Gender Bias in Justification of Lethal Force in Latin America

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Abstract 1

This article offers a critique of the legal treatment afforded in Latin America to women who resort to lethal force against their partners in situations of domestic violence. Building on the existing literature concerning the way in which legal requirements of legitimate self-defense are construed in this type of case, the move proposed is to contrast the standards to which they are held with the requirements imposed in the region to security and armed forces facing organized criminal violence. I show that women who are alone, at the mercy of stronger victimizers, in places hidden from the public eye, are demanded significantly more restraint, and face significantly harsher legal treatment than men who have received training, are equipped with weapons, and have the military and police apparatuses of the state backing them up. Furthermore, given the way in which the militarization of security correlates with serious human rights violations, I claim that this scenario cannot be justified on normative grounds but rather can only be the result of gender-bias.

I. Introduction

E.C. lived on an island in the archipelago of Chiloé, in Chile. She suffered 2
different forms of severe domestic violence by her husband for a number of years. One night her husband physically abused her and their three children. He attacked her, expelled her naked from their house -before bringing her back- and raped her. He threatened her and their children with an axe, and only calmed down after their small daughter begged him not to kill them. Finally, he went to sleep leaving the axe by the bed. Early in the morning, E.C. grabbed the axe and killed him. She put her children

1 * All websites last visited on 21 March 2021. I am grateful to Kai Ambos, Leandro Dias, Manuel Iturralde, and María Luisa Piqué for useful discussion of a previous draft. The usual disclaimer applies

in a canoe and left the island for her mother's house. After leaving her children with her mother, she turned herself in to the police. On April 5th, 2007 E.C. was convicted and sentenced to four years in prison (ultimately being allowed to remain free on probation).[2] At the time of writing, Eva Analía deJesús (known as "Higui") is facing trial before an Argentine Court. She has been prosecuted for killing one of her aggressors while defending herself against an alleged group rape. During the proceedings, she spent 8 months in preventive detention until several organizations of the civil society launched a campaign to defend her. By contrast, her allegations of rape were never properly investigated.[3] Notably, these two cases are hardly isolated instances of how the criminal justice systems in Latin America approach defensive violence exercised by women, and one over which recent feminist critiques have delved in significant detail.

3 On July 6th 2021, Colombian authorities informed that their armed forces had attacked a compound of a dissident group to the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) in the Municipality of San Vicente del Caguán, Department of Caquetá. Among those who were killed was a 16-year-old minor. Colombia's Defense Minister at the time, Diego Molano, argued that the use of force in this case was lawful, insofar the attack had been conducted against a "terrorist" who had prepared "war machines" to perpetrate attacks against Colombian society, including drug-trafficking and terrorist activities.[4] Notably, the fact that five more members of the group had been killed while not directly threatening anyone was hardly considered problematic by the state authorities. The reason for this was that the operation was regulated under International Humanitarian Law (hereinafter IHL), which allowed targeting members of enemy armed groups. Notably, Mexico and Peru have adopted roughly similar approaches concerning the justification of lethal violence against organized armed groups, and it is very likely that the militarization of security in Latin America will expand this approach to other countries.

2 Tribunal Oral en lo Penal de Castro, RUC 0500142125–7, RIT 4–2006 (5/04/2007).

3 See, e.g., available at https://www.perfil.com/noticias/sociedad/violacion-grupal-empezo-el-juicio-contra-higui-acusada-de-matar-a-un-agresor-sexual.phtml. On March 17th 2022, she was finally acquitted, after almost 6 years of being prosecuted.

4 See interview at RCN Radio, available at https://twitter.com/COLElige/status/1369687681131831297. On the story more broadly, see "'Máquinas de guerra': la polémica en Colombia por la justificación del gobierno de un bombardeo a la guerrilla en el que murió al menos una menor", available at https://www.bbc.com/mundo/noticias-america-latina-56261428.

On their face, many would argue that there is little in common between 4
these two types of scenarios. They occurred in different countries -the former in Chile and Argentina, the latter in Colombia. They are arguably regulated by different areas of the law -the former by the criminal law, the latter by the laws of armed conflict. They capture very different social and political problems -the former gender violence, the latter state responses to organized criminal groups. Nevertheless, I want to suggest that the contrast between the legal treatment of these two different types of situation captures something important about the legal assessment of the use of lethal force in Latin America. In brief, I will argue that when facing situations of structural violence, Latin American legal systems impose much stricter, in fact, indefensible requirements over women who face serious threats to their security, sexual autonomy, and their lives, than to men who are specially trained, armed, and backed up by the security forces. Furthermore, I shall argue that this entrenched bias leads to serious social harms.[5]

Before I proceed, however, a brief point concerning the scope and focus 5
of this chapter. Much, if not most of contemporary work on regional or comparative approaches in law is concerned with identifying features which are specific, or distinct in a given region. In this sense, I have argued elsewhere, for instance, that Latin American countries have a peculiar approach to extraterritorial criminal jurisdiction which is largely determined by the prevalent interests of their (creole) elites, who seek to maximize their autonomy from the countries in the Global North (most notably the US), while at the same time profit from the "imperial" or "expansive" reach of their laws to pursue their own objectives against domestic foes.[6] Similarly, others have shown the peculiar historical intellectual legacies and trajectories of certain national legal systems, or regional approaches to both domestic and international law.[7] Here, by contrast, my objective

5 By no means this is meant to suggest that this is the only type of entrenched bias in this context or that this bias does not work in conjunction with other relevant bias as the literature on intersectionality powerfully illustrates. On intersectionality, see classically Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, identity Politics, and Violence Against Women of Color", *Stanford Law Review* 43 (1991), 1241.

6 Alejandro Chehtman, "Strategic Approaches to Extraterritorial Criminal Jurisdiction in Latin America", in A. Parrish and C. Ryngaert (eds.), *Extraterritoriality in International Law* (forthcoming).

7 See, e.g., Roberto Gargarella, *Latin American Constitutionalism 1810–2010. The Engine Room of the Constitution* (2013). See, Anthea Roberts et al, *Comparative International Law* (2018).

is to address and critically engage with a practice that I argue is prevalent in Latin America, yet acknowledging that its main logic and dynamics are likely present in other countries and regions in the world, and also pervasive in the region outside this particular issue.[8]

6 The chapter proceeds as follows. Section 2 examines the treatment of women who use force against their partners or spouses in situations of domestic violence. Section 3 addresses the way in which Latin American states are increasingly approaching violence against organized criminal groups. Section 4 briefly concludes by drawing broader inferences on the entrenched bias that structures how Latin American countries approach the justification of resort to force.

II. Women who kill in situations of domestic violence

7 Resort to justified force by private individuals is typically regulated by the criminal law. This area of the law standardly recognizes justifications and excuses which constitute sufficiently strong reasons to exempt or mitigate punishment to individuals. For simplicity, I will concentrate here on the treatment of the justification of self- and other-defense (though I admit that some of my claims apply to situations of defensive necessity as defined in different domestic legal systems in the region). Most regulations in the region (and beyond) share a number of basic conditions for permissible resort to defensive force. First, they require that the person using force faces an ongoing (actual) or imminent unlawful or illegitimate aggression. Second, her defensive action must meet the requirements of proportionality and necessity. Third, the person exercising defensive force must act "with right intention", or at least without having provoked the attack.[9] Despite the broad agreement on the basic requirements for permissible defensive force, there is significant leeway in the interpretation of each of these

8 See, e.g., B. Morenne, "François Hollande Pardons French Woman Who Killed Abusive Husband", NYT (Dec. 28, 2016) available at https://www.nytimes.com/2016/12/28/world/europe/jacqueline-sauvage-full-pardon-france.html, and Aileen McColgan, "In Defence of Battered Women Who Kill" *Oxford Journal of Legal Studies* (1993), 508–529.

9 See, with minor differences, Art. 32(6) of the Colombian Penal Code, Art. 34(6) of the Argentine Penal Code, art. 10(4) of the Chilean Penal Code, and art. 15(IV) of the Mexican Penal Code. This structure is also common to other legal provisions in the regions, such as, Brazil's Criminal Code, art. 19; Cuban Criminal Code, art. 21; Honduras' Criminal Code, art. 24; Criminal Code of Paraguay, art. 19; Peruvian Criminal Code, art. 28, among others.

requirements. In this section, I shall critically engage with some illustrative cases from the region concerning women who killed their partners usually in non-confrontational situations, that is, in situations in which they were not being physically attacked or immediately about to be.

8 But first a brief methodological note on case selection is in order. In this section I focus on decisions mostly from Argentine courts, though there are similar cases in many other parts of the region. There is, however, very little systematic information of how domestic legal systems treat this type of case. Nonetheless, a survey of the academic work in this area clearly points to a broader trend which is refractory of women's allegations of defensive force against a permanent or continuous threat, but who act in non-confrontation situations. This chapter is based on the only report offering systematic analysis of at least one jurisdiction, which refers to Argentine case law. Furthermore, it only captures seven cases of the use of self-defense by women in situations of non-confrontation. Five of them can be classified as adverse to the woman, and only two as favourable.[10] Similarly, most of the law review articles that are quoted below confirm that this is clearly the dominant approach in domestic courts to this type of case in the region.[11] Although we are beginning to see significant changes -largely thanks to the awareness created by feminist scholars, organizations and broader movements- women are always prosecuted, and they are still usually, albeit if diminishingly, convicted and punished.[12]

9 There are at least four different arguments that are typically resorted to by domestic courts when convicting these women. A first type of claim is to deny, as in the E.C. situation referred to at the outset of this chapter, that they were acting defensively on the grounds that they were not under an actual or imminent aggression. To illustrate, on July 22nd 2008, a Chilean court in San Antonio convicted a woman who had shot her husband inside their home. Although the court acknowledged the existence of persistent episodes of severe violence by the husband over her, and established that she had wounds which were compatible with this violence exercised only

10 Julieta Di Corleto, Mauro Lauría Masaro and Lucía Pizzi, L*egítima Defensa y Géneros. Una cartografía de la jurisprudencia argentina* (2020).

11 See, e.g., Myrna Villegas, "Mujeres homicidas de sus parejas en contexto de violencia intrafamiliar. Posibilidades de exención de responsabilidad penal en el derecho penal chileno", in Carmen Antony García, *Criminología Feminista* (2021).

12 See, e.g., Di Corleto et al, n 10 above, at 34. In particular, it is interesting to examine the decisions of the Argentine Supreme court in *Leiva* (L. 421. XLIV, 1/11/2011), and *RCE* (File no 733/2018, 29/10/2019).

days before her attack, it refused to consider her action defensive, let alone justified. By contrast, it claimed that there was no firm basis ("witnesses or other evidence") to conclude that at the time of the shooting her husband had actually attacked her, or was about to do so. Furthermore, the court pointed out that nor could it be established that she was in a situation such that she had faced "a kind of fear so acute, that caused her to lose sense of her acts of her command of her body".[13]

10 Similarly, *RRJ* was convicted in Argentina for manslaughter after throwing boiling water over her partner while he was lying in bed.[14] That night, upon arriving home drunk, he had thrown stones against the door and windows of their house until he woke her up and was let in. When he entered, he demanded that she cook something for him, he insulted her, sexually touched her in front of her son, and tried to have sex with her against her will. He then went to the bedroom to speak on the phone with another woman. At that moment RRJ came with the boiling water and threw it over him. Badly harmed, he changed clothes and left for the hospital where he died soon afterwards. During the proceedings and the trial, it was admitted that RRJ had been regularly victim of severe mistreatment and all sorts of violent acts at the hand of her partner. Nevertheless, both the trial judges and the Appeals Court concluded that given that, at the time of the attack, she was not being actively or imminently threatened, it could not be said that she was reacting against an illegitimate aggression that created the need for defensive action.

11 In a second group of cases, courts rejected the self-defense justification on grounds that the woman resorting to lethal force had a less harmful means at her disposal to prevent the attack. *JMDA*, for instance, was an underaged woman living with her partner. On the day of the events, they fought over a set of keys, and after the struggle her partner fled the building. She followed him to the street and after a heated discussion stabbed him on the chest with a kitchen knife. During the investigation it was found that he had inflicted upon her continuous acts of violence, including beatings and lockups. She was prosecuted and indicted for aggravated murder both by the investigative judge and the Argentine Appeals Court. The latter argued that on the day of the events there had been no actual

13 Sentencia TOP de San Antonio (22–07–2008), RIT 49–2008, RUC 0700509932–8 (Chile).

14 Cámara en lo Penal de Puerto Madryn, *RRJ*, file No 1001/2008 (24/11/2010, Argentina).

aggression that could justify the defendant's reaction. Furthermore, the Court concluded that resorting to a knife was entirely disproportionate and unnecessary in the circumstances, particularly since the defendant had no injuries. By contrast, the judges concluded that the defendant should have remained home, as the "logic and reasonable" way to protect herself, and "ask other people for help", rather than pursue her partner.[15]

12 In *Torres* a woman was attacked by her partner who, in arriving home drunk, began to abuse her verbally and physically. To this, she responded by grabbing a knife and stabbing him. He died on the spot. During trial, several witnesses testified to the continuous violence he exercised against her. A psychologist further testified to this, as well as vis-a-vis her submission to her partner's violent attitudes. Although the Trial Court acknowledged this general situation, it argued that she had gone beyond what was necessary to protect herself, given that she could have "chosen a different way of resolving the dispute (e.g., fleeing the place, locking herself up at home and prevent her partner to enter the house)".[16] Similarly, in *RRJ* an Argentine appeals tribunal claimed that the defendant's response did not satisfy the requirements of necessity, given that she could (and should) have resorted to the "appropriate" legal means at her disposal, including criminal and civil actions, administrative measures or legal orders of restraint, "among many others". Often, courts claim that necessity is not satisfied on the grounds that the victim could have escaped instead of killing the aggressor, or could go to the police for protection.

13 A third group of cases reject the self-defence justification on the grounds that the response was disproportionate. In *DGL*, for instance, a woman grabbed a knife she had concealed in her clothes and stabbed her partner, causing his death. At the time, he had just hit her "for looking at other men" and immediately walked towards a club (which was attached to a fence) he then used against her. The psychological report indicated that she was emotionally unstable (she had a significant amount of anger contained), and that she had been subdued physically and psychologically by her partner. The Argentine Trial Chamber convicted her for murder and sentenced her to eight years in prison, arguing that her response was disproportionate to the ongoing or imminent attack she was suffering. They claimed that the

15 Tribunal de Impugnación de Salta (Argentina), Sala II, "JMDA", case No. 57.735/2017 (28/2/2019).

16 Cámara Segunda en lo Criminal de Formosa (Argentina), "Torres", case No. 11.241 (4/4/2019).

threat of being hit with a club was insufficient to justify her using a knife. The Appeals Court reduced the sentence to four years, convicting her for excess in the use of legitimate defensive force.[17] Similarly, an Appeals Court in Rancagua (Chile) concluded that although the defendant had suffered persistent violence and serious mistreatment, given that at the relevant day she had "maybe only suffered punches", her act of killing him was disproportionate and thereby punishable.[18]

14 A different, yet ultimately consistent approach was adopted by the Appeals Chamber of Río Cuarto (Argentina) in the *Olmedo* decision.[19] In that case, the defendant had started a relationship with her partner when she was only 12 years old --he was much older. During 14 years she was subjected to mistreatment and different forms of violence. One night, she went looking for her partner and found him using drugs at a party. They began to quarrel, and she followed him out of the building. When she reached him, she stabbed him in his abdomen. Although she immediately called an ambulance, her partner died before he could be assisted. During the trial, she related that when she was sixteen years-old she had filed a criminal complaint against him, and as a result of that complain *she* was interned in a minority institute. After returning with him, he would administer the money she made working as a cleaner, subjected her to constant physical and psychological abuse, and threatened to take away their daughters if she left him. Finally, she stated that the night she killed him, he had looked at her "in a particular way", and told her that they "would settle the matter at home". At that moment, she claimed, she feared for her life and therefore attacked him. The psychological report stated that the defendant was under the complete domination of her partner, and she minimized the constant sexual, physical and psychological abuses she had been suffering. It further stated that she had developed an adaptive tolerance to pain which could generate impulsive reactions. The Tribunal (with lay juries) ultimately acquitted her. However, this decision was based on the finding that she was

17 Tribunal de Impugnación de Salta (Argentina), Sala III, "DGL", case No 75736/2016 (31/7/2018).

18 Corte de Apelaciones de Rancagua (Chile), Decisión 221196 (22–11–2004), cited in Myrna Villegas Díaz, "Homicidio de la Pareja en Violencia Intrafamiliar. Mujeres Homicidas y Exención de Responsabilidad Penal", *Revista de Derecho* Vol. XXIII num. 2 (2010), 170.

19 Cámara en lo Criminal y Correccional de Primera Nominación de la Segunda Circunscripción Judicial de Río Cuarto (Argentina), "Olmedo", File No 7.488.544 (27/10/2020).

not considered fit to stand trial, rather than on the grounds that she had used force in her defense against an ongoing, or imminent attack. This decision again concedes that her actions were legally wrongful and that she lacked the right to act under the circumstances.

There are a number of problems with each of these forms of reasoning 15
that have been highlighted in the relevant literature. In the first type of claim, concerning the lack of an actual or imminent aggression, courts seem to conflate imminence with immediacy.[20] This is a mistake. Any threat should plausibly be considered imminent in the relevant sense if it is sufficiently individualized, certain, and an agent acting defensively will not be able to avert it at a later time, even if it is not yet ongoing or immediately forthcoming.[21] Insofar what matters for the justification of defensive force is to avert the unjustified harm the aggressor will cause, what we need to inquire is precisely whether the defensive act can be performed successfully at a later time. Accordingly, in situations of domestic violence authorities have suggested that threats are often continuous, and the victim is best placed to know when the next iteration is coming.[22] To put it briefly, immediacy can make it crystal clear (epistemically) in many situations that a particular threat is imminent, but it does not explain (normatively) why it is permissible to harm the person imposing the threat, even before the threat has materialized.[23]

Similarly, it has been persuasively argued that necessity cannot be asses- 16
sed by merely comparing the means which the person defending herself

20 See, e.g., J. Wilenmann Von Bernath, *La Justificación de un Delito en Situaciones de Necesidad* (2017), 273.

21 See, e.g., N. Lubell, "The Problem of Imminence in an Uncertain World", in M. Weller (ed.), *The Oxford Handbook of The Use of Force in International Law* (2015), 718.

22 See, e.g., Decisión 221196, n 17 above (Chile); Argentine Supreme Court in "RCE" (29/10/2019); and Juzgado Décimo Penal del Circuito con Función de Conocimiento (Bucaramanga, Colombia), decisión CUI-68001 6000258201301700 (29th June 2021). See also *Recomendación General No. 1. Legítima Defensa y Violencia contra las Mujeres*, Mecanismo de Seguimiento de la Convención de Belém do Pará (MESEVI) 2018. This by no means implies that immediacy can play no role in standard assessments of self-defence. But this role is perhaps better appraised as only an epistemic role, not a justificatory one.

23 Admittedly, one needs to be particularly careful with justifying force against non-immediate threats, on the grounds that such a permission may be easily abused. But the way to address this concern is to require a very high degree of certainty by the person using defensive force, not by curtailing its right to defend herself against an imminent (non-immediate) threat.

used with others which were available.[24] By contrast, any plausible account of necessity must take into consideration not merely whether there is a less harmful means available, but also how effective this alteranative means actually is. No one can be put under a duty to use a defensive means which is a less harmful if that effectively means putting herself at much greater risk of serious harm. For instance, and as indicated, when facing this type of case courts often argue that defensive force was impermissible because the victim could have resorted to police protection as an alterative, less harmful means of protection. Nevertheless, there is plenty of empirical data suggesting that resorting to the police or other similar means are hardly effective in the Latin American context. In Argentina, for instance, a study of the first 50 convictions of men who killed their partners shows that 39 % of the deceased women had filed police complaints against their killers before the attacks that killed them.[25] Observers typically highlight that women that seek protection from state organs fail to receive adequate, or effective protection.[26] The Office of the Rapporteur on the Rights of Women at the Inter-American Commission on Human Rights has similarly argued that in several countries in the region "there is a pattern of systematic impunity" around cases involving violence against women, and that this perpetrates the social acceptance of this phenomenon.[27]

17 Finally, there is significant agreement that proportionality should not be construed as some form of mathematical equivalence between the aggression and the defensive response. By contrast, it has been standardly accepted, in the legal and philosophical literature, that someone defending herself may impose a greater harm to prevent a lesser aggression insofar it is not seriously disproportionate or excessive. Jonathan Quong, for instance, has recently argued that the amount of harm that it is permissible to inflict to defend a right depends on the value of the right that is threatened.[28] In

24 S. Lazar, "Necessity in Self-defence and War" *Philosophy & Public Affairs* 40(1) (2012), 3–44.

25 Unidad Fiscal Especializada de Violencia contra las Mujeres, "Análisis de las primeras 50 sentencias por femicidio del país" (2017), available at https://www.mpf.gob.ar/ufem/files/2017/11/UFEM-Analisis_50_primeras_sentencias_femicidio.pdf

26 See, e.g., Camila Maturana, from the Regional Center of Human Rights and Gender Justice in Chile in "Reportaje: Mujeres que matan (en defensa propia) hoy", available at https://www.humanas.cl/reportaje-mujeres-que-matan-en-defensa-propia-hoy/.

27 Office of the Rapporteur on the Rights of Women, "Acceso a la Justicia para Mujeres Víctimas de Violencia en las Américas" (2007), para 124, available at https://www.cidh.oas.org/women/acceso07/cap2.htm

28 J. Quong, *The Morality of Defensive Force* (2020), 109.

the type of situation we are concerned with here, the relevant right that is being violated must be construed as the right not to be constantly held to physical, psychological and/or sexual attacks, and not merely as the right against suffering the last iteration of that situation. It is hard not to consider, absent a sufficiently effective alternative means, that resorting to force, and even lethal force, to avoid being subjected to this type of treatment can hardly be considered seriously disproportionate. In effect, not many people consider someone freeing himself from a kidnapper or a rapist by lethal force to be acting disproportionately.

Notwithstanding these "internal" criticisms to the arguments put forward 18
by the relevant courts, my contention here is ultimately about the biases at play when these courts apply the self-defence conceptual apparatus.[29] This type of bias is well captured by certain remarks made by judges and other officials in this type of case. For instance, a Trial Court in San Isidro, Argentina, accused a woman of "taking the Lex Talionis in her own hands" because she had injured her partner by stabbing him, when he attacked her once again after having inflicted upon her constant violence for years.[30] Notably, even defense attorneys of accused women often fail to raise the legitimate defense argument, and opt for a partial defense, such as excess in the use of legitimate defensive force or "insuperable fear".[31]

Admittedly, some courts have recently decided this type of case differ- 19
ently. In *LSB*, an Argentine Court acquitted a woman who killed her husband in his sleep. During the proceedings it was stated that he constantly threatened her at gunpoint and had repeatedly sexually and physically abused her. The night of the killing he had threatened her and their 45-days-old daughter with the gun, and went to sleep leaving the weapon on the bed. LSB picked it up and shot him dead. The trial chamber acquitted LSB on

29 For sustained treatment of these criticisms, see, e.g., Camila Correa Flórez, *Legítima Defensa en situaciones sin confrontación: La muerte del tirano de casa* (2017); Cecilia Hopp, "La legítima defensa: un derecho androcéntrico", Boletín No 13, Observatorio de Género en la Justicia (2017), and McColgan, n 8 above.

30 Tribunal Oral Criminal No 1 de San Isidro (Argentina), "RCE" File No 3113 (31/10/2013). This court convicted the defendant and sentenced her to two years in prison (suspended). This decision was upheld by the Criminal Cassation Court of the Province of Buenos Aires only to be reversed by the Argentine Supreme Court on October 2019, six years after her conviction (Decision No 733/2018).

31 See, e.g., the arguments raised at the trial stage in Tribunal de Impugnación de Salta, Sala I, "OPA" (4/12/2017). At the appeals stage the defense did claim that the defendant was fully justified as a case of standard self-defense. The Court rejected the argument.

the grounds that she had acted in self-defense. The Criminal Cassation Court confirmed that decision and argued that the actual illegitimate aggression was present in the case as a result of the persistent threats, attacks and fear the defendant lived in. In this sense, the Court argued that this type of aggression should be construed as "continuous". In order to reach this conclusion, the Court took centrally into consideration the facts as recounted by the defendant.[32] But even non-guilty verdicts such as these come after long and usually devastating judicial processes, where women are often held in custody and/or several of their rights are meaningfully curtailed.

III. Force against organized violence

20 To fully capture the legal treatment of women who exercise defensive violence against their partners, I suggest it is useful to compare it with situations in which typically it is men Who resort to defensive force. I do not doubt that we may see certain notable differences in the treatment they often receive in standard interpersonal violent situations between private individuals. For instance, an Argentine butcher was acquitted by a lay jury after killing a robber during his attempt to recover the money. After being held at gun point, he got into his car, pursued the thieves until he found them, and run one of them over with his truck ("until he killed him").[33] Further, some Latin American states have formalized a right to kill an intruder upon finding him within their house even when they have the chance to flee into safety, thereby lifting the necessity requirement in contexts in which defense is most typically exercised by men. This type of institution is often called "stand-your-ground laws".[34]

21 Nevertheless, I believe a more pertinent point of comparison to the situation of women who face violent or abusive partners is the treatment afforded to security forces resorting to lethal force against organized armed/criminal groups. The reason for this is precisely that this type of situa-

32 Tribunal de Casación Penal de la Provincia de Buenos Aires (Argentina), Sala I, "LSB", case No 6996 (5/7/2016).

33 See, e.g., José Luis Ares, "El ladrón, el carnicero y el jurado popular", Derecho Penal online (28/9/2018), available at https://derechopenalonline.com/el-ladron-el-carnicero-y-el-jurado-popular/.

34 See, e.g., Chilean Criminal Code, Art. 10(6), Argentine Criminal Code, Art. 34(6), Mexican Criminal Code, Art. 15(IV), Criminal Code of Guatemala, Art. 24(1)(c).

tion confronts (typically) men to contexts of structural violence, which puts their life and other of their fundamental rights at risk. Most Latin American countries have faced, and continue to face, severe challenges by organized groups, often with strong ties to drug-trafficking activities, and some with determined political projects. Among the former, we may identify the Zetas, the Cartel de Jalisco Nueva Generación, and the Cartel de Sinaloa, in Mexico, the maras in El Salvador and other parts of Central America, the Kaibilies in Guatemala, gangs in Rio de Janeiro, BACRIMs (short for *Bandas Criminales* or Criminal Bands) in Colombia, and Los Monos in Argentina. Among the later we may include, inter alia, the FARC and M19 in Colombia, and Shining Path in Peru. Resort to force by security forces against these groups is usually regulated through a number of different legal regimes, including criminal law, international human rights law, but increasingly in the region, and this is part of the argument in this chapter, also international humanitarian law. Although I focus here on Colombia, Peru and Mexico, this approach is far more extended in the region, with an increased militarization of security issues in many countries.[35]

In effect, the standard response against this type of threat is not regulated 22
by the domestic criminal law of each state (the "law enforcement" model), at least not exclusively. Since 2006, Colombian authorities have persistently sought to justify and regulate the state's resort to (lethal) force against organized armed groups by reference to IHL rules, particularly in "areas of hostilities". This general stance was articulated through a 2008 policy document, issued by the Ministry of Defense, as an Integral Policy of Human Rights and International Humanitarian Law (*Política integral de DD. HH. Y DIH*), and a 2009 Manual of Operational Law (*Manual de derecho operacional*).[36] The Colombian Congress further solidified this approach by enacting current article 221 in the Colombian Constitution, which establishes that military justice will oversee any alleged violations, and IHL will be the prevailing legal regime through which these violations will be assessed.[37] More recently, this approach was adopted beyond the

35 For an overview, see CELS, *La Guerra Interna. Cómo la Lucha contra las Drogas está Militarizando América Latina* (2018), available at https://www.cels.org.ar/militarizacion/.

36 Ministerio de Defensa Nacional (Colombia), *Manual de derecho operacional* (Comando General Fuerzas Armadas, 2009), 77–86.

37 Enacted by *Acto Legislativo* 1 de 2015, later endorsed by the Colombian Constitutional Court in its decision C-084/2016. Notably, the Peace Agreement with FARC also stated IHL as a prevailing legal regime at the time of criminally prosecuting conduct of

traditional parties in the Colombian context (in cases of non-international armed conflicts with organizations such as FARC, until recently, or the *Ejército de Liberación Nacional*, ELN). In 2016 the Colombian Ministry of Defense issued Directive 0015 authorizing the targeting of camps pertaining to criminal bands known as BACRIM, which had formed after the demobilization and dismemberment of paramilitary groups.[38] A year later, the Ministry issued Directive 37(2017) extending this legal approach to groups formed out of FARC dissidents.[39]

23 IHL has certain operational advantages for state forces, including providing them with a significant number of privileges.[40] For one, the prevailing interpretation of these rules indicates that members of the security forces may kill members of non-state armed groups regardless of whether they are actually, or imminently threatening them or any innocent victim. In effect, under IHL members of the military wing of non-state armed groups (ie, those with a "continuous combat function") may be targeted at any time.[41] Furthermore, other participants who may be considered civilians taking direct part in the hostilities lose their immunity against being attacked "for such a time as" they do so.[42] It is also irrelevant whether the military has less harmful means at their disposal (they are not obliged to capture them even if they can do so at no personal risk), and even if they will prevent only a far lesser harm. In effect, the Manual of Operational Law adopted by the Colombian Ministry of Defense permits resorting to lethal force against any objective defined as "military", provided it is identified as such and

state armed forces, and requires expertise in IHL for those who will be adjudicating these cases.

38 Available at: https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/ Prensa/Documentos/dir_15_2016.pdf.

39 Kalmanovitz recalls that until the 1980s, the judiciary was "largely deferent and passive" vis-à-vis the military. Under the division of labour agreed upon by President Alberto Lleras Camargo in his 1958 speech, separating political decisions (left to civilian powers) from "public order" decisions, left to the military. The latter were de facto excluded from the jurisdiction of civilian courts. See P. Kalmanovitz, "Entre el deber de protección y la necesidad militar: oscilaciones del discurso humanitario en Colombia, 1991–2016", *Lat. Am. Law Review*, no 01 (2018), 38.

40 ICRC, *Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non International Armed Conflicts* (Protocol II), art. 1 (8 June 1977).

41 See, ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009), 36. See, further, Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (2012), 359–362.

42 See, Protocol II, Art. 13(3). See, further, Sivakumaran, ibid, 367.

included in an "operational order".[43] This approach is in stark contrast with the use of lethal force outside of armed conflict, which requires that force be "strictly unavoidable to protect life", and hat officials "identify themselves … and give clear warning of their intent to use firearms, with sufficient time for the warning to be observed".[44]

Furthermore, the Manual clarifies that the proportionality and necessity analyses are different in military and in law enforcement operations. Proportionality in military operations must assess the harm caused by the attack to civilians compared to the military advantage. Harm to those who are considered part of the threat does not count *at all* for these purposes. In law enforcement operations, by contrast, proportionate harm is limited to the minimum level of force necessary to bring someone into custody, allowing for lethal force only in exceptional circumstances.[45] Military necessity is further construed as only restricting force which is not directly connected to the military purposes, or goes beyond these objectives.[46] Put succinctly, military actions in Colombia (and other countries) are not limited by the standard requirements of actual or imminent illegitimate aggression, necessity and proportionality that apply within the 'law enforcement' or 'human rights' paradigm.[47] 24

The response against Shining Path in Peru was also deeply connected with the IHL framework.[48] In 1983, as police forces were overwhelmed by the violence unleashed by Shining Path, President Belaunde sent the Army to Ayacucho.[49] Several Peruvian authorities acknowledged the application of IHL rules in this context, including the Truth Commission, the Supreme 25

43 n 36 above, 106.

44 See, United Nations, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (7 September 1990) available at https://www.achpr.org/public/Document/file/Any/ basic_principles_on_the_use_of_force_and_firearms.pdf.

45 ibid, 76.

46 ibid, 88.

47 Admittedly, there is a sense in which IHL necessity and proportionality continues to apply, but neither of them have to do with protecting enemy fighters from lethal force. That is, state forces are still obliged to minimize harm to civilians, including in the choice of targets, weapons, and other relevant decisions.

48 Note that invoking IHL in Peru has the further obstacle that it is often construed by part of the legal and political community as denial that Shining Path was a "terrorist" organization, and a resulting form of legitimizing its violence. Alonso Gurmendi Dunkelberg, "'Si Vis Pacem' la Aplicación del Derecho Internacional Humanitario en el Ordenamiento Jurídico Peruano", *Revista Latinoamericana de Derecho Internacional* (2020), 12.

49 ibid, 7.

Court, and even the agent for the State arguing before the Inter-American Court of Human Rights.[50] More relevantly for our purposes, it has been argued that the clashes between state forces and remnants of Shining Path in the VRAEM region (Valley of the Apurímac, Ene, and Madero rivers) are regulated by IHL, even when their intensity is significantly lower than those obtaining in the 1980s. In effect, in 2007 the Peruvian Congress passed a piece of legislation explicitly resorting to IHL rules in clashes against these organizations. Under this law, armed forces are entitled to resort to lethal force as a first response in fulfilling a military mission, in self-defense, or when facing a "hostile act".[51]

26 In 2009, the Constitutional Court of Peru challenged the legal basis of this provision, and requested Congress to regulate the issue by distinguishing between rules that applied in armed conflict, and those applicable to law enforcement situations.[52] Congress responded by authorizing the Executive to legislate on this issue.[53] The following month, the Peruvian Executive passed Legislative Decree 1095, insisting -as Gurmendi highlights- on the conflation between the two regimes.[54] In particular, Article 5 of this Decree resorted to IHL rules in situations of emergency, regardless of whether there existed or not a non-international armed conflict.[55] The Constitutional Court of Peru brought down again Decree 1095, by indicating that resort to IHL depended on whether the conditions for the existence of a non-international armed conflict were met as a matter of international law, not by political fiat of domestic authorities.[56] Nevertheless, the political authorities of Peru have continued to invoke the regime established under

50 See, respectively, Comisión de la Verdad y Reconciliación de Perú, Informe Final (2003), Tomo I, 25, Corte Suprema, Sala Penal Nacional, File No. 560–03 (13th October 2006), 136, and IACtHR, *La Cantuta v. Peru, Merits, Reparations and Costs*, Series C 162 (29th November 2006), 44.

51 Act 29.166, *Ley que Establece Reglas de Empleo de la Fuerza por parte del Personal de las Fuerzas Armadas en el Territorio Nacional*, Art. 7.

52 Tribunal Constitucional del Perú, File no 002–2008-PI/TC, 27.

53 Act 29.548 (3rd July 2010).

54 Gurmendi, n 48 above, 29–30.

55 The existence of an international or a non-international armed conflict is standardly considered a necessary requirement for the application of IHL, in one of its different settings (conflicts are not regulated by the same rules). For classification of armed conflicts see, generally, Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts", in E. Wilmshurst (ed), *International Law and the Classification of Conflicts* (2012).

56 Constitutional Court, File No. 022–2011 PI/TC (8th July 2015), 29–30.

Decree 1095, and by implication an IHL-type regulation, with regards to resort of lethal force by military forces, not by the more restrictive system in operation under International Human Rights Law.[57] Whether this is warranted or not as a matter of IHL is irrelevant for present purposes, as what is relevant for us here is that their prevailing attitude is to institutionalize an expansive framework for the use of (lethal) force against this type of group.

Finally, Mexico reached a similar outcome through a different path. 27
Indeed, although many observers have suggested that, at least part of the violence in Mexico between the state and certain drug cartels amounts to a non-international armed conflict, Mexican authorities have consistently decided against invoking IHL.[58] The pattern of violence has been described as "multiple incidents of micro-violence at local levels", rather than as a war or an organised confrontation between military structures.[59] Nevertheless, Mexican authorities have been quite successful in construing a similar framework regarding the authorisation to use lethal force on the grounds of "formal derogations on human rights instruments, invoking global counter-terrorism norms, or activated domestic emergency powers."[60] In 2000, Mexico's Supreme Court considered militarisation of a given situation as within the Executive's prerogatives in a "landmark" ruling, particularly in situations "in which there is a well-founded fear that, if not addressed immediately, a grave danger for society will be imminent."[61] In 2006, then

57 See, Decreto Supremo 076–2016-PCM (5th October 2016), art. 3, Decreto Supremo 091–2016-PCM (7th December 2016) and Decreto Supremo 010–2017-PCM (1st February 2017).

58 See, e.g., Geneva Academy, Report on "Rule of Law in Armed Conflict, 33 (by reference to the violence with the Sinaloa and Jalisco Nueva Generación cartels), Ana Gabriela Rojo Fierro, "La Guerra contra el Narcotráfico en México ¿Un Conflicto Armado No Internacional no Reconocido?" Foro Internacional (2020), 60; Cailin Kerr, "Mexico's Drug War: Is it Really a War?", *Texas Law Review* (2012), 54, Grotius Centre for International Legal Studies, The Situation of Drug-Related Violence in Mexico from 2006–2017? A Non-International Armed Conflict?" (Leiden, 2018), 157. Against this characterization, see, e.g., Alejandro Rodiles, "Law and Violence in the Global South: The Legal Framing of Mexico's 'NARCO WAR'", *Journal of Conflict & Security Law* 23(2) (2018), 269–281, and Andrea Nill Sanchez, "Mexico's Drug 'War': Drawing a Line Between Rhetoric and Reality", *The Yale Journal of International Law* 38 (2013), 467–509. On Mexico deciding against invoking IHL, see P. Kalmanovitz and A. Anaya-Muñoz, "To Invoke or not to Invoke: International Humanitarian Law and the 'War on Drugs' in Mexico" (typescript on file with author).

59 Nill Sanchez, ibid, 485–6.

60 Kalmanovitz & Anaya Muñoz, n 58 above, 5

61 Res. P./J.34/2000, cited and translated in Kalmanovitz & Anaya Muñoz, ibid, 25.

president Calderón declared Mexico's "war on drugs", invoking the National Security Law passed under president Fox, and also citing the Supreme Court's 2000 ruling.[62]

28 Militarization of Mexican responses against drug cartels only increased in the following years. Although on paper these military operations were limited by strict human rights norms, in practice the Mexican state avoided taking the necessary steps to make these restrictions meaningful.[63] For instance, oversight mechanisms have been placed under the internal disciplinary bodies of the armed forces, rather than on Mexico's civilian courts.[64] As a result, Kalmanovitz and Anaya conclude, "there has been a great deal of de facto permissiveness".[65] In fact, evidence suggests that resort to force by Mexican security forces is guided by the logic and principles of *jus in bello*. Arguably, in "the deep narrative known as the 'Mexican Drug War'", civilian lives lost are framed as collateral damage and Cartel members are construed as national enemies aiming to topple the government.

29 Overall, the militarization of responses to this type of group has had severe and pernicious consequences well beyond the groups involved. Consider, for example, the lethality rate, which reflects the ratio of civilian deaths per every civilian injured. As documented by Silva Forné et al, the Mexican army averaged a 7.9 lethality rate from 2007 to 2014, with a constant increase from 1.6 in 2007 up to 14.7 in 2012.[66] Notably, during the same period the Mexican police averaged a significantly lower lethality rate of 4.8.[67] Even more, since the intervention of the military in the fight against the cartels the lethality rate of police forces significantly increased. This increase in harm to innocent bystanders does not seem to be taken

62 Presidencia de México, Decreto por el que se crea el Cuerpo Especial del Ejército y Fuerza Aérea denominado Cuerpo de Fuerzas de Apoyo Federal (2007).

63 Javier Trevino-Rangel et al, "Deadly force and denial: the military's legacy in Mexico's 'war on drugs'", *The International Journal of Human Rights* (2021), and Catalina Pérez Correa et al, "Deadly Forces: Use of Lethal Force by Mexican Security Forces 2007–2015", in Alejandro Anaya-Muñoz & Barbara Frey, *Mexico's Human Rights Crisis* (University of Pennsylvania Press, 2019).

64 Kalmanovitz & Anaya, n 58 above, 34. Attempts to bring investigations also under the civilian jurisdiction have been largely unsuccessful.

65 ibid, 35. See further, Nill Sánchez, n 58 above, at 485–6.

66 Carlos Silva Forné, Catalina Pérez Correa, Rodrigo Guitérrez Rivas, "Índice de letalidad 2008–2014? Menos enfrentamientos, misma letalidad, más opacidad", *Perfiles Latinoamericanos* 25 (2014), available at https://perfilesla.flacso.edu.mx/index.php/perfilesla/article/view/544.

67 It only surpassed that of the Army during 2013.

seriously by the relevant authorities. By contrast, "the vast majority of cases on lethal use of force are not investigated under the presumption that they occurred in a context that legitimizes them."[68] Furthermore, the raise of military power incentivizes organized armed groups to get more powerful weapons and resort to even more violent tactics.[69] In Mexico, the total number of intentional homicides increased 250 % over the ten years since the military first got involved in the fight against the cartels. As Clapham has recently argued, the logic, discourse and conceptual apparatus of war make it much harder to establish and demand respect for fundamental rights, including notably those of innocent bystanders.[70]

There are a number of sources indicating that resort to military action, 30
which as we have seen is governed *de jure* or *de facto* by IHL rules, has entailed other serious violations of human rights.[71] In Peru, for instance, militarization has been directly correlated with forced displacements, torture and looting.[72] In Colombia, this type of approach has notably led officials to justifying the killing of children belonging to armed groups, when they died in the context of attacks against guerrilla compounds.[73] In Mexico, the significant number of deaths in clashes with "perfect lethality" (that is, with only dead and no wounded) signals the existence of summary executions.[74] Executions have also been documented in Honduras, Brazil, El Salvador and Guatemala. In sum, then, this approach has led to significant claims of human rights violations in Mexico, Colombia and Perú (and other parts

68 Silva Forné et al, n 66 above.

69 n 38 above.

70 Andrew Clapham, *War* (2021), "Conclusion".

71 This argument assumes, as it is currently generally acknowledged, that International Human Rights Law continues to apply during armed conflict, albeit with certain adjustments. See, inter alia, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, para. 106; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, para. 106. See, further, Human Rights Committee, General Comment No 31, "Nature of the General legal Obligation Imposed on States Parties to the Covenant", CCPR/C/21/Rev.1/Add.13, 2004, para. 11. See, further, Sivakumaran, n 39 above, 83. The view, however, is not unanimous. See, e.g., B. Browning, "Fragmentation, *Lex Specialis* and the Tensions in the Jurisprudence of the European Court of Human Rights," *Journal of Conflict & Security Law* 14 (2009), 485.

72 See, e.g., Yasmin Calmet & Diego Salazar, "VRAEM: Políticas de Seguridad Pública en Zona de conflicto", *Cuadernos de Marte* 4(5) (2013), 169

73 See, e.g., https://www.bbc.com/mundo/noticias-america-latina-56261428.

74 n 35 above.

of Latin America) connected precisely to this type of resort to military or lethal force.

IV. Drawing some conclusions

31 Feminist critiques of the law have long argued that despite the fact that laws often do not formally distinguish between men and women, they do not operate equally to protect them "from those harms they are *in fact* more likely to suffer".[75] This present contribution suggests that the legal principles that are typically applied to assess resort to lethal force in Latin America show a pervasive bias against women. The requirements of an actual or imminent threat, just as those of a necessary and proportionate response are applied in unsound ways to women who resort to force against structural violence. Similarly, the evidentiary threshold often required of women is very high. Finally, even in cases in which domestic courts have ultimately vindicated the defensive force of women, this vindication came after long judicial processes, in which women were often incarcerated, or subjected to severe restrictions, as well as convictions by lower courts. By contrast, men facing patterns of structural violence are afforded far more permissive legal rules and their judgment concerning the threat they are facing is typically trusted. Virtually no prosecutions are brought about against them.

32 It may be objected that the different treatment given to two situations is explained by the fact that in one of them individuals act on behalf of the state while in the other they act privately. Under this interpretation, it is the concern about private individuals taking other people's lives that accounts for the more stringent requirements imposed upon them. I find this objection unpersuasive. For one, it replicates the standard biased separation of the private and public sphere, which has traditionally been functional to the oppression of women. As Charlesworth and Chinkin have influentially argued, the separation between the private and the public domains has worked to obscure the violation of women's fundamental rights (gender violence, but also sexual equality, reproductive freedom, and economic rights), while making visible the rights violations suffered overwhelmingly

75 Hillary Charlesworth & Christine Chinkin, "The Gender of Jus Cogens", *Human Rights Quarterly* 15 (1993), 75 (my emphasis).

by men (torture, murder, arbitrary detention, etc.).[76] Accordingly the claim that certain rights violation belong on the public sphere whereas others are merely private seems to conceal precisely the type of bias this chapter claims it is operating in this type of situation.

33 Furthermore, and as indicated above, if anything the security forces should be under more stringent requirements to use force than private individuals; they are generally required to endure greater risks.[77] Now, the reason why the rules on permissive force have been relaxed with regards to public forces is allegedly that they face situations of structural violence that put them under constant threat. However, this is precisely the reason why women should be afforded as a matter of principle at least as much leeway as that conferred upon men fighting organized crime, and certainly not significantly less. Indeed, just like men in the security forces facing organized criminal/armed groups, or even more so, there is overwhelming empirical evidence showing that women in the region who face this type of threat have no alternative means of protection they can effectively resort to.

34 Put more clearly, many Latin American legal systems are largely operating on the general assumption that women who are alone, at the mercy of stronger victimizers, in places hidden from the public eye, have to exercise significantly more restraint, endure greater levels of risk, and face much more serious legal consequences than men who have received training, are equipped with powerful weapons, and have the military and legal apparatuses of the state backing them up. Given the harmful implications that militarization of responses to organized crime has had throughout the region, and particularly vis-à-vis innocent bystanders, the treatment imposed by most domestic courts on women fighting to protect their lives, dignity and sexual autonomy can only be the result of deep, indefensible bias.

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