GROUNDS FOR EXEMPTION. SELF-DEFENSE: 1. Excess self-defense: exclusion of the culpable figure. 2. Subjective component, assessment. 3. Justified *actus reus*. Homicide. Mistake of fact.

1. Homicide by excessive legal defense (Art. 35 of the Criminal Code) must be deemed voluntary, since the actions of the party intending an act - using an appropriate means for this purpose - cannot be adjudged as not having been produced; even less so when an injurious outcome is the alternative, as it is unacceptable for behavior to be reproached following a culpable breach of duty of care. (*)
2. Any situation of need will always entail a subjective component, as instead of demanding a reasoned and prior process of decision and action, we must accept that this is a semi-instinctive reaction (Art. 34, subs. 6 of the Criminal Code) provoked, particularly in violent crimes, by the fear of being killed or suffering physical injury. It is essential that this component is assessed together with the objective comparison of the legal rights at stake.
3. Assault, or the threat thereof, where an aggressive man is in possession of a sharp weapon of sufficient significance against a repeatedly abused female with battered woman syndrome allows us to consider the *actus reus* of voluntary homicide as justified and, therefore, lawful in the event that the latter should act by firing a loaded weapon with the rational necessity of an adequate means of preventing attack, and even where doubts exist over whether an attack had actually been initiated, such behavior is excusable given that this belief of being attacked led to an inevitable mistake of fact (over the existence of allegations of fact).

National Criminal Court Chamber IV (Def.) -Campos, Escobar, Valdovinos- (Sent. "A", Sect. 1)
c. 38,759, PIPERNO, María A.
Rsp: 4/18/91.

Cited: (*) Zaffaroni, Eugenio, "Tratado", T. III, p. 642; Bacigalupo, "Tipo y error", p. 52; Donna, E., "El exceso en las causas de justificación", Astrea, p. 89; Ramos Mejía, "Un posible caso de error de prohibición indirecto", L.L. T. 1975-A, p. 182 and Jeschek, "Tratado", T. I, p. 671/2.

Buenos Aires, April 18, 1991

WHEREAS: To resolve the appeal filed against the judgment on pp. 512/521;

Dr. Campos said:
These proceedings have reached the court in view of the appeal filed by the District Attorney against the judgment on pp. 512/521 absolving the accused, Piperno, and the Attorney General therefore deems, on pp. 533/535 of his appeal, that although the fact, the authorship and the criminal liability of the accused have been proven, the latter, according to his interpretation of culpability, must be deemed culpable for the purposes of the sentence passed, since, in his opinion, although the accused acted in self-defense, excessive force was used, and applying Article 35 of the Criminal Code, he pleads for a sentence of two years in prison, which should be held as completed given the time of detention suffered. The defense improves its legal basis on pp. 539/541, requesting that the transferal solution adopted by the trial court be confirmed, and that the plea of the Attorney General be rejected, as he deems the behavior of his client to have been fully justified.
In this respect, the matter before this court does not relate to the occurrence of the fact that the accused caused the death of her domestic partner Miranda as a result of two gunshots that proved lethal, striking her in the abdomen, whereas a third gunshot was untoward, which were fired by the accused, who had been mandatorily sent to obtain and load the weapon by her partner the previous day, having left it on a shelf at the exit of the bathroom.
The matter called into question by the Representative of the Public Prosecutor's Office in this case, in view of the recognition that Piperno was the author of the above mentioned action, is the legal nature of the committed *actus reus* of homicide, based on the fact that the court believed the death to be the consequence of a provoked reaction provided for in Article 34, Subsection 6 of the Criminal Code, and he maintains that, as stated above, her actions in the emergency situation were unlawful as she failed to meet the requisite of the rational requirement for employing said means; in other words, any excess in the justification, which our law (although this is under dispute) resolves by referring to offenses when these are incorporated into the law and within this, limited, scope.
In my view, it is not immediately evident from the legal text, or the declaration of purpose and parliamentary debate, whether the conduct is willful or otherwise, other than from the opinion of Herrera, cited by Morena without any explicit stance being taken in respect of whether, in these circumstances, the

action should framed as the criminal offense provided for in Art. 79 or Art. 84. If, as our former Attorney General claims in his prosecution document, the action is framed within the latter regulation, then the criminal charges are not based on an unlawful *actus reus* of the party, but rather on a reckless offense; in the case before us, I cannot see how it could be accepted that the woman acted blamefully, but not intentionally, if she pulled the trigger of a firearm that she knew to be loaded and useful for preventing the unlawful attack to which she claims to have been subject, on the assumption that her version of events is correct, or which she feared may have resulted. This gives added vigor to my own personally held concept of both elements of the offense, and does not constitute culpability as defined by traditional doctrine (according to Zaffaroni, "Tratado", T. III, p. 642; Bacigalupo, "Tipo y error", p. 52; Donna, E., "El exceso...", Astrea, p. 89; Ramos Mejía, "Un posible caso...", L.L. T. 1975-A, p. 182).
If the outcome were portrayed as a possible intentional act (albeit incidental) of homicide (if she fired two shots at a person, she cannot hide behind the excuse that this was not so, because it would occur to anyone that the result could be the possible damage to body and health); and if by analyzing this intentionality, we find that she was motivated by an instinctive (emotional) reaction to the attack, or fear of being stabbed by the victim, it would be remiss of me to rule that this conduct was not intended to kill and, if we consider this as an alternative at the very least, since we know that she is able in the weapon's use, this conduct shall then be called to account as a violation of the duty of care under any of the offenses for which blame can be identified under Article 84 of the Criminal Code.
Clearly, this does not imply that we should discredit the coherence of thought of Ricardo Núñez, and there are many who will share the same or a similar understanding by conceiving this intentionality to be outside of criminal law, although I am of the opinion that, in these circumstances, as our colleague Donna states in his work cited above (p. 99), "if the party perpetrates an excess due to negligence or recklessness, this may be framed under Art. 35 of the Criminal Code, but the negligence or recklessness committed shall have to be clarified.
I shall not proceed to further doctrinal consideration on whether the issue of Art. 35 should be resolved from the perspective of avoidable error or another matter of lesser unlawfulness - with both (Bacigalupo and Zaffaroni) agreeing that the excessive conduct is intentional - otherwise my vote shall read as a monograph, which would be improper in a legal judgment. I shall merely state why I cannot accept the theory of the public prosecutor. Because the legislature did not take fear, dread or perturbation into account (cf. Donna, p. 96), and although I believe this to be the reason for the excessive force and the time restrictions (Jeschek, "Tratado", T. I, p. 671/2), in my view, this is a particular case of intensive and extensive error of prohibition, and I do not share the distinction made by the German author cited above in relation to its separate treatment depending whether we are dealing with a conscious or unconscious act (I make the proviso that, rather than using the original terminology, I refer to that translated into Spanish by Mir Puig). Furthermore, Art. 33 of the German Code (C. Penal Alemán -Parte General- Ed. Depalma) expressly sets forth a presumption in law (iuris et de iure) - for hypotheses covered by this regulation - for inexorable error of prohibition, thus exonerating the sentences of those to whom this applies.
In my opinion, we should strengthen our law by extending this premise of fear to the cases held in account by the legislature when drafting Art. 35 of our Criminal Code, which, as we know, is a response to the Italian Code, and therefore the controversy that arose from the differing opinions of Carrara and Impallomeni, are also valid in its regards.
Nevertheless, despite maintaining the criminal nature of the offense, Soler ("Derecho Penal Argentino", T. I, p. 426) discusses the fear produced in the self-defending party in these circumstances.
This is relevant insofar as any situation of need (including self-defense), will entail a subjective component, as in any permissive circumstance, whereby a reasoned and prior process of decision and action cannot be expected, and we must instead accept that this is a near instinctive reaction (as in Art. 34, subs. 6) provoked, particularly in so-called violent crimes, by this fear of being killed or suffering physical injury. Since, in my opinion, this psychological ingredient is essential to rule on any justifying factor, as is an objective comparison of the legal interests at stake, it is my belief that the case under study does not constitute one of excessive force, since no error is admitted by the accused and her representative, and she merely seeks the allowance of the right to intentionally act in an unlawful way in the face of a fearful unlawful attack of the deceased; thus giving rise to what Nino ("La legítima defensa", Astrea, T. 172) - in contrast to the grounds set forth by Soler and Bacigalupo - has styled "emotional self-defense", an assumption which is not entirely rejected in the conclusion (p. 175) that "when fear cannot entirely exclude the intention of her actions and we are confronted with a homicide...",
At this point, we find ourselves facing a further alternative: that the accused may have acted intentionally but, rather than using excess force, was merely in a state of violent excitement, which the circumstances of all precedents - including those mentioned above by the Representative of the Attorney General's

Office - admit could make the action excusable; and the opposition stated by the defense regarding the prohibition of the *reformatio in peius* in the event that the conduct of his client should be characterized as such, expressing the right therein to extraordinary federal legal remedies, as is logical, although it is my belief that the defense had considered the simple mode of trial, provided for in the aforementioned Art. 79 of this Law, as it was indeed categorized by the Trial Court, rather than this attenuated process
This leads me to ask: If the public prosecutor modifies the framework under which it is processed in the trial court, and this offense carries a maximum sentence of three years and recusal, can the Chamber agree to adapt the sentence to another offense such as that established in Art. 81, subs. 1 of the Code, which authorizes the rendering of a similar sentence? Also, if a two-year prison sentence is recommended in the prosecution document, can we - the judges in the appeal - accept this adaptation, but pass a three-year sentence, subject to authorization, of course, by the law?
Personally, I am of the opinion, in accordance with the provisions of Case 30,836 "Rocchia", resolved on 4/17/86, that once the trial has been opened, if there is no change in the facts subject to debate during the proceedings, and if the offense can be situated in the regulatory framework of the basic felony, trial judges cannot be restricted by the punitive provisions specified by the Attorney General, particularly so when we consider that such a restriction is not placed upon sentencing judges, as established with due reason in doctrine and case law, since sentencing trials are an obligated consequence of proceedings to determine culpability, and it is here that the gravity of this modern (although still disputed) guarantee of modern criminal law (now expressly enshrined in Spanish law) is evaluated. I have asserted on repeated occasions that its, albeit tacit, adoption is provided for in Arts. 18 and 19 of the Constitution (cf. L.L. 4/14/88, judgments reproduced therein).
A very specific case is presented here, since if we appreciate the emotional state of the victim (which is subjective following analysis of the permissive regulation), we are also accepting that if such state existed, and if it manifested itself as such, it may have clouded - leaving no space for understanding and self-control - her judgment, since all behavior prior to the killing, which has been analyzed in detail by the lower court, leads us entirely to consider the existence of this state to be excusable at the time of the event, given that it is not essential for a threat to occur for a built-up emotional overload to explode even in much less serious circumstances, which would be the case of an assault, or at least the threat thereof (I am convinced there was), with a sharp, sufficiently powerful weapon in the hands of an - in all likelihood aggressive - man, facing a repeatedly abused woman with clear battered woman syndrome.
It is my view that, as the sentencing judge says, Piperno had reason to believe that she could be seriously hurt, even under the least generous of hypotheses, and to be afraid of being attacked with the sharp instrument in the possession of Miranda, albeit hidden away in the bedtable (of no interest), since she had already wounded Benítez (p. 63) previous. This belief, which could be erroneous, would also make her behavior excusable as an inevitable error of prohibition (based on the existence of assumptions of fact of a justifying factor), thus excluding her from the criminal charge of culpability.
However, I am inclined to believe, sharing the view of the judge and the strong grounds set forth in his sole Considering clause (although it reads A and B) in the judgments rendered, which I hold as reproduced herein for reasons of brevity, that the *actus reus* of voluntary homicide was justified and, therefore, lawful, as she acted in accordance with the rational need to use a suitable means in order to - at the very least - stop the attack. I cannot be sure of whether the attack had begun or not, since there is only one witness - the accused - who has no injuries that suggest the aggression of her attacker, although it is possible that she may have had if she had not acted in self-defense.
In my view, only three uncertainties remain: first of all, the convenience location in which the accused was told by the victim to hide the revolver; secondly, the victim's command that she load it with bullets, and; thirdly, her mental faculties, which the report on pp. 468/469 and, particularly, that on pp. 473/477 suggest are in excellent condition on the basis of psychological techniques (including the Rorschach test), which the lower court did not pause to analyze. Added to this is a further uncertainty regarding the circumstances in which the accused, armed, defended two male witnesses of whom the deceased was jealous, in her own words, who could have dissuaded her after the knife was brandished and, as Dr. Nicholson states, could have remained quiet and left, rather than staying and remaining vulnerable to what later, according to the accused, occurred, with the initiation of an attack by Miranda or, at least, the brandishing of a sharp instrument in a threatening way.
However, in the absence of decisive incriminatory evidence, as stated by the Attorney General, these doubts are not sufficient to prove beyond any reasonable doubt the unlawfulness of the fact and, by consequence, the responsibility on the part of the accused, and a split confession of judgment cannot be issued.
Moreover, alternative responses can be given to these questions. For the first and second questions: that it

was a way of intimidating her partner even more, by letting her know that the gun was loaded and could be used against her; and for the third: that it was this anomalous personality that led her to be subject to battered woman syndrome. If she had been of a healthy emotional state, she would not have chosen this subject as her partner, and in the event of having been deceived through a clever cover-up of her sick mental condition, she would have abandoned him after receiving the first blows, or would at least have gone to the police or her family, which she did a month prior to the event, although she remained with her partner.
The sadomasochistic relationship entered into by this woman requires special treatment since, as Miotto de D'Andrea comments, we cannot universally defend the weakest members of all couples in this way, since, in doing so, we would establish a new form of resolving emotional conflicts and homicides. It is my view that this aspect was not properly examined by Piperno in this case due to the difficulties in getting persons affected by such anomalies to recognize their - particularly emotional - failings and having them receive treatment from the appropriate persons, notwithstanding the lack of sufficient economic means to facilitate this treatment, as well as the lack of availability of the sparse funds that do exist. This is a sufficient illustration of a terrible issue that is becoming increasingly common, and extending at an alarming rate to abused minors, who - as victims - are even more innocent and powerless towards this kind of widespread violence that has arisen in modern societies, which claim to be developed: an image that visual media makes sure to enhance. Although gaps exist in the reconstruction of the events, it is my view that the homicide examined herein should be considered as justified in accordance with the guidelines established in Art. 34, subs. 6 of the Criminal Code, and as required by the provisions of Art. 13 of the C.P.M.P. in view of the evidentiary failings noted by the Representative of the Attorney General's Office in the appeal.
In view of the foregoing, I vote: That the ruling of pp. 512/521 be confirmed in all its parts, with no award of costs in this instance.

Dr. ESCOBAR and Dr. VALDOVINOS said: That they are in conformance with the vote above.

On the quality of the Agreement that precedes the Tribunal, it is hereby RESOLVED:
That regulatory item I of the ruling on pp. 512/521 absolving María Ana Piperno of voluntary homicide be confirmed, with no costs awarded...

EDUARDO A. VALDOVINOS
ALBERTO A. CAMPOS
LUIS A. ESCOBAR