entered into force* June 26, 1987) [hereinafter CAT]; Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, art. 14, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969) [hereinafter CERD].

13. United Nations Human Rights Office of the High Commissioner, *Human Rights Treaty Bodies – Individual Communications*, <http://www.ohchr.org/en/hrbodies/tbpetitions/Pages/IndividualCommunications.aspx>.

14. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (*entered into force* Sept. 3, 1981) [hereinafter CEDAW].

15. Human Rights Voices, *UN 101 Individual Human Rights Complaints Handled by the UN: Few and Very Far Between*, [http://www.humanrightsvoces.org/EYEontheUN/un\\_101/facts/?p=54](http://www.humanrightsvoces.org/EYEontheUN/un_101/facts/?p=54) (last visited Oct. 24, 2018).

16. See Human Rights Comm., *Report of the Human Rights Committee 117th session (20 June-15 July 2016)*, *118th session (17 October-4 November 2016)*, *119th session (6-29 March 2017)*, G.A., 72nd Sess., A/72/40; Comm. on the Elimination of Discrimination against Women, *Report of the Committee on the Elimination on Discrimination against Women sixty-fourth*

## II. REPRODUCTIVE RIGHTS AS HUMAN RIGHTS

The catchcry of women's reproductive rights as human rights gained momentum following the 1994 International Conference on Population and Development and the 1995 Fourth World UN Conference on Women in Beijing.<sup>17</sup> Reproductive rights have always been firmly rooted in the most basic human rights principles guaranteed by international law,<sup>18</sup> and have been drawn from existing provisions in international human rights treaties. For example, the right to health was first articulated in the Universal Declaration of Human Rights in 1948.<sup>19</sup> It was then reiterated in the 1966 Covenant on Economic, Social and Cultural Rights,<sup>20</sup> with the Committee on Economic, Social and Cultural Rights explicitly recognizing in its General Comment No. 22 that the right of all persons to the enjoyment of the highest attainable standard of physical and mental health includes the right to sexual and reproductive health and services.<sup>21</sup>

Reproductive rights are also articulated in CEDAW.<sup>22</sup> Article 12 of CEDAW calls on state parties to take all appropriate measures to eliminate discrimination against women by providing access to health care services and family planning health services.<sup>23</sup> In General Comment No. 14, the Committee on Economic, Social and Cultural Rights articulated that the state has an obligation to ensure availability, accessibility, acceptability and quality of such health services.<sup>24</sup> Article 16 of CEDAW also provides a right to decide on the number and spacing

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*session (4-22 July 2016), sixty-fifth session (24 October-18 November 2016), sixty-sixth session (13 February -3 March 2017), G.A., 72nd Sess. A/72/38; United Nations Comm. on the Elimination of Racial Discrimination, Report of the Committee on the Elimination of Racial Discrimination ninetieth session (2-26 August 2016), ninety-first session (21 November- 9 December 2016), ninety-second session (24 April 12 May 2017), G.A., 72nd Sess., A/72/18.*

17. Christina Zampas and Jaime M. Gher, *Abortion as a Human Rights – International and Regional Standards*, 8 HUMAN RIGHTS L. REV. 249, 252 (2008).

18. CENTER FOR REPRODUCTIVE RIGHTS AND UNIVERSITY OF TORONTO INTERNATIONAL PROGRAMME ON REPRODUCTIVE AND SEXUAL HEALTH LAW, BRINGING RIGHTS TO BEAR: AN ANALYSIS OF THE WORK OF UN TREATY MONITORING BODIES ON REPRODUCTIVE AND SEXUAL RIGHTS 4 (2002), [https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/pub\\_bp\\_BRB.pdf](https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_BRB.pdf).

19. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 76 (Dec. 10, 1948) [hereinafter Universal Declaration].

20. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, at art. 12 (Dec. 16, 1966) [hereinafter ICESCR].

21. U.N. Econ. & Soc. Council, Comm. on Economic, Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social, and Cultural Rights), ¶ 11.

22. See generally CEDAW, *supra* note 14.

23. CEDAW, *supra* note 14, at art. 12.

24. U.N. Econ. & Soc. Council, Comm. on Economic, Social and Cultural Rights, *General comment No. 14: The right to the highest attainable standard of health (art. 12)*, in COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY THE HUMAN RIGHTS TREATY BODIES at 85, ¶ 12, UN Doc. HRI/GEN/I/Rev. 6 (2003).

of children and protects the autonomy of women in decisions about their reproductive rights.<sup>25</sup> In 2006, the Convention on the Rights of Persons with Disabilities became the first international human rights instrument to explicitly include the right to reproductive and sexual health as a human right.<sup>26</sup> Reproductive rights are also an integral part of the right to liberty, the right to be free from discrimination, and the principles of autonomy and self-determination in making reproductive health decisions.<sup>27</sup> This includes decisions related to the termination of pregnancy.

Although abortion continues to be a divisive political issue globally, often dichotomizing individuals into the pro-choice or pro-life movements, international human rights bodies have generally moved towards recognizing the right to a safe abortion as falling within the ambit of human rights.<sup>28</sup> Most recently, the Human Rights Committee (HRC) articulated the right to a safe abortion in the context of the right to life, recognizing that

[s]tates parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or is not viable.<sup>29</sup>

United Nations human rights bodies have characterized laws generally criminalizing abortion as discriminatory barriers to women's access to the right to health. They have also indicated that the denial of access to abortion for women, where there is a threat to her life or health, or in cases where the pregnancy is a result of rape or incest, not only violates the right to health, the right to privacy, and the right to be free from discrimination, but may amount to cruel, inhuman and degrading

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25. CEDAW, *supra* note 14, at art. 16.

26. G.A. Res. A/RES/61/106, at \_\_\_\_ (May 3, 2008).

27. *See generally* Universal Declaration, *supra* note 19, at art. 2-3; International Covenant on Civil and Political Rights, art. 3, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR], art 3; and ICESCR, *supra* note 20, at art. 2-3.

28. *See generally* Comm. on the Elimination of Discrimination Against Women, *General Comment 24: Article 12 of the Convention (Women and Health)*, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* at 358, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008) [hereinafter CEDAW Committee, *Gen. Recommendation No. 24*]; Human Rights Comm., *UN Human Rights Committee: Concluding Observations: Argentina*, U.N. Doc. CCPR/CO/70/ARG (Nov. 15, 2000).

29. Human Rights Comm., *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, para. 8, U.N. Doc. CCPR/C/GC/36 (2018).

treatment in certain circumstances.<sup>30</sup> The criminalization of abortion can thus be said to infringe the exercise of numerous rights. While the right to a safe abortion may not be expressly addressed in current international human rights treaties, it is inherent to the exercise of women's fundamental human rights and freedoms as recognized under those instruments.

Under international human rights law, states party to human rights treaties have certain responsibilities and obligations.<sup>31</sup> At a minimum, this includes the obligation to respect the rights of individuals who are subject to the state's jurisdiction.<sup>32</sup> Given that access to a safe abortion is inextricably linked with a woman's ability to exercise certain basic rights, states party to U.N. treaties may have an obligation to legalize, or at least decriminalize, access to safe abortions in circumstances where a lack of access would violate other basic rights.

### III. CASE STUDY: *L.C. v. PERU*

*L.C. v. Peru* is the first case in which a human rights body unequivocally instructed a state party to liberalize its abortion law so as to protect women's rights.<sup>33</sup> In its decision the CEDAW Committee also recognized for the first time that the denial of a legal abortion constituted a form of discrimination against women.<sup>34</sup> The case of *L.C. v. Peru* focuses on an individual petition against the state of Peru for violations of L.C.'s rights under CEDAW resulting from her inability to obtain a safe abortion.

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30. See generally Comm. on the Elimination of Discrimination Against Women, *Concluding Observations on the Combined Seventh and Eighth Periodic Reports of: Peru*, para. 36, U.N. Doc. CEDAW/C/PER/CO/7-8 (July 24, 2014); CEDAW Committee, Statement of the Committee on the Elimination of Discrimination Against Women on Sexual and Reproductive Health and Rights: Beyond 2014 ICPD Review (Feb. 10-28, 2014); *L.C. v. Peru*, CEDAW Committee, Commc'n No. 22/2009, U.N. Doc. CEDAW/C/50/D/22/2009; *K.L. v. Peru*, Human Rights Comm., Commc'n No. 1153/2003, para. 6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); *V.D.A. v. Argentina*, Human Rights Comm., Commc'n No. 1608/2007, para. 9.3, U.N. Doc. CCPR/C/101/D/1608/2007 (2011); *Mellet v. Ireland*, Human Rights Comm., Commc'n No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (2016); *Whelan v. Ireland*, Human Rights Comm., Commc'n No. 2425/2014, paras. 7.7-7.12, U.N. Doc. CCPR/C/119/D/2425/2014 (2017); U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, INFORMATION SERIES ON SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS: ABORTION, [http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO\\_Abortion\\_WEB.pdf](http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf) (last visited Oct. 30, 2018).

31. LOUIS HENKIN ET AL., HUMAN RIGHTS 211-14 (2nd ed. 2009).

32. *Id.* at 211.

33. Johanna B. Fine, Katherine Mayall, Lilian Sepúlveda, *The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally*, 19 HEALTH AND HUM. RTS. J. 69, 71 (2017).

34. *Id.*; *Peru: Abortion Guidelines Established after 90-Year Delay*, CHILD RTS. INT'L NETWORK (Mar. 30, 2016), <https://archive.crin.org/en/library/publications/peru-abortion-guidelines-established-after-90-year-delay.html>.



Peru is not unique in regulating reproduction, as Levit and Verchick recognize, there are “. . . long-standing historical assumptions [that] hold that the state has a legitimate interest in regulating sexual and reproductive behavior.”<sup>35</sup> This is very often done by restricting access to abortion services. Under the Penal Code of Peru, abortion is illegal except in limited circumstances.<sup>36</sup> A therapeutic abortion is only permitted if the abortion will save the life or health of the pregnant woman.<sup>37</sup> Such abortions have been legal in Peru since 1924, however, actual access to such abortions, even when women meet the requirements for a legal abortion, are problematic.

At the time of the case, there were no regulated standards for performing therapeutic abortions. The repeal of certain provisions of the Peruvian Health Code in 1997, which had required an abortion be performed by a doctor supported by two other doctors, left a legal vacuum not only in the context of access to a safe abortion but also in relation to the process to be followed to determine whether an abortion was necessary and therefore legal under the Penal Code.<sup>38</sup> As the case of *L.C. v. Peru* highlights, the process, which has life-long and significant implications for pregnant women, was at the discretion of doctors or hospital authorities. This arbitrary process not only reduces the agency of women but devastatingly can also risk the life and health of pregnant women where a doctor determines, at their own discretion, that there is no such risk. This also has a chilling effect on health care providers who may refuse to provide legal abortions for fear of facing criminal sanctions.

Peru has one of the highest rates of sexual violence in South America with 7,208 counts of sexual violence recorded by police in 2007 alone.<sup>39</sup> L.C., who was a thirteen-year-old at the time, was the sexual abuse victim of a man twenty years her senior. She became pregnant as a result of the rape. Depressed and distraught she attempted to commit suicide by jumping from a neighbor’s roof. While ultimately unsuccessful, her suicide attempt left her with a number of serious injuries including paraplegia of the lower and upper limbs because of the damage to her spinal column. Her initial diagnosis included a recommendation for

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35. NANCY LEVIT & ROBERT R. M., *FEMINIST LEGAL THEORY: A PRIMER* 128 (Richard Delgado et al. eds., 2006).

36. PENAL CODE, art. 114 (Peru).

37. PENAL CODE art. 119.

38. CEDAW Committee, Commc’n No. 22/2009 ¶ 2.13.

39. *Peru: Total sexual violence at the national level, number of police-recorded offences*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKewiE1daQtu\\_nAhUvnOAKHb0VAhcQFjABegQIAhAB&url=https%3A%2F%2Fwww.unodc.org%2Fdocuments%2Fdata-and-analysis%2Fstatistics%2Fcrime%2FCTS2013\\_SexualViolence.xls&usg=AOvVaw3CB3FQhvp6uaUsbae6W80k](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKewiE1daQtu_nAhUvnOAKHb0VAhcQFjABegQIAhAB&url=https%3A%2F%2Fwww.unodc.org%2Fdocuments%2Fdata-and-analysis%2Fstatistics%2Fcrime%2FCTS2013_SexualViolence.xls&usg=AOvVaw3CB3FQhvp6uaUsbae6W80k) (last visited Apr. 30, 2018).

emergency surgery to prevent her injuries from worsening and leaving her with a permanent disability. This surgery was initially scheduled for 12 April 2007, 13 days after the diagnosis. A psychological evaluation of L.C. revealed the reasons behind her attempted suicide as well as her pregnancy. After the pregnancy was discovered the doctors determined that the necessary and urgent surgery would be postponed.

L.C. requested a legal abortion be performed, claiming that the pregnancy, “seriously and permanently endangered [her] life, physical and psychological health and personal integrity.”<sup>40</sup> There were significant delays in getting a response from the hospital authorities and L.C. sought assistance from the Centre for the Promotion and Protection of Sexual and Reproductive Rights (Promsex), who brought the case to the attention of the office of the Deputy Defender for Women’s Rights in the Public Defender’s Office.<sup>41</sup> The Deputy Defender requested a medical report from the High-Level Commission on Reproductive Health of the Medical College of Peru. The medical report arrived before the hospital authorities responded to L.C.’s request and concluded that “[t]here are sufficient reasons to state that, if the pregnancy continues, there is grave risk to the girl’s physical and mental health; a therapeutic abortion, if requested by the subject, would therefore be justified.”<sup>42</sup> Unfortunately, the hospital authorities denied her request 42 days after it was initially made, claiming that they did not consider her life in danger.<sup>43</sup>

At 16 weeks pregnant, L.C.’s mother submitted an appeal to have the initial request reconsidered, attaching the report of the Medical College of Peru and stressing the serious and immediate risk to both the physical and mental health of the minor. While the appeal was pending, L.C. miscarried. Twenty days after the appeal had been lodged L.C.’s mother was notified that the hospital authorities’ decision was not subject to appeal.<sup>44</sup> This emphasizes the arbitrary nature of the hospital authorities’ decision on whether to perform therapeutic abortions. The lack of a clear process also meant that the hospital authorities did not have to give deference to the report of the Medical College of Peru, the Peruvian medical profession’s independent and representative body. The lack of certainty over the outcome of the decision and the total discretion that hospital authorities had over the minor’s right to abortion completely ignored L.C.’s rights to life and health.

L.C. finally had the spinal surgery on 11 July 2007, almost four months after she was first diagnosed.<sup>45</sup> As a result of the delays, L.C. is

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40. CEDAW Committee, Commc’n No. 22/2009, ¶ 2.5.

41. *Id.* at ¶ 2.6.

42. *Id.* at ¶ 2.7.

43. *Id.* at ¶ 2.6.

44. *Id.* at ¶ 2.9.

45. CEDAW Committee, Commc’n No. 22/2009, ¶ 2.7.

now paralyzed from the neck down and depends entirely on a wheelchair and on her mother as her full-time caregiver.

L.C.'s mother brought the case before the CEDAW Committee in 2011. L.C. was represented by the Centre for Reproductive Rights (CRR) and Promsex, both leaders in reproductive rights advocacy.<sup>46</sup> In the lead-up to the CEDAW Committee's decision, both organizations were already heavily involved in advocacy work around reforming the laws and policies in Peru to better regulate the conditions and criteria giving rise to a legal abortion. In fact, in 2002 the Center for Reproductive Rights brought another case, *K.L. v Peru*, before the HRC in relation to the same law.<sup>47</sup> L.C.'s legal representatives were therefore well versed in the issue of access to a safe abortion in Peru and had been seeking ways in which to facilitate a change in policy. L.C. proved to be a sympathetic client with a horrific story that exemplified the problems with Peru's abortion law.

L.C. claimed the refusal by the doctors to perform the therapeutic abortion constituted a violation of CEDAW, which Peru had ratified in 1982.<sup>48</sup> Specifically, she claimed that Peru had violated article 1 which defines discrimination against women as:

. . . any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women...on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>49</sup>

L.C. also claimed violations of Articles 2(c), 2(f), 3, 5, 12, and 16.<sup>50</sup> Article 2(c) requires Peru to establish legal protection of the rights of women on an equal basis with men to ensure effective protection of women against discrimination through public institutions.<sup>51</sup> Article 2(f), requires Peru take all appropriate measures to modify or abolish laws, customs and practices which constitute discrimination against women.<sup>52</sup> Article 3, requires Peru take all appropriate measures to ensure the full development and advancement of women for the purpose of guaranteeing

46. CEDAW Committee, Commc'n No. 22/2009.

47. *K.L. v. Peru*, Human Rights Comm., Commc'n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

48. U.N. High Commissioner for Human Rights, *Ratification Status of Peru*, U.N. TREATY DATABASE (Apr. 1, 2018), [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=136&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=136&Lang=EN)

49. CEDAW, *supra* note 14, at art. 1.

50. CEDAW Committee, Commc'n No. 22/2009, ¶ 3.2.

51. CEDAW, *supra* note 14, at art. 2(c).

52. *Id.* at art. 2(f).

them the exercise and enjoyment of human rights and fundamental freedoms on an equal basis with men.<sup>53</sup> Article 5 requires Peru to take all appropriate measures to modify social and cultural patterns of conduct which are based on stereotyped roles of men and women.<sup>54</sup> Article 12 requires Peru take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure access to health care services, including those related to family planning.<sup>55</sup> Article 16(1)(e), requires Peru take all appropriate measures to ensure women have the same rights as men to decide freely and responsibly on the number and spacing of their children and to have access to information, education and means to enable them to exercise such rights.<sup>56</sup> L.C. also claimed a violation of her right to life, dignity and freedom from cruel, inhuman and degrading treatment.

The first issue before the CEDAW Committee was whether L.C. had exhausted all domestic remedies before bringing the case before the U.N. body. This is a question of admissibility. Peru claimed that in addition to requesting the hospital authorities to decide on her appeal to terminate her pregnancy, L.C. ought to have also instituted legal proceedings in the Peruvian domestic courts. In addressing this, L.C.'s claim underscored the lack of appropriate judicial mechanisms to allow women to request an abortion or provide redress for violations of the type she had experienced in Peru. The remedy of amparo—a remedy for the protection of constitutional rights—existed under the Peruvian Constitution.<sup>57</sup> However, it did not address the urgency of the situation, with amparo decisions taking anywhere between 62 and 102 days.<sup>58</sup>

The CEDAW Committee held that L.C. had pursued the available procedure through the hospital authority and should not have been expected to initiate court proceedings. The CEDAW Committee held that the hospital procedure was too long and unsatisfactory and that amparo proceedings were likewise unpredictable in duration. Therefore, there was no appropriate legal procedure available to L.C. which would have allowed her access to a “. . . preventive, independent and enforceable decision.”<sup>59</sup> This necessitated the CEDAW Committee concluding that the exception to the exhaustion of domestic remedies applied, and that admissibility was not at issue.<sup>60</sup>

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53. *Id.* at art. 3.

54. *Id.* at art. 5.

55. *Id.* at art. 12.

56. CEDAW, *supra* note 14, at art. 16(1)(e).

57. POLITICAL CONSTITUTION OF PERU, Dec. 29, 1993, Title V, art. 200(2).

58. CEDAW Committee, Commc'n No. 22/2009, ¶ 5.3, U.N. Doc. CEDAW/C/50/D/22/2009 (2011).

59. *Id.* at ¶ 8.4.

60. Optional Protocol to CEDAW, *supra* note 11, at art. 4.

In considering the merits of the case, the CEDAW Committee held that Peru had violated Articles 1, 2(c) and (f), 3, and 12 of CEDAW. The CEDAW Committee did not consider it necessary to rule on the possible violation of Article 16(1)(e).<sup>61</sup> It also did not consider the alleged violation of her right to be free from cruel, inhumane and degrading treatment.

The CEDAW Committee found that Peru had failed to provide an effective and accessible procedure to allow L.C. to exercise her rights under CEDAW, namely access to health services in violation of Article 12.<sup>62</sup> It acknowledged there was no question that the surgery proposed was necessary and should have been performed as soon as possible. Moreover, the doctors considered the pregnancy to be “. . . high risk, leading to elevated maternal morbidity.”<sup>63</sup> The doctors only postponed the surgery due to her pregnancy and this decision was “influenced by the stereotype that the protection of the fetus should prevail over the health of the mother,”<sup>64</sup> in patent violation of article 5.

In addressing violations of Articles 2(c), 2(f), and 3, the CEDAW Committee emphasized that as Peru had legalized therapeutic abortions in certain circumstances, it was under an obligation to establish a legal framework to allow women to exercise their rights to access abortions. The absence of such a framework in Peru left a legal gap and permitted hospitals to each determine arbitrarily: what requirements are necessary; the procedure to be followed; and the time frame, in making a decision on whether to allow an abortion.<sup>65</sup> In L.C.’s case there appeared to be no regard in the hospital’s decision-making process to the risk the pregnancy imposed on her physical and mental health.

The CEDAW Committee proposed five requirements that were essential to a legal framework that effectively allowed women seeking an abortion to realize their rights. Such a framework needs to: (1) include a mechanism for quick decision-making; (2) limit the risks to the health of the mother (3) take into account the opinion of the mother; (4) ensure a decision to either allow or deny an abortion be well-founded; and (4) ensure any decision be subject to appeal.<sup>66</sup> In the current case, these criteria were not met and the violation was further compounded by the delay by the hospital authorities in deciding on L.C.’s request for an abortion. The CEDAW Committee therefore concluded that an effective remedy was not available to L.C. in violation of Articles 2(c) and (f).

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61. CEDAW Committee, Commc’n No. 22/2009 at ¶ 8.10.

62. *Id.* at ¶ 8.11.

63. *Id.* at ¶ 8.12.

64. *Id.* at ¶ 8.15.

65. *Id.* at ¶ 8.16.

66. CEDAW Committee, Commc’n No. 22/2009, ¶ 8.17.

After finding that Peru had violated CEDAW, the CEDAW Committee recommended that Peru provide reparation to L.C. that included adequate compensation for material and moral damages, and measures of rehabilitation commensurate with the gravity of the violation of her rights and condition of her health.<sup>67</sup> The CEDAW Committee also made four general recommendations that sought to address and prevent further human rights violations. The first, that Peru establish a mechanism for effective access to therapeutic abortion under conditions that protect women's physical and mental health.<sup>68</sup> The second, that Peru take measures to ensure that the relevant provisions of CEDAW and General Recommendation No. 24 are observed in all health-care facilities. This includes creating education and training programs to encourage medical providers to change their attitudes to adolescent women seeking reproductive health services, especially related to sexual violence.<sup>69</sup> The third, that Peru decriminalize abortion when pregnancy results from rape or sexual abuse.<sup>70</sup> Finally, that Peru review its restrictive interpretation of therapeutic abortion in line with General Recommendation No. 24 and the Beijing Declaration and Platform for Action.<sup>71</sup>

#### IV. MEASURING IMPACT

The case of *L.C. v. Peru* set out landmark recommendations by the Committee on a state's abortion laws. This makes it an excellent case study for measuring what impact the views expressed by the Committee had on L.C. as the victim, Peru's law makers and the wider international community. There are certain criteria that have previously been proposed, in the context of measuring the evolution and impact of human rights trials in the context of Latin America, that offer guidance on how to measure the impact of the *L.C. v. Peru* decision. While primarily concerned with human rights violations that occurred during civil conflict, Lutz and Sikkink proposed indicators to assist measuring the depth of penetration of what they coined the "justice cascade", a paradigm shift towards the recognition of human rights norms and a rise to effect compliance with these norms through international and regional action.<sup>72</sup> The three objective indicators they proposed are: (1) the number of trials held in states where human rights abuses occurred; (2) legislative changes by decision makers that allow trials where none were previously permitted; and (3) judicial decisions by domestic courts and international

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67. *Id.* at ¶ 9.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHI. J. INT'L L. 1, 4. (2001).

bodies that amnesty cannot be granted for certain crimes.<sup>73</sup> The three subjective indicators Lutz and Sikkink proposed are: (1) the career trajectories of individuals accused of perpetrating human rights abuses; (2) the satisfaction levels of human rights victims involved in either foreign or domestic cases; and (3) policy change, including political discourse about policy change relating to the prosecution of those responsible for human rights abuses.<sup>74</sup> These indicators provide a strong basis for measuring impact in the context of impact litigation more broadly, thus the criteria proposed in this article modifies and builds on the indicators proposed by Lutz and Sikkink. Given the politically divisive topic of abortion, this article proposes objective, and to a large extent, quantifiable criteria to determine the impact of the *L.C. v. Peru* decision.

This Article proposes three criteria that have been developed so as to gain an understanding of the importance of the case at three different levels. First, at the individual level because while ultimately impact litigation seeks to bring about broader legal and societal change, the lawyer-client relationship dictates that the interests of the individual rights holder must be placed above all else.<sup>75</sup> Critical to human rights advocacy is the objective of empowering rights holders. Impact litigation, as an advocacy strategy, must reinforce the individual seeing themselves as a rights-bearing subject entitled to a remedy for the harm they have suffered.<sup>76</sup> Second, at the state level. As noted, the goal of human rights impact litigation is to create political and societal change to address human rights violation. In the context of international human rights litigation, this done by bringing international attention to an issue, such as the right to a safe abortion, and moving public opinion to push for positive legislative reform and ensure compliance with human rights standards. It is only by changing laws and policies at the state level and ensuring compliance with these laws that systemic human rights violations can be addressed. Third, at the international level. Human rights are universal, as is their recognition, protection, and development. It is therefore in the interest of the entire international community to recognize landmark decisions that further women's reproductive rights and address issues of gender discrimination. For these reasons, it is critical to ensure that any metrics takes into account the effect impact litigation case has at the individual level, the state level, and the international level. Hence, the criteria proposed to measure the effect of impact litigation in this case, in the hopes that the can be applied more

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73. *Id.* at 32.

74. *Id.*

75. American University Washington College of Law, *supra* note 2, at 7.

76. Sally Engle Merry, *Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence*, 25 HUM. RTS. Q. 343, 381 (2003).

broadly, are: (1) reparations, if any, recommended by the CEDAW Committee and actually paid by the state; (2) legislative or policy changes implemented by decision makers to address the alleged human rights violation in the state; and (3) the number of courts (both international and foreign) that have cited the *L.C. v. Peru* decision in cases of a similar nature.

#### A. *Reparations for L.C.*

There is an undeniable theoretical tension in impact litigation between the cause that drives the litigation and the client whose rights have been violated. This tension is brought about by the overarching goal of impact litigation, which is to bring about wider changes in law and society and not necessarily for the client.<sup>77</sup> While the goal of impact litigation may be to create wider changes in society in relation to a particular cause, lawyers cannot “focus single-mindedly on the cause.”<sup>78</sup> The individual rights holder should also feel empowered through the impact litigation process as they have rights in the cause of action.<sup>79</sup>

The ‘rights’ discourse is the dominant framework of the human rights movements. By espousing the universality of ‘rights,’ human rights law creates a sense of an entitlement or claim that individuals have on their state.<sup>80</sup> However, as Sally Merry acknowledges, “seeing oneself as a rights bearing subject whose problems are violations of these rights is far from universal.”<sup>81</sup> While Merry explores the concept of how a person comes to understand their problems in terms of rights in the context of domestic violence, the notion that the adoption of a rights consciousness requires positive experiences with the legal system that fortify this subjectivity rings equally true in the context of impact litigation in the human rights sphere.<sup>82</sup> Arguably, empowerment through the litigation process results in seeing oneself as a rights bearing subject. An important way in which the individual rights holder can have a positive experience with a legal system is through recognition and acknowledgment of the harm they have suffered as a result of a human rights violation through the payment of reparations.

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77. Melissa E. Crow, *From Dyad to Triad: Reconceptualizing the Lawyer-Client Relationship for Litigation in Regional Human Rights Commissions*, 26 MICH. J. INT’L L. 1097 (2005).

78. *Id.* at 1098.

79. *Id.* at 1097.

80. HENKIN ET AL., *supra* note 31, at 41–53.

81. Merry, *supra* note 76, at 344.

82. Merry, *supra* note 76, at 344.



All U.N. treaty bodies empowered to receive and consider individual complaints have the power to recommend reparations in the form of restitution, compensation and rehabilitation.<sup>83</sup>

In the case of *L.C. v. Peru*, the CEDAW Committee recommended Peru pay adequate compensation to L.C. “for material and moral damages and measures of rehabilitation, commensurate with the gravity of the violation of her rights and the conditions of her health, in order to ensure that she enjoys the best possible quality of life.”<sup>84</sup> The recommendation to pay compensation recognizes the personal harm suffered by L.C., and not only does work to restore dignity to the victim but also assists in her recognition as a rights bearing subject.<sup>85</sup> However, the recommendation of a U.N. treaty body is merely that. While the state must give due consideration to the views of the treaty body, it is ultimately up to the state to determine whether it will comply with the recommendation.<sup>86</sup> In the case of U.N. treaty bodies, as in decisions rendered in most international fora, the difficulty of enforcing a decision at the domestic level means that the victim may ultimately be deprived of the compensation that the treaty body has recognized as being owed to them to remedy the harm they have suffered. Despite the difficulty in enforcement, a study examining compliance with the Inter-American system of human rights found that compliance by states with monetary compensation orders was in fact more frequent than other remedies.<sup>87</sup> In the case of *L.C. v. Peru*, Peru provided monetary compensation to both L.C. and her mother, and in addition, on 29 March 2016 the Justice Minister Aldo Alejandro Vasquez publicly recognized that Peru violated L.C.’s rights by precluding access to a legal abortion.<sup>88</sup> This is important as the remedy of reparations is personal to the victim and compliance by the state, particularly in this case, has the potential to immediately impact on the quality of life for the victim.

It is worth noting that due to the lack of enforcement power by international bodies, compliance with decisions made in international

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83. U.N. High Commissioner for Human Rights, *Human Rights Treaty Bodies – Individual Communications* (Apr. 1, 2018), <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx>.

84. *L.C. v Peru* at 20; CEDAW Committee, Comm’n No. 22/2009, ¶ 9, U.N. Doc. CEDAW/C/50/D/22/2009.

85. Merry, *supra* note 76, at 347.

86. Optional Protocol to CEDAW, *supra* note 11, at art. 7(4).

87. Fernando Basch et. al., *The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions*, 7 INT’L J. HUM. RTS., 9, 27 (2010).

88. *Peruvian Government Publicly Recognizes Human Rights Violations Against Rape Survivor as Part of Landmark U.N. Abortion Case*, CENTER FOR REPRODUCTIVE RIGHTS (Mar. 29, 2016), <https://www.reproductiverights.org/press-room/peruvian-government-publicly-recognizes-human-rights-violations-against-rape-survivor>.

bodies has increasingly required the involvement of other actors, such as NGOs or civil society actors, who can be critical in exerting pressure on the state and acting to move public opinion through their advocacy strategies. For example, it took almost a decade of advocacy work by civil society actors, including taking up the L.C. case, before Peru paid out financial compensation in the case of *K.L. v. Peru*.<sup>89</sup> This was a case decided by the U.N. HRC in 2002 where a young woman was also denied access to a safe abortion in circumstances where she was pregnant with an anencephalic fetus. Likewise, in the case of *L.C. v. Peru*, CRR made a public commitment to monitor Peru's response to the CEDAW Committee's decision and hold it to account in fulfilling the recommendations.<sup>90</sup>

### B. Legislative or Policy Changes in Peru

Measuring the rate of compliance in the payment of compensation is important. However, Heyns and Viljoen argue that "the success or failure of any international human rights system should be evaluated in accordance with its impact on human rights practices on the domestic level."<sup>91</sup> Therefore, when it comes to the broader cause, namely the recognition of women's rights to a safe abortion and addressing gender stereotypes that understand women's reproductive capacity as a duty, it is equally important to understand what legislative or policy changes have actually been made, if any, following a decision.

Compliance with recommendations of international bodies, such as the CEDAW Committee, that require legislative or policy change are critical. This is because domestic legislative change is important in rectifying systemic human rights abuses and setting normative societal standards.<sup>92</sup> The predilection to sovereignty within the international law system means it is the individual state that determines whether and how it will amend its laws to protect its citizens from human rights violations.<sup>93</sup> It has been found that in the context of litigation at the international level, states are far less likely to comply with recommendations or decisions that require them to change laws or

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89. UN announces that Peru will compensate woman in historic human rights abortion case, UN NEWS (Jan. 18, 2016), <https://news.un.org/en/story/2016/01/520272-un-announces-peru-will-compensate-woman-historic-human-rights-abortion-case>.

90. *AGirl Who Changed The World, A Victory For Women Everywhere*, CENTER FOR REPRODUCTIVE RIGHTS (Nov. 15, 2011), <https://www.reproductiverights.org/changetheworld>.

91. Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 HUM. RTS. Q. 483, 483 (2001).

92. James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768, 785 (2008).

93. Basch et. al., *supra* note 87, at 9.

practice.<sup>94</sup> This highlights the fact that more is required than simply a positive decision in one individual case. As Cavallaro and Brewer argue in the context of the Inter-American Court, “[e]xperience indicates that advancement of human rights in many Latin American countries is most likely when positive media coverage, public support, and/or international pressure can be brought to bear on a given issue.”<sup>95</sup> There is therefore, need of a multifaceted advocacy strategy, and not just litigation in and of itself, that is necessary to move public opinion on an issue and lead a state to change its laws to comply with decisions of international bodies.<sup>96</sup>

In its views, the CEDAW Committee made two important, concrete, and measurable recommendations to Peru in relation to policy and law related to access to a safe abortion. The first was the recommendation to establish a mechanism for effective access to legal abortions. The second was to decriminalize abortion when the pregnancy results from rape or sexual abuse. In 2014, Peru took steps to comply with the first recommendation and fill the legal vacuum that had been created since the repeal of the procedure for therapeutic abortions in the Peruvian Health Code.<sup>97</sup> Following the CEDAW Committee’s decision in *L.C. v. Peru*, and as a result of the HRC’s decision in the earlier case of *K.L. v. Peru*, Peru adopted a set of guidelines on therapeutic abortions.<sup>98</sup> While the guidelines do not address the issue of whether women should have access to an abortion where the pregnancy could impact their mental health, the guidelines are a significant step in protecting Peruvian women’s right to access a safe legal abortion.<sup>99</sup> The guidelines remove the complete discretion hospital authorities previously had, addressing the arbitrariness of the decision making process, and set out an administrative procedure for hospitals to follow.<sup>100</sup> They also directly address the concern raised in *L.C. v. Peru* on a right to an appeal by introducing an appeals process in cases where an abortion is denied.<sup>101</sup> Unsurprisingly, civil society actors, including Promsex and CRR were heavily engaged in advocacy

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94. Cavallaro & Brewer, *supra* note 92.

95. *Id.* at 792.

96. Cummings & Rhode, *supra* note 1.

97. Jessica Clyde, *After 90-Year Delay, Peru Releases Protocols for Legal Abortion Services*, INT’L WOMEN’S HEALTH COAL. (July 1, 2014), <https://iwhc.org/2014/07/90-year-delay-peru-releases-protocols-legal-abortion-services/>.

98. *Resolución Ministerial* (Act No. 486-2014/MINSA 27 June 2014) (Peru).

99. Amanda Klasing, *Dispatches: New Abortion Rules in Peru*, HUMAN RIGHTS WATCH (July 1, 2014), <https://www.hrw.org/news/2014/07/01/dispatches-new-abortion-rules-peru>.

100. MINISTERIO DE SALUD, *GUIA TECNICA NACIONAL PARA LA ESTANDARIZACION DEL PROCEDIMIENTO DE LA ATENCION INTEGRAL DE LA GESTANTE EN LA INTERRUPCION VOLUNTARIA POR INDICACION TERAPEUTICA DEL EMBARAZO MENOR DE 22 SEMANAS CON CONSENTIMIENTO INFORMADO EN EL MARCO DE LO DISPUESTO EN EL ARTICULO 119° DEL CODIGO PENAL* (2016).

101. *Id.*

campaigns to change public opinion and pressure the Peruvian government to enact these guidelines following the *L.C.* decision.

Peru is yet to comply with the Committee's second recommendation that it decriminalize abortion when pregnancy is a result of rape or sexual abuse. In 2015 the Peruvian congress voted against such a bill with one member of congress stating that the decision was taken to ". . . safeguard the health of a mother and the greater interests of the unborn child."<sup>102</sup> This statement perpetuates the gender stereotypes that women have a duty to bear children rather than recognizing women's autonomy in exercising their reproductive rights, even those that have had gender-based violence inflicted upon them. It also continues to privilege the life of the fetus over the health of the mother. This suggests that while the *L.C.* decision has had some impact in changing policy, it has not as yet driven legislative change to recognize the full ambit of women's reproductive rights as recognized under international human rights law. The latter will likely require sustained advocacy efforts by civil society actors to mobilize and move public opinion to ensure broader recognition and protection of women's rights to safe abortion in Peru.

### C. *The Pervasiveness of the Legal Doctrine Set by L.C. v. Peru*

The third and final criteria to measure the impact of the CEDAW Committee's views in *L.C. v. Peru* is premised on the pervasiveness of the case in foreign and international jurisdictions. The recognition and protection of women's reproductive rights ought to be of international concern.<sup>103</sup> Therefore, it is of critical importance to examine to what effect, if any, the precedent set by *L.C. v. Peru* has had on other international and foreign courts.

The case of *L.C. v. Peru* was cited by the Inter-American Court of Human Rights in the Case of *Artavia Murillo et al. v. Costa Rica*.<sup>104</sup> The case was brought by the Inter-American Commission against Costa Rica in relation to a law that prohibited the practice of in vitro fertilization (IVF). The Constitutional Chamber of the Costa Rican Supreme Court of Justice had declared that IVF was unconstitutional because it violated the right to life. This was based on the view that IVF creates human embryos and many inevitably die over the course of the process. The Inter-American Commission alleged that the prohibition was an arbitrary interference with the right to private life and to found a family, as well as the right to equality because it disproportionately impacted women. In

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102. Anastasia Moloney, *Peru lawmakers reject bill to allow pregnant rape victims an abortion*, BUS. INSIDER (May 27, 2015, 1:45 PM), [www.businessinsider.com/r-peru-lawmakers-reject-bill-to-allow-pregnant-rape-victims-an-abortion-2015-5](http://www.businessinsider.com/r-peru-lawmakers-reject-bill-to-allow-pregnant-rape-victims-an-abortion-2015-5).

103. LOUIS HENKIN, *THE AGE OF RIGHTS* 13–20 (1990).

104. *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012).

the case, the Inter-American Court of Human Rights cited *L.C. v. Peru* for the proposition that giving priority to the fetus over the health of a woman was a gender stereotype and constituted gender-based discrimination.<sup>105</sup> In this case the law, which favored the rights of embryos over women's rights to sexual and reproductive self-determination, was held to be a form of gender-based discrimination. The Inter-American Court of Human Rights held that the influence of stereotypes was incompatible with international human rights law and measures had to be taken to eliminate them.<sup>106</sup>

The case of *L.C. v. Peru* has also been cited by other U.N. treaty bodies, more recently in the HRC's views in the cases of *Whelan v. Ireland* and *Mellet v. Ireland*.<sup>107</sup> In these, the HRC found that restrictive Irish laws on abortion that denied a woman the right to terminate her pregnancy after discovering fatal fetal impairment violated numerous rights under the ICCPR. This included her right to be free from cruel, inhuman or degrading treatment, her right to privacy, and her right to be free from discrimination. In a concurring opinion, HRC member Sarah Cleveland cited the case of *L.C. v. Peru* for the proposition that "a State's failure or refusal to provide reproductive health services that only women need constitutes gender discrimination."<sup>108</sup> Similarly to the Inter-American Court of Human Rights Case, Cleveland also quoted the CEDAW Committee's views that the notion that, "protection of the [fetus] should prevail over the health of the mother,"<sup>109</sup> was a gender stereotype in violation of CEDAW.

Reference to the *L.C. v. Peru* case at the international level are significant, however, as has been mentioned, human rights decision-making bodies lack enforcement power at the state party level and states need not, and often do not comply with their decisions. Consequently, it is even more significant that *L.C. v. Peru* is being cited in cases brought before domestic courts in an attempt to internalize human rights doctrine. This demonstrates that the case has set an important precedent internationally in progressing the recognition of women's reproductive rights, and is being used as a strategy at the local level to move public opinion on the issue of abortion rights.

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105. *Id.* at ¶ 297.

106. *Id.* at ¶ 302.

107. *Whelan v. Ireland*, Human Rights Committee, Commc'n No. 2425/2014, U.N. Doc. CCPR/C/119/D/2425/2014 (2017); *Mellet v. Ireland*, Human Rights Committee, Commc'n No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (2016).

108. *Mellet v. Ireland*, Human Rights Committee, Commc'n No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (2016) (S. Cleveland concurring).

109. CEDAW Committee, Commc'n No. 22/2009, ¶ 8.15, U.N. Doc. CEDAW/C/50/D/22/2009 (2011).

*L.C. v. Peru* has been cited in submissions filed in the High Court of Kenya, Nairobi.<sup>110</sup> The initial petition, filed by Federation of Women Lawyers and a three other individual petitioners in the High Court of Kenya, questioned the legality of a letter and memo from the Director of Medical Services addressed to all health workers in Kenya directing them not to participate in any training on safe abortions and use of certain medication, warning them of “dire legal consequences” if they did so.<sup>111</sup> The Petitioners in the case argued that the letter and memo had significant implications on the ability of health workers to perform safe abortions in the context of the Kenyan constitution as well as regional human rights instruments.<sup>112</sup> The petition was held to raise pertinent questions of law and the subject matter of abortions was held to be of great public concern and interest. As such the case was directed to the Chief Justice of the High Court to constitute a bench of judges to determine the questions of law in contention. The submission to the High Court by the applications included a citation to the decision in the *L.C. v. Peru* decision.

With the exception of the case brought before the Inter-American Court, CRR has been actively involved in bringing the cases cited above before the respective courts and committees. This has been either through direct representation of the victim or otherwise through local partners. This underscores the importance and necessity of civil society actors in ensuring the expansion and universality of rights development, particularly in the area of politically controversial rights such as the right to a safe abortion.<sup>113</sup> It also demonstrates how such civil society actors can use litigation as a tactic to bring attention to abortion rights and move public opinion on this divisive issue to create legal change.

## CONCLUSION

The goal of human rights impact litigation is to affect societal and governmental change to further human rights as well as address the harm caused to individual rights holders. While this *raison d'être* is well articulated, the criteria to measure the effectiveness of impact litigation in achieving these goals is not. This Article has tried to bridge this gap. It has proposed three criteria which it has applied to measure the impact of the recent CEDAW Committee decision in *L.C. v. Peru* and which can be applied more broadly to other cases. First, at the individual victim

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110. Email exchange with Selome Argaw, Legal Adviser for Africa, Center for Reproductive Rights (Apr. 19, 2018).

111. Fed'n of Women Laws. (Fida-Kenya) v. Att'y Gen. (2016) eK.L.R. ¶ 289 (Kenya), <http://kenyalaw.org/caselaw/cases/view/175490/>.

112. *Id.* at ¶ 2(iii), 4.

113. Jennifer Templeton Dunn et al., *The Role of Human Rights Litigation in Improving Access to Reproductive Health Care and Achieving Reductions in Maternal Mortality*, 17 BMC PREGNANCY AND CHILDBIRTH 367 (2017).

level, through the payment of reparation by the state to L.C. in recognition of the human rights violation caused by Peru in denying her access to a safe abortion. Second, at the local state level, where the outcome of the decision and other advocacy compelled Peruvian law makers to adopt a set of guidelines on the procedure for therapeutic abortions to address the legal vacuum that existed in the law. Finally, at the international level, where it has measured the number of international, regional and domestic courts which have cited the *L.C. v. Peru* decision, progressing the recognition of women's reproductive rights.

The author acknowledges that there are obvious limitations to impact litigation as a human rights strategy, particularly in the context of a right to safe abortion. For example, the state may not take any steps to address the recommendations in the decision or, as in the case of Peru, it may only choose to address some of the recommendations, providing access to abortion in limited circumstances without providing women with the ability to exercise the full ambit of rights that should be afforded to them to recognize their autonomy, dignity, and self-determination. This Article thus acknowledges that the outcome of impact litigation, particularly at the international level, cannot be an end in itself. Impact litigation needs to be part of a multifaceted strategy involving civil society actors who play a critical role in ensuring that the actual outcome of a decision: empowers the victim by recognizing the harm they have suffered through reparations; mobilizes and move public opinion on the right to a safe abortion; and ensuring the decision is universally recognized as progressing women's reproductive rights.