was liable for violating Article 3 in this particular case, citing specific actions the state could have taken to avoid this. The effect of such an alternate holding might have constituted a slap on the wrist for Italy, but it would have better preserved Article 3 rights.

The holding that the treatment of Tunisian migrants did not meet the definition of collective expulsion is even more troubling. Even beyond the concerns stated in Justice Serghides's dissent, the ruling seems to reduce the prohibition against collective expulsion to the theoretical requirement that a migrant can challenge his expulsion, regardless of whether he is aware of or meaningfully afforded the opportunity to do so. The Court's ruling is ambiguous as to what procedural guarantees are actually required, and what information the migrant must be given about his rights. Without an affirmative requirement of individual screenings or interviews, collective expulsion may be difficult to prevent. If the *Khlaifia* ruling is extended, it could erode procedural guarantees for migrants in other circumstances, and potentially open the door for still more erosion of ECHR rights in emergency situations.

*Khlaifia* has now been sent to the Committee of Ministers of the European Council in Strasbourg, which will require Italy to show how it has implemented the ruling. As mass migration to Europe continues, it remains to be seen whether *Khlaifia* will affect state behavior, cause better procedural guarantees for migrants, and whether it will open the door for the continued erosion of rights guaranteed by the ECHR.

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*Constitutional Court of Chile—abortion—conscientious objectors—international and comparative sources in constitutional interpretation*

STC 3729/2017. Upon Unconstitutionality Actions 3729, 3751; Against Legislative Bill Bulletin No. 9895-11. Rol de la causa 3729(3751)-17-CPT. *At* https://www.tribunalconstitucional.cl/descargar_sentencia.php?id=3515.
Constitutional Court of Chile, August 28, 2017.

While many women have profited from the relatively recent rights-revolution in Latin America,[1] their pregnant sisters have apparently had to sit in the back of the bus or stay off altogether. Even modest progress on abortion entitlements has come at a high price and slow pace,[2] perhaps due to the opposition of an alliance of long-established and up-and-coming religious groups. On a positive note, however, the struggle for emancipation on this front seems to be moving forward. In Chile, the Constitutional Court's (or

* Views expressed here are those of the author, and do not reflect those of Marine Corps University, the U.S. Department of Defense, or any other U.S. government agency.

[1] *See generally* ÁNGEL R. OQUENDO, LATIN AMERICAN LAW 593–656 (3d ed. 2017).

[2] *See generally id.* at 231–60.

Tribunal's) opinion of August 28, 2017, STC 3729/2017,[3] which generally upholds a legislative bill allowing a woman to abort in the face of risk to life, lethal prenatal pathology, or rape, provides a case in point. Significantly, it also expands the statutory category of conscientious objectors to include non-professional staff and institutions.

In the dispute at stake, Chile's constitutional justices adjudicate an unconstitutionality suit prosecuted "by a group of senators and representatives" against "the legislative bill that decriminalizes the voluntary interruption of pregnancy on three grounds (Bulletin No. 9895-11)" (p. 45). The proposed statute "authorizes a medical surgeon, upon the woman's consent, to interrupt her gravidity in three cases involving, respectively: (1) risk to her life; (2) lethal, congenital embryonic or fetal pathology incompatible with independent extrauterine survival; and (3) pregnancy resulting from rape" (pp. 51–52). "The petitioners buil[t] their argumentation upon the second sentence of Article 19(1) of the Constitution providing that the law protects the life of the unborn child" (p. 82).

The Tribunal upholds the enactment for the most part. As to the first enumerated scenario, it zeroes in on and repudiates the assertion "that the Constitution allows only indirect abortions" (p. 109): to wit, those in which the prenatal death comes about as a byproduct of the physicians' exertions simultaneously to keep the patient and her embryo or fetus alive. The justices cast this contention aside, in conjunction with the undergirding idea that morality necessitates "exhausting all options to save the mother and her fetus" (*id.*). Similarly, they apparently doubt that one can thereby console oneself by saying that "if one cannot do both and only saves her, one has not intended to kill her offspring" (pp. 109–10).

The Court observes that the constitutional text contains solely "a general command to protect or defend the unborn child" (p. 110). Furthermore, it underscores that "to do nothing against the hazard that the pregnancy poses to the woman amounts to deciding in a sense" (*id.*). "Upon her request to terminate her gravidity and the surgeon's diagnosis of a risk to her life," so the argument goes, "no solution other than a termination remains to save her life" (*id.*).

The ratiocination in full would unfold as follows: The authorities owe the offspring in gestation every protective effort up to the point at which it threatens the mother's survival. At this juncture, they cannot wash their hands, so to speak, but must either accept or reject the threat. The state may rightfully embrace the latter of these alternatives. Hitherto, it had opted for the former, at least implicitly.

Regarding the second statutory scenario, the justices hold: "It is the woman who should determine whether to go ahead . . . notwithstanding the embryo's or fetus' pathology, which will necessarily lead to its demise, or whether instead to put an end to this situation and discontinue her gravidity" (p. 113). They dismiss the allegation that the legislature discriminated against unhealthy children in the womb and do so essentially along these lines: For one, "the fetus does not have a right to life because it does not legally constitute a person" (p. 115). Moreover, inasmuch as "the decision boils down to whether the death will occur before or after the discontinuation, no possibility of shielding the unborn life exists" (*id.*).

Turning to the third scenario, the Tribunal bestows discretion upon lawmakers to entitle someone to abort in the face of the undeniable "trauma of rape" (p. 116). It recalls that: "Any woman who has been raped suffers a traumatic experience, especially when pregnancy ensues"

[3] Tribunal Constitucional [T.C.] [Constitutional Court], August 28, 2017, Rol de la causa: 3729(3751)-17-CPT (Chile).

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(*id.*). Under these circumstances, "the focus should fall not upon [her] embryo or fetus but rather upon [her own] suffering" (p. 117).

The justices stress that the government does not and need not deliver information about abortion to the victim with a "dissuasive" aim, let alone the "coercive" aim of "forcing [her] will . . . in one direction or another" (p. 118). "What matters," they announce, "is the provision of shelter, support, and supportive networks" (*id.*). "Only thus will her entitlements be adequately vindicated" (*id.*).

The six-vote majority thereafter concludes that the Congress's overall approach, as opposed to that proffered by the plaintiffs (and the four dissenters on the Court), meets the proportionality test and, particularly, the requirement of balance between the conflicting interests:

> Of course, the rights of the woman stand in stark contrast with the protected legal good.
>
> In addition, pregnancy may entail for the woman a vital commitment that shapes her entire existence. The intensity of the union between her and the embryo or fetus creates a unique bond, different from any other one. Nonetheless, the three scenarios contemplated by the statute force reflection upon the excessive burden that they inflict upon the woman. The law cannot compel someone to act against herself or to bear (1) a risk to her life, (2) the death of her child upon a lethal pathology, or (3) a maternity stemming from rape. (P. 121)

Under any of these conditions, the woman's entitlements trump the safeguard constitutionally due to the unborn child.

This whole reasoning may partly rest on the critique of patriarchal domination that the Tribunal alludes to in Subsection 2 (Women's Rights) of Section VII (Reasoning Guidelines) but never really develops:

> In this respect, the effective protection against all acts of discrimination against women stands out. So do the rights to be esteemed and educated spared of social and cultural stereotypes based on concepts of inferiority or subordination; to a life free from physical, sexual, or psychological violence; and to legal capacity identical to that of men. (Pp. 78–79)

Perhaps the justices in the majority sense that they cannot socially or politically afford the consequences of a full development of the intimated critical stance. Most probably, however, they have no desire to venture down this path, or further to enlarge women's freedom of choice.

In Chapter Two of its opinion and with a different majority, the Court invalidates the bill's limitations on the entitlements of conscientious objectors under Article 1(3) (pp. 124–34). This provision expressly "exempts the medical surgeon . . . and the professional staff. . . who conscientiously object from the obligation to undertake the corresponding surgical operation" (p. 124). It spells out that "the conscientious objection is personal and may never be invoked by an institution" (p. 125).

The justices see "no legal reason to restrict [this option] exclusively to natural persons that would qualify as professionals" (p. 129). They note that: "Non-professionals could equally have scruples of conscience about the procedures in which they must participate" (pp. 129–30). The decision then adds "that the conscientious objection may be legitimately interposed by juridical entities or private associations in accordance with [their] constitutional autonomy. . . ." In fact: "Raising such legitimate qualms is not the prerogative of individuals.

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It may extend to organizations aimed at embodying their own free thought, pursuant to an entitlement that Article 19(15) of the [Chilean] Constitution assures all persons" (p. 130). The next two, basically superfluous, sentences might reflect the influence of faith groups: "And, identically, religious institutions, along with juridical persons or entities with confessional ideologies may [object too]. So may educational establishments with a function or creed of this sort" (*id.*).

As a whole, the Chilean Tribunal does not, argue tightly, thoroughly, or creatively. It appears to have reached for the least common denominator in an attempt to keep all of the majority members on board. In relation to this decision, the words "[g]reat cases like hard cases make bad law"[4] take on new meaning.

* * * *

The analysis that follows will first explore the justices' transnational and international contextualization of their holding. Next, it will focus on their rather unceremonious supersession of their own adverse case-law. Finally, the discussion will conclude with a brief reflection upon how to transition from an external to an internal viewpoint in the study of national adjudication.

In specifying "what [it] will not be deciding," the majority curiously cautions that it will not be commenting on "the way in which judgments of international tribunals, or declarations formulated by committees created by certain international agreements, affect Chile" (p. 50). It supplies the rationale for its restraint: "These matters sit far afield from the core controversy that this Court must resolve" (p. 51). Nevertheless, the justices do not mean that they will refrain from transnationally and internationally contextualizing their inquiry. Indeed, they painstakingly examine the issues before them from the perspective of "comparative law and international accords" (p. 55.)

The Tribunal observes that the enactment of statutes authorizing specified abortive procedures "started in the 1970s" (pp. 55–56). "Currently," according to the quick survey conducted thereupon, "very few countries have instituted an absolute prohibition on abortion" (p. 56). As to the details:

> The various jurisdictions have adopted one or another of two models of regulation. First, some permit a person freely to abort—that is, without an invocation of any specific justificatory ground; though they sometimes set deadlines. Secondly, others establish reasons (or conditions), whose pertinence (or satisfaction) may or may not have to be proven judicially, on the basis of which to proceed. (*Id.*)

The surveyed national legislations reportedly contemplate the "therapeutic, eugenic, ethical, social, or emergency" interruption of pregnancy (*id.*).

The majority emphasizes that the constitutions in force elsewhere display no "explicit reference to abortion" (*id.*). It elucidates that they, like treaties, often address the "right to life" and sporadically "refer to the unborn child," whether directly or indirectly (pp. 56–57). For instance,

[4] Northern Securities Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.").

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> the American Convention of Human Rights [in its] Article 4 provides that: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." (P. 57)

The Court notes that its counterpart in the United States contributed to and actually launched the initial wave of judicial opinions on point in 1973 with *Roe v. Wade*.[5] On the one hand, the U.S. justices at the time identified in the potential life of the child prior to birth "a legitimate interest that the government may secure" (p. 58). On the other hand, they have generally "relied on three arguments to support the legitimacy of abortion": namely, those pertaining to "the privacy of women (*Roe v. Wade*, 1973)," the lack of "viability of the fetus (*Roe v. Wade*, 1973)," and "the unwarranted or undue burden (*Planned Parenthood v. Casey*,[6] 1992)" that might otherwise fall upon mothers (*id.*).

Germany's Constitutional Court joined this nascent transnational movement in 1975 (p. 57). It "recognized" the "right to life" of the offspring while in gestation (p. 58). Nonetheless, the German justices underscored that the polity may not saddle the pregnant woman with unreasonable demands (pp. 58–59). They "also described the penal sanction as the utmost degree of coercion and as a last resort" and, relying on "the proportionality principle," highlighted "that in extreme cases imposing on the woman the onus of carrying her gravidity to term may be prohibited" (p. 60).

In 1993, the same tribunal stepped forward again and explained "that lawmakers may abstain from criminalizing abortive practices that are constitutionally unjustifiable" (p. 59). It embraced, "as its benchmark, the incremental protection of the embryo and fetus" (*id.*). Consequently: "The state's interest prevails over that of the woman as months of pregnancy go by and as the fetus becomes capable of independent existence outside the uterus" (p. 59).

The Chilean Court discusses a final stage that took place in "the twenty-first century" and that encompasses, among others, "the rulings in Colombia ([2006]) [and] Mexico (2007)" (p. 58). The former viewed safeguarding the unborn child "as a value" (*id.*) and "maintained that penalizing abortion in all cases amounts to granting the product of conception complete priority, while completely sacrificing the entitlements of pregnant women" (p. 60). The latter concluded "that the [Mexican] Constitution contained no command to criminalize" the termination of a pregnancy (p. 59).

In fact, Chile's top constitutional adjudicators tune into this whole transnational and international conversation implicitly as well as explicitly. For example, the section itemizing what will lie beyond the adjudicative deliberation reads in part: "[W]e will not analyze whether the legislative bill decriminalizes or, instead, legalizes conduct that rests on one of the three statutorily endorsed grounds" (p. 50) This statement probably implies a rejection of the approach advanced in Germany and Mexico. There, the tribunals of last recourse in relation to the federal constitution conferred, respectively, an "excuse" (not a "justification") and an "absolving excuse[]" (not an "excuse[] that exclude[s] responsibility") upon individuals who abort under certain circumstances.[7] Therefore, both presumably presuppose a dichotomy between the constitutionally approved decriminalization and disapproved legalization of an abortive procedure.

[5] Roe v. Wade, 410 U.S. 113 (1973).
[6] Planned Parenthood v. Casey, 505 U.S. 833 (1992).
[7] *See* OQUENDO, *supra* note 1, at 255.

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Similarly, the Chilean justices list "the dynamicity of constitutional interpretation" (p. 65) as one of their "interpretative criteria" (p. 63). They expound this criterion thus:

> [This kind of interpretation] allows adapting the text to different realities. Furthermore, it heeds the contextual changes that may have occurred between the respective dates of the Constitution's adoption and application. [S]tatutory, constitutional, and international law has evolved toward a reinforcement of women's autonomy to make their own life decisions, of their claim to full equality, and of their rights by and large. The interpreter must pay attention to this evolution. (P. 65)

Hence, the Court refuses originalism as occasionally professed and promoted in the United States.[8] It even spells out its refusal by asserting that the "situation [portrayed] renders particularly problematic any attempt to interpret the Constitution from an exclusively originalist standpoint" (*id.*). This assertion spawns no internal disagreement or dissension even though it tends to shore up the majority's construction of the applicable constitutional provision.

This entire extraterritorial expedition, in its covert as well as overt phases, shows that judges in Chile, unlike some of their U.S. counterparts,[9] will not hesitate to search transnationally and internationally for insights when adjudicating. In all likelihood, it additionally constitutes, in the context at hand, an effort to present Chile's erstwhile categorical ban as out of sync, and the challenged enactment as more in tune, with the rest of the world.[10] Interestingly, the dissenters explore extraterritorially too—specifically, in the direction of the Universal Declaration of Human Rights (p. 143), the American Convention of Human Rights (p. 162), the Convention on the Elimination of All Forms of Discrimination Against Women (p. 178), the Convention on the Rights of the Child (pp. 178–79), "other formal sources of public international law" (p. 180), and "international soft law" (*id.*). They equally point to pronouncements of the European Court of Human Rights (p. 157) and of the highest constitutional authority in the United States (*id.*), Brazil (p. 145), France (*id.*), and, especially, Germany (pp. 158–59, 165, 172–76, 181).

[8] *See, e.g.,* Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) ("Returning to the original meaning would do more than simplify our task. It also would avoid the pitfalls present in the Court's current approach. . . ."); Roper v. Simmons, 543 U.S. 551, 626 (2005) (Scalia, J., dissenting) ("The Court has, however—I think wrongly—long rejected a purely originalist approach. . . ."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 CINCINNATI L. REV. 849 (1989).

[9] *See, e.g.*, Sosa v. Alvarez-Machaín, 542 U.S. 692, 750 (2004) (Scalia, J., concurring in part and concurring in the judgment) ("We Americans have a method for making the laws that are over us. . . . For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law."); Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) ("The Court's discussion of . . . foreign views . . . is . . . meaningless dicta. Dangerous dicta."); Foster v. Florida, 537 U.S. 990, 990 n.1 (2002) (Thomas, J., concurring in denial of certiorari) (The "Court's . . . jurisprudence should not impose foreign moods, fads, or fashions on Americans."); Thompson v. Okla., 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) ("[W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.").

[10] According to the Pew Research Center's Report on Worldwide Abortion Policies, only Chile, the Dominican Republic, El Salvador, the Holy See, Malta, and Nicaragua permitted an abortion under no circumstances in 2015. Pew Research Ctr., *Worldwide Abortion Policies: Circumstances Under Which a Woman Can Legally Obtain an Abortion* (2015), *at* http://www.pewresearch.org/interactives/global-abortion. *See also* Press Release, UN Population Division, Dept. of Economic & Social Affairs, UN Population Division Issues Updated Study on Abortion Policies, POP/830 (June 14, 2002) ("The publication shows that abortion is legally permitted to save the life of the woman in 98 per cent of the countries in the world.").

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This global contextualization notwithstanding, the dissenting stance comes across as an outlier at the end of the day.

All the same, the Chilean Tribunal runs into damaging case law on its way to validating the legislative project as a whole. In its 2007 case labeled *STC 740/2007*,[11] for instance, it entertained a claim interposed by a group of lawmakers" against "a supreme decree's regulation of the so-called morning-after pill" (p. 61). The justices ruled in favor of the claimants, affirming that:

> The unborn child is a person. As a legal subject, it comprises all the genetic information necessary of its development. Besides, it is distinct and distinguishable from its father and mother. It is unique and one of a kind. It . . . enjoys dignity and may be neither subsumed into another entity nor manipulated. The constitutional protection of a person launches at the very moment of his or her conception. (Pp. 61–62)

Consequently, "the Court resolved that [the entitlement to protective concern] commenced upon conception" (p. 88).

In a manner hardly imaginable in the United States,[12] the justices set aside this stumbling block somewhat nonchalantly. They simply register their disagreement or, more precisely, their views on the inappropriateness of broaching the underlying conceptual controversy: "In light of the Constitution's silence—as well as the scientific and moral disputations—on the question, we consider it inappropriate for this body to opine one way or the other" (pp. 88–89).[13] Unlike what one would expect in the common law tradition, a disregard instead of an overruling ensues, without extended hesitations or explanations, let alone apologies.

The dissent, for its part, objects with vehemence. "The adjudication[] alluded to," it protests, "undoubtedly constitute[s] a source to which we must adhere in solving the constitutional conflict at bar" (p. 147). To be sure, the dissenters concede that "no system of stare decisis exists in Chile" (*id.*). Nonetheless, they insist (almost contradicting themselves),

> this Court, pursuant to its general rules, may not distance itself from jurisprudence laid down in its previous pronouncements. It may avoid this imperative only upon delivering, in a new opinion, arguments to undermine or supersede the reasoning elaborated earlier. (Pp. 147–48)

Not surprisingly, the dissenting justices repeatedly hark back to this clearly relevant ruling (pp. 141, 147–48, 156–57, 159, 160). They proclaim it both binding and decisive: "Hence, this Court has taken a position, which has not been dislodged in the present constitutional adjudication, on when life begins and, accordingly, on who holds the corresponding entitlement" (p. 160).

[11] T.C., April 18, 2008, Rol de la causa: 740-07-CDS (Chile).

[12] *See, e.g.,* Vásquez v. Hillery, 474 U.S. 254, 265–66 (1986) ("[T]he important doctrine of stare decisis . . . ensure[s] that the law will not merely change erratically. . . . Our history['s] . . . lesson is that every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective.").

[13] In refusing to enter the morality fray, the tribunal might also be distancing itself from its counterparts in the Continental European civil-law realm. *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 112 (1987) ("Constitutions, statutes, and court decisions in the continental countries are more deeply engaged in an ongoing moral conversation about abortion, divorce, and dependency than are their Anglo-American counterparts.").

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The majority implicitly counters, or actually preempts, this proclamation by citing, at the outset, the decision "*STC 220/1995*,[14] on the subject of brain death" (p. 60).

> The judgment there issued upon a challenge by a group of lawmakers against a legislative bill on organ donation. . . . The enactment was challenged because it allowed a medical team unanimously and unequivocally to certify the total and irreversible abolition of all cerebral functions. (Pp. 60–61)

It did not, the justices responded on that occasion, thereby encroach upon "the patient's right to life" (p. 61). They determined, in particular, "that the Chilean Constitution regulates life from birth on and throughout a person's existence, which ends with his or her natural death, [and] that it was up to [Chile's] Congress to define 'death'" (*id.*).

A parliamentary prerogative over the definition of "life" may therefore seem to follow, *STC 740/2007* notwithstanding. Indeed, the Tribunal acknowledges that it confronts "two doctrines at odds with each other. The principal discrepancy has to do with the role of the legislature" (p. 62). On the one side: "The parliament possesses plenary powers to legislate regarding situations linked to people's life and death and has regularly done so." "In contrast, the Court held, upon adjudicating on morning-after contraception, that the Constitution makes a choice with respect to the unborn child that lawmakers may neither modify nor second-guess" (*id.*).

Apparently, the prevailing justices feel that they may favor one precedent over the other without distinguishing the two or offering any other justification. In any event, they note that a subsequent statute vouchsafes "any person the right freely to choose and access, without any form of coercion and in accordance with his or her beliefs and background, any duly authorized birth-control method" (p. 63). "As a result, the day-after pill is currently one of the contraceptives that the state distributes and that is commercially available for fertility control [in Chile]" (*id.*).

Finally, the Tribunal appears to intensify its internationalization effort and to embrace international case law over its own as articulated in *STC 740/2007*. It observes:

> We all know the Inter-American Court of Human Rights' interpretation of [the American Convention's Article 4 on the right to life] in the case *Artavia Murillo v. Costa Rica*. [The interpreting judges] set forth two holdings. First, the protection of the unborn does not operate absolutely but rather gradually and incrementally according to the child's development and, accordingly, does not generate an absolute and unconditional duty. Secondly, it entails protecting the woman because conception occurs in her body. (P. 89)

In reality, the conventional provision referred to and previously reproduced goes beyond its counterpart in Chile's Constitution in shielding the fetus. It not merely safeguards life "from the moment of conception" but additionally does so as a matter of "right." Nevertheless, the most authoritative institutional interpreter of the pact limited the safeguard with respect to the offspring and expanded it to cover the mother too.

To a considerable extent, this entire discussion has tackled the Chilean Constitutional Court's pronouncement on abortion from the outside: namely, from an international, comparative, Latin American, and U.S. perspective. It has done so principally with an eye to

[14] T.C., August 13, 1995, Rol de la causa: 220 (Chile).

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ultimately assuming "the internal point of view"[15] more critically. In particular, the inquiry has aimed to understand the debate on the right to abort as men and, especially, women in Chile would, in light of their own reality and upon a look around the world. To this end, it has closely tracked and scrutinized the Chilean justices' disquisitions—which draw on those of the parties, the political establishment, and civil society—on the underlying questions as debated at home and abroad. Hopefully, the analysis undertaken will engender more dialogue in Chile and elsewhere and help open a window from which to view as vividly as possible the road behind and ahead.

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*International Court of Justice—monetary damages awarded—method of calculating damages to the environment—overall valuation—pre- and post-judgment interest*

CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA (Costa Rica v. Nicaragua). Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica. *At* http://www.icj-cij.org/en.
International Court of Justice, February 2, 2018.

Should trees have standing?[1] The decision of the International Court of Justice (ICJ or Court) in its *Question of Compensation (Costa Rica v. Nicaragua)* case of February 2, 2018 provides a pioneering example of damage to the environment being litigated before an international tribunal.[2] The judgment is the first time that the ICJ has adjudicated compensation for environmental damage, and it is only the third time the ICJ has awarded compensation at all.[3] Nevertheless, the ICJ boldly asserted in this case that "damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law" (para. 42). That said, the reasoning employed by the Court leaves much to be desired. Given the increasing number of cases involving the environment, it is unfortunate that international courts and tribunals will garner only limited guidance from the methodology adopted by the ICJ in valuing environmental damage.

As for the background to this judgment, Costa Rica instituted proceedings against Nicaragua in 2010, alleging incursion, occupation, and use of its territory by Nicaragua, as

[15] HERBERT LIONEL ADOLPHUS HART, THE CONCEPT OF LAW 199 (1984) ("Those who accept the authority of a legal system look upon it from the internal point of view, and express their sense of its requirements in internal statements couched in the normative language which is common to both law and morals. . . .").

[1] *See* CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? LAW, MORALITY AND THE ENVIRONMENT (3d ed. 2010).

[2] Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica, General List No. 150, at para. 42 (Int'l Ct. Just. Feb. 2, 2018) (hereinafter Question of Compensation).

[3] The other two cases are: Corfu Channel (U.K. v. Alb.), Judgment, 1949 ICJ Rep. 4 (Apr. 9); Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Compensation, Judgment, 2012 ICJ Rep. 324 (June 19).