

War Criminology

Exploring Dimensions, Addressing Challenges

Conference Proceedings

Faculty of Law, University of Porto
2024

Eds.

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Conference: 22nd July 2024

Proceedings: 5th December 2024

Research Project

Crime and Justice Administration in the Portuguese Colonial War (1961-1974): Exploratory Analysis of the Criminal Proceedings against Combatants of the Portuguese Armed Forces in Angola, Mozambique and Guinea-Bissau.

Founded by FCT; Ref. 2022.05692.PTDC; DOI 10.54499/2022.05692.PTDC

Foreword

The Proceedings of the International Conference *War Criminology: Exploring Dimensions, Addressing Challenges* compiles the contributions presented during the event held on July 22, 2024. The conference featured the presentation of preliminary results from the InJUSTiceWar project, funded by FCT (Ref. 2022.05692.PTDC; DOI 10.54499/2022.05692.PTDC) and provides a venue to host a series of contributions addressing the issue of war-related crimes, as well as their implications and impacts across different domains.

By promoting multidisciplinary reflections, the Conference aimed to underscore the multifaceted nature of phenomena arising from the intersection of war and crime, while deepening the understanding of their impacts, complexities, and the strategies for addressing issues related to armed conflicts and their criminal dimensions. Through presentations and discussions, the event sought to foster collective reflection on how armed conflict challenges conventional approaches to issues at the nexus of war and crime. This focus invites us to reconsider how crimes are addressed within this unique context, framing war as a distinct domain for criminological inquiry, as emphasized by the conference theme: *War Criminology: Exploring Dimensions, Addressing Challenges*.

Criminology has long sought to understand the relationship between war and crime, a topic that has increasingly gained prominence in interdisciplinary debates, transcending the traditional boundaries of the discipline (Jamieson, 1998, 2017; Sparks & Loader, 2012; Hagan & Rymond-Richmond, 2009; McGarry & Walklate, 2015; Aydin-Aitchison et al., 2023). Despite repeated calls to position war as a central focus of criminological research, the study of war remains marginal within the field. This gap was the central theme of the conference *War Criminology: Exploring Dimensions, Addressing*

Challenges, which aimed to convene diverse perspectives on the complexities of war-related crimes and their broader implications, more than twenty-five years after Ruth Jamieson's seminal call to integrate the study of war into criminology.

The conference proceedings aim to capture this moment and contribute to the ongoing exploration of establishing War Criminology as a distinct field. This volume compiles all the abstracts and the majority of presentations delivered at the conference, reflecting the diversity of topics and discussions explored. We hope it inspires further reflection on the potential for developing War Criminology as a specialized area of study.

The success of this conference¹ and the publication of these proceedings would not have been possible without the support of various institutions. We extend our heartfelt gratitude to the Foundation for Science and Technology (FCT), whose funding made the InJUSTiceWar Project (Ref. 2022.05692.PTDC; DOI 10.54499/2022.05692.PTDC) a reality. We also wish to express our sincere appreciation to the Faculty of Law of the University of Porto (FDUP), the Centre for Interdisciplinary Research on Justice (CIJ), the Military Historical Archive (AHM), and the Portuguese Army (Exército Português) for their invaluable collaboration and support in organizing this event. Finally, we thank all the speakers and participants for their contributions, which were essential to the success of the conference and to the richness of the papers included in these proceedings.

¹ The Conference Programme, with the abstracts of the communications, is available [here](#).

Bibliography

Aydin-Aitchison, A., Buljubašić, M., & Holá, B. (2023). Criminology and atrocity crimes. In *Oxford Handbook of Criminology*. Oxford University Press. <https://www.research.ed.ac.uk/en/publications/criminology-and-atrocity-crimes>

Jamieson, R. (1998). Towards a criminology of war in Europe. In V. Ruggiero, N. South, & I. Taylor (Eds.), *The New European Criminology: Crime and Social Order in Europe*. Routledge.

Jamieson, R. (2017). *The Criminology of War*. Routledge.

Ross McGarry, & Sandra Walklate. (2015). Introduction. Placing war within criminology. In *Criminology and War: Transgressing the Borders* (Sandra Walklate, Ross McGarry). Routledge.

Sparks, R., & Loader, I. (2012). Situating Criminology: On the Production and Consumption of Knowledge About Crime and Justice. *The Oxford Handbook of Criminology*, 139–140.

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Conference Proceedings

Crime e Administração da Justiça na Guerra Colonial Portuguesa (1961-1974): Análise Exploratória dos Processos-Crime Instaurados a Combatentes das Forças Armadas Portuguesas em Angola, em Moçambique e na Guiné-Bissau

Crime and Justice Administration in the Portuguese Colonial War (1961- 1974): Exploratory Analysis of the Criminal Proceedings against Combatants of the Portuguese Armed Forces in Angola, Mozambique and Guinea-Bissau

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² This work was supported by FCT – Fundação para a Ciência e Tecnologia, I.P. by project reference 2022.05692.PTDC and DOI identifier <<https://doi.org/10.54499/2022.05692.PTDC>>.

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Pedro Sousa holds a PhD in Economics from the University of Lisbon (ISEG, 2007). He is a professor at the Faculty of Law of the University of Porto, where he serves as the Director of the School of Criminology. He was a member of the Executive Board of the European Society of Criminology and is currently a member of the European Working Group on Organizational Crime (EUROC) and the European Working Group on Organized Crime and Criminal Networks, both under the European Society of Criminology. His research focuses on the economic analysis of law, economic and financial crimes, the costs of crime, criminal networks, domestic violence, and the evaluation of interventions within the justice system.

Nesta comunicação serão apresentados alguns resultados preliminares do projeto *Crime e administração da justiça na Guerra Colonial portuguesa (1961-1974): análise exploratória dos processos-crime instaurados a combatentes das Forças Armadas Portuguesas em Angola, em Moçambique e na Guiné-Bissau (InJUSTiceWar)*.

Para o projeto *InJUSTiceWar* é um enorme privilégio podermos apresentar esses resultados e, ao mesmo tempo, refletir sobre os mesmos com investigadores de outras origens que irão partilhar connosco os seus conhecimentos sobre pesquisas que relacionam, de múltiplas formas, a Guerra e o Crime.

Em nome da Equipa do projeto e da Faculdade de Direito da Universidade do Porto desejamos que esta conferência seja o início de outras colaborações que permitam à Criminologia *Explorar Dimensões e Enfrentar Desafios* que se lhe colocam quando se pensam os crimes cometidos em contexto de guerra, tal como sugere o título da nossa conferência.

O *InJUSTiceWar* é um projeto exploratório, financiado pela Fundação para a Ciência e Tecnologia e acolhido na Faculdade de Direito da Universidade do Porto, com início a 12 de março de 2023 e conclusão a 11 de dezembro de 2024. Esta investigação surgiu de uma questão que merecia a nossa reflexão. Sabendo que a guerra é um contexto singular de oportunidades para o crime queríamos perceber como a justiça portuguesa teria lidado com os factos criminosos cometidos por combatentes das forças armadas ao longo daquele conflito.

A pesquisa dedicada a analisar este tipo de fenómeno tem indicado que os combatentes de forças envolvidas em conflitos armados têm, com frequência, comportamentos para lá das leis e costumes da guerra (Alvarez, 2016; Jamieson, 2014; Mullins, 2016; Mullins & Visagaratnam, 2015; Walklate & McGarry, 2015). Partindo desse pressuposto, Portugal não poderia ser uma exceção. Consequentemente, a Guerra que travou em África teria obrigado a que a administração da justiça portuguesa da época tivesse

de responder aos factos criminosos que pudessem ser cometidos por alguns dos cerca de 800.000 combatentes das suas forças armadas, espalhados por três territórios, situados a milhares de quilómetros do Portugal continental, ao longo de treze anos de conflitos. Foi no Arquivo Histórico Militar que começamos a procurar pistas para responder a estas inquietações o que, alguns anos mais tarde, resultou neste projeto.

Os documentos do Arquivo Histórico Militar permitiram, antes de mais, verificar que, desde o início da Guerra de independência de Angola, iniciada em 1961, a administração da justiça portuguesa não ignorou os crimes que foram praticados por membros das suas Forças Armadas. Os documentos demonstram como, ao longo de treze anos de guerra, a justiça portuguesa foi executada ao abrigo do Código de Justiça Militar e do Código Penal vigentes na época, no âmbito dos Tribunais Militares Territoriais das respetivas jurisdições. Os mesmos documentos evidenciam como foram instaurados milhares de processos-crime, após terem sido apresentadas queixas-crime, que determinaram o início das respetivas investigações criminais.

Quando começamos a analisar esses processos verificamos que os crimes indiciados são diversos: muitos são crimes essencialmente militares, tais como a traição, o abuso de autoridade, a insubordinação, as violências militares, a deserção; outros são crimes comuns, como ofensas corporais, homicídios voluntários e involuntários, roubos, entre outros.

Grande parte das investigações que têm sido desenvolvidas sobre crimes cometidos em tempo de guerra tendem a privilegiar a análise de crimes configurados no âmbito do Direito Internacional, isto é, do crime de genocídio, de crimes contra a Humanidade, de crimes de guerra e do crime de agressão, bem como de crimes essencialmente militares (Glennon, 2005; Lea, 2015; McEvoy, 2007; Teitel, 2014a).

Essas investigações são inquestionavelmente fundamentais para se entenderem as mais graves violações em matéria de direitos humanos,

codificadas no Estatuto de Roma do Tribunal Penal Internacional. Contudo acreditamos que não são suficientes e podem até não ser adequadas para interpretar outros crimes cometidos em tempos de guerra, e muito menos para entender esses fenómenos quando perpetrados em contexto de guerras subversivas. Decidiu-se, então, que investigar a forma como a administração da justiça portuguesa tratou os crimes comuns cometidos por combatentes numa guerra considerada não convencional, seria um objeto de estudo que poderia contribuir significativamente para ampliar o conhecimento produzido sobre estas problemáticas.

Assim o projeto *InJUSTiceWar* analisa exclusivamente a forma como a administração da justiça interpretou os crimes contemplados pelo Art. 4º do Código de Justiça Militar vigente na época, que correspondem aos crimes que “[...] por violação da lei geral, cometidos por militares ou outras pessoas ao serviço do exército ou da armada [sejam] aplicáveis as disposições do Código Penal [...].” Convém esclarecer que, segundo aquele Código de Justiça Militar, esses crimes eram “[...] sempre punidos com as penas determinadas pela lei geral, ainda que julgados pelos tribunais militares” (Art. 16.º do Código Penal Português de 1884).

Consequentemente, o nosso universo inclui apenas os processos-crime instaurados a membros das Forças Armadas por alegadamente terem cometido crimes comuns. Tivemos de excluir, logo à partida, alguns dos processos-crime preservados no Arquivo Histórico Militar por terem informações omissas, nomeadamente os processos onde não foi possível identificar o ano de abertura dos mesmos. Tomamos também a decisão de excluir os processos que foram instaurados em Moçambique. Isto porque o AHM tem apenas quarenta e quatro processos provenientes desse território, por motivos que ainda estão por apurar e que não cabe aqui discutir³.

³ Para algumas informações adicionais sobre este assunto, consulte-se: Rodrigues, F. (2017), pp. 84-85.

Excluímos-os porque o efetivo existente não permite análise em virtude da sua reduzida dimensão.

Partindo do acervo preservado no Arquivo Histórico Militar, o *InJUSTiceWar* pretende, então, indagar como é que os factos criminosos, alegadamente cometidos por combatentes das Forças Armadas Portuguesas, foram interpretados pelos Tribunais Militares Territoriais de Angola e da Guiné, ao longo da guerra colonial (1961-1974).

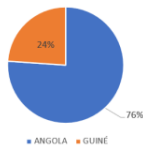
Trata-se de uma pesquisa documental, focada nos processos-crime disponíveis nesse Arquivo, com recurso a uma metodologia que permitirá caracterizar os factos criminais, os ofensores e as vítimas; identificar os procedimentos, e as decisões tomadas pela administração da justiça; captar factores estruturadores de decisões tomadas pela administração da justiça ao longo da tramitação processual; e identificar e testar a importância de factores legais e extra-legais relacionados com as decisões identificadas.

A interpretação desses dados está em curso. Nesta conferência apresentamos apenas alguns resultados preliminares desta pesquisa exploratória que estão a ser objeto de análise e cujos resultados serão divulgados no final do projeto.

Arquivo histórico-militar, Lisboa. (1961-1974)

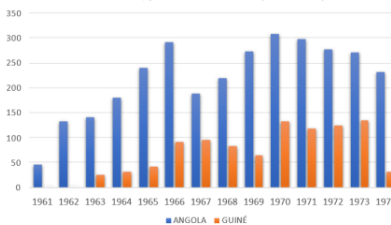
PROCESSOS

Angola	3100 (76,4%)
Guiné	974 (23,4%)
Total	4074



Moçambiqueefetivoinsuf . Processossemdata:14

Processos, por ano e território (1961-1974)



Angola: Por ano: M=210 (DP=85,6, CVR=,41)

Guiné: Por ano: M=65 (DP=49,8, CVR=,77)

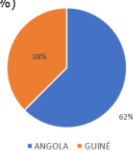
Este projeto beneficiou da existência de um acervo de processos-crime instaurados a militares em serviço nos conflitos que decorreram em Angola (1961-1974) e na Guiné (1963-1974), que se encontram preservados no Arquivo Histórico-Militar de Lisboa.

A maior parte do acervo respeita a crimes cometidos em Angola (76,4%), com uma média de 210 processos por ano. À Guiné cabe um menor número total de processos e uma média anual de 65.

Arquivo histórico-militar, Lisboa.
(1961-1974)

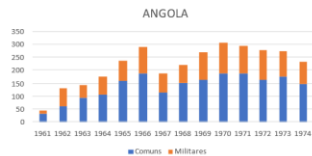
CRIME PRINCIPAL (comuns, militares)

Angola 3082 (76,0%) (omissos18)
Guiné 974 (24,0%)
Total 4056



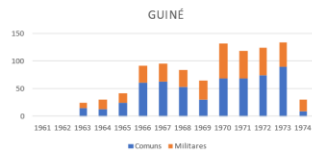
Alguns processos com mais do que 1 crime:

- Angola: 21,9% processos= 2 ou mais crimes
- Guiné: 6,9% processos= 2 ou mais crimes



Angola: Por ano: M=220,1 (DP=75,8, CVR=,34)

Guiné: Por ano: M=81,2 (DP=41,5, CVR=,51)



Em Angola, quase 22% dos processos dizem respeito a situações de dois ou mais crimes. Na Guiné, essa proporção é menor (6,9%).

Arquivo histórico-militar, Lisboa.
(1961-1974)

**CRIMES
MAIS FREQUENTES**

Angola

- COMUNS
 - Ofensas corporais involuntárias
 - Furto
 - Homicídio involuntário
 - Ofensas corporais voluntárias
 - Crimes contra a segurança do Estado
 - Burla
 - Detenção de arma proibida
 - ...
- MILITARES
 - Deserção
 - Insubordinação
 - Extraviado de objetos militares
 - Infidelidade militar
 - Crimes contra o dever militar
 - Abuso de autoridade
 - ...

Guiné

- COMUNS
 - Ofensas corporais involuntárias
 - Homicídio involuntário
 - Furto
 - Ofensas corporais voluntárias
 - ...
- MILITARES
 - Insubordinação
 - Deserção
 - Extraviado de objetos militares
 - Peculato militar
 - ...

A primeira grande classificação dos processos foi feita com base nos crimes, fazendo-se uma distinção entre os crimes comuns e os crimes militares.

Em Angola, de entre os crimes comuns, são mais frequentes os de ofensas corporais involuntárias, o furto, o homicídio involuntário, as ofensas corporais voluntárias, os crimes contra a segurança do Estado, a burla, e a detenção de arma proibida. De entre os militares, foram mais frequentes os de deserção, a insubordinação, o extravio de objetos militares, a infidelidade militar, os crimes contra o dever militar, e o abuso de autoridade.

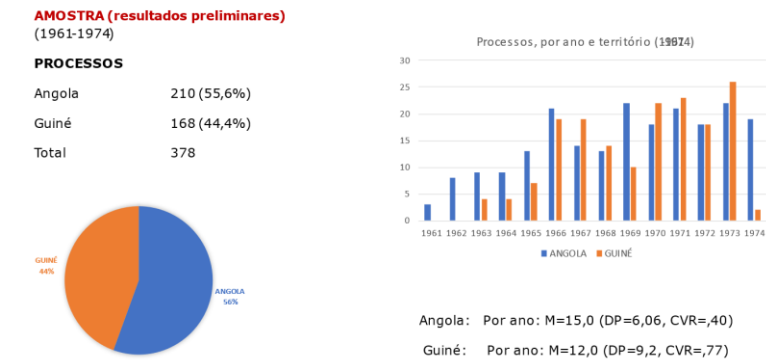
Na Guiné, as ofensas corporais involuntárias constituíram os crimes comuns mais frequentes, tal como ocorreu em Angola. Seguiram-se os crimes de homicídio involuntário, o furto e as ofensas corporais voluntárias. No que respeita a crimes militares, relevaram os crimes de insubordinação, a deserção, o extravio de objetos militares, e o peculato.



No desenvolvimento deste projeto, procurou-se analisar processos-crime relativos apenas a crimes comuns. Sendo impossível recolher informação sobre todos os processos-crime, no tempo disponível do projeto, optou-se por trabalhar numa amostra adequadamente selecionada com vista a se procurar um acervo representativo existente no Arquivo Histórico-Militar.

Após seleção dos processos, estes foram alvo de uma atenta análise e subsequente extração de informação por aplicação de uma grelha de recolha de dados, elaborada especificamente para esta tarefa mas que aproveitou do conhecimento acumulado anteriormente em outros projetos desenvolvidos por investigadores da Escola de Criminologia da FDUP.

Os dados recolhidos nos processos foram, depois, sujeitos a codificação e introdução numa base de dados criada com auxílio de software de análise estatística IBM SPSS Statistics v29. Seguiu-se uma análise preliminar de dados que permitiu encontrar dados inconsistentes e outros erros. A base de dados daí resultante foi sujeita a análise estatística descritiva e inferencial, o que permitiu testar algumas hipóteses de investigação, obtendo-se resultados discutidos, sobretudo tendo por base o contexto em que estas decisões foram produzidas.



Encontrámo-nos a meio da recolha de dados nos processos seleccionados no acervo total. Até este momento, a amostra é constituída por 378 processos, 55,6% deles correspondentes a Angola, o que significa a cobertura de uma média por ano de 15 processos prolatados pelos tribunais militares presentes naquele território, enquanto na Guiné a média anual foi de 12 processos sobre crimes comuns.

AMOSTRA (resultados preliminares)

(1961-1974)

ACUSADOS

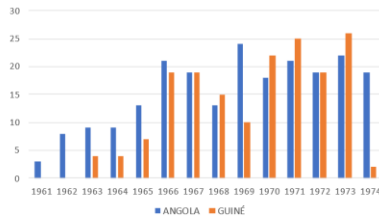
Angola 218 (55,9%)
Guiné 172 (44,1%)
Total 390



Nr. acusados >Nr. processos ? → Processos com mais do que 1 acusado:

- ANGOLA: 3 processos (2 / 3 / 6 acusados)
- GUINÉ: 3 processos (2 / 2 / 3 acusados)

Acusados, por ano e território (1961-1974)



Angola: Por ano: M=15,6 (DP=15,6, CVR=,40)

Guiné: Por ano: M=12,3 (DP=9,5, CVR=,77)

Em termos de acusados, os processos-crime que integram a nossa amostra são maioritariamente respeitantes a 218 réus em Angola.

AMOSTRA (resultados preliminares)

(1961-1974)

TIPO LEGAL DE CRIME (COMUM) NA ACUSAÇÃO

N.º de tipos legais de crime, por acusado	ANGOLA (N=218) N %		GUINÉ (N=172) N %	
1	190	87,2	169	98,3
2	28	12,8	3	1,7
	M=1,13 (DP=,32)		M=1,02 (DP=,12)	
N.º total de tipos legais de crime	246		175	

A grande maioria dos processos respeitou apenas a um tipo legal de crime na acusação, sendo de 246 o número total de tipos legais de crime em Angola e de 175 na Guiné.

AMOSTRA (resultados preliminares)

(1961-1974)

TIPO LEGAL DE CRIME (COMUM) NA ACUSAÇÃO**CRIMES COMUNS mais frequentes na acusação**

- Na ACUSAÇÃO
 - Ofensas corporais involuntárias 187 (47,9%)
 - Homicídio involuntário 104 (26,7%)
 - ...
- Na DECISÃO
 - Homicídio involuntário 71 (18,2%)
 - Ofensas corporais involuntárias 66 (16,9%)
 - ...

ANGOLA (n=218 acusados)

- NA ACUSAÇÃO
 - Ofensas corporais involuntárias 111 (50,9%)
 - Homicídio involuntário 60 (27,5%)
 - ...
- Na DECISÃO
 - Ofensas corporais involuntárias 64 (29,4%)
 - Homicídio involuntário 44 (20,2%)
 - ...

GUINÉ (n=172 acusados)

- NA ACUSAÇÃO
 - Ofensas corporais involuntárias 76 (44,2%)
 - Homicídio involuntário 44 (25,6%)
 - ...
- Na DECISÃO
 - Ofensas corporais involuntárias 31 (18,0%)
 - Homicídio involuntário 27 (15,7%)
 - ...

A amostra até ao momento permite já ter alguns resultados interessantes.

Quanto aos crimes mais comuns na acusação bem como na decisão, destacando-se as ofensas corporais e o homicídio.

AMOSTRA (resultados preliminares)

(1961-1974)

ACUSADO (RÉU)	ANGOLA (N=218)	GUINÉ (N=172)	Estatísticas/ Observações	
SEXO	MASCULINO	MASCULINO		
IDADE NA DATA DOS FACTOS	17-48 A; M=23,05; DP=3,20	20-35; M=22,86; DP=2,32	t(361)=-,595; p=,552	d = ,064
ORIGEM AFRICANA?	Não: 214 (98,6%) Sim: 3 (1,4%) Omissos: 1 (0,5%)	Não: 125 (72,7%) Sim: 47 (27,3%)	Chi-Sqr(1) = 57,652 p<,001 OR=26,821 (IC95%: 8,177-87,971)	V = ,385
ESTADO CIVIL	Casado: 33 (15,9%) Solteiro 174 (84,1%) Omissos: 11 (5,0%)	Casado: 29 (18,0%) Solteiro 132 (82,0%) Omissos: 11 (6,4%)	Chi-Sqr(1) = ,277 p=,599	V = ,027
INSTRUÇÃO ESCOLAR	Exame 2.º grau 113 (54,1%) ... Sabere escrever 5 (2,3%) Analfabeto 12 (5,5%)	Exame 2.º grau 61 (40,9%) ... Sabere escrever 2 (1,2%) Analfabeto 10 (7,0%)	Diversidade de situações Reduzido efetivo de analfabetos	

Os dados recolhidos permitem já uma comparação entre as decisões dos tribunais militares nos dois territórios.

Não existem diferenças significativas entre os dois territórios em termos de idade dos réus na data dos factos, nem no que respeita à instrução escolar. No entanto, em Angola é significativamente maior a proporção de réus de

origem não africana quando se compara com a Guiné, resultado este com significado estatístico.

AMOSTRA (resultados preliminares)
(1961-1974)

ACUSADO (RÉU)	ANGOLA (N=218)		GUINÉ (N=172)		Estatísticas/ Observações	
POSTO MILITAR	Soldado	147 (67,4%)	Soldado	124 (73,8%)	Necessária precaução na interpretação dos resultados a diferença efetiva entre categorias de posto militar não são estranhas diferenças de efetivo/obahs forças militares	
	1.º Cabo	38 (17,4%)	1.º Cabo	27 (15,7%)		
	Furriel Miliciano	18 (8,3%) 93,1%	Furriel Miliciano	9 (5,2%) 93,0%		
	2.º Sargento	3 (1,4%)	2.º Sargento	3 (1,7%)		
	2.º Sarg Miliciano	3 (1,4%)	Alferes Miliciano	2 (1,2%)		
	Alferes Miliciano	3 (1,4%)	Capitão	2 (1,2%)		
	Capitão	3 (1,4%)	Furriel Infanteria	2 (1,2%)		
	1.º Sargento	1 (0,5%)	Miliciano	2 (1,2%)		
	Alferes capitão	1 (0,5%)	2.º Sargento Milic.	1 (0,6%)		
	Tenente Coronel	1 (0,5%)				

Naturalmente, são as categorias mais frequentes nas companhias as que também se encontram mais representadas no total de réus.

Voltando a atenção para as vítimas, podemos constatar o que se apresenta na próxima tabela.

AMOSTRA (resultados preliminares)
(1961-1974)

VÍTIMA	ANGOLA (N=218)		GUINÉ (N=172)		Estatísticas/ Observações	
SEXO	Masc.	171 (83,4%)	Masc.	142 (83,0%)	Chi-Sqr(1)=,009; p=,923	
	Fem.	34 (16,6%)	Fem.	29 (17,0%)		
	Omissos	13 (6,0%)	Omissos	1 (0,6%)		
IDADE NA DATA DOS FACTOS	N=131 (60,1%) 2-63 A; M=25,21; DP=11,47		N=112 (65,1%) 4-65; M=26,42; DP=12,68		t(241)=,783; p=,217	
ORIGEM AFRICANA?	Não:	90 (57,3%)	Não:	57 (43,5%)	Chi-Sqr(1)= 5,453 P=,020 OR=1,744 (IC95%: 1,092-2,786)	V = ,138
	Sim:	67 (42,7%)	Sim:	74 (56,5%)		
	Omissos:	61 (28,0%)	Omissos	41 (23,8%)		
VÍTIMA É MILITAR?	Sim:	114 (54,8%)	Sim:	98 (57,6%)	Chi-Sqr(1)= ,306 P=,580	
	Não:	94 (45,2%)	Não:	72 (48,4%)		
	Omissos	10 (4,6%)	Omissos	2 (1,2%)		
ESTADO CIVIL	Casado/a:	34 (30,6%)	Casado/a:	24 (27,6%)	Chi-Sqr(3)= 1,083 P=,781	
	Solteir/a:	74 (66,7%)	Solteir/a:	61 (70,1%)		
	Viúvo/a:	2 (1,8%)	Viúvo/a:	2 (2,3%)		
	Separad/a:	1 (0,9%)				
	Omissos	107 (49,1%)	Omissos	107 (49,1%)		

A grande maioria das vítimas são do sexo masculino e não existem diferenças significativas entre os dois territórios.

A idade média das vítimas anda à volta de 25,21 anos nos casos de Angola e de 26,4 anos nos casos da Guiné, não tendo qualquer significado estatístico esta diferença.

Maioritariamente, as vítimas eram militares, em ambos os territórios.

Cruzando-se as características das vítimas com as características dos réus, conclui-se que não existe qualquer correlação entre as idades de ambos, que na Guiné, a vítima é significativamente mais velha do que o réu, enquanto nos casos de Angola, não é significativa a diferença entre ambos.

Na Guiné: Acusado de origem Africana significativamente associado a vítima de origem Africana.

Em Angola: inexistente qualquer relação entre acusado e vítima em termos de origem Africana

AMOSTRA (resultados preliminares)
(1961-1974)

ALGUNS RESULTADOS PRELIMINARES SOBRE RELAÇÕES ENTRE ACUSADO (RÉU) E VÍTIMA...	
Idade do acusado (réu) não está correlacionado com a idade do/a vítima	ANGOLA: $r=.162, p=.064$ GUINÉ: $r=.096, p=.369$
Mas, na GUINÉ: a Vítima é significativamente mais velha do que o acusado. Em Angola, não há diferença significativa.	ANGOLA: 25,2 (11,47) ...23,5 (3,85) $t(130)=1,69, p=.10$ GUINÉ: 26,0 (12,91) > 23,0 (2,67) $t(89)=2,206, p=.015$
Na GUINÉ: Acusado de origem Africana significativamente associado a vítima de origem Africana.	ANGOLA: $\chi^2-Sq(1)=2,721, p=.099$
Em Angola: inexistente qualquer relação entre acusado e vítima em termos de origem Africana	GUINÉ: Vítima N S Acusado N 46 44 S 11 30 $\chi^2-Sq(1)=6,757, p=.09. OR=2,851 (1,2756,378)$

No que respeita ao processo no tribunal e à decisão, é possível relevar o seguinte:

AMOSTRA (resultados preliminares) (1961-1974)

JUSTIÇA	ANGOLA (N=218)		GUINÉ (N=172)		Estatísticas / Observações	
CUMPRIMENTO DOS DEVERES DE INFORMAÇÃO- DEFENSOR	Sim	202 (95,7%)	Sim	167 (97,1%)	Angola e Guiné iguais	
	Não	9 (4,3%)	Não	5 (2,9%)		
	Omissos	7 (3,2%)				
CUMPRIMENTO DE DEVER DE INFORMAÇÃO- DIREITO AO SILÊNCIO	Sim	201 (95,3%)	Sim	167 (97,1%)	Angola e Guiné iguais	
	Não	10 (4,7%)	Não	5 (2,9%)		
	Omissos	7 (3,2%)				
PRISÃO PREVENTIVA	Sim	33 (15,6%)	Sim	24 (14,0%)	Angola e Guiné próximas	
	Não	179 (84,4%)	Não	148 (86,0%)		

Situações de PRISÃO PREVENTIVA em ANGOLA

- Homicídio 11
- Ocultação de cadáver 6
- Roubos e furtos 8
- Crimes sexuais 4
- Ofensas corporais involuntárias 2
- Burla 1
- Uso de estupefacientes 1

Situações de PRISÃO PREVENTIVA na GUINÉ

- Homicídio 12
- Furtos 2
- Crimes sexuais 3
- Ofensas corporais involuntárias 5
- Ameaça com arma de fogo 2

Em ambos os territórios foi cumprido o dever de informar o réu sobre o direito a ter defensor e o direito ao silêncio.

Foram registadas prisões preventivas numa proporção próxima entre os dois territórios, e à volta dos 15%, e especialmente para os casos que envolveram homicídios.

AMOSTRA (resultados preliminares) (1961-1974)

DECISÃO JUDICIAL	ANGOLA (N=218)	GUINÉ (N=172)	Estatísticas / Observações
TEMPO DA DECISÃO	M=8,59 meses (DP=11,80) Md= 5 meses	M=6,49 meses (DP=7,29) Md= 5 meses	Decisão mais demorada em Angola: $t(369,478)=2,168, p=.031$. $d=.210$
CONDENAÇÃO DO RÉU	143 (65,6%)	89 (51,7%)	Taxa de condenação significativamente mais elevada em Angola $Z=2,776, p=.006$
CONVOLAÇÃO	3 situações (1,4%) Entrada em casa alheia → Crimes sexuais Injúria → Furto Homicídio involuntário → Hom. Voluntário	4 situações (2,3%) H. involuntário → Hom. c/ culpa grave Burla → Burla e subtração de menores H. Voluntário → Excesso de legítima defesa Atentado ao pudor → Ultragepúblico	

No que respeita à decisão judicial, é de relevar que o tempo da decisão foi maior nos casos prolatados pelos tribunais de Angola (à volta e 8,6 meses).

Houve alguns casos de convolação assinalados nesta tabela.

Foi ainda possível apurar que a taxa de condenação do réu foi significativamente mais elevada em Angola do que na Guiné.

O trabalho ainda está em curso e as próximas tarefas consistem em:

- Aprofundamento da análise da amostra
- Apuramento de mais resultados
- Exame da decisão judicial propriamente dita
- Entrega de relatório final
- Apresentações em conferências internacionais
- Publicação de artigos científicos

O projeto prosseguirá com a análise desses e de outros dados com o objetivo de identificar as variáveis que possam ter influenciado a administração da justiça militar ao longo da guerra. Nesse sentido procurar-se-á identificar os fatores estruturadores dos discursos da administração da justiça em relação às decisões que foram tomadas no decorrer dos processos-crime instaurados a combatentes recrutados para os cenários da guerra em África. Espera-se que esta pesquisa permitirá caracterizar os factos criminosos, ofensores, vítimas e testemunhas dos processos-crime; identificar as decisões tomadas pela administração da justiça ao longo dos processos; e testar a importância de fatores legais e extra-legais orientadores de decisões tomadas pela administração da justiça ao longo da marcha processual. Espera-se que os resultados deste projeto possam vir a contribuir para o debate no campo de uma criminologia que em termos teóricos, metodológicos e epistemológicos, se interessa particularmente pelo estudo de crimes cometidos em contextos de guerra.

Bibliografia

Alvarez, A. (2016). Genocide in the Context of War. In *The Palgrave Handbook of War and Criminology* (Ross McGarry and Sandra Walklate, pp. 99–115). Palgrave Macmillan. https://doi.org/10.1057/978-1-137-43170-7_6

Glennon, M. J. (2005). *How International Rules Die*. <https://papers.ssrn.com/abstract=752987>

Jamieson, R. (2014). *The Criminology of War*. Ashgate.

Lea, J. (2015). From the criminalisation of war to the militarisation of crime control. In *Criminology and War: Transgressing Borders* (Walklate and McGarry, pp. 198–211). Routledge.

McEvoy, K. (2007). Beyond Legalism: Towards a Thicker Understanding of Transitional Justice. *Journal of Law and Society*, 34(4), 411–440.

Mullins, C., & Visagaratnam, N. (2015). Sexual and sexualized violence in armed conflict. *Criminology and War: Transgressing the Borders*, 139–157.

Mullins, C. W. (2016). Sexual Violence During Armed Conflict. In R. McGarry & S. Walklate (Eds.), *The Palgrave Handbook of Criminology and War* (pp. 117–131). Palgrave Macmillan UK. https://doi.org/10.1057/978-1-137-43170-7_7

Rodrigues, F. (2017). Antigos Combatentes Africanos das Forças Armadas Portuguesas: A Guerra Colonial como Território de (Re)Conciliação. Camões - Instituto da Cooperação e da Língua.

Teitel, R. G. (2014). *Globalizing Transitional Justice: Contemporary Essays*. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780195394948.001.0001>

Walklate, S., & McGarry, R. (2015). *Criminology and War: Transgressing the Borders*. <https://www.routledge.com/Criminology-and-War-Transgressing-the-Borders/Walklate-McGarry/p/book/9781138288652>

English

In this presentation, we will share some preliminary results of the *Crime and Justice Administration in the Portuguese Colonial War (1961- 1974): Exploratory Analysis of the Criminal Proceedings against Combatants of the Portuguese Armed Forces in Angola, Mozambique and Guinea-Bissau* project (*InJUSTiceWar*).

For the *InJUSTiceWar* project, it is an immense privilege to present these findings and simultaneously reflect upon them with researchers from different backgrounds, who will share their knowledge on studies that, in various ways, connect War and Crime.

On behalf of the project team and the Faculty of Law of the University of Porto, we hope this conference marks the beginning of future collaborations that will enable Criminology to explore dimensions and confront challenges posed by thinking about crimes committed in wartime contexts, as suggested by the title of our conference.

InJUSTiceWar is an exploratory project funded by the Foundation for Science and Technology and hosted by the Faculty of Law of the University of Porto. It commenced on March 12, 2023, and will conclude on December 11, 2024. This research emerged from a question that deserved our reflection: recognizing that war is a unique context that creates opportunities for crime, we sought to understand how the Portuguese justice system addressed criminal acts committed by members of the armed forces during this conflict.

Research focused on analysing such phenomena has indicated that combatants of forces involved in armed conflicts frequently engage in behaviours that go beyond the laws and customs of war (Alvarez, 2016; Jamieson, 2014; Mullins, 2016; Mullins & Visagaratnam, 2015; Walklate & McGarry, 2015). Based on this premise, Portugal could not be an exception. Consequently, the war it waged in Africa would have necessitated a response from the Portuguese justice system of the time to address criminal acts

potentially committed by some of the approximately 800,000 members of its armed forces deployed across three territories thousands of kilometres away from mainland Portugal, over thirteen years of conflict.

We began our investigation in the Military Historical Archive, searching for clues to answer these concerns, which, years later, culminated in this project.

The documents in the Military Historical Archive confirmed that, since the onset of the Angolan War of Independence in 1961, the Portuguese justice system did not ignore crimes committed by members of its Armed Forces. The documents reveal how, over thirteen years of war, Portuguese justice operated under the Military Justice Code and the Penal Code in force at the time through the Territorial Military Courts of the respective jurisdictions.

The same documents show that thousands of criminal cases were initiated following the filing of criminal complaints, leading to corresponding criminal investigations.

When we began analysing these cases, we found that the alleged crimes were diverse: many were strictly military crimes, such as treason, abuse of authority, insubordination, military violence, and desertion. Others were common crimes, such as bodily harm, voluntary and involuntary homicide, and robbery, among others.

A significant portion of research on crimes committed during wartime tends to focus on crimes defined under International Law, such as genocide, crimes against humanity, war crimes, and crimes of aggression, as well as on strictly military crimes (Glennon, 2005; Lea, 2015; McEvoy, 2007; Teitel, 2014a).

These studies are essential to understanding the gravest human rights violations, codified in the Rome Statute of the International Criminal Court. However, we believe they are insufficient and may even be inadequate to interpret other crimes committed in wartime, let alone to understand these phenomena when they occur in the context of subversive wars.

Thus, it was decided that investigating how the Portuguese justice system handled common crimes committed by combatants in a war considered unconventional would be a valuable area of study, contributing significantly to broadening knowledge on these issues.

The *InJUSTiceWar* project exclusively examines how the justice system interpreted crimes covered under Article 4.º of the Military Justice Code in effect at the time, which corresponds to crimes "[...] by violation of general law, committed by military personnel or other individuals in the service of the army or navy [to which] the provisions of the Penal Code [...] apply."

It is worth clarifying that, according to the Código de Justiça Militar at the time, these crimes were "[...] always punished with the penalties determined by general law, even if tried by military courts" (Article 16.º of the Código Penal Português).

As a result, our universe includes only criminal cases filed against members of the Armed Forces for allegedly committing common crimes. From the outset, we excluded some criminal cases preserved in the Military Historical Archive due to missing information, such as cases where the year of initiation could not be identified.

We also decided to exclude cases filed in Mozambique because the archive holds only forty-four cases from this territory for reasons yet to be determined and beyond the scope of this discussion⁴. We excluded them as the small sample size does not allow for analysis.

Drawing from the collection preserved in the Military Historical Archive, *inJUSTiceWar* seeks to investigate how criminal acts allegedly committed by Portuguese Armed Forces combatants were interpreted by the Territorial

⁴ For more information on this topic, consult: Rodrigues, F. (2017), pp. 84-85.

Military Courts in Angola and Guinea throughout the colonial war (1961–1974).

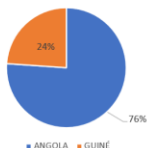
This is a documentary study focused on the criminal cases available in this archive, employing a methodology that will allow us to characterize criminal acts, offenders, and victims; identify procedures and decisions made by the justice system; capture structuring factors influencing decisions made by the justice system throughout the procedural course; and identify and test the relevance of legal and extralegal factors related to the identified decisions.

The interpretation of these data is ongoing. In this conference, we are presenting only preliminary results from this exploratory research, which are currently under analysis and will be disclosed after the end of the project.

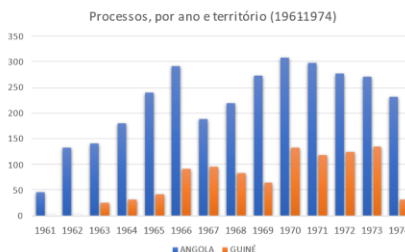
Arquivo histórico-militar, Lisboa.
(1961-1974)

PROCESSOS

Angola 3100 (76,4%)
Guiné 974 (23,4%)
Total 4074



Moçambique efetivo: 14. Processos sem data: 14



Angola: Por ano: M=210 (DP=85,6, CVR=,41)

Guiné: Por ano: M=65 (DP=49,8, CVR=,77)

This project benefited from the existence of a collection of criminal case files initiated against military personnel serving in the conflicts that took place in Angola (1961–1974) and Guinea (1963–1974), preserved in the Military Historical Archive in Lisbon. Most of the collection pertains to crimes committed in Angola (76,4%), with an average of 210 cases per year. Guinea accounts for a smaller total number of cases, with an annual average of 65.

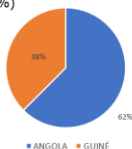
Arquivo histórico-militar, Lisboa.
(1961-1974)

CRIME PRINCIPAL (comuns, militares)

Angola 3082 (76,0%) (omissos 18)

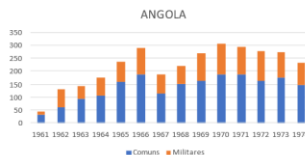
Guiné 974 (24,0%)

Total 4056



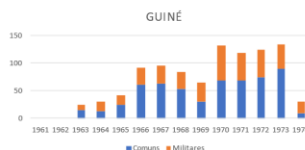
Alguns processos com mais do que 1 crime:

- Angola: 21,9% processos= 2 ou mais crimes
- Guiné: 6,9% processos= 2 ou mais crimes



Angola: Por ano: M=220,1 (DP=75,8, CVR=,34)

Guiné: Por ano: M=81,2 (DP=41,5, CVR=,51)



In Angola, almost 22% of the cases relate to situations involving two or more crimes. In Guinea, this proportion is lower (6,9%).

Arquivo histórico-militar, Lisboa.
(1961-1974)

**CRIMES
MAIS FREQUENTES**

Angola

- COMUNS
 - Ofensas corporais involuntárias
 - Furto
 - Homicídio involuntário
 - Ofensas corporais voluntárias
 - Crimes contra a segurança do Estado
 - Burla
 - Detenção de arma proibida
 - ...
- MILITARES
 - Deserção
 - Insubordinação
 - Extraviado de objetos militares
 - Infidelidade militar
 - Crimes contra o dever militar
 - Abuso de autoridade
 - ...

Guiné

- COMUNS
 - Ofensas corporais involuntárias
 - Homicídio involuntário
 - Furto
 - Ofensas corporais voluntárias
 - ...
- MILITARES
 - Insubordinação
 - Deserção
 - Extraviado de objetos militares
 - Peculato militar
 - ...

The first major classification of the cases was based on the crimes, distinguishing between common crimes and military crimes. In Angola, among common crimes, the most frequent were involuntary bodily harm, theft, involuntary homicide, voluntary bodily harm, crimes against state security, fraud, and possession of prohibited weapons. Among military crimes, the most frequent were desertion, insubordination, misappropriation of military objects, military disloyalty, crimes against military duty, and abuse of authority. In Guinea, involuntary bodily harm was also the most frequent common

crime, as in Angola. This was followed by involuntary homicide, theft, and voluntary bodily harm. Regarding military crimes, the most significant were insubordination, desertion, misappropriation of military objects, and embezzlement.

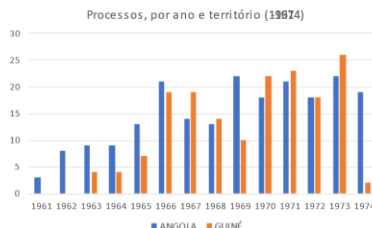


During the development of this project, efforts were focused on analysing criminal cases related only to common crimes. Since it was impossible to collect information on all criminal cases within the project's time frame, work was conducted on an adequately selected sample to seek a representative collection from the Military Historical Archive. After the cases were selected, they underwent detailed analysis and subsequent information extraction using a data collection grid specifically designed for this task, drawing on knowledge accumulated in previous projects undertaken by researchers from the School of Criminology at FDUP. The data collected from the cases were then coded and entered into a database created with the assistance of IBM SPSS Statistics v29 software. A preliminary data analysis followed, which helped identify inconsistent data and other errors. The resulting database was subjected to descriptive and inferential statistical analysis, enabling the testing of some research hypotheses, with results discussed primarily based on the context in which these decisions were made.

AMOSTRA (resultados preliminares)
(1961-1974)

PROCESSOS

Angola	210 (55,6%)
Guiné	168 (44,4%)
Total	378



Angola: Por ano: M=15,0 (DP=6,06, CVR=,40)

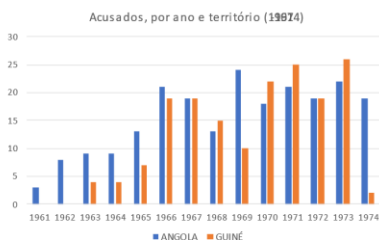
Guiné: Por ano: M=12,0 (DP=9,2, CVR=,77)

We are currently midway through data collection from the selected cases in the overall collection. To date, the sample consists of 378 cases, 55,6% of which correspond to Angola, representing an average of 15 cases adjudicated annually by military courts in that territory, while in Guinea, the annual average was 12 cases concerning common crimes.

AMOSTRA (resultados preliminares)
(1961-1974)

ACUSADOS

Angola	218 (55,9%)
Guiné	172 (44,1%)
Total	390



Angola: Por ano: M=15,6 (DP=15,6, CVR=,40)

Guiné: Por ano: M=12,3 (DP=9,5, CVR=,77)

Nr. acusados >Nr. processos ? → Processos com mais do que 1 acusado:

- ANGOLA: 3 processos (2 / 3 / 6 acusados)
- GUINÉ: 3 processos (2 / 2 / 3 acusados)

Regarding defendants, the criminal cases in our sample predominantly concern 218 defendants in Angola.

AMOSTRA (resultados preliminares)

(1961-1974)

TIPO LEGAL DE CRIME (COMUM) NA ACUSAÇÃO

N.º de tipos legais de crime, por acusado	ANGOLA (N=218) N %		GUINÉ (N=172) N %	
1	190	87,2	169	98,3
2	28	12,8	3	1,7
	M=1,13 (DP=,32)		M=1,02 (DP=,12)	
N.º total de tipos legais de crime	246		175	

The vast majority of the cases involved only one legal type of crime in the charges, with a total of 246 legal types of crime in Angola and 175 in Guinea.

AMOSTRA (resultados preliminares)

(1961-1974)

TIPO LEGAL DE CRIME (COMUM) NA ACUSAÇÃO

CRIMES COMUNS mais frequentes na acusação

- Na ACUSAÇÃO
 - Ofensas corporais involuntárias 187 (47,9%)
 - Homicídio involuntário 104 (26,7%)
 - ...
- Na DECISÃO
 - Homicídio involuntário 71 (18,2%)
 - Ofensas corporais involuntárias 66 (16,9%)
 - ...

ANGOLA (n=218 acusados)

- NA ACUSAÇÃO
 - Ofensas corporais involuntárias 111 (50,9%)
 - Homicídio involuntário 60 (27,5%)
 - ...
- Na DECISÃO
 - Ofensas corporais involuntárias 64 (29,4%)
 - Homicídio involuntário 44 (20,2%)
 - ...

GUINÉ (n=172 acusados)

- NA ACUSAÇÃO
 - Ofensas corporais involuntárias 76 (44,2%)
 - Homicídio involuntário 44 (25,6%)
 - ...
- Na DECISÃO
 - Ofensas corporais involuntárias 31 (18,0%)
 - Homicídio involuntário 27 (15,7%)
 - ...

The sample to date already provides some interesting results. Concerning the most common crimes in the charges as well as the decisions, bodily harm and homicide stand out.

AMOSTRA (resultados preliminares)

(1961-1974)

ACUSADO (RÉU)	ANGOLA (N=218)	GUINÉ (N=172)	Estatísticas/ Observações	
SEXO	MASCULINO	MASCULINO		
IDADE NA DATA DOS FACTOS	17-48 A; M=23,05; DP=3,20	20-35; M=22,86; DP=2,32	t(361)=,595; p=,552	d = ,064
ORIGEM AFRICANA?	Não: 214 (98,6%) Sim: 3 (1,4%) Omissos: 1 (0,5%)	Não: 125 (72,7%) Sim: 47 (27,3%)	Chi-Sqr(1) = 57,652 p<,001 OR=26,821 (IC95% 8,177-87,971)	V = ,385
ESTADO CIVIL	Casado: 33 (15,9%) Solteiro: 174 (84,1%) Omissos: 11 (5,0%)	Casado: 29 (18,0%) Solteiro: 132 (82,0%) Omissos: 11 (6,4%)	Chi-Sqr(1) = ,277 p=,599	V = ,027
INSTRUÇÃO ESCOLAR	Exame 2.º grau 113 (54,1%) ... Sabelere escrever 5 (2,3%) Analfabeto 12 (5,5%)	Exame 2.º grau 61 (40,9%) ... Sabelere escrever 2 (1,2%) Analfabeto 10 (7,0%)	Diversidade de situações ... Reduzido efetivo de analfabetos	

The data collected already allow for a comparison between the decisions of military courts in the two territories. There are no significant differences between the two territories in terms of the defendants' ages at the time of the incidents or their level of education. However, in Angola, the proportion of defendants of non-African origin is significantly higher compared to Guinea, a statistically significant result.

AMOSTRA (resultados preliminares)

(1961-1974)

ACUSADO (RÉU)	ANGOLA (N=218)	GUINÉ (N=172)	Estatísticas/ Observações	
POSTO MILITAR	Soldado 147 (67,4%) 1.º Cabo 38 (17,4%) Furriel Miliciano 18 (8,3%) 93,1% 2.º Sargento 3 (1,4%) 2.º Sarg Miliciano 3 (1,4%) Alfere Miliciano 3 (1,4%) Capitão 3 (1,4%) 1.º Sargento 1 (0,5%) Alfere Capelão 1 (0,5%) Tenente Coronel 1 (0,5%)	Soldado 124 (73,8%) 1.º Cabo 27 (15,7%) Furriel Miliciano 9 (5,2%) 93,0% 2.º Sargento 3 (1,7%) Alfere Miliciano 2 (1,2%) Capitão 2 (1,2%) Furriel Infanteria 2 (1,2%) Miliciano 2 (1,2%) 2.º Sargento Milic. 1 (0,6%)	Necessária precaução na interpretação dos resultados de diferenças efetivo entre categoria de postomilitares e estranhas diferenças de efetivo globais das forças militares	

Naturally, the most frequent categories in the companies are also the most represented among the total defendants. Focusing attention on the victims, we can observe what is presented in the next table.

AMOSTRA (resultados preliminares)

(1961-1974)

VÍTIMA	ANGOLA (N=218)	GUINÉ (N=172)	Estatísticas/ Observações	
SEXO	Masc. 171 (83,4%) Fem. 34 (16,6%) Omissos 13 (6,0%)	Masc. 142 (83,0%) Fem. 29 (17,0%) Omissos 1 (0,6%)	Chi-Sqr(1)=,009; p=,923	
IDADE NA DATA DOS FACTOS	N=131 (60,1%) 2-63 A; M=25,21; DP=11,47	N=112 (65,1%) 4-65; M=26,42; DP=12,68	t(241)=,783; p=,217	
ORIGEM AFRICANA?	Não: 90 (57,3%) Sim: 67 (42,7%) Omissos: 61 (28,0%)	Não: 57 (43,5%) Sim: 74 (56,5%) Omissos 41 (23,8%)	Chi-Sqr(1) = 5,453 P=,020 Ofr=1,744 (IC95%: 1,092-2,786)	V = ,138
VÍTIMA É MILITAR?	Sim: 114 (54,8%) Não: 94 (45,2%) Omissos 10 (4,6%)	Sim: 98 (57,6%) Não: 72 (48,4%) Omissos 2 (1,2%)	Chi-Sqr(1) = ,306 P=,580	
ESTADO CIVIL	Casado/a: 34 (30,6%) Solteir@: 74 (66,7%) Viúv@: 2 (1,8%) Separad@: 1 (0,9%) Omissos 107 (49,1%)	Casado/a: 24 (27,6%) Solteir@: 61 (70,1%) Viúv@: 2 (2,3%) Omissos 107 (49,1%)	Chi-Sqr(3) = 1,083 P=,781	

The vast majority of the victims are male, and there are no significant differences between the two territories. The average age of the victims is around 25,21 years in the cases from Angola and 26,4 years in the cases from Guinea, with no statistical significance to this difference. Most victims were military personnel in both territories. Cross-referencing the characteristics of the victims with those of the defendants, it can be concluded that there is no correlation between the ages of the two; in Guinea, the victim is significantly older than the defendant, while in Angola, there is no significant difference between the two. In Guinea: Defendants of African origin are significantly associated with victims of African origin. In Angola: There is no relationship between the defendant and the victim in terms of African origin.

AMOSTRA (resultados preliminares)
(1961-1974)

ALGUNS RESULTADOS PRELIMINARES SOBRE RELAÇÕES ENTRE ACUSADO (RÉU) E VÍTIMA...	
Idade do acusado (réu) não está correlacionado com a idade do/a vítima	ANGOLA: $r=,162, p=,064$ GUINÉ: $r=,096, p=,369$
Mas, na GUINÉ: a Vítila é significativamente mais velha do que o acusado. Em Angola, não há diferença significativa.	ANGOLA: 25,2 (11,47) ...23,5 (3,85) $t(130)=1,69, p=,015$ GUINÉ: 26,0 (12,91) > 23,0 (2,67) $t(89)=2,206, p=,015$
Na GUINÉ: Acusado de origem Africana significativamente associado a vítima de origem Africana.	ANGOLA: Chi-Sq(1)=2,721, $p=,099$
Em Angola: inexistente qualquer relação entre acusado e vítima em termos de origem Africana	GUINÉ: Vítima N 5 Acusado N 46 44 S 11 30 Chi-Sq(1)=6,757, $p=,09$. OR=2,851 (1,2756,378)

Regarding the trial process and the decision, the following can be highlighted:

AMOSTRA (resultados preliminares)
(1961-1974)

JUSTIÇA	ANGOLA (N=218)		GUINÉ (N=172)		Estatísticas / Observações	
CUMPRIMENTO DOS DEVERES DE INFORMAÇÃO- DEFENSOR	Sím 202 (95,7%) Não 9 (4,3%) Omissos 7 (3,2%)		Sím 167 (97,1%) Não 5 (2,9%)		Angola e Guiné iguais	
CUMPRIMENTO DE DEVER DE INFORMAÇÃO- DIREITO AO SILÊNCIO	Sím 201 (95,3%) Não 10 (4,7%) Omissos 7 (3,2%)		Sím 167 (97,1%) Não 5 (2,9%)		Angola e Guiné iguais	
PRISÃO PREVENTIVA	Sím 33 (15,6%) Não 179 (84,4%)		Sím 24 (14,0%) Não 148 (86,0%)		Angola e Guiné próximas	
Situações de PRISÃO PREVENTIVA em ANGOLA • Homicídio 11 • Ocultação de cadáver 6 • Roubos e furtos 8 • Crimes sexuais 4 • Ofensas corporais involuntárias 2 • Burla 1 • Uso de estupefacientes 1 Situações de PRISÃO PREVENTIVA na GUINÉ • Homicídio 12 • Furtos 2 • Crimes sexuais 3 • Ofensas corporais involuntárias 5 • Ameaça com arma de fogo 2						

In both territories, the obligation to inform the defendant of the right to legal counsel and the right to remain silent was fulfilled. Preventive detentions were recorded in similar proportions between the two territories, around 15%, especially in cases involving homicides.

AMOSTRA (resultados preliminares)

(1961-1974)

DECISÃO JUDICIAL	ANGOLA (N=218)	GUINÉ (N=172)	Estatísticas / Observações
TEMPO DA DECISÃO	M=8,59 meses (DP=11,80) Md= 5 meses	M=6,49 meses (DP=7,29) Md= 5 meses	Decisão mais demorada em Angola: $t(369,478)=2,168, p=.031$. d=.210
CONDENAÇÃO DO RÉU	143 (65,6%)	89 (51,7%)	Taxa de condenação significativamente mais elevada em Angola $Z=2,776, p=.006$
CONVOLUÇÃO	3 situações (1,4%) Entrada em casa alheia→ Crimes sexuais Injúria→ Furto Homicídio involuntário→ Hom. Voluntário	4 situações (2,3%) H. involuntário→ Hom. c/ culpa grave Burla→ Burla e subtração de menores H. Voluntário→ Excesso de legítima defesa Atentado ao pudor→ Ultrage público	

Concerning judicial decisions, it is noteworthy that the time to a decision was longer in cases adjudicated by the courts in Angola (around 8,6 months).

There were some cases of conversion, noted in the table.

It was also possible to ascertain that the conviction rate for the defendant was significantly higher in Angola than in Guinea.

The work is still ongoing, and the next tasks include:

- Deepening the analysis of the sample
- Gathering more results
- Examining the judicial decision itself
- Submission of the final report
- Presentations at international conferences
- Publication of scientific articles

The project will continue to analyse these and other data to identify variables that may have influenced the administration of military justice throughout the war. In this sense, efforts will be made to identify the structuring factors underlying the justice system's discourse regarding the decisions made during criminal cases involving combatants deployed in African war scenarios.

It is hoped that this research will enable the characterization of criminal acts, offenders, victims, and witnesses in criminal cases; identify decisions made by the justice system throughout the processes; and test the significance of legal and extra-legal factors guiding decisions made during the procedural course.

It is anticipated that the results of this project will contribute to the debate in the field of Criminology, which, theoretically, methodologically, and epistemologically, is particularly interested in studying crimes committed in wartime contexts.

References

Alvarez, A. (2016). Genocide in the Context of War. In *The Palgrave Handbook of War and Criminology* (Ross McGarry and Sandra Walklate, pp. 99–115). Palgrave Macmillan. https://doi.org/10.1057/978-1-137-43170-7_6

Glennon, M. J. (2005). *How International Rules Die*. <https://papers.ssrn.com/abstract=752987>

Jamieson, R. (2014). *The Criminology of War*. Ashgate.

Lea, J. (2015). From the criminalisation of war to the militarisation of crime control. In *Criminology and War. Transgressing Borders* (Walklate and McGarry, pp. 198–211). Routledge.

McEvoy, K. (2007). Beyond Legalism: Towards a Thicker Understanding of Transitional Justice. *Journal of Law and Society*, 34(4), 411–440.

Mullins, C., & Visagaratnam, N. (2015). Sexual and sexualized violence in armed conflict. *Criminology and War: Transgressing the Borders*, 139–157.

Mullins, C. W. (2016). Sexual Violence During Armed Conflict. In R. McGarry & S. Walklate (Eds.), *The Palgrave Handbook of Criminology and War* (pp. 117–131). Palgrave Macmillan UK. https://doi.org/10.1057/978-1-137-43170-7_7

Rodrigues, F. (2017). Antigos Combatentes Africanos das Forças Armadas Portuguesas: A Guerra Colonial como Território de (Re)Conciliação. Camões - Instituto da Cooperação e da Língua.

Teitel, R. G. (2014). *Globalizing Transitional Justice: Contemporary Essays*. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780195394948.001.0001>

Walklate, S., & McGarry, R. (2015). *Criminology and War: Transgressing the Borders*. <https://www.routledge.com/Criminology-and-War-Transgressing-the-Borders/Walklate-McGarry/p/book/9781138288652>

Algumas observações sobre o modelo processual penal militar vigente no período da Guerra Colonial portuguesa

Some Observations on the Military Criminal Procedural Structure in Force During the Period of the Portuguese Colonial War

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Cabendo-me falar sobre o Projecto comum, em particular fazer um esboço da dinâmica processual penal militar no período da Guerra Colonial portuguesa, seja-me permitido tecer umas, breves, considerações sobre o tema guerra, o trágico exercício a que há séculos se dedica a Humanidade no seu conjunto, e que é objecto de estudo, não apenas pelo Direito, mas

⁵ This work was supported by FCT – Fundação para a Ciência e Tecnologia, I.P. by project reference 2022.05692.PTDC and DOI identifier <<https://doi.org/10.54499/2022.05692.PTDC>>.

pelas ciências humanas, a sociologia, a psicologia, a antropologia e, naturalmente, a criminologia.

Há que reconhecer que ao longo da História dos Homens, são perceptíveis, em contraponto, sinais de ideologias pacifistas e manifestações apologéticas da violência bélica. Recorde-se a psicologia de exaltação da guerra ínsita nos movimentos ditos irracionalistas do dealbar do século XX e que antecedem a I Guerra Mundial (Esteves, 2016, pp. 116-140). A guerra surge, não só como uma necessidade, mas como algo desejado, exaltada uma sua propalada dimensão poética, estética e, mesmo, mística. Ocasão para que no decurso da carnificina se revele o heroísmo guerreiro, o verter de sangue quase sacrificial, regenerador e catártico. A este propósito recorro o Manifesto Futurista de MARINETTI onde se declara ser “a guerra a única cura do Mundo” (Marinetti, 1995).

De toda a sorte, de há muito que a guerra é tida como indispensável, numa lógica expansionista de conquista e domínio, se não, inscrita no destino das populações humanas, na sua luta incessante pela sobrevivência (por aqui se compreende a ideia nacional socialista da conquista do espaço ou esfera vital (*Lebenssphäre*) corolário da compreensão *völkisch-darwinista*, do mundo e da vida perfilhado já por Von BERNHARDI (1849-1930) e expresso no aforismo “*hegemonia mundial ou decadência (e morte)*” (Esteves, 2016, pp. 194-196).

Enfim, o darwinismo social em todo o seu esplendor, que serve à saciedade o sentido mais exasperado, mais radical, absoluto, do conceito de guerra - a *guerra total* - imanente a toda a construção política totalitária fundada na dialéctica do conflito, quer se trate do conflito de classes, do conflito de raças, do conflito de culturas ou de civilizações ou da antítese *amigo/inimigo*, propaladamente, fundante da política, combinada com o princípio da liderança encarnado num Chefe que decide *legibus solutus* o *se* e o *como* de um pretenso *destino colectivo*, em que o ser humano individual carece de sentido e de valor (Esteves, 2016, p. 116; Esteves, 2021, pp. 372-373).

Ora se, tanto quanto nos é dado conhecer, desde há quinhentos anos A.C. existem textos que contém regras que procuram limitar a tragédia incomensurável que é sempre um conflito bélico, apelando aos famosos princípios da necessidade e da proporcionalidade cuidando de proteger determinados grupos de pessoas. Os ensinamentos do livro de MANU (ed. 2007), as judiciosas considerações de SUN TZU (ed. 1971) na teorização da “guerra justa” e as clarividentes reflexões de VITORIA (séc. XVI) - cujo pensamento será, no essencial glosado por SUAREZ (séc. XVII) - que, antecipando os fundamentos do direito internacional, são bastante mais exigentes do que as propostas de GRÓCIO na justificação da guerra (*ius ad bellum*) e nos limites definidos na sua prática. (*ius in bellum*), proclamando que “*não deverá ser usada violência excessiva, deverão ser poupados os inocentes (...), as mulheres (...), as crianças (...), os reféns (...), os inimigos que foram aprisionados*” (Vitoria, 1998, pp. 193-204).

Nos finais do séc. XIX, passando de largo o conteúdo do denominado Direito de Haia, destaco a famosa Cláusula Martens que vincula o uso de meios bélicos e a actuação dos beligerantes às *leis de humanidade e imperativos de consciência pública* (Detter, 2000, pp. 366-377; Esteves, 2016, pp. 63-65; Mansfield, 1995, pp. 296-297).

Não ignoro que a iniciativa de conter, marginalizar juridicamente a guerra, se inscreve num horizonte problemático - se, de uma parte, partilha de um pressuposto pueril, dada a aporia ontológica, jurídica e prática que constitui a regulação da guerra, um tempo e um espaço vazios de Direito, por natureza avessos a limites, de outra parte, cria uma disciplina jurídica aplicável ao conflito armado, assim normalizando e legitimando a violência bélica.

Na madrugada de um dia do mês de Julho, há 26 anos, no edifício da FAO, em Roma, ovacionei convicta e entusiasticamente a aprovação do texto do Estatuto que criava o Tribunal Penal Internacional com competência para julgar crimes de genocídio, contra a humanidade e de guerra. Foi o termo de um trabalho de alguns anos intenso, árduo, e quase esgotante. O sentimento

partilhado pelos delegados dos Estados representados na Conferência Diplomática era a de dever cumprido.

Na verdade, cumpria-se o que até ao último momento parecia impossível.

Definiam-se jurídico-internacionalmente os limites ao poder *de jure* ou *de facto*, repudiando-se solenemente as atrocidades cometidas no exercício abusivo e criminoso de uma relação de poder, tanto em contexto de guerra como fora de tal contexto.

E afirmava-se uma plataforma comum de valores essenciais reconduzíveis ao princípio absoluto do respeito pela dignidade inerente a todos os membros da família humana.

Dito isto, intentarei, agora, traçar, ainda que de modo grosseiro e fragmentário, um esboço do processo penal militar no contexto da Guerra Colonial portuguesa, que terá de ser, necessariamente, histórico-politicamente situado.

O pano de fundo da administração da justiça militar, na época em referência, é a complexa tessitura da administração colonial portuguesa onde se projecta a concepção política autoritária própria do Estado Novo implantada na metrópole, num tempo marcado pela guerra de guerrilha, que opunha o exército português aos braços armados dos movimentos de libertação. De quando em vez, a administração da justiça militar dos ditos territórios ultramarinos acusa, mesmo que em flaches, as reverberações produzidas pelo abuso das relações de poder mas, também, a tensão antinómica e violenta entre quem, de entre os autóctones, colaborava com o exército português e os apoiantes e membros das guerrilhas independentistas que eram considerados por estes “colonialistas” e “traidores”. Exemplifico, em brevíssima nota, com um caso de homicídio processado nos anos 1972/73 no Tribunal Militar Territorial da Guiné (Proc. Nº 25/73), em que um militar guineense é acusado de matar a mãe de um apoiante do movimento

independentista que fugira após degolar a filha do réu de cerca de três anos de idade, enquanto bradava ser a criança *“filha de colonialista”*.

Julgo dever recordar que há 63 anos, em Angola, a União das Populações de Angola, UPA, cujos membros eram apoiados pelo ex-Congo belga, perpetraram ataques, em simultâneo a cinco localidades, onde chacinaram milhares de pessoas, a maioria negras, mas também, mestiças e brancas, homens, crianças de berço, violaram e mataram mulheres – um *“terror insurreccional”* nas palavras de Miguel JÚNIOR, Tenente General das Forças Armadas angolanas e Director do Instituto Superior Técnico Militar de Angola (2021) que *“deixou perplexas as populações angolanas e círculos de observadores internacionais (...) um terror aleatório que produziu “algumas imagens dantescas”*. As Forças Armadas portuguesas reagiram em conformidade diz o Autor. Isto é, com manifesta violência.

Salazar, Chefe do Governo, profere, no mês de Abril, o conhecido discurso, transmitido pela rádio em que sobressaía a palavra de ordem: *Para Angola e em força*.

A referida actuação da UPA, para além da intenção deliberada de infundir terror, dava início a um período de confronto armado em Angola, a que se seguiu, no ano de 1963, a Guiné e, em 1964, Moçambique, e que não pode desafectar-se, naturalmente, de atitudes de abuso e de exploração, da repressão brutal que recaiu sobre reivindicações dos trabalhadores do cultivo de algodão, das graves limitações aos direitos de associação cultural e política, das detenções e condenações à pena de degredo de nacionalistas africanos impostas pelo Governo ditatorial de Salazar e que, em grande medida, espelhavam a restrição das liberdades e direitos fundamentais que se vivia na metrópole.

Mas, deve ser interpretada à luz da conjuntura internacional marcada pelo confronto entre dois Blocos um encabeçado pelos EUA e outro pela URSS e as respectivas ambições geo-estratégicas, cuja consecução parecia passar pelo apoio, não desinteressado, aos movimentos de independência pan-

africanos e às justas pretensões dos povos africanos à autodeterminação que, aliás, faziam eco do estipulado no artigo 73º da Carta das Nações Unidas (Policarpo, 2021).

Na década de 50, a nacionalização pelo Egipto do Canal do Suez, e a formação de dezenas de Estados africanos precipitou a queda de Impérios. Parecia cumprir-se a proclamação saída Conferência de Bandung: “A África para os africanos”.

O Governo português chefiado por Salazar mantinha-se, todavia, irredutível, enclausurado no seu labirinto político: *“Os territórios ultramarinos não são colónias mas sim províncias portuguesas. O território de Portugal é uno e indivisível, do Minho a Timor”*. Esta a resposta dada por Portugal ao questionamento da ONU, na sequência de uma proposta da Ex-URSS apresentada em Abril de 1960 à AG que aprova o direito dos povos dos territórios coloniais à independência, sendo que a recusa de Portugal a conceder-lhes esse direito constituía “uma ameaça ao bem-estar da humanidade e à paz internacional” (Calhaço, 2021; Fati, 2021; Policarpo, 2021).

Foram, no início de 60, criadas as Regiões Militares de Angola e Moçambique e sete Comandos Territoriais Independentes sendo um o da Guiné (Estado Maior do Exército, 1988, p. 229).

O Código de Justiça Militar português, aprovado por Decreto, em Novembro de 1925, foi estendido, com alterações, às províncias ultramarinas através do Decreto nº 12.393, de 27/12/1926 que previa a constituição de um Tribunal Militar em cada uma dessas províncias.

É necessário ter em conta que o Código de Justiça Militar e o seu Regulamento constituíam o suporte normativo de uma jurisdição especial aplicável aos membros das Forças Armadas portuguesas. E que se encontrava subordinada a um modelo penal e processual próprio, que pretendia cumprir as finalidades de prevenir e reprimir condutas de

incumprimento dos deveres militares ou ofensivas da disciplina e da segurança das forças armadas mas, também, condutas perpetradas por militares que, pela sua gravidade, ameaçavam a honra e a dignidade das mesmas.

Por isso, dispõe-se que são submetidos à jurisdição militar os factos que, não sendo considerados crimes essencialmente militares (p. ex., traição, espionagem, crimes contra o direito das gentes, insubordinação, abuso de autoridade, cobardia, deserção, violência militar, crimes contra pessoas e propriedade em tempo de guerra...) ou militares (falsidade, infidelidade ou outros deveres militares), são qualificados como crimes comuns cometidos por militares ou pessoas pertencentes às Forças Armadas, devendo, porém, neste caso, ser aplicáveis as penas previstas na lei penal geral (artigos 1º a 4º do Código de Justiça Militar, ed. 1971). De enfatizar, que a pena de morte, abolida para os crimes comuns, encontrava-se prevista para os crimes essencialmente militares, situação que se manteve até à entrada em vigor da Constituição de 1976 que, hoje, proíbe a criação de tribunais especiais, conforme a exigência do princípio do juiz natural (artigo 32º, nº 9).

É dos processos referentes à prática, por militares portugueses, de crimes comuns nos territórios de Angola, Moçambique e Guiné, que trata o Projecto Comum, crimes que são, como referido, investigados e julgados de acordo com o modelo processual desenhado pela lei militar.

Convém realçar que o processo penal militar mantém a estrutura marcadamente inquisitória, ao arrepio da tendência inscrita nas alterações sofridas pelo Código de Processo Penal Português de 1929, (declarado em vigor nas “províncias ultramarinas” por Decreto, em 1931), alterações desencadeadas pelo Decreto-Lei 35007 de 1945, que entrega a investigação ao Ministério Público e, mais tarde, pela Lei nº 2/1972, que cria os juizes de instrução criminal titulares da fase da instrução preparatória, acentuando, desta forma, a estrutura acusatória material (e não apenas formal), ou seja, estabelecendo uma clara separação entre a entidade que investiga e a entidade que julga e reforçando as garantias processuais do réu, de defesa

e de fiscalização jurisdicional da aplicação de meios coactivos processuais (em particular, subordinando a aplicação da prisão preventiva aos princípios da necessidade, proporcionalidade e subsidiariedade - Decreto-Lei nº 185/72 de 31 de Maio) (Dias, 1974, pp. 59-92).

Na verdade, compreende o processo criminal militar quatro fases, a saber, o corpo de delito, o sumário da culpa, a acusação e defesa e o julgamento.

O corpo de delito abrange o conjunto de diligências visando a investigação do crime de que foi dada notícia, levado a cabo pelo órgão da polícia judiciária nas Colónias, regra geral, um militar graduado (artigos 408º e ss do Código de Justiça Militar, doravante, CJM). O sumário da culpa é, já, uma fase judicial ordenada pela da Autoridade militar (*havendo indícios suficientes*), que se inicia com uma exposição dos factos e do direito aplicável, elaborada pelo promotor de justiça junto do tribunal militar correspondente, um oficial graduado que exerce as funções atribuídas ao Ministério Público (artigos 432º e ss. do CMJ), a que se seguem as diligências processuais de prova da competência do Juiz auditor, magistrado judicial que dirige esta fase de instrução, em particular o interrogatório do arguido (artigos 437º e 438º do CJM). Mais compete ao juiz elaborar uma exposição fundamentada com os factos e o direito aplicável que permitam uma prévia formação da culpa do arguido (artigo 454º do CJM). Segue-se, por ordem da autoridade máxima militar territorial, a remessa do processo para que o promotor deduza o libelo acusatório (artigo 465º do CJM). Recebida acusação pelo juiz auditor, este manda informar o réu do seu conteúdo, bem como dos direitos de defesa que lhe assistem (artigo 469º do CJM). A audiência de julgamento ocorre perante um tribunal constituído por três Juizes, dois militares e um juiz togado, o juiz auditor (artigo 21º e ss. do Decreto-Lei nº 19892, de 15/6/1932).

De onde, o juiz competente para a instrução e a quem é cometida a função de elaborar a peça processual fundamental, visando a submissão do réu a julgamento, é o mesmo juiz que participa no julgamento (e, activamente visto que é este juiz que interroga o réu na audiência, artigo 34º do

mencionado Decreto-Lei de 1932). O processo penal militar apresenta, por aqui, o vício de que enferma todo o processo de estrutura inquisitória que serviu, como é sabido, concepções autoritárias de Estado.

Sendo o juiz que julga, simultaneamente, o acusador, não disporá da exigível imparcialidade para valorar o facto e decidir no julgamento, dado que, com toda a certeza, formou, previamente, a sua opinião sobre o facto e o seu presumível autor, o que constituirá um sério impedimento à formulação de uma (outra) opinião isenta.

Ora, pesem embora os entorses inquisitórios das exigências do processo justo e equitativo, considero poder afirmar, sem reboço, que nos processos que me foi dado consultar, verifica-se, ao menos no plano formal, o estrito cumprimento da lei e dos princípios que aí vêm acolhidos, nomeadamente, o reconhecimento dos direitos de defesa básicos, o direito do réu a escolher advogado, o direito ao contraditório e a não prestar declarações sobre os factos de que vem acusado, o direito ao silêncio. Ainda que o direito ao silêncio não possuísse, no modelo processual penal em causa, o âmbito que, contemporaneamente, lhe atribui o sistema jurídico português, ancorado no princípio da presunção da inocência - que inspirou o estatuto do arguido no Direito Processual Penal da Região Administrativa Especial de Macau, da China (Esteves, 2014) - direito ao silêncio que constitui uma manifestação do respeito devida à dignidade da pessoa (artigos 1º e 32º, nº 2 da Constituição), que tem como consequências o direito do arguido não se auto-incriminar, princípio do respeito pela sua decisão de vontade (traduzido pelo decantado aforismo *nemo tenetur se ipso accusare*), enfim, o direito de não ser prejudicado se optar por nada declarar sobre os factos de que vem acusado (Dias & Brandão, 2022).

Coisa diferente é saber, se e até que ponto, as relações de poder num contexto de domínio colonial, que enfrenta insurreições armadas, se projectam no processo ou entretecem a dinâmica processual militar, designadamente, no tratamento conferido aos demais intervenientes processuais, às testemunhas e, em particular, aos ofendidos. Mas isto terá,

necessariamente, de ser objecto de uma futura investigação que requer muito mais tempo, dedicação e ponderação.

Referências bibliográficas

Calhaço, N. R. (2021). Uma Perspetiva Sobre o 'Teatro de Operações' de Moçambique. *Revista Portuguesa de História Militar*, 1(1).

Dias, J. D. F. (1974). *Direito Processual Penal*. Coimbra: Coimbra Editora, 1.

Dias, J. D. F., & Brandão, N. (2022). *Direito Processual Penal: Os Sujeitos Processuais*. Gestlegal.

Esteves, M. L. (2014). The Structural Model of the Macao's Criminal Procedure. Founding Principles. In M. Trigo (Ed.), *Report on Macau Law*. University of Macau, LexisNexis.

Esteves, M. L. (2016). *Contributo para uma reflexão em torno do Sentido e do Fundamento dos Crimes contra a Humanidade* [Doctoral Dissertation, Universidade de Santiago de Compostela]. Portal da Investigación de la Universidade de Santiago de Compostela. <https://investigacion.usc.gal/documentos/5d1df65c29995204f7669b8f>

Esteves, M. L. (2021). *Crímenes de lesa humanidad: Genealogia de un concepto jurídico-filosófico contemporáneo*. Editorial Reus. <https://www.editorialreus.es/libros/crimenes-de-lesa-humanidad/9788429024364/>

Fati, S. (2021). Início da Guerra na Guiné-Bissau 1963: Uma Visão Guineense. *Revista Portuguesa de História Militar*, 1(1).

Júnior, M. D. (2021). Início da guerra em Angola 1961. Uma Visão Angolana. *Revista Portuguesa de História Militar*, 1(1).

Manou. (2007). *Les Lois de Manou* (A. Loiseleur Deslongchamps, Trad.). Narratif.

Mansfield, L. (1995). Crimes against Humanity: Reflections on the Fiftieth Anniversary of Nuremberg and a Forgotten Legacy. *Nordic Journal of International Law*, 64.

Marinetti, F. (1995). *O Futurismo* (António Moura, Trad.). Lisboa: Editora Hiena.

Policarpo, F. (2021). O Fim do Império e o Início da Guerra na Guiné. *Revista Portuguesa de História Militar*, 1(1).

Estado Maior do Exército. (1988). *Resenha Histórico-Militar das Campanhas de África, 1961-1974* (Vol. 1). Lisboa.

Suárez, F. (2004). *De Legibus, Livro I, da Lei em Geral* (Apresentação de M. C. Henriques; Introdução e tradução de G. Moita). Lisboa: Tribuna da História.

Sun Tzu. (1971). *The Art of War* (S. B. Griffith, Trad.; Introdução por S. B. Griffith; Prefácio por B. H. Liddell Hart). New York: Oxford University Press.

Vicente, L. M. (1971). *Código de Justiça Militar: Anotado e Atualizado* (11ª ed.).

Detter, I. (2000) *The Law of War*. Cambridge University Press.

Vitoria, F. de. (1998). *Sobre el Poder Civil. Sobre los Indios. Sobre el Derecho de la Guerra* (Estudio preliminar, traducción y notas de L. Fraye Delgado). Madrid: Tecnos.

English

Being tasked with speaking about the common Project, mainly sketching the dynamics of military criminal procedure during the period of the Portuguese Colonial War, may I be allowed to make a few brief considerations on the theme of war—the tragic exercise to which Humanity as a whole has dedicated itself for centuries, studied not only by Law but also by the human sciences: sociology, psychology, anthropology, and, naturally, criminology.

It must be acknowledged that throughout human history, pacifist ideologies and apologetic manifestations of warlike violence have, in contrast, been perceptible. Consider the psychology of war exaltation inherent in the so-called irrationalist movements of the early 20th century, which preceded World War I (Esteves, 2016, pp. 116-140). War appears not only as a necessity but as something desired, with its purportedly poetic, aesthetic, and even mystical dimensions exalted. An occasion during which, amid carnage, warrior heroism is revealed, a shedding of blood almost sacrificial, regenerative, and cathartic. In this regard, I recall MARINETTI's Futurist Manifesto, which declares that "war is the world's only cure" (Marinetti, 1995).

In any case, war has long been regarded as indispensable, following an expansionist logic of conquest and domination, if not inherently inscribed in the destiny of human populations in their incessant struggle for survival. This perspective helps to contextualize the National Socialist idea of the conquest of space or vital sphere (*Lebenssphäre*), a corollary of the *völkisch*-Darwinist understanding of the world and life. This view was already espoused by Von Bernhardi (1849–1930) and encapsulated in the aphorism, "world hegemony or decline (and death)." (Esteves, 2016, pp. 194–196).

In short, social Darwinism, in all its splendor, which abundantly serves the most exacerbated, radical, and absolute meaning of the concept of war—total war—immanent to any totalitarian political construction founded on the dialectic of conflict, whether it be class conflict, race conflict, cultural or

civilizational conflict, or the friend/enemy antithesis, supposedly foundational to politics, combined with the principle of leadership embodied in a Leader who decides *legibus solutus* the “what” and the “how” of a pretended collective destiny, wherein the individual human being lacks meaning and value (Esteves, 2016, p. 116; Esteves, 2021, pp. 372-373).

As far as we know, for over five hundred years B.C., there have been texts containing rules aimed at limiting the immeasurable tragedy that war always entails. These texts appeal to the famous principles of necessity and proportionality, seeking to protect certain groups of people. The teachings of MANU (ed. 2007), the judicious considerations of SUN TZU (ed. 1971) in the theorization of “just war,” and the insightful reflections of VITORIA (16th century)—whose thought would essentially be glossed by SUAREZ (17th century)—anticipated the foundations of international Law and were far more demanding than GROTIUS’s proposals in justifying war (*ius ad bellum*) and defining its limits (*ius in bello*), proclaiming that “excessive violence should not be used, the ‘innocents (...) women (...) children (...) hostages (...) enemies who have been captured’ should be spared” (Vitoria, 1998, pp. 193–204).

At the end of the 19th century, bypassing the content of what is known as Hague Law, I highlight the famous Martens Clause, which binds the use of war means and the actions of belligerents to the laws of Humanity and the imperatives of public conscience (Detter, 2000, pp. 366–377; Esteves, 2016, pp. 63–65; Mansfield, 1995, pp. 296–297).

I do not ignore that the initiative to legally contain and marginalize war falls within a problematic framework—on one hand, it shares a naïve assumption, given the ontological, legal, and practical aporia that the regulation of war constitutes, a time and space inherently devoid of law and naturally resistant to limits. On the other hand, it establishes a legal discipline applicable to armed conflict, thereby normalizing and legitimizing wartime violence.

In the early hours of a July day 26 years ago, in the FAO building in Rome, I enthusiastically and convincingly applauded the approval of the Statute text that established the International Criminal Court with jurisdiction to try crimes of genocide, crimes against Humanity, and war crimes. It culminated years of intense, arduous, and almost exhausting work. The sentiment shared by the delegates of the States represented at the Diplomatic Conference was one of duty fulfilled.

In truth, what seemed impossible until the last moment was achieved. The international legal limits to *de jure* or *de facto* power were defined, with a solemn repudiation of atrocities committed in the abusive and criminal exercise of power, both in the context of war and outside of it.

And a common platform of essential values was affirmed, anchored in the absolute principle of respect for the inherent dignity of all members of the human family.

That said, I will now attempt to outline, albeit roughly and fragmentarily, a sketch of military criminal procedure within the context of the Portuguese Colonial War, which must necessarily be situated within its historical-political context.

The backdrop of the administration of military justice during the period in question is the complex tapestry of Portuguese colonial administration, reflecting the authoritarian political conception characteristic of the Estado Novo regime established in the metropole, during a time marked by guerrilla warfare opposing the Portuguese army and the armed wings of liberation. From time to time, the administration of military justice in the so-called overseas territories reveals, albeit in flashes, the reverberations produced by the abuse of power relations, as well as the antinomic and violent tension between those among the natives who collaborated with the Portuguese army and the supporters and members of the independence guerrillas, who were regarded by the former as “colonialists” and “traitors.”

I'll give a very brief example of this with a murder case that was prosecuted in 1972/73 at the Territorial Military Court of Guinea (Case No. 25/73), in which a Guinean military officer was accused of killing the mother of a supporter of the independence movement who had fled after slashing the defendant's three-year-old daughter while shouting that the child was 'the daughter of a colonialist'.

I believe it is worth recalling that 63 years ago, in Angola, the União das Populações de Angola (UPA), whose members were supported by the former Belgian Congo, carried out simultaneous attacks on five localities, massacring thousands of people—mainly black but also mixed-race and white men, women, infants, and children. Women were raped and killed - a "rebellious terror," in the words of Miguel JÚNIOR, Lieutenant General of the Angolan Armed Forces and Director of the Instituto Superior Técnico Militar de Angola (2021), which "left the Angolan populations and international observers perplexed (...) random terror that produced some Dantesque images." The Portuguese Armed Forces reacted accordingly, the author states—that is, with manifest violence.

In April, Salazar, head of the government, gave a well-known speech, broadcast on the radio, in which the slogan stood out: *Para Angola e em força* ("To Angola and with force").

The UPA, beyond the deliberate intention of instilling terror, marked the beginning of an armed conflict in Angola, followed in 1963 by Guinea and 1964 by Mozambique, which cannot be dissociated, naturally, from attitudes of abuse and exploitation, the brutal repression of cotton workers' demands, the severe restrictions on cultural and political association rights, the arrests and exile sentences imposed on African nationalists by Salazar's dictatorial government. These actions primarily reflected the restriction of fundamental freedoms and rights experienced in the mainland.

However, it must be interpreted in light of the international context marked by the confrontation between two Blocs—one led by the USA and the other

by the USSR—and their respective geopolitical ambitions, which seemed to include providing, albeit not disinterested, support to pan-African independence movements and the just aspirations of African peoples for self-determination, which, incidentally, echoed Article 73 of the United Nations Charter (Policarpo, 2021).

In the 1950s, Egypt's nationalization of the Suez Canal and the formation of dozens of African states accelerated the fall of empires, seemingly fulfilling the proclamation from the Bandung Conference: "Africa for the Africans."

The Portuguese government, headed by Salazar, remained, however, unyielding, trapped in its political labyrinth: "*The overseas territories are not colonies but Portuguese provinces. Portugal's territory is one and indivisible, from Minho to Timor.*" This was Portugal's response to the UN's questioning, following a proposal by the former USSR in April 1960 to the General Assembly, which approved the right of peoples in colonial territories to independence, stating that Portugal's refusal to grant them this right constituted "a threat to humanity's well-being and international peace" (Calhaço, 2021; Fati, 2021; Policarpo, 2021).

In the early 1960s, the Military Regions of Angola and Mozambique were created alongside seven Independent Territorial Commands, one of which was in Guinea (Estado Maior do Exército, 1988, p. 229).

The Portuguese Military Justice Code, approved by Decree in November 1925, was extended, with amendments, to the overseas provinces through Decree No. 12.393 of December 27, 1926, which established a Military Court in each of those provinces.

It is necessary to consider that the Military Justice Code and its Regulations constituted the normative framework for a special jurisdiction applicable to members of the Portuguese Armed Forces. It was governed by a specific penal and procedural model aimed at preventing and repressing behaviours of non-compliance with military duties or those that undermined discipline

and the security of the armed forces, as well as behaviours committed by military personnel that, due to their gravity, threatened their honour and dignity.

For this reason, it is stipulated that acts not considered essentially military crimes (e.g., treason, espionage, crimes against the laws of war, insubordination, abuse of authority, cowardice, desertion, military violence, crimes against persons and property in wartime...) or military (falsehood, infidelity, or other military duties) but are qualified as common crimes, when committed by military personnel or members of the Armed Forces, must be subject to penalties provided for in general criminal Law (Articles 1 to 4 of the Military Justice Code, ed. 1971). It is noteworthy that the death penalty, abolished for ordinary crimes, was still applicable to essentially military crimes, a situation that remained until the 1976 Constitution came into force, which today prohibits the creation of special courts in accordance with the principle of the natural judge (Article 32, No. 9).

The *Common Project* addresses cases concerning the commission of common crimes by Portuguese military personnel in Angola, Mozambique, and Guinea, crimes which, as mentioned, were investigated and judged according to the procedural model designed by military Law.

It is essential to highlight that military criminal proceedings maintained a markedly inquisitorial structure, contrary to the trend reflected in the amendments to the Portuguese Penal Procedure Code of 1929 (declared in force in the "overseas provinces" by Decree in 1931). These amendments began with Decree-Law 35007 of 1945, transferring the investigation to the Public Prosecutor's Office, and later, through Law No. 2/1972, which created criminal investigation judges responsible for the preparatory investigation phase, thereby reinforcing the material (not merely formal) accusatory structure. This established a clear separation between the investigating entity and the judging entity and strengthened the procedural guarantees, the accused's defence and the judicial oversight of coercive procedural measures, particularly subordinating preventive detention to the principles

of necessity, proportionality, and subsidiarity (Decree-Law No. 185/72 of May 31) (Dias, 1974, pp. 59–92).

In practice, military criminal proceedings encompassed four phases: the investigation, the summary of the charges, the prosecution and defence, and the trial.

The *corpus delicti* encompasses a set of steps aimed at investigating the crime reported, carried out by the judicial police body in the Colonies, generally a senior-ranking military officer (Articles 408 and following of the Military Justice Code, hereinafter CJM). The charge summary is already a judicial phase ordered by the military authority (if sufficient evidence exists). It begins with presenting the facts and the applicable Law, prepared by the justice promoter attached to the corresponding military court, a senior-ranking officer fulfilling the functions attributed to the Public Prosecutor (Articles 432 and following of the CJM). This is followed by procedural evidentiary actions under the jurisdiction of the Judge Auditor, a judicial magistrate overseeing this investigative phase, particularly the interrogation of the accused (Articles 437 and 438 of the CJM). The judge is also responsible for drafting a substantiated report of the facts and applicable Law to allow a preliminary formation of the accused's guilt (Article 454 of the CJM). Subsequently, by order of the highest territorial military authority, the case is referred so that the promoter can file the indictment (Article 465 of the CJM). Upon receiving the indictment, the Judge Auditor informs the accused of its content and the procedural rights of defence to which he is entitled. (Article 469 of the CJM).

The trial hearing takes place before a court composed of three judges: two military officers and one civilian judge, the Judge Auditor (Article 21 and following Decree-Law No. 19892 of 15/06/1932).

Hence, the judge responsible for the investigation and drafting the critical procedural document to bring the accused to trial is the same judge participating in the trial. This participation is active, as it is the judge who

interrogates the accused during the hearing (Article 34 of the aforementioned Decree-Law of 1932). This reveals the inherent flaw of the military criminal process, which is symptomatic of the inquisitorial structure used, as is well known, served authoritarian state conceptions.

As the judge who tries the case is also the accuser, he cannot possess the required impartiality to evaluate the facts and decide the trial's outcome. This is because, almost certainly, he would have already formed an opinion about the facts and the presumed perpetrator, which constitutes a significant impediment to the formulation of (another) impartial opinion.

Now, despite the inquisitorial distortions of the requirements for a fair and equitable trial, I believe I can confidently state that, in the cases I have reviewed, there was, at least formally, strict compliance with the Law and the principles upheld therein. These include recognizing fundamental defence rights, the accused's right to choose a defence attorney, the right to adversarial proceedings, the right not to testify about the facts they are accused of, and the right to remain silent. Although the right to silence did not have, within the procedural model in question, the scope it is contemporarily granted in the Portuguese legal system - anchored in the principle of the presumption of innocence, which inspired the status of the accused in the Criminal Procedure Law of the Macao Special Administrative Region of China (Esteves, 2014) - constitutes an expression of the respect owed to human dignity (Articles 1 and 32(2) of the Constitution). It entails the accused's right not to self-incriminate, the principle of respect for their autonomous decision (as reflected in the well-known maxim *nemo tenetur se ipso accusare*), and, ultimately, the right not to be disadvantaged for choosing not to provide statements about the facts they are accused of (Dias & Brandão, 2022).

It is another matter, however, to determine whether and to what extent the power relations within a colonial domination context—facing armed insurrections—are reflected in the process or weave into the dynamics of military judicial proceedings, particularly regarding the treatment of other

procedural participants, witnesses, and especially the victims. This will, necessarily, have to be the subject of future research, which requires much more time, dedication, and consideration.

References

Calhaço, N. R. (2021). Uma Perspetiva Sobre o 'Teatro de Operações' de Moçambique. *Revista Portuguesa de História Militar*, 1(1).

Dias, J. D. F. (1974). *Direito Processual Penal*. Coimbra: Coimbra Editora, 1.

Dias, J. D. F., & Brandão, N. (2022). *Direito Processual Penal: Os Sujeitos Processuais*. Gestlegal.

Esteves, M. L. (2014). The Structural Model of the Macao's Criminal Procedure. Founding Principles. In M. Trigo (Ed.), *Report on Macau Law*. University of Macau, LexisNexis.

Esteves, M. L. (2016). *Contributo para uma reflexão em torno do Sentido e do Fundamento dos Crimes contra a Humanidade* [Doctoral Dissertation, Universidade de Santiago de Compostela]. Portal da Investigación de la Universidade de Santiago de Compostela. <https://investigacion.usc.gal/documentos/5d1df65c29995204f7669b8f>

Esteves, M. L. (2021). *Crímenes de lesa humanidad: Genealogia de un concepto jurídico-filosófico contemporáneo*. Editorial Reus. <https://www.editorialreus.es/libros/crimenes-de-lesa-humanidad/9788429024364/>

Fati, S. (2021). Início da Guerra na Guiné-Bissau 1963: Uma Visão Guineense. *Revista Portuguesa de História Militar*, 1(1).

Júnior, M. D. (2021). Início da guerra em Angola 1961. Uma Visão Angolana. *Revista Portuguesa de História Militar*, 1(1).

Manou. (2007). *Les Lois de Manou* (A. Loiseleur Deslongchamps, Trad.). Narratif.

Mansfield, L. (1995). Crimes against Humanity: Reflections on the Fiftieth Anniversary of Nuremberg and a Forgotten Legacy. *Nordic Journal of International Law*, 64.

Marinetti, F. (1995). *O Futurismo* (António Moura, Trad.). Lisboa: Editora Hiena.

Policarpo, F. (2021). O Fim do Império e o Início da Guerra na Guiné. *Revista Portuguesa de História Militar*, 1(1).

Estado Maior do Exército. (1988). *Resenha Histórico-Militar das Campanhas de África, 1961-1974* (Vol. 1). Lisboa.

Suárez, F. (2004). *De Legibus, Livro I, da Lei em Geral* (Apresentação de M. C. Henriques; Introdução e tradução de G. Moita). Lisboa: Tribuna da História.

Sun Tzu. (1971). *The Art of War* (S. B. Griffith, Trad.; Introdução por S. B. Griffith; Prefácio por B. H. Liddell Hart). New York: Oxford University Press.

Vicente, L. M. (1971). *Código de Justiça Militar: Anotado e Atualizado* (11ª ed.).

Detter, I. (2000) *The Law of War*. Cambridge University Press.

Vitoria, F. de. (1998). *Sobre el Poder Civil. Sobre los Indios. Sobre el Derecho de la Guerra* (Estudio preliminar, traducción y notas de L. Fraye Delgado). Madrid: Tecnos.

A Justiça Militar e os Tribunais Militares Territoriais (TMT) sob uma Perspectiva Histórica

Military Justice and Territorial Military Courts from a Historical Perspective

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⁶ This work was supported by FCT – Fundação para a Ciência e Tecnologia, I.P. by project reference 2022.05692.PTDC and DOI identifier <<https://doi.org/10.54499/2022.05692.PTDC>>.

Resumo

A Justiça Militar compreende duas componentes distintas: a Penal e a Disciplinar. A origem da Justiça Militar data do aparecimento dos Exércitos permanentes e remonta à Antiguidade Clássica, estando relacionada com o aparecimento do Estado e a necessidade de um corpo armado de defesa. Considera-se que, em Portugal, o direito penal militar só alcançou autonomia em 1640, quando D. João IV instituiu o Conselho de Guerra, criado na sequência da Restauração, tendo sido, na mesma altura, publicado o primeiro Código de Justiça Militar (CJM) em 1875. Nessa sequência, foi concebido, também, o Código de Processo Criminal Militar (CPCM), em 1911. Em relação à pena de morte em Portugal, a mesma foi abolida logo a partir de 1 de julho de 1867, tendo sido esta medida mandada aplicar a todo o império colonial por Decreto de 9 de junho de 1870. Ainda assim, verificou-se a sua reintrodução efetiva com a entrada de Portugal na Grande Guerra (1916). O Código de 1911 cria os Tribunais Militares Territoriais (TMT). Com o processo de descolonização, deu-se a extinção destes tribunais nos territórios ultramarinos e o desaforamento dos respetivos processos para os tribunais militares metropolitanos. A Lei Constitucional de 1997 suprimiu a existência dos tribunais militares em tempo de paz e, com a Lei n.º 100/2003, de 15 de novembro, foi revogado o CJM de 1977, tendo sido aprovado o CJM, atualmente em vigor, desde 14 de setembro de 2000. A partir desta data, procedeu-se à transferência dos processos dos Tribunais para o Arquivo Histórico Militar, onde se encontram depositados e disponíveis para consulta e investigação. Assim, perspetiva-se a apresentação desta comunicação do ponto de vista histórico e de Arquivo, abrangendo o panorama da Justiça Militar e dos Tribunais Militares Territoriais em Portugal diante do fenómeno complexo da Guerra.

Palavras-chave

Justiça Militar, Tribunais Militares Territoriais (TMT), Código de Justiça Militar (CJM), Guerra do Ultramar, Descolonização, Arquivo Histórico Militar.

A Origem da Justiça Militar

A origem da Justiça Militar perde-se na História e confunde-se muitas vezes com a origem da hierarquia, da disciplina militar e do direito militar. A justiça militar consolidou-se com o aparecimento dos primeiros Exércitos permanentes remontando à Antiguidade Clássica e encontra-se diretamente relacionada com o aparecimento do Estado e a necessidade de um corpo armado de defesa, com características próprias e que contribuem decisivamente para o seu sucesso. Esse corpo armado de defesa assentava, sobretudo, na presença de soldados altamente disciplinados, sob o controlo total dos seus comandantes, prontos para intervenção imediata e assente num regime férreo, com sanções rigorosas, gravosas e de aplicação imediata.⁷

Os factos hoje tipificados como crime já eram conhecidos e referidos no Código de *Urnammu*⁸, considerada a mais antiga lei conhecida. A primeira referência expressa à hierarquia e disciplina militar surgiu no Código de *Hammurabi*⁹, tal só possuía paralelo, nas antigas leis Assírias e Egípcias. Homero já falava de “anciãos, escolhidos de entre guerreiros, sentados

⁷ Franz Von Liszt, nascido em 2 de março de 1851, em Viena, na Áustria e falecido a 21 de junho de 1919, em Seeheim, Áustria. Foi advogado austríaco, especialista em Direito Internacional e Direito Penal e ainda, Professor de Direito Penal.

⁸*Urnammu* foi redigido na cidade de UR e determinou a fundação da III Dinastia de UR, na antiga Mesopotâmia, região que se situa entre os rios Tigre e Eufrates (2060 a.C.).

⁹ *Hammurabi*, sexto rei da Babilónia, governou durante 43 anos (1728 a 1686 a.C.).

diante de Troia, a administrar a justiça". Os helênicos, por seu turno, não possuíam uma conceção diferenciada e específica dos delitos militares, talvez por considerarem que todo o cidadão era um soldado da pátria e, assim, não existiria a necessidade de uma justiça militar que estivesse nitidamente separada da justiça comum.

No início, a justiça militar era exercida pelo Archonte, juiz sacerdote, que conhecia os delitos militares, julgando-os e prescrevendo-lhes as penas correspondentes. Essa competência foi passando, aos poucos, para o Estratego¹⁰ e mais tarde, passou para o Taxiarco.

Para Platão, o magistrado deveria pertencer à mesma arma do militar culpável, de modo que o infante fosse julgado por outro infante e, de igual modo, com respeito às demais armas. Com os romanos, a Justiça Militar e o Direito Militar adquirem uma importância capital. A Justiça Militar aparece-nos organizada e com o seu espaço próprio, com direito a um capítulo no *DIGESTO - DE RE MILITARE*, um compêndio normativo dos Romanos. A história da organização militar de Roma pode dividir-se em três períodos: o primeiro desde a fundação da cidade de Roma (séc. VIII a.C.) e à guerra social, onde todos os cidadãos são soldados e todos os soldados são cidadãos. Neste período encontram-se sujeitos ao *jus commune* (Direito Comum); o segundo, dos exércitos permanentes, que começaram nos primeiros anos do Império, tendo sido objeto de reorganização e transformação durante o Séc. II. O terceiro, o dos mercenários, que emergem com as guerras civis. São estas que marcam a decadência da República.

É com César Augusto que a jurisdição penal militar adquire foros de verdadeira instituição jurídica. É neste período, dos exércitos permanentes,

¹⁰ Literalmente "líder de Exército" é um título usado na Grécia Antiga para designar o cargo general. No período helenístico e no Império Bizantino passou a ser usado para descrever um governador militar.

que são marcadas as diferenças entre o que é considerado “crime propriamente ou impropriamente militar.”¹¹

A Justiça Militar dos mais antigos povos civilizados, consolidada na antiga Roma (*DIGESTO – DE RE MILITARE*), contribuiu para a coesão e para a eficácia dos exércitos romanos. A História diz-nos que o Império Romano se formou e prosperou graças à disciplina das legiões romanas, assente num Direito Militar férreo aplicado pela Justiça Castrense. Com a queda de Roma, toda a Europa sofre transformações decorrentes da queda do Império Romano do Ocidente (476 d.C.), pois o seu território passou a ser dominado por hordas de bárbaros. No entanto, os povos invasores da Península Ibérica aproveitaram na íntegra o conhecimento que os romanos nos deixaram, especialmente no que respeita à organização da justiça militar. Em 506 (d.C.), os Visigodos publicaram o *Breviarium ou código de Alarico* (Rei dos visigodos), baseado fundamentalmente no Direito Romano. Em 693 (d.C.) os Visigodos redigiram um outro Código Visigótico, que seria um compêndio normativo fazendo a junção das leis romanas com a magistratura episcopal (os visigodos eram principalmente cristãos). A Invasão Árabe (712 d.C.) derruba o Império Visigótico. Séculos de domínio sarraceno na Península Ibérica não lograram deixar traços de relevo no mundo jurídico ibérico, podendo afirmar-se que nunca o Direito do norte de África abriu brechas no Código Visigótico e se instalou no território da Península Ibérica.

Durante o período histórico da Idade Média, o Direito Militar permaneceu estagnado. Considera-se que, em Portugal, o direito penal militar só alcançou autonomia em 1640, quando D. João IV instituiu o Conselho de Guerra¹²,

¹¹ São diferenças de entendimento doutrinário e jurisprudencial que se vão projetar no tempo e no espaço, até aos nossos dias.

¹² A existência de um tribunal próprio para julgar infrações à disciplina remonta ao Conselho de Guerra, criado em 11 de dezembro de 1640.

criado na sequência da Restauração¹³. Este conselho possuía incumbências de gestão logística e jurisdicional. Só a partir desta data (1640) é que se produziu um conjunto de normas ordenadas e estruturadas com a finalidade de proporcionar o exercício da disciplina e da justiça militar, nomeadamente: o levantamento do estado das fortalezas e fortificações; diretivas relativas à disciplina e instrução das tropas; a instalação relevante e ordenado de quartéis e hospitais; o provimento ao Reino de fundições e oficinas destinadas à fabricação do material de guerra; a organização do sistema geral de comunicações pelas vias marítimas e terrestres; a fiscalização e administração na construção de galeões, munições e no recrutamento; planeamento dos movimentos que os exércitos realizavam; elaboração das ordens, regimentos e instruções para cumprimento dos cargos superiores.

O Regimento de 1643 acomodava normas materiais e normas procedimentais, tendo tipificado um conjunto de crimes materialmente militares (guerra, desobediência e traição); estipulou normas aplicáveis exclusivamente aos militares, assumindo, assim, o foro marcadamente pessoal, mantendo-se em funcionamento cerca de dois séculos e considerou um tratamento especial aplicado aos fidalgos e capitães, que só podiam ser julgados perante o Conselho de Guerra.

O Conselho de Guerra era muito mais do que um órgão de aconselhamento do rei, possuía incumbências nas áreas da gestão logística e jurisdicional, a sua extinção ocorreu por Decreto de 1 de julho de 1834.

¹³ A 1 de dezembro de 1640 foi restaurada a independência de Portugal, colocando fim à união dinástica Portugal-Espanha. D. João, Duque de Bragança tornou-se rei de Portugal como D. João IV.

O Conde de Lippe e a Justiça Militar¹⁴

Foi no contexto da *Guerra Fantástica*, iniciada em 18 de maio de 1762, quando Portugal declarou guerra à Espanha e à França devido à violação de fronteiras, que o Conde de Lippe foi nomeado marechal-general do Exército Português, por conselho da Inglaterra, para prestar auxílio militar a Portugal. A sua ação pautou-se, sobretudo, na criação de novos regulamentos para o Exército Português, tendo em vista consolidar a disciplina das tropas, proceder à uniformização dos fardamentos e promover a instrução militar, com o objetivo de aumentar a sua proficiência.

Em 1763 criou o “Regulamento para o Exercício e Disciplina dos Regimentos de Infantaria e Praças que Constituem as Barreiras do Reino”; em 1764 desenvolveu o “Regulamento para o Exercício e Disciplina dos Regimentos de Cavalaria”; e os artigos de Justiça militar, Cap. XXVI – dos artigos de Guerra. A Principal novidade foi a introdução do conceito de “foro material”.

Por Portaria de 23 de julho de 1855, assinada pelo Duque de Saldanha, mandou proceder à redação de um Código Penal Militar. A referida Portaria encarregou o então Auditor da 1.^a Divisão, José de Barros Sá, de redigir um novo Código. Através da Lei de 9 de abril de 1875 foi aprovado o primeiro Código de Justiça Militar¹⁵ e, assim, criado e publicado o primeiro Código de Justiça Militar (CJM) em 1875.

¹⁴ Wilhelm Lippe, Conde Schaumbourg, foi convidado pelo Rei D. José I com a finalidade de reestruturar o Exército Português, no Séc. XVIII.

¹⁵ Nesse mesmo ano é nomeada uma comissão encarregada de redigir um outro Código de Justiça Militar para a Marinha.

Tribunais Militares Territoriais (TMT)

A designação de Tribunais Militares Territoriais foi introduzida pelo Código Penal Criminal Militar (CPCM, 1911). A organização e localização dos TMT ficaram determinados neste código, tendo sido previsto, na sua redação, que fossem criados Tribunais Militares Territoriais junto da sede de cada Divisão Militar e, excecionalmente, apenas quando as necessidades de serviço o exigissem, dois em Lisboa, um em Viseu e outro no Porto¹⁶. Cada um destes Tribunais Militares Territoriais era constituído por um presidente, com a patente de Coronel, um auditor, um júri, um promotor, um defensor e um secretário.

Junto de cada Tribunal Militar havia ainda um auditor, juiz togado, sem graduação militar e um júri constituído por cinco oficiais. Esta constituição era fixa, em termos quantitativos, variando apenas na patente de quem o compõe face à patente do réu. Para as praças de pré o júri era constituído por subalternos e para o julgamento de oficiais o júri era constituído, obrigatoriamente, por oficiais de patente igual ou mais antigos que o réu.

Junto de cada Tribunal Militar Territorial existia um promotor de justiça, um defensor oficioso e um secretário, sendo os dois primeiros oficiais superiores ou Capitães e o último subalterno (CPCM).¹⁷

Em consequência do fim da guerra do ultramar (1961-1974) e do processo de descolonização que se seguiu, promoveu-se de imediato à extinção dos

¹⁶ Artigo 22.º do CPCM (CPCM, 1911).

¹⁷ O serviço de secretaria era assegurado por dois amanuenses, um porteiro, um meirinho e um servente (CPCM).

Tribunais Militares Territoriais ultramarinos e o desaforamento dos respetivos processos para tribunais militares metropolitanos.¹⁸

Os processos dos tribunais bem como toda a documentação dos TMT encontram-se arquivados no Arquivo Histórico Militar (AHM), podendo ser consultados presencialmente através da pesquisa na respetiva base de dados.

O facto de deixarem de existir forças militares em Macau¹⁹ e a situação instável em Timor justificaram providências semelhantes para estas duas antigas províncias ultramarinas.

O aumento do número de processos que foram afetos ao foro militar e as referidas transferências de processos, obrigou o sistema a aumentar o número de tribunais militares territoriais metropolitanos.²⁰

Através da Lei 5/75, de 14 de março, o Conselho da Revolução decretou e promulgou, para valer como lei, a criação dos seguintes tribunais militares territoriais:

O 4.º Tribunal Militar Territorial de Lisboa (4.º TMTL) e o 5.º Tribunal Militar Territorial de Lisboa (5.º TMTL), ambos com sede em Lisboa; O 2.º Tribunal Militar Territorial do Porto (2.º TMTP), com sede no Porto; O Tribunal Militar Territorial de Coimbra (TMTC), com sede em Coimbra; O Tribunal Militar

¹⁸ Nas respetivas guias de entrega, que se encontram no Arquivo Histórico Militar, está registado por exemplo a Entrega do 1º TMT de Angola ao 2º TMT de Lisboa.

¹⁹ As forças militares em Macau encontravam-se integrados no Comando Territorial Independente de Macau (CTIM) extinto em 31 de dezembro de 1975, posteriormente os militares que ficaram no território integraram a organização das Forças de Segurança de Macau (FSM).

²⁰ A criação de novos TMT correspondem à imperiosa necessidade da justiça militar funcionar corretamente e dentro dos trâmites do princípio da justiça.

Territorial de Évora (TMTE), com sede em Évora; Os Tribunais Militares Territoriais de Tomar e Coimbra.

Ao mesmo tempo extingue a partir de 1 de janeiro de 1976 os Tribunais Militares Territoriais de Macau e Timor, passando a jurisdição dos mesmos para o Tribunal Militar Territorial de Lisboa. Determinou ainda que em circunstâncias especiais e por motivos de segurança dos arguidos ou maior celeridade processual, se proceda a título excecional, à criação tribunais territoriais em localidades diferentes das previamente estabelecidas mas dentro da mesma área de jurisdição.²¹

O Código de Justiça Militar de 1925

Em 1925 é promulgado pelo Decreto n.º 11.292, de 26 de novembro, um novo CJM para execução no Exército e na Armada. No preâmbulo deste diploma é manifestada a necessidade de atualizar os CJM do Exército e da Armada e alterar algumas disposições constantes no CPCM, reunindo num único documento toda a legislação penal militar.

A instabilidade política que então se vivia, as perturbações e os receios por ela motivados, refletiram-se neste CJM, constituindo um verdadeiro retrocesso em relação ao Código de 1911 de que se destacam as principais alterações²²: a manutenção da pena de morte, apesar da Grande Guerra (1914-1918) ter terminado há sete anos²³; o estabelecimento de uma pena de reclusão, imediatamente superior à de presídio militar, a cumprir no

²¹ Este diploma entrou em vigor em 1 de janeiro de 1976, visto e aprovado em Conselho da Revolução, promulgado em 12 de janeiro de 1976 pelo Presidente da República, Francisco da Costa Gomes.

²² ROQUE, Nuno. *A Justiça Penal Militar em Portugal*, 2000.

²³ ROBERTO, Joaquim J. da Cunha. *O Último Fuzilado*, 2018.

ultramar; a abolição da pena de deportação como pena acessória para o Exército e a criação dos Tribunais Militares extraordinários.

Com este código de justiça militar existiu um verdadeiro retrocesso na abordagem e na aplicação do CJM, tendo-se retrocedido ao conceito de foro pessoal.²⁴

O Decreto n.º 19.892 de 11 de janeiro de 1931 vem alterar profundamente este CJM de 1925, nomeadamente no domínio da organização judiciária militar e do processo penal militar (suprindo-se o júri por exemplo). Foi delimitado o seu âmbito de aplicação conforme se refere:

Os factos que constituem crimes essencialmente militares, por violarem algum dever militar ou ofenderem a segurança e a disciplina do Exército ou da Armada; os factos que, em razão da qualidade militar dos delinquentes, do lugar ou de outras circunstâncias, tomam o carácter de crime militar.²⁵

A definição apresentada neste Código de “crime militar” encontrava-se bem delimitada, ao invés da apresentada como “crime essencialmente militar”, pois bastava que um facto violasse um dever militar ou a segurança militar e a disciplina para que pudesse ser considerado crime essencialmente militar.

Em 1934, pelo Decreto n.º 24.826, de 29 de dezembro, é extinta a aplicação da pena de deportação, sendo substituída, conforme os casos, por presídio militar ou incorporação em depósito disciplinar.

²⁴ O artigo 363.º do CJM de 1925 refere que os Tribunais Militares eram competentes para conhecerem dos crimes de qualquer natureza cometidos por militares e outras pessoas ao serviço do Exército ou da Armada (...). Nesta ótica manteve-se o conceito do foro pessoal.

²⁵ Decreto n.º 19.892, de 11 de janeiro de 1931.

O Código de Justiça Militar de 1977

A revolução de 25 de abril de 1974 e, depois, a Constituição da República Portuguesa (CRP) de 1976 conduziram à reorganização da jurisdição militar.²⁶

A CRP citada dava apenas o prazo de um ano para se proceder à revisão do CJM, tendo sido nomeada uma comissão que elaborou o projeto para o CJM de 1977.²⁷

Neste Código foi restabelecido o foro material²⁸, foi abolida a pena de morte e limitado o foro militar ao conhecimento dos crimes essencialmente militares, independentemente da qualidade do agente e sem prejuízo de, virem a ser a estes equiparados outros crimes pela lei ordinária. A organização judiciária militar foi reestruturada em função das novas regras de processo, de forma a restringir o campo de ação à investigação policial do crime das autoridades.

O CJM de 1977 abrange num único diploma, de 477 artigos, o Direito Penal Militar e o Direito Judiciário, incluindo a organização judiciária e o processo criminal militar.

²⁶ O artigo n.º 293.º da referida CRP determinava a revisão do CJM e de toda a legislação complementar existente.

²⁷ ARAÚJO, António. *A Jurisdição Militar (do Conselho de Guerra à Revisão Constitucional de 1977)*, 2000.

²⁸ No preâmbulo do Decreto-Lei n.º 147/77, de 9 de abril refere o seguinte: "A constituição vigente veio colocar de novo a jurisdição militar no plano do foro material. O cidadão, militar ou civil, só estará a ele sujeito enquanto violador de interesses especificamente militares. Caso negativo, sobrepõe-se-lhe o foro comum (...)" (CR, 1985, p.13). Também a este respeito refere o artigo 218.º da CRP (1976) que "Ao foro militar é indiferente a qualidade do agente do crime; é a natureza deste que passa a contar".

À luz do CJM de 1977, a justiça militar é exercida através das autoridades judiciárias militares e dos Tribunais Militares. O CJM refere que são autoridades judiciárias a Polícia Judiciária Militar (PJM), os Juizes de Instrução Criminal Militar, os Comandantes das Regiões Militares do Exército e as entidades equivalentes da Armada e da Força Aérea, os Chefes de Estado-Maior dos Ramos das Forças Armadas e o Chefe de Estado-Maior General das Forças Armadas (CEMGFA)²⁹. No CJM de 1977 o processo criminal militar compreende a investigação, a instrução, a acusação e defesa e o julgamento.³⁰

O Código de Justiça Militar de 2003³¹

O CJM tem uma existência secular. A Lei n.º 100/2003 de 15 de novembro manteve a tradição de existência de um diploma próprio para tratar da justiça militar. Este Código apresenta-se com uma extensão consideravelmente reduzida, procurou-se condensar toda legislação na implantação desta reforma, compensando esta realidade com aditamentos e alterações ao Código Penal (CP) e ao Código de Processo Penal (CPP).

Ao contrário do CJM de 1977, o novo CJM de 2003 apresenta-se reduzido na sua extensão, com apenas 137 artigos, dispostos por dois livros. Este CJM não visa permitir a “criação de um sistema autónomo nem multiplicar as exceções, nem as restrições à aplicação da Lei penal comum, mas especializar certos aspetos desta ou regular matérias reguladas por ela”³².

²⁹ De acordo com o artigo n.º 211.º do CJM de 1977.

³⁰ De acordo com o artigo n.º 322.º do CJM de 1977.

³¹ A Lei n.º 100/2003, de 15 de novembro introduz o atual Código de Justiça Militar.

³² Projeto de Lei n.º 259/IX.

Apenas algumas das suas disposições limitam-se a precisar conceitos que são utilizados na parte especial.

Os tribunais são constituídos, não só por magistrados judiciais, mas também por juízes militares, de acordo com as regras que regulam a participação dos juízes militares e que ficou a constar na Lei de Organização e Funcionamento dos Tribunais Judiciais (LOFTJ).³³

Na LOFTJ ficou expresso a criação de secções de instrução criminal nos Tribunais de Instrução Criminal de Lisboa e do Porto. Estas secções tinham a competência para procederem à instrução criminal, decidir quanto à pronúncia e exercer as funções jurisdicionais relativas ao inquérito.

A Situação atual da Justiça Militar e dos Tribunais Militares

Com a revisão constitucional de 1997, a existência de Tribunais Militares em tempo de paz deixou de estar expressa na Constituição da República Portuguesa. No entanto, os Tribunais Militares mantêm-se em funções até à entrada em vigor de legislação que regulamenta a composição dos Tribunais de qualquer instância que julguem crimes estritamente militares.

A extinção dos Tribunais Militares, ocorrida na revisão constitucional de 1997, realizou-se de uma forma cautelosa, atendendo que, ela apenas se circunscreve ao tempo de paz, a extinção foi acompanhada com a previsão de juízes militares nos Tribunais de qualquer instância que julguem crimes estritamente militares, onde se previram formas especiais de assessoria junto do Ministério Público e por último, a extinção dos Tribunais Militares foi

³³ Este diploma foi revogado pelo(a) Lei n.º 62/2013, de 26 de agosto - Lei da Organização do Sistema Judiciário.

acompanhada por uma norma transitória para impedir hiatos ou vazios legais.³⁴

Nos termos desta norma transitória, foi apresentado um conjunto de projetos de Lei à Assembleia da República relativos à extinção dos Tribunais Militares em tempo de paz. Os Projetos de Lei apresentados visavam a integração dos Tribunais Militares no sistema judicial vigente, a criação de um estatuto dos Juízes Militares e Assessores Militares do Ministério Público (EJMAMMP) e a aprovação de um novo CJM.

Em 15 de novembro e 10 de dezembro de 2003, foi publicada a legislação que originou a extinção dos Tribunais Militares em tempo de paz. O atual modelo atualmente em vigor, foi preconizado pelo CJM de 1977 encontrando-se expresso na Lei n.º 100/2003, de 15 de novembro. Assim com a entrada em vigor, em 14 de setembro de 2004, do novo CJM e da nova Lei de Organização e Funcionamento dos Tribunais Judiciais³⁵ a apreciação dos atos que apliquem sanções disciplinares passaram definitivamente para a competência da jurisdição administrativa.

A aprovação do CJM de 2003 reflete definitivamente o conceito do foro material no direito penal militar que passou a ser exclusivamente definido em função dos bens jurídicos e não em função da qualidade do agente.

A CRP contém normas específicas para a justiça e disciplina militares que lhe confere autonomia relativamente à comum, essa autonomia do direito penal militar fundamenta-se no facto de contemplar bens ou interesses jurídicos

³⁴ ARAÚJO, António. *A Jurisdição Militar (do Conselho de Guerra à Revisão Constitucional de 1997)*, 2000.

³⁵ Lei n.º 105/2003 de 10 de dezembro.

não considerados pela lei penal comum e de ter regimes jurídicos diferentes desta, contudo ambos se regem pelos mesmos princípios do direito.³⁶

Bibliografia

Albuquerque, R., & Albuquerque, M. (1999). *História do Direito Português*. 10ª ed. Lisboa: Faculdade de Direito de Lisboa, Volume I., 1999.

Biblioteca Nacional de Portugal & Instituto Português da Qualidade. (2010). *Normas portuguesas de documentação e informação*. Lisboa: Instituto Português da Qualidade.

Código Penal. (1996). Coimbra: Livraria Almedina. ISBN 972-40-0863-0.

Araújo, A. (2000). A Jurisdição Militar (Do Conselho de Guerra à Revisão Constitucional de 1997). In C. Morais, A. Araújo, & A. Leitão (Coord.), *O Direito da Defesa Nacional e das Forças Armadas* (pp. 529–582). Lisboa: Edições Cosmos, Instituto da Defesa Nacional.

Canas, V., Pinto, A. L., & Leitão, A. (2004). *Código de Justiça Militar Anotado e Outra Legislação Militar*. Coimbra

Costa, E. (2001). A Justiça Militar Portuguesa – Presente, Passado e Futuro. *Jornal do Exército*, 42(493), 18–21.

CR [Conselho da Revolução]. (1985). *Código de Justiça Militar – Regulamento de Disciplina Militar*. Lisboa: Edições Imprensa Nacional Casa da Moeda.

³⁶ PRATA, Vítor M. Gil. *A Justiça Militar e a Defesa Nacional*, 2012.

EME [Estado-Maior do Exército]. (1993). *Quadro Orgânico do 2º Tribunal Territorial de Lisboa (2º TMT)*. Lisboa: Estado-Maior do Exército.

Fernandes, J. (1999). *Planeamento e Gestão de Carreiras: Quadro Especial de Juristas e Quadro Especial de Gestão de Recursos Humanos*. Lisboa: Instituto de Altos Estudos Militares.

Morais, C. B. de, Araújo, A., & Leitão, A. (2000). *O Direito da Defesa Nacional e das Forças Armadas*. Lisboa: Edições Cosmos IDN.

Neves, F. (2003). *Tribunais Militares Extintos. Sobre o Novo Código de Justiça Militar* [Em linha]. [Consult. 13 de outubro de 2024]. Disponível em: <http://www.mundo.juridico.planetclix.pt/pag.htm>.

Norma Portuguesa 405-1. (1994). *Informação e documentação*. Monte da Caparica: Instituto Português da Qualidade.

Norma Portuguesa 405-4. (1994). *Referências bibliográficas para documentos eletrónicos*. Monte da Caparica: Instituto Português da Qualidade.

PGR [Procuradoria Geral da República]. (2003). *O Ministério Público e a Procuradoria-Geral da República* [Em linha]. [Consult. 22 de outubro de 2024]. Disponível em: http://www.pgr.pt/portugues/grupo_pgr/indice.htm.

Pimentel, L. (2001). A Preparação dos Juízes para os Novos Tribunais – O Fim dos Tribunais Militares. *Jornal do Exército*, 42(497), 30–34.

PJM [Polícia Judiciária Militar]. (2000). *Justiça Militar*. Lisboa: Polícia Judiciária Militar. Execução Gráfica CAVE.

Prata, A. (1990). *Dicionário Jurídico* (3ª ed.). Coimbra: Livraria Almedina.

Prata, V. M. G. (2012). *A Justiça Militar e a Defesa Nacional*. Lisboa: Coisas do Saber.

Roberto, J. J. da C. (2018). O Último Fuzilado. In *A Batalha do Lys - Os Combatentes Portugueses* (pp. 333–345). Lisboa: [Editora não especificada].

Roque, N. (2000). *A Justiça Penal Militar em Portugal* (1ª ed.). S. Pedro do Estoril: Edições Atena Lda.

Silva, N. (1985). *História do Direito Português – Fontes de Direito* (Vol. 1). Lisboa: Fundação Calouste Gulbenkian.

STM [Supremo Tribunal Militar]. (1980). *Supremo Tribunal Militar*. [Monografia]. Lisboa.

STM [Supremo Tribunal Militar]. (2001). *Anuário - Supremo Tribunal Militar 2001*. Lisboa.

Vicente, L. M. (1971). *Código de Justiça Militar Anotado* (11ª ed.). Lisboa: Minerva.

Legislação

AR [Assembleia da República]. *Constituição da República de 1911* [Em linha]. [Consult. 08 de novembro de 2024]. Disponível em:

WWW

<URL:<http://www.parlamento.pt/livraria/edicoesdigitais/luisa/textos%20crp/CRP-1911.pdf>>

LEI nº 5/75, de 14 de março. O Conselho da Revolução aprova a extinção de TMT e a criação de novos TMT (temporários).

DECRETO n.º 135/IX/2003. *Aprova um Novo Código de Justiça Militar e Revoga a Legislação Existente Sobre a Matéria* [Em linha]. Assembleia da

República, [Consult. 07 de novembro de 2024]. Disponível em: WWW <URL:http://www3.parlamento.pt/plc/Texto.aspx?ID_Tex=4874>.

Decreto-Lei nº 141/77, de 9 de abril. *Aprova o novo Código de Justiça Militar de 1977.*

LEI nº 3/99 de 13 de janeiro. *Aprova a Lei de Organização e Funcionamento dos Tribunais Judiciais* (altera a Lei n.º 38/87, de 23 de dezembro).

LEI nº 100/2003 de 15 de novembro. *Aprova um Novo Código de Justiça Militar e Revoga a Legislação Existente Sobre a Matéria.*

English

Abstract

Military Justice comprises two distinct components: Criminal and Disciplinary. The origin of Military Justice dates back to the emergence of standing armies and goes back to Classical Antiquity, being related to the emergence of the State and the need for an armed defense corp. In Portugal, military criminal law is only considered to have achieved autonomy in 1640, when King João IV instituted the Council of War, created following the Restoration, and the first Code of Military Justice was published in 1875. The Code of Military Criminal Procedure was also conceived in 1911. With regard to the death penalty in Portugal, it was abolished as of 1 July 1867, and this measure was ordered to be applied throughout the colonial empire by Decree of 9 June 1870. Nevertheless, it was effectively reintroduced when Portugal entered the Great War (1916). The 1911 Code created the Territorial Military Courts. With the process of decolonization, these courts were abolished in the overseas territories and their cases were transferred to the metropolitan military courts. The 1997 Constitutional Law abolished the existence of peacetime military courts and, with Law 100/2003 of 15 November, the 1977 CJM was repealed and the CJM, currently in force since 14 September 2000,

was approved. From that date onwards, court cases were transferred to the Military Historical Archive, where they are deposited and available for consultation and research. This chapter is presented from a historical and archival point of view, covering the panorama of Military Justice and Territorial Military Courts in Portugal in the face of the complex phenomenon of war.

Keywords

Military Justice, Territorial Military Courts, Code of Military Justice, Overseas War, Decolonization, Military Historical Archive.

The Origin of Military Justice

The origin of military justice is lost in history and is often confused with the origin of hierarchy, military discipline and military law. Military justice was consolidated with the appearance of the first standing armies, dating back to Classical Antiquity, and is directly related to the emergence of the state and the need for an armed defence corps with its own characteristics, which contributed decisively to its success. This armed defence corps was based above all on the presence of highly disciplined soldiers, under the total control of their commanders, ready for immediate intervention and based on an iron-fisted regime, with strict, severe and immediately applicable sanctions³⁷.

³⁷ Franz Von Liszt was born on 2 March 1851 in Vienna, Austria and died on 21 June 1919 in Seeheim, Austria. He was an Austrian lawyer, specialized in international law and criminal law and was also a professor of criminal law.

The facts that are now criminal offences were already known and referred to in the Code of *Urnammu*³⁸, considered to be the oldest known law. The first express reference to military hierarchy and discipline appeared in the Code of *Hammurabi*³⁹, which was only paralleled in ancient Assyrian and Egyptian law. Homer already spoke of 'elders, chosen from among warriors, sitting before Troy, administering justice'. The Hellenes, for their part, did not have a differentiated and specific conception of military offences, perhaps because they considered that every citizen was a soldier of the fatherland and, therefore, there was no need for military justice that was clearly separated from common justice.

In the beginning, military justice was exercised by the *Archon*, a priestly judge, who dealt with military offences, judging them and prescribing the corresponding penalties. This jurisdiction gradually passed to the *Estratego*⁴⁰ and later to the *Taxiarco*.

For Plato, the magistrate had to belong to the same weapon as the guilty soldier, so that the infant was judged by another infant and, likewise, with respect to the other weapons. With the Romans, Military Justice and Military Law acquired capital importance. Military justice appears to us organised and with its own space, with the right to a chapter in the *DIGESTO - DE RE MILITARE*, a compendium of Roman norms. The history of Rome's military organisation can be divided into three periods: the first from the foundation of the city of Rome (8th century BC) and the social war, where all citizens are soldiers and all soldiers are citizens. In this period they are subject to the

³⁸ *Urnammu* was written in the city of UR and determined the foundation of the Third Dynasty of UR, in ancient Mesopotamia, a region between the Tigris and Euphrates rivers (2060 BC).

³⁹ *Hammurabi*, sixth king of Babylon, ruled for 43 years (1728 to 1686 BC).

⁴⁰ Literally 'army leader' is a title used in Ancient Greece to designate the position of general. In the Hellenistic period and in the Byzantine Empire it came to be used to describe a military governor.

jus commune (Common Law); the second, the standing armies, which began in the early years of the Empire and were reorganised and transformed during the 2nd century. The third, the mercenaries, which emerged with the civil wars. These marked the decline of the Republic.

It was with Caesar Augustus that military criminal jurisdiction acquired the status of a true legal institution. It was during this period, of standing armies, that the differences between what is considered a 'properly or improperly military crime' were marked.⁴¹

The Military Justice of the oldest civilised peoples, consolidated in ancient Rome (*DIGESTO - DE RE MILITARE*), contributed to the cohesion and effectiveness of the Roman armies. History tells us that the Roman Empire was formed and prospered thanks to the discipline of the Roman legions, based on an iron-fisted Military Law applied by the Castrense Justice. With the fall of Rome, the whole of Europe was transformed by the fall of the Western Roman Empire (476 AD), as its territory came to be dominated by hordes of barbarians. However, the invading peoples of the Iberian Peninsula took full advantage of the knowledge that the Romans had left us, especially with regard to the organisation of military justice. In 506 (AD), the Visigoths published the *Breviarium or code of Alaric* (King of the Visigoths), based fundamentally on Roman Law. In 693 AD, the Visigoths drew up another Visigothic Code, which was a compendium of rules combining Roman law with Episcopal magistracy (the Visigoths were mainly Christian). The Arab Invasion (712 AD) overthrew the Visigothic Empire. Centuries of Saracen rule in the Iberian Peninsula failed to leave any significant traces in the Iberian legal world, and it can be said that the Law of North Africa never broke through the Visigothic Code and established itself in the territory of the Iberian Peninsula.

⁴¹ These are differences in doctrinal and jurisprudential understanding that will be projected over time and space, right up to the present day.

During the Middle Ages, military law remained stagnant. It is considered that military criminal law in Portugal only achieved autonomy in 1640, when King João IV instituted the War Council,⁴² created following the Restoration.⁴³ This council had logistical and jurisdictional management duties. It was only from this date (1640) that a set of ordered and structured rules was produced with the aim of providing the exercise of discipline and military justice, namely: the survey of the state of fortresses and fortifications; directives regarding the discipline and instruction of troops; the relevant and orderly installation of barracks and hospitals; the provision to the Kingdom of foundries and workshops for the manufacture of war material; the organisation of the general system of communications by sea and land routes; supervision and administration in the construction of galleons, munitions and in recruitment; planning of the movements that the armies carried out; the drafting of orders, regiments and instructions for the fulfilment of senior positions.

The Regiment of 1643 included both material and procedural rules, and typified a set of materially military offences (war, disobedience and treason); it stipulated rules applicable exclusively to the military, thus assuming a markedly personal forum, remaining in operation for nearly two centuries and considered special treatment applied to noblemen and captains, who could only be tried before the War Council.

The Council of War was much more than an advisory body to the king, it had duties in the areas of logistical and jurisdictional management, and was abolished by decree on 1 July 1834.

⁴² The existence of a court to judge infractions of discipline dates back to the Council of War, created on 11 December 1640.

⁴³ Portugal's independence was restored on 1 December 1640, putting an end to the Portugal-Spain dynastic union. D. João, Duke of Bragança became King of Portugal as D. João IV.

The Count of Lippe⁴⁴ and Military Justice

It was in the context of the *Fantastic War*, which began on 18 May 1762, when Portugal declared war on Spain and France due to border violations, that the Count of Lippe was appointed marshal-general of the Portuguese Army, on the advice of England, to provide military aid to Portugal. His actions were based above all on creating new regulations for the Portuguese Army, with a view to consolidating troop discipline, standardising uniforms and promoting military instruction with the aim of increasing proficiency.

In 1763, he created the 'Regulations for the Exercise and Discipline of the Infantry Regiments and Squares that Constitute the Barriers of the Kingdom'; in 1764, he developed the 'Regulations for the Exercise and Discipline of the Cavalry Regiments'; and the Articles of Military Justice, Chap. XXVI - of the Articles of War. The main novelty was the introduction of the concept of 'material forum'.

By Order of 23 July 1855, signed by the Duke of Saldanha, he ordered the drafting of a Military Penal Code. This decree commissioned the then Auditor of the 1st Division, José de Barros Sá, to draft a new Code. The Law of 9 April 1875 approved the first Code of Military Justice⁴⁵ and thus created and published the first Code of Military Justice (CJM) in 1875.

⁴⁴ Wilhelm Lippe, Count Schaumbourg, was invited by King José I to restructure the Portuguese Army in the 18th century.

⁴⁵ That same year, a commission was appointed to draft another Code of Military Justice for the Navy.

Territorial Military Courts (TMT)

The designation of Territorial Military Courts was introduced by the Military Criminal Code (CPCM, 1911). The organisation and location of the TMT were determined in this code, which provided for Territorial Military Courts to be set up at the headquarters of each Military Division and, exceptionally, only when the needs of the service required it, two in Lisbon, one in Viseu and another in Porto.⁴⁶ Each of these Territorial Military Courts consisted of a president, with the rank of Colonel, an auditor, a jury, a prosecutor, a defence counsel and a secretary.

At each military court there was also an auditor, a judge without military rank, and a jury made up of five officers. This constitution was fixed in quantitative terms, varying only in the rank of those who made up the jury in relation to the rank of the defendant. In the case of non-commissioned officers, the jury was made up of non-commissioned officers and in the case of officers, the jury had to be made up of officers of the same rank or more senior than the defendant.

At each Territorial Military Court there was a prosecutor, a defence counsel and a secretary, the first two being senior officers or captains and the last a subaltern (CPCM).⁴⁷

As a result of the end of the overseas war (1961-1974) and the decolonisation process that followed, the overseas Territorial Military Courts

⁴⁶ Article 22 of the CPCM (CPCM, 1911).

⁴⁷ The secretariat was staffed by two amanuenses, a porter, a bailiff and a servant (CPCM).

were immediately abolished and their cases transferred to metropolitan military courts.⁴⁸

The court cases and all the TMT documentation are archived in the Military Historical Archive (AHM) and can be consulted in person by searching the respective database.

The fact that there were no longer any military forces in Macau⁴⁹ and the unstable situation in Timor justified similar measures for these two former overseas provinces.

The increase in the number of cases assigned to the military courts and the aforementioned transfers of cases forced the system to increase the number of metropolitan territorial military courts.⁵⁰

Through Law 5/75, of 14 March, the Council of the Revolution decreed and promulgated, to be valid as law, the creation of the following territorial military courts:

The 4th Territorial Military Court of Lisbon (4th TMTL) and the 5th Territorial Military Court of Lisbon (5th TMTL), both based in Lisbon; The 2nd Territorial Military Court of Porto (2nd TMTP), based in Porto; The Territorial Military Court of Coimbra (TMTC), based in Coimbra; The Territorial Military Court of Évora (TMTE), based in Évora; The Territorial Military Courts of Tomar and Coimbra.

⁴⁸ The respective delivery notes, which can be found in the Military Historical Archive, record, for example, the delivery of the 1st TMT of Angola to the 2nd TMT of Lisbon.

⁴⁹ The military forces in Macau were part of the Macau Independent Territorial Command (CTIM), which was abolished on 31 December 1975. The soldiers who remained in the territory later joined the Macau Security Forces (FSM) organization.

⁵⁰ The creation of new TMTs corresponds to the imperative need for military justice to function correctly and in accordance with the principles of justice.

At the same time, it abolished the Territorial Military Courts of Macao and Timor on 1 January 1976, transferring their jurisdiction to the Territorial Military Court of Lisbon. It also determined that in special circumstances and for reasons of the safety of the accused or greater procedural speed, territorial courts could exceptionally be set up in locations other than those previously established but within the same area of jurisdiction.⁵¹

The Military Justice Code of 1925

In 1925, Decree no. 11,292 of 26 November promulgated a new CJM for the Army and Navy. The preamble to this decree expressed the need to update the Army and Navy CJM and amend some of the provisions of the CPCM, bringing together all military criminal legislation in a single document.

The political instability at the time, the turmoil and the fears it caused, were reflected in this CJM, which was a real step backwards in relation to the 1911 Code, the main changes of which are:⁵² the maintenance of the death penalty, despite the Great War (1914-1918) having ended seven years previously; ⁵³ the establishment of a prison sentence, immediately higher than that of military imprisonment, to be served overseas; the abolition of the penalty of deportation as an accessory penalty for the Army and the creation of the Extraordinary Military Courts.

⁵¹ This law entered into force on 1 January 1976, was approved by the Council of the Revolution and promulgated on 12 January 1976 by the President of the Republic, Francisco da Costa Gomes.

⁵² ROQUE, Nuno. *Military Criminal Justice in Portugal*, 2000.

⁵³ ROBERTO, Joaquim J. da Cunha. *The Last Shot*, 2018.

With this code of military justice there was a real step backwards in the approach and application of the CJM, and the concept of personal jurisdiction went backwards.⁵⁴

Decree no. 19.892 of 11 January 1931 profoundly altered the 1925 CJM, particularly in the field of military judicial organisation and military criminal procedure (for example, by abolishing the jury). Its scope of application was delimited as follows:

The facts that constitute essentially military crimes, because they violate some military duty or offend the security and discipline of the Army or the Navy; The facts that, by reason of the military quality of the offenders, the place or other circumstances, take on the character of a military crime.

This Code's definition of 'military crime' was well-defined, unlike that of 'essentially military crime', since it was enough for an offence to violate a military duty or military security and discipline for it to be considered an essentially military crime.⁵⁵

In 1934, Decree No. 24,826 of 29 December abolished the penalty of deportation, replacing it, depending on the case, with military imprisonment or incorporation into a disciplinary depot.

⁵⁴ Article 363 of the 1925 CJM states that the Military Courts were competent to hear offences of any nature committed by military personnel and other persons in the service of the Army or Navy (...). From this point of view, the concept of personal jurisdiction was maintained.

⁵⁵ Decree no. 19.892 of 11 January 1931.

The 1977 Code of Military Justice

The revolution of 25 April 1974 and then the 1976 Constitution of the Portuguese Republic (CRP) led to the reorganisation of military jurisdiction.⁵⁶

The aforementioned CRP gave only one year to revise the CJM, and a commission was appointed to draw up the draft for the 1977 CJM.⁵⁷

This Code re-established the substantive jurisdiction,⁵⁸ abolished the death penalty and limited the military jurisdiction to essentially military offences, regardless of the quality of the perpetrator and without prejudice to other offences being equated to them by ordinary law. The military judicial organisation was restructured in line with the new rules of procedure, so as to restrict the field of action to police investigation of the crime of the authorities.

The 1977 CJM covers military criminal law and judicial law, including judicial organisation and military criminal procedure, in a single 477-article statute.

Under the 1977 CJM, military justice is exercised through the military judicial authorities and the Military Courts. The CJM states that the judicial authorities are the Military Judicial Police (PJM), the Military Criminal Investigation Judges, the Commanders of the Military Regions of the Army and the equivalent entities of the Navy and Air Force, the Chiefs of Staff of

⁵⁶ Article 293 of the CRP ordered the revision of the CJM and all existing complementary legislation.

⁵⁷ ARAÚJO, António. *A Jurisdição Militar (do Conselho de Guerra à Revisão Constitucional de 1997)*, 2000.

⁵⁸ The preamble to Decree-Law 147/77 of 9 April states: 'The current constitution has once again placed military jurisdiction at the level of the material forum. Citizens, whether military or civilian, are only subject to it if they violate specifically military interests. If not, the ordinary courts take precedence (...)' (CR, 1985, p.13). Article 218 of the CRP (1976) also states that 'The quality of the perpetrator of the offence is indifferent to military jurisdiction; it is the nature of the offence that counts'.

the branches of the Armed Forces and the Chief of the General Staff of the Armed Forces (CEMGFA).⁵⁹ In the 1977 CJM, the military criminal process includes investigation, instruction, prosecution, defence and trial.⁶⁰

The 2003 Code of Military Justice⁶¹

The CJM has existed for centuries. Law no. 100/2003 of 15 November maintained the tradition of having its own law dealing with military justice. This Code is considerably reduced in length, and an attempt was made to condense all legislation in the implementation of this reform, compensating for this reality with additions and alterations to the Penal Code (CP) and the Code of Criminal Procedure (CPP).

Unlike the 1977 CJM, the new 2003 CJM is reduced in length, with only 137 articles, spread over two books. This CJM is not intended to 'create an autonomous system or multiply exceptions or restrictions to the application of ordinary criminal law, but to specialise certain aspects of it or regulate matters regulated by it'.⁶² Only some of its provisions merely specify concepts that are used in the special part.

The courts are made up not only of judicial magistrates, but also of military judges, in accordance with the rules governing the participation of military

⁵⁹ In accordance with Article 211 of the 1977 CJM.

⁶⁰ In accordance with article 322 of the 1977 CJM.

⁶¹ Law no. 100/2003 of 15 November introduces the current Code of Military Justice.

⁶² Low project n°. 259/IX.

judges, which are set out in the Law on the Organisation and Functioning of the Judicial Courts (LOFTJ).⁶³

The LOFTJ established criminal investigation sections in the Lisbon and Oporto Criminal Investigation Courts. These sections had the competence to carry out the criminal investigation, decide on the indictment and exercise the jurisdictional functions relating to the enquiry.

The current situation of Military Justice and Military Courts

With the constitutional revision of 1997, the existence of Military Courts in peacetime was no longer expressed in the Constitution of the Portuguese Republic. However, the Military Courts remain in place until legislation comes into force regulating the composition of courts of any instance that try strictly military offences.

The extinction of the Military Courts, which took place in the 1997 constitutional revision, was carried out in a cautious manner, given that it is only limited to peacetime, the extinction was accompanied by the provision of military judges in the Courts of any instance that try strictly military crimes, where special forms of advice were provided to the Public Prosecutor's Office and finally, the extinction of the Military Courts was accompanied by a transitional rule to prevent legal gaps or loopholes.⁶⁴

Under the terms of this transitional rule, a series of bills were presented to the Assembly of the Republic regarding the extinction of the Military Courts

⁶³ This law was repealed by Law nº. 62/2013, of 26 August - Law on the Organization of the Judicial System.

⁶⁴ ARAÚJO, António. *A Jurisdição Militar (do Conselho de Guerra à Revisão Constitucional de 1997)*, 2000.

in peacetime. The bills presented were aimed at integrating the Military Courts into the current judicial system, creating a statute for Military Judges and Military Advisors to the Public Prosecutor's Office (EJMAMMP) and approving a new CJM.

On 15 November and 10 December 2003, the legislation that led to the extinction of the peacetime Military Courts was published. The model currently in force was advocated by the 1977 CJM and is expressed in Law no. 100/2003 of 15 November. Thus, with the entry into force on 14 September 2004 of the new CJM and the new Law on the Organisation and Functioning of the Judicial Courts,⁶⁵ the assessment of acts imposing disciplinary sanctions definitively passed to the competence of the administrative jurisdiction.

The approval of the 2003 CJM definitively reflects the concept of material jurisdiction in military criminal law, which is now defined exclusively according to legal assets and not according to the quality of the perpetrator.

The CRP contains specific rules for military justice and discipline that give it autonomy from ordinary criminal law. This autonomy of military criminal law is based on the fact that it covers legal assets or interests not considered by ordinary criminal law and that it has different legal regimes from ordinary criminal law, although both are governed by the same principles of law.⁶⁶

⁶⁵ Law nº 105/2003 of 10 December.

⁶⁶ PRATA, Vítor M. Gil. *Military Justice and National Defense*, 2012.

Bibliography

Albuquerque, R., & Albuquerque, M. (1999). *História do Direito Português*. 10ª ed. Lisboa: Faculdade de Direito de Lisboa, Volume I., 1999.

Biblioteca Nacional de Portugal & Instituto Português da Qualidade. (2010). *Normas portuguesas de documentação e informação*. Lisboa: Instituto Português da Qualidade.

Código Penal. (1996). Coimbra: Livraria Almedina. ISBN 972-40-0863-0.

Araújo, A. (2000). A Jurisdição Militar (Do Conselho de Guerra à Revisão Constitucional de 1997). In C. Morais, A. Araújo, & A. Leitão (Coord.), *O Direito da Defesa Nacional e das Forças Armadas* (pp. 529–582). Lisboa: Edições Cosmos, Instituto da Defesa Nacional.

Canas, V., Pinto, A. L., & Leitão, A. (2004). *Código de Justiça Militar Anotado e Outra Legislação Militar*. Coimbra

Costa, E. (2001). A Justiça Militar Portuguesa – Presente, Passado e Futuro. *Jornal do Exército*, 42(493), 18–21.

CR [Conselho da Revolução]. (1985). *Código de Justiça Militar – Regulamento de Disciplina Militar*. Lisboa: Edições Imprensa Nacional Casa da Moeda.

EME [Estado-Maior do Exército]. (1993). *Quadro Orgânico do 2º Tribunal Territorial de Lisboa (2º TMT)*. Lisboa: Estado-Maior do Exército.

Fernandes, J. (1999). *Planeamento e Gestão de Carreiras: Quadro Especial de Juristas e Quadro Especial de Gestão de Recursos Humanos*. Lisboa: Instituto de Altos Estudos Militares.

Morais, C. B. de, Araújo, A., & Leitão, A. (2000). *O Direito da Defesa Nacional e das Forças Armadas*. Lisboa: Edições Cosmos IDN.

Neves, F. (2003). *Tribunais Militares Extintos. Sobre o Novo Código de Justiça Militar* [Em linha]. [Consult. 13 de outubro de 2024]. Disponível em: <http://www.mundo.juridico.planetclix.pt/pag.htm>.

Norma Portuguesa 405-1. (1994). *Informação e documentação*. Monte da Caparica: Instituto Português da Qualidade.

Norma Portuguesa 405-4. (1994). *Referências bibliográficas para documentos eletrónicos*. Monte da Caparica: Instituto Português da Qualidade.

PGR [Procuradoria Geral da República]. (2003). *O Ministério Público e a Procuradoria-Geral da República* [Em linha]. [Consult. 22 de outubro de 2024]. Disponível em: http://www.pgr.pt/portugues/grupo_pgr/indice.htm.

Pimentel, L. (2001). A Preparação dos Juizes para os Novos Tribunais – O Fim dos Tribunais Militares. *Jornal do Exército*, 42(497), 30–34.

PJM [Polícia Judiciária Militar]. (2000). *Justiça Militar*. Lisboa: Polícia Judiciária Militar. Execução Gráfica CAVE.

Prata, A. (1990). *Dicionário Jurídico* (3ª ed.). Coimbra: Livraria Almedina.

Prata, V. M. G. (2012). *A Justiça Militar e a Defesa Nacional*. Lisboa: Coisas do Saber.

Roberto, J. J. da C. (2018). O Último Fuzilado. In *A Batalha do Lys - Os Combatentes Portugueses* (pp. 333–345). Lisboa: [Editora não especificada].

Roque, N. (2000). *A Justiça Penal Militar em Portugal* (1ª ed.). S. Pedro do Estoril: Edições Atena Lda.

Silva, N. (1985). *História do Direito Português – Fontes de Direito* (Vol. 1). Lisboa: Fundação Calouste Gulbenkian.

STM [Supremo Tribunal Militar]. (1980). *Supremo Tribunal Militar*. [Monografia]. Lisboa.

STM [Supremo Tribunal Militar]. (2001). *Anuário - Supremo Tribunal Militar 2001*. Lisboa.

Vicente, L. M. (1971). *Código de Justiça Militar Anotado* (11^a ed.). Lisboa: Minerva.

Legislation

AR [Assembly of the Republic]. Constitution of the Republic of 1911 [Online]. [Consulted on 08 November 2024]. Available at:

WWW

<URL:<http://www.parlamento.pt/livraria/edicoesdigitais/luisa/textos%20crp/CRP-1911.pdf>>

LAW no. 5/75, of 14 March. The Council of the Revolution approves the extinction of TMTs and the creation of new (temporary) TMTs.

DECREE no. 135/IX/2003. Approves a New Code of Military Justice and Repeals Existing Legislation on the Matter [Online]. Assembly of the Republic, [Consult. 07 November 2024]. Available at: WWW
<URL:http://www3.parlamento.pt/plc/Texto.aspx?ID_Tex=4874>.

Decree-Law no. 141/77, of 9 April. Approves the new 1977 Code of Military Justice.

LAW no. 3/99 of 13 January. Approves the Law on the Organisation and Functioning of the Judicial Courts (amends Law no. 38/87 of 23 December).

LAW no. 100/2003 of 15 November. Approves a New Code of Military Justice and Repeals Existing Legislation on the Matter.

Vitimologia em guerra

Victimology in war

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⁶⁷ This work was supported by FCT – Fundação para a Ciência e Tecnologia, I.P. by project reference 2022.05692.PTDC and DOI identifier <<https://doi.org/10.54499/2022.05692.PTDC>>.

Solo le pido a Dios

Que la guerra no me sea indiferente

Es un monstruo grande y pisa fuerte

Toda la pobre inocencia de la gente

León Gieco

Solo le pido a Dios

Abstract

Como é evidente, a guerra gera vítimas diretas e indiretas. O impacto negativo da guerra nas suas vidas pode durar muito tempo, mesmo décadas. Paradoxalmente, a vitimologia, apesar da importância das consequências da Segunda Guerra Mundial na sua emergência, não se tem tradicionalmente focado nas vítimas de guerra. Este artigo tem como objetivo dar uma visão geral dos contributos da vitimologia para a compreensão das características específicas e da dinâmica da vitimização que ocorre tanto em consequência da guerra como em períodos de conflito. Analisa também a complexa e sempre socialmente conflituosa questão da memória das vítimas.

1.- Introdução: Vitimologia e guerra

Verifica-se como óbvio que a guerra produz vítimas. Vítimas de diversos tipos. Vítimas com necessidades específicas que podem prolongar-se durante anos e até décadas. Apesar disso, a vitimologia não tem considerado a guerra

como elemento de estudo preferencial. Num sentido mais geral, também a Criminologia não se ocupou muito da guerra, pelo menos até recentemente, embora seja um fenómeno em que o desvio se torna a norma. No entanto, trata-se de um objeto de análise de grande interesse, entre outras razões porque, como costume dizer nas minhas aulas, o foco fundamental da Vitimologia é o sofrimento. Sofrimento que provém do crime ou, no caso que nos ocupa, das diferentes formas de violência presentes na guerra e nos conflitos armados. A guerra é talvez o epítome desse sofrimento humano.

Talvez valha a pena delinear algumas considerações sobre a origem e a posição atual da Vitimologia como conhecimento científico. A Vitimologia pode ser entendida como uma imagem especular da criminologia que, face a uma perceção hegemónica muito focada no agressor, introduz um segundo olhar sobre esses processos de vitimização (Echeburua & Cruz-Sáez, 2015). Nesse sentido, não seria razoável, ou sequer possível, estudar em profundidade o fenómeno criminal sem incluir as vítimas, além dos agressores. Entre os objetivos da vitimologia incluem-se, entre outros, “destacar a vitimização e o impacto económico, social e psicológico desta, a sua ligação com os sentimentos de insegurança, a elaboração detalhada de iniciativas dirigidas às vítimas, a busca das causas da vitimização, o fenómeno da vitimização múltipla e a geografia da vitimização” (Daems 2020, 353). Nesse sentido, “a vitimologia adquiriu uma posição firme e consolidada no campo” realizando “um importante contributo para uma visão matizada e com base científica sobre a vitimação” (Daems, 2020, p. 353).

Desde os seus primórdios, com as contribuições de Von Henting e Mendelsohn (1956), até ao presente, a Vitimologia passou por muitas transformações. Num primeiro momento, os autores focaram-se na classificação das vítimas com base, em grande medida, no grau de responsabilidade destas na sua própria vitimação ou na sua vulnerabilidade. Estas conceções teóricas centravam-se nos mecanismos de precipitação do resultado por parte das próprias vítimas (*victim precipitation*). As principais características desta primeira Vitimologia, também denominada Vitimologia convencional, incluem: uma análise individualista das relações entre a vítima

e o delinquente, uma tendência a considerar a vítima como culpada (*victim blaming*); e uma propensão a concentrar-se no crime comum (Walklate, 1989).

Importa salientar como o surgimento destes primeiros trabalhos no campo da Vitimologia científica ocorre em meados da década de 1940 e nos anos 1950 do século passado. Isto num contexto em que a devastação provocada pela Segunda Guerra Mundial, sobretudo na Europa, tornou muito evidente a existência e a presença das vítimas. Como indicam Walklate & McGarry (2016), os vínculos da Vitimologia com a guerra, o genocídio e outros crimes atrozes sempre estiveram presentes (assim como sempre houve criminólogos interessados na guerra), embora, paradoxalmente, este tema tenha sido marginalizado no desenvolvimento da disciplina. Foi necessário esperar por avanços relacionados com o surgimento da Vitimologia crítica que permitiram ir além, ao ampliar o conceito de vítima e expandir o campo de interesse para vítimas tradicionalmente esquecidas, como as de crimes de colarinho branco, crimes económicos ou corporativos, vítimas de crimes ambientais, de crimes de Estado e as vítimas de guerra.

Apesar da atenção intermitente que a Criminologia dedicou à guerra, existem várias razões pelas quais deve ser estudada de forma aprofundada, sistemática, sustentada e crítica. Como lembra Ruth Jamieson (2016) na introdução à sua obra *The Criminology of War*, a guerra revela a natureza altamente contingente da definição de crime. Os crimes e abusos de guerra implicam uma ação tanto coletiva (por parte do Estado e das corporações) como individual (por soldados e combatentes). A guerra e os estados de exceção implicam um aumento massivo da regulação social, do castigo e do controlo ideológico, bem como novas técnicas de vigilância, todos eles objetos de grande interesse e com longa tradição teórica no campo da Criminologia. A guerra e os estados de exceção são momentos de transparência nos quais os processos de dominação, exclusão e punição se tornam mais visíveis.

Finalmente, dado que a guerra oferece um exemplo dramático de violência massiva e vitimização *in extremis* (Jamieson, 2016), é óbvio que, do ponto de vista das vítimas, as dinâmicas específicas de vitimização, o impacto da violência durante o conflito e a sua persistência no tempo, bem como a dificuldade e complexidade da intervenção, constituem razões adicionais para que, junto ao desenvolvimento da Criminologia da guerra, se incremente o conhecimento científico a partir da perspectiva de uma Vitimologia da guerra.

2.- Uma tipologia das vítimas de guerra e conflito armado

Como acontece frequentemente no nascimento de novas disciplinas, os primeiros esforços concentram-se, por um lado, em estabelecer e delimitar o objeto de estudo em relação a outras disciplinas afins, identificando o que a nova perspectiva pode contribuir para o seu entendimento, e, por outro lado, na classificação e criação de tipologias relacionadas com o objeto dessa disciplina. Este foi também o caso da Vitimologia (Morillas Fernández *et al.*, 2011). De facto, continuam a surgir e a ser refinadas essas tipologias das vítimas como um elemento-chave no desenvolvimento teórico da disciplina.

Neste texto, vamos centrar-nos numa classificação das vítimas de guerra proposta por Wemmers e Mariambona (2014). Nesta tipologia, parte-se da ideia de que a determinação da vítima deve incluir tanto indivíduos como grupos que tenham sofrido danos, bem como membros da família e da comunidade. Trata-se de uma tipologia baseada na proximidade emocional ou psicológica com a vitimização, permitindo compreender melhor e intervir de forma adequada nas necessidades das vítimas. Esta proposta de classificação distingue entre:

- A vítima direta. É a pessoa que foi ilegalmente morta, desaparecida, ferida ou torturada. Estas pessoas sofreram diretamente os efeitos dos crimes de guerra, quer através da morte, quer através de maus-tratos físicos ou

psicológicos, quer através de prisões ou detenções ilegais, quer ainda através de acções discriminatórias ou outras formas de atrocidades.

- As vítimas indiretas. São aquelas que estão ligadas às vítimas diretas de tal forma que também elas sofrem em resultado dessa ligação. São frequentemente os membros da família de uma vítima direta, que "experimentam dificuldades e dores extremas devido ao sofrimento de um membro da família ou ao facto de serem punidos devido à sua ligação a essa pessoa - através de graves privações socioeconómicas, luto, perda de um chefe de família, perda de oportunidades de educação, rutura familiar, intimidação ou humilhação por parte da polícia".

- As vítimas secundárias. São pessoas que sofreram danos ao intervir para ajudar as vítimas em perigo ou que testemunharam a vitimização. Esta categoria é composta por testemunhas, que podem incluir vizinhos, amigos e familiares das vítimas diretas, que podem ter ficado traumatizados devido ao que testemunharam, bem como os socorristas, como a polícia e os paramédicos.

- As vítimas terciárias. Referem-se aos membros da comunidade. Por exemplo, comunidades inteiras podem ser atingidas pelo medo após o uso sistemático de violência por grupos armados.

Quando a vitimização é generalizada, como acontece durante a guerra, um indivíduo pode ser abrangido por várias categorias de vítimas em simultâneo. Por exemplo, uma pessoa pode ter sido vítima direta de um crime, bem como testemunha da vitimização de outros (vitimização secundária), bem como familiar de alguém que foi vitimado (vítima indireta), para além de ser membro da comunidade vitimada (vitimização terciária) (Wemmers & Marinabona, 2014, p. 325).

Se partirmos de um conceito mais amplo no qual, juntamente com a guerra convencional ou aberta, consideramos também conflitos graves que podem prolongar-se no tempo, incluindo o pós-conflito, seria possível falar em

vítimas da guerra (diretamente relacionadas com o conflito) e *vítimas na guerra* ou nesses conflitos que geram desordem devido a essa situação de anomia e desorganização social. No fundo “a guerra normaliza o anormal. Subverte as regras e práticas sociais tradicionais e faz com que o extremo pareça normal. Nessas comunidades desenraizadas ou destruídas, os laços e ligações que unem as pessoas entre si e à lei e à ordem podem ser enfraquecidos ou eliminados. As regras e convenções normais ou vulgares já não parecem aplicáveis” (Álvarez, 2016, p. 110).

Importa notar que isso acontece com maior intensidade nos casos em que o conflito está a ser travado no próprio território de origem, em comparação com os casos em que a violência ocorre em locais mais distantes. Neste cenário social, político e geográfico alterado, a própria vida perde valor, e os indivíduos e grupos são brutalizados pelo que testemunham e vivenciam. As sensibilidades normais tornam-se anestesiadas num contexto em que a perda, a violência, a morte e a destruição se tornam frequentes.

Em suma, a guerra é uma situação anômica na qual o controlo social desaparece, caracterizando-se como um espaço marcado pela violência e pela desorganização social. Nesse sentido, como vimos, algumas das teorias criminológicas clássicas focadas nessas questões podem oferecer um entendimento sobre essas dinâmicas violentas.

3.- A violência sexual como arma de guerra e as vítimas.

Vamos abordar especificamente uma forma de vitimização muito associada à guerra. Como indica Christopher Mullins (2016, p. 117), “é um clichê dizer que onde há guerra, há violência sexual”. Essa violência sexual, embora possa afetar tanto homens como mulheres, afeta mais frequentemente as últimas, pois reproduz e sustenta-se nas desigualdades de género preexistentes.

Segundo Mullins (2016), os conflitos armados produzem agressões sexuais, mas também produzem uma grande quantidade de violência sexualizada. A violência sexualizada é a violência física e social que adquire um significado negativo e é uma experiência negativa para a vítima, devido à associação da ação com o sexo e a sexualidade. Tais atos incluem ser obrigado a ficar nu à frente de outros (amigos ou inimigos) durante longos períodos, infligir dor específica nos órgãos genitais ou noutras partes anatómicas sexualizadas (incluindo amputação e mutilação pré ou pós-morte) e ser forçado a assistir a familiares ou membros da comunidade a sofrerem violência sexual ou sexualizada, entre outros. A violência sexualizada não envolve atos sexuais forçados, mas funciona de forma semelhante e o seu poder baseia-se num conjunto semelhante de normas de género.

Por outro lado, las agressões oportunistas ocorrem quando um soldado (ou civil) comete uma agressão ou outra violência sexualizada porque lhe é apresentada uma vítima potencial num contexto social que facilita o ataque (Mullins, 2016). Simplesmente, usando os termos da *Teoria das Atividades Rotineiras*, tais agressões ocorrem quando um agressor motivado entra em contacto com uma vítima adequada na ausência de uma tutela capaz (Felson 2002). A diáde vítima-agressor numa violação oportunista não é necessariamente um soldado masculino e uma civil feminina, embora seja isso que normalmente vem à mente. Pode tratar-se de um civil que aproveita a anomalia de um conflito ativo para violar outro civil (vítimas em guerra); além disso, pode tratar-se de um combatente que viola outro combatente, quer inimigo, quer aliado ou companheiro de unidade.

Outra forma de violência sexual na guerra descrita por Mullins (2016) é a escravatura sexual é a prostituição forçada. Historicamente, ocorreu, por exemplo, durante a Segunda Guerra Mundial, no caso da Alemanha e do Japão. As agressões sexuais no contexto da escravatura sexual estão presentes na maioria das situações de conflito. Neste caso, a vítima é mantida na proximidade das tropas durante um longo período e é repetidamente agredida.

Por vezes, a própria violação torna-se um instrumento de guerra, tanto intencionalmente como não intencionalmente (Mullins, 2016). Podem acontecer por omissão, nos casos em que oficiais, a nível de unidade ou superior, que ignoraram ou encorajaram a violência sexual e sexualizada generalizada contra civis. Há exemplos de agressões sexuais que atingiram níveis quase sistemáticos, de forma não intencional, devido ao desinteresse dos oficiais gerais em manter a ordem, quer em geral, quer durante um evento específico. O podem acontecer por vingança. Mullins (2016) refere o exemplo histórico da guerra civil na antiga Jugoslávia, na qual os comandantes sérvios criaram as infames *brigadas de violação*: unidades encarregadas de violar todas as mulheres não sérvias que encontrassem.

Um aspeto fundamental em que a agressão sexual, embora não necessariamente a violência sexualizada, difere quando está a ser utilizada sistematicamente é o facto de vermos frequentemente homens e rapazes a tornarem-se também vítimas. Os homens são vitimados ao serem sodomizados por tropas inimigas, ao serem forçados a violarem-se uns aos outros ou aos seus próprios familiares (Mullins, 2016). O alargamento das violações a homens e rapazes é um indicador de que a violência sexual está a ser consciente e deliberadamente utilizada como tática militar (Mullins, 2016)

Mesmo com o recente enfoque internacional na violência sexual baseada em conflitos, as discussões, ou mesmo o reconhecimento, das vítimas do sexo masculino têm estado essencialmente ausentes (Carpenter 2006; Lewis, 2009). Como sugere Schulz (2021), é frequente concluir-se que a violência sexual contra os homens durante os conflitos armados compromete a identidade masculina dos sobreviventes, produzindo aquilo que é quase exclusivamente referido na literatura como a *emasculação* e a *feminização* dos sobreviventes do sexo masculino, e é frequentemente apresentado como uma motivação para a perpetração dessa violência, bem como a sua principal consequência e dano. Para Mullins (2016) a violência sexual sistemática mostra até que ponto o domínio da força de combate sobre os civis e os militares é completo.

Também mantém os cidadãos num estado de terror para induzir a sua conformidade com os objetivos das forças combatentes e tem sido utilizada como punição e dissuasão da cooperação. Finalmente, é um ataque altamente discriminado por género e etnia às comunidades e à identidade cultural da vítima. Este último elemento é ainda mais acentuado quando os homens também são vitimados.

Quanto às possíveis explicações de parte da teoria criminológica/vitimológica Mullins (2016) refere a chamada *Teoria da Panela de Pressão*, desenvolvida por outros (Gottschall, 2004), que fornece uma explicação a nível micro para as agressões em conflito, com alguns pressupostos macro contextuais. O combate é claramente uma das experiências mais stressantes que os seres humanos suportam. Com o passar do tempo, os soldados acumulam cada vez mais tensão que se acumula neles da mesma forma que o vapor cria uma pressão de ar mais forte numa panela de pressão. A pressão tem de ser libertada ou a panela rebentará. Nesta perspetiva, a violação torna-se o veículo para esta libertação de pressão. Este modelo baseia-se em mecanismos causais semelhantes aos descritos na *teoria geral da tensão* de Agnew (1992) e nas hipóteses de *frustração-agressão psicológica* (Berkowitz, 1989) para explicar o que desencadeia um determinado acontecimento. No entanto não explica satisfatoriamente porque é que um soldado viola e outro não, ou porque é que alguns conflitos registam níveis elevados de violência sexual e outros não (Mullins, 2016).

De outra parte, a *Teoria das Actividades Rotineiras* diria essencialmente que os soldados violam mulheres porque podem. Ocupar militarmente uma cidade ou aldeia proporciona uma ampla oportunidade. Enquanto os oficiais não tiverem conhecimento de (ou forem indiferentes a) um determinado incidente, não existe tutela. Isto aplicar-se-ia tanto a violações oportunistas como a violações de escravatura sexual. Mas, segundo Mullins (2016) esta teoria ignora as questões motivacionais, assumindo simplesmente que elas estão presentes em qualquer espaço social, e uma abordagem semelhante lança mais luz sobre a natureza e a dinâmica dos ataques oportunistas e da escravatura sexual. Finalmente, um forte sentimento de direito sexual

masculino aumentaria claramente a probabilidade de um soldado cometer um ataque oportunista. Além disso, há muito que muitos notam a cultura híper masculina das forças armadas (Mullins, 2016).

4.- Os soldados e combatentes como vítimas

Por fim, devemos abordar outra questão controversa: até que ponto podemos considerar os soldados e combatentes como vítimas de guerra. Como indicam McGarry e Walklate (2011), é óbvio que participar como soldado numa guerra pode ser uma experiência perigosa e negativa. A questão é por que razão este facto deveria interessar não apenas à Criminologia, mas também à Vitimologia? De facto, o soldado como vítima da guerra contradiz completamente as imagens heroicas dos noticiários ou dos filmes de Hollywood, bem como a preocupação criminológica com o soldado *desviado* (Walklate & McGarry, 2016).

Parece evidente que o soldado ou combatente se afasta do estereótipo de vítima ideal teorizado por Christie (1986). As expectativas sociais e culturais tradicionalmente associadas ao soldado, portanto, não se prestam facilmente às conotações de vitimização que implicam vulnerabilidade, fraqueza e passividade (Rock, 2007). Um soldado apresenta-se como o epítome da heterossexualidade normativa e é, em grande medida, uma "não-vítima", dotada de capacidade para o uso da força bruta e resistência (McGarry & Walklate, 2011). Não se trata de uma vítima inocente; pelo contrário, ele próprio é veículo da violência própria da guerra.

No entanto, o impacto da participação na guerra é evidente e pode gerar stress pós-traumático ou suicídios. Assim, os soldados masculinos que atuam em nome do Estado podem ser considerados vítimas ou ofensores no contexto das supostas circunstâncias excecionais da guerra. Este paradoxo tem sido tradicionalmente pouco analisado (McGarry & Walklate, 2011), e o

soldado, afastado da vítima ideal e do centro dos estudos vitimológicos, continua a ser um tópico marginal.

Contudo, alguns autores (Kauzlarich *et al.*, 2001; Ruggiero, 2005) sugerem que os soldados podem ser considerados vítimas do Estado e das corporações que geram as guerras. A imagem do soldado como “herói” com grande apoio social que perdurou até à Segunda Guerra Mundial conta com um menor apoio social e uma receção mais ambígua quando os soldados e combatentes de guerras como as do Vietname, Golfo ou Afeganistão regressaram aos seus lares (Alker & Godfrey, 2016). Essa visão deu lugar a perspectivas muito mais complexas, nas quais se mistura a imagem do soldado como agressor, mas também como vítima.

Neste último sentido, nas guerras contemporâneas, sobretudo desde a guerra do Vietname e os movimentos pacifistas contra a guerra, foi-se abrindo uma perceção social mais favorável ao soldado como vítima. A visão dos militares como vítimas é cada vez mais frequente nos relatos dos meios de comunicação britânicos sobre o Iraque e o Afeganistão. Em muitos casos, observa-se uma transição da imagem de herói para a de vítima, não só na perceção social, mas também na autoperceção dos próprios ex-soldados e ex-combatentes. Neste sentido, a conceção do soldado como vítima implica desafiar a *alteridade vitimológica* e o profundo controlo autorreferencial que o crime e o positivismo têm exercido sobre esta área de estudo.

5.- Conclusões

A singularidade da guerra como espaço de normalização da violência torna-a um objeto de estudo de grande interesse e um desafio tanto para a Criminologia em geral como, mais especificamente, para a Vitimologia. No caso desta última disciplina, entendida como uma subespecialidade da Criminologia que constitui *o outro lado do espelho* do olhar criminológico, a guerra e os conflitos armados deveriam ocupar um lugar de atenção

preferencial. Especialmente no que diz respeito ao impacto e às necessidades das vítimas que geram. Afinal, a guerra gera uma multiplicidade de vítimas de todo o tipo: inocentes, mas também aquelas que exercem a violência por si mesmas, diretas ou indiretas. Refira-se aqui os soldados e combatentes, que podem ser considerados socialmente ou como criminosos ou como vítimas, dependendo das circunstâncias.

Os impactos da guerra e, conseqüentemente, as necessidades das vítimas, evoluem. As conseqüências negativas da guerra podem prolongar-se muito tempo após o cessar das hostilidades e até abranger gerações. Por isso, é necessário compreender melhor as dinâmicas da vitimização e da vitimidade no contexto da guerra e do conflito, para melhor intervir. Parafraseando os versos da bela canção de León Gieco que encabeça este texto, não devemos permitir que, da Criminologia e da Vitimologia, a guerra nos seja indiferente.

Referências

- Agnew, R. (1992). Foundation for a general strain theory of crime and delinquency. *Criminology*, 30(1), 47–87.
- Álvarez, A. (2016). Genocide in the context of war. In R. McGarry & S. Walklate (Eds.), *The Palgrave handbook of criminology and war* (pp. 99–116). Palgrave.
- Alker, Z., & Godfrey, B. (2016). Soldiers and victims: Conceptions of military service and victimhood, 1914–45. In R. McGarry & S. Walklate (Eds.), *The Palgrave handbook of criminology and war* (pp. 133–150). Palgrave.
- Berkowitz, L. (1989). Frustration-aggression hypothesis: Examination and reformulation. *Psychological Bulletin*, 106(1), 59–73.
- Carpenter, R. C. (2006). Recognizing gender-based violence against civilian men and boys in conflict situations. *Security Dialogue*, 37(1), 83–103.

Daems, T. (2020). ¿Tienen las sociedades las víctimas que se merecen? Un estudio sociológico sobre la victimización. *InDret*, 2, 351–372.

Echeburúa, E., & Cruz-Sáez, M. S. (2015). De ser víctimas a dejar de serlo: Un largo proceso. *Revista de Victimología*, 1, 83–96.

Felson, M. (2002). *Crime and everyday life*. Pine Forge Press.

Gottschall, J. (2004). Explaining wartime rape. *The Journal of Sex Research*, 41(2), 129–136.

Jamieson, R. (Ed.). (2016). *The criminology of war*. Routledge.

Kauzlarich, D., Matthews, R. A., & Miller, W. J. (2001). Toward a victimology of state crime. *Critical Criminology*, 10(3), 173–194.

Lewis, D. A. (2009). Unrecognized victims: Sexual violence against men in conflict settings under international law. *Wisconsin International Law Journal*, 27(1), 1–49.

McGarry, R., & Walklate, S. (2011). The soldier as victim: Peering through the looking glass. *The British Journal of Criminology*, 51(6), 900–917. <http://www.jstor.org/stable/23639897>

Mendelsohn, B. (1956). Une nouvelle branche de la science bio-psycho-sociale: La victimologie. *Revue Internationale de Criminologie et de Police Technique*, 10, 95–109.

Morillas Fernández, D. L., Patró Hernández, R. M., & Aguilar Cárceles, M. M. (2014). *Victimología: Un estudio sobre la víctima y los procesos de victimización*. Dyckinson.

Mullins, C. W. (2016). Sexual violence during armed conflict. In R. McGarry & S. Walklate (Eds.), *The Palgrave handbook of criminology and war* (pp. 117–132). Palgrave.

Ruggiero, V. (2005). Criminalizing war: Criminology as ceasefire. *Social and Legal Studies*, 14(2), 239–257.

Shultz, P. (2021). “I used to be a strong man, but now I am not”: Gendered vulnerabilities and harms. In *Male survivors of wartime sexual violence: Perspectives from Northern Uganda* (pp. 74–101). University of California Press.

Walklate, S. (1989). *Victimology*. Routledge.

Walklate, S., & McGarry, R. (2016). Conclusion: Taking account of war, making it count. In R. McGarry & S. Walklate (Eds.), *The Palgrave handbook of criminology and war* (pp. 445–460). Palgrave.

Wemmers, J. A., & Manirabona, A. (2014). Defining victims: A proposed typology for victims of war crimes and their need for reparation. In I. Bantekas & E. Mylonaki (Eds.), *Criminal approaches to international criminal law* (pp. 316–337). Cambridge University Press.

English

1.- Introduction: Victimology and war

It is evident that war produces victims. Victims of various types. Victims with specific needs that may persist for years or even decades. Despite this, Victimology has not considered war a preferential study object. More generally, criminology has also not paid much attention to war, at least until recently, despite it being a phenomenon where deviation becomes the norm. However, war is a fascinating object of analysis, among other reasons, because, as I often say in my classes, the fundamental focus of Victimology is suffering. The suffering stems from crime or, in the case at hand, from the various forms of violence present in war and armed conflicts. War is perhaps the epitome of human suffering.

It might be worth outlining some considerations about the origins and current position of Victimology as a scientific discipline. Victimology can be understood as a mirror image of criminology, which, in contrast to a hegemonic perception heavily focused on the perpetrator, introduces a second perspective on these processes of victimization (Echeburua & Cruz-Sáez, 2015). In this sense, it would not be reasonable, or even possible, to study the criminal phenomenon in depth without including victims alongside perpetrators. Among the objectives of Victimology are, among others, "highlighting victimization and its economic, social, and psychological impact, its connection to feelings of insecurity, the detailed development of initiatives aimed at victims, the search for the causes of victimization, the phenomenon of multiple victimization, and the geography of victimization" (Daems, 2020, p. 353). In this sense, "victimology has acquired a firm and consolidated position in the field," making "a significant contribution to a nuanced and scientifically grounded understanding of victimization" (Daems, 2020, p. 353).

From its beginnings, with the contributions of Von Henting and Mendelsohn (1956), to the present, Victimology has undergone many transformations. Initially, authors focused on classifying victims based mainly on their degree of responsibility for their victimization or their vulnerability. These theoretical concepts centered on the mechanisms of *victim precipitation*. The main characteristics of this initial Victimology, also referred to as conventional Victimology, include an individualistic analysis of the relationships between victim and offender, a tendency to consider the victim as culpable (*victim blaming*), and a propensity to focus on common crime (Walklate, 1989).

It is important to note how the emergence of these early works in the field of scientific Victimology occurred in the mid-1940s and 1950s. This was in a context where the devastation caused by World War II, especially in Europe, made the existence and presence of victims highly evident. As Walklate and McGarry (2016) indicate, the ties between Victimology and war, genocide, and other heinous crimes have always been present (just as there have always been criminologists interested in war), although, paradoxically, this

topic has been marginalized in the discipline's development. Advances associated with the emergence of critical Victimology were needed to move forward, expanding the concept of victim and broadening the field of interest to traditionally overlooked victims, such as those of white-collar crimes, economic or corporate crimes, environmental crimes, state crimes, and war victims.

Despite the intermittent attention criminology has devoted to war, there are several reasons why it should be studied in depth, systematically, sustainably, and critically. As Ruth Jamieson (2016) notes in the introduction to her work *The Criminology of War*, war reveals the highly contingent nature of the definition of crime. War crimes and abuses involve both collective action (by states and corporations) and individual action (by soldiers and combatants). War and states of exception involve a massive increase in social regulation, punishment, and ideological control, as well as new surveillance techniques, all of which are of great interest and have a long theoretical tradition within criminology. War and states of exception are moments of transparency in which processes of domination, exclusion, and punishment become more visible.

Finally, given that war provides a dramatic example of massive violence and victimization *in extremis* (Jamieson, 2016), it is evident that, from the victims' perspective, the specific dynamics of victimization, the impact of violence during the conflict and its persistence over time, as well as the difficulty and complexity of intervention, constitute additional reasons to deepen scientific knowledge from the perspective of a victimology of war alongside the development of a criminology of war.

2.- A typology of war victims and victims of armed conflict

As often happens with the emergence of new disciplines, initial efforts focus, on the one hand, on establishing and delimiting the object of study

concerning other related disciplines, identifying what the new perspective can contribute to understanding, and, on the other hand, the classification and creation of typologies related to the object of that discipline. This was also the case with Victimology (Morillas Fernández et al., 2011). Indeed, these typologies of victims continue to emerge and be refined as a critical element in the theoretical development of the discipline.

In this text, we will focus on a classification of war victims proposed by Wemmers and Mariambona (2014). This typology is based on the idea that the determination of the victim must include both individuals and groups who have suffered harm, as well as family and community members. It is a typology based on emotional or psychological proximity to victimization, allowing for a better understanding and intervention in victims' needs. This proposed classification distinguishes between:

Direct victims. These are individuals who have been illegally killed, disappeared, injured, or tortured. These people have directly suffered the effects of war crimes, whether through death, physical or psychological mistreatment, illegal imprisonment or detention, discriminatory actions, or other forms of atrocities.

Indirect victims. These are those linked to direct victims in such a way that they also suffer due to that connection. They are often family members of a direct victim who "experience extreme difficulties and pain due to the suffering of a family member or being punished due to their association with that person – through severe socioeconomic deprivations, grief, loss of a family breadwinner, loss of educational opportunities, family breakdown, police intimidation, or humiliation."

Secondary victims. These individuals have suffered harm while intervening to help victims in danger or witnessed victimization. This category includes witnesses, who may be neighbors, friends, and relatives of direct victims, who may have been traumatized by what they witnessed, as well as first responders, such as police officers and paramedics.

Tertiary victims. These refer to community members. For example, entire communities may be affected by fear following the systematic use of violence by armed groups.

When victimization is widespread, as occurs during war, an individual may fall into several categories of victims simultaneously. For instance, a person may have been a direct victim of a crime, as well as a witness to the victimization of others (secondary victimization), a family member of someone victimized (indirect victim), and a member of the victimized community (tertiary victimization) (Wemmers & Marinabona, 2014, p. 325).

From a broader perspective that considers, alongside conventional or open war, serious conflicts that may persist over time, including post-conflict situations, it would be possible to speak of *victims of war* (directly related to the conflict) and *victims in war* or in such conflicts that generate disorder due to this situation of anomie and social disorganization. In essence, "war normalizes the abnormal. It subverts traditional social rules and practices and makes the extreme seem normal. In these uprooted or destroyed communities, the ties and connections that bind people to each other and to law and order can be weakened or eliminated. Normal or everyday rules and conventions no longer seem applicable" (Álvarez, 2016, p. 110).

It is worth noting that this occurs more intensely when the conflict is fought within one's homeland compared to instances where violence occurs in distant locations. In this altered social, political, and geographical scenario, life itself loses value, and individuals and groups are brutalized by what they witness and experience. Normal sensitivities become desensitized in a context where loss, violence, death, and destruction become frequent.

In summary, war is an anomic situation where social control disappears, characterized as a space marked by violence and social disorganization. As we have seen, some classic criminological theories focused on these issues may offer insights into these violent dynamics.

3.- Sexual violence as a weapon of war and the victims

Let us specifically address a form of victimization strongly associated with war. As Christopher Mullins (2016, p. 117) states, "it is a cliché to say that where there is war, there is sexual violence." This sexual violence, although it can affect both men and women, more often affects the latter, as it reproduces and is sustained by pre-existing gender inequalities.

According to Mullins (2016), armed conflicts produce sexual assaults but also generate a large amount of sexualized violence. Sexualized violence is physical and social violence that acquires a negative significance and is a negative experience for the victim due to the association of the act with sex and sexuality. Such acts include being forced to stand naked in front of others (friends or enemies) for extended periods, inflicting specific pain on the genitals or other sexualized body parts (including amputation and mutilation pre- or post-mortem), and being forced to watch family members or community members suffer sexual or sexualized violence, among others. Sexualized violence does not involve forced sexual acts but operates similarly, with its power based on a similar set of gender norms.

On the other hand, opportunistic assaults occur when a soldier (or civilian) commits an assault or other sexualized violence because they are presented with a potential victim in a social context that facilitates the attack (Mullins, 2016). Simply put, using the terms of Routine Activities Theory, such assaults occur when a motivated offender comes into contact with a suitable victim in the absence of capable guardianship (Felson, 2002). The victim-offender dyad in an opportunistic rape is not necessarily a male soldier and a female civilian, although this is what usually comes to mind. It could involve a civilian taking advantage of the anomaly of an active conflict to rape another civilian (victims in war); moreover, it could involve a combatant raping another combatant, whether enemy, ally, or unit comrade.

Another form of sexual violence in war described by Mullins (2016) is sexual slavery and forced prostitution. Historically, this has occurred, for example,

during World War II in the cases of Germany and Japan. Sexual assaults in the context of sexual slavery are present in most conflict situations. In this case, the victim is kept in the proximity of troops for an extended period and is repeatedly assaulted.

Sometimes, rape itself becomes a weapon of war, both intentionally and unintentionally (Mullins, 2016). It may happen by omission in cases where officers, at the unit or higher level, ignored or encouraged widespread sexual and sexualized violence against civilians. There are examples of sexual assaults that reached near-systematic levels, unintentionally, due to the general officers' disinterest in maintaining order, either in general or during a specific event. Or they may happen as revenge. Mullins (2016) cites the historical example of the civil war in the former Yugoslavia, in which Serbian commanders created the infamous *rape brigades*: units tasked with raping all non-Serbian women they encountered.

A fundamental aspect in which sexual assault, though not necessarily sexualized violence, differs when used systematically is the frequent occurrence of men and boys also becoming victims. Men are victimized by being sodomized by enemy troops, being forced to rape each other or their own family members (Mullins, 2016). The extension of rape to men and boys is an indicator that sexual violence is being consciously and deliberately used as a military tactic (Mullins, 2016).

Even with the recent international focus on conflict-based sexual violence, discussions, or even acknowledgment, of male victims have been essentially absent (Carpenter, 2006; Lewis, 2009). As Schulz (2021) suggests, it is common to conclude that sexual violence against men during armed conflicts compromises male survivors' masculinity, producing what is almost exclusively referred to in the literature as the *emasculaton* and *feminization* of male survivors, often presented as a motivation for perpetrating this violence as well as its primary consequence and harm. For Mullins (2016), systematic sexual violence demonstrates the extent to which the combat force's domination over civilians and military personnel is complete.

It also keeps citizens in a state of terror to induce their compliance with the combatant forces' objectives and has been used as punishment and deterrence against cooperation. Finally, it is a highly gender- and ethnicity-discriminated attack on victims' communities and cultural identity. This latter element is even more pronounced when men are also victimized.

As for possible explanations from criminological/victimological theory, Mullins (2016) references the so-called Pressure-Cooker Theory, developed by others (Gottschall, 2004), which provides a micro-level explanation for assaults in conflict with some macro-contextual assumptions. Combat is clearly one of the most stressful experiences humans endure. Over time, soldiers accumulate increasing tension that builds up in them, much like steam creates stronger air pressure in a pressure cooker. The pressure must be released, or the pot will explode. From this perspective, rape becomes the vehicle for this pressure release. This model is based on causal mechanisms similar to those described in Agnew's (1992) *general strain theory* and Berkowitz's (1989) *frustration-aggression psychological hypotheses* to explain what triggers a given event. However, it does not satisfactorily explain why one soldier rapes and another does not or why some conflicts record high levels of sexual violence, and others do not (Mullins, 2016).

On the other hand, *Routine Activities Theory* would essentially say that soldiers rape women because they can. Militarily occupying a town or village provides ample opportunity. As long as officers are unaware of (or indifferent to) a given incident, there is no guardianship. This would apply to both opportunistic rapes and sexual slavery rapes. However, according to Mullins (2016), this theory ignores motivational issues, simply assuming that they are present in any social space, and a similar approach sheds more light on the nature and dynamics of opportunistic attacks and sexual slavery. Finally, a strong sense of male sexual entitlement would clearly increase the likelihood of a soldier committing an opportunistic assault. Additionally, many have long noted the hyper-masculine culture of the armed forces (Mullins, 2016).

4.- Soldiers and combatants as victims

Finally, we must address another controversial issue: to what extent can we consider soldiers and combatants as victims of war? As McGarry and Walklate (2011) indicate, it is evident that participating as a soldier in a war can be a dangerous and negative experience. The question is why this fact should concern not only Criminology but also Victimology. Indeed, the soldier as a victim of war completely contradicts the heroic images of news or Hollywood movies, as well as criminological concerns with the *deviant* soldier (Walklate & McGarry, 2016).

It seems evident that the soldier or combatant departs from the ideal victim stereotype theorized by Christie (1986). The social and cultural expectations traditionally associated with the soldier, therefore, do not easily lend themselves to the connotations of victimization that imply vulnerability, weakness, and passivity (Rock, 2007). A soldier presents as the epitome of normative heterosexuality and is essentially a "non-victim" equipped with the capacity for brute force and resilience (McGarry & Walklate, 2011). He is not an innocent victim; on the contrary, he is himself a vehicle of the violence inherent to war.

However, the impact of participation in war is evident and can generate post-traumatic stress or suicide. Thus, male soldiers acting on behalf of the state can be considered victims or offenders in the context of the alleged exceptional circumstances of war. This paradox has traditionally been little analyzed (McGarry & Walklate, 2011), and the soldier, removed from the ideal victim and the centre of victimological studies, remains a marginal topic.

Nevertheless, some authors (Kauzlarich *et al.*, 2001; Ruggiero, 2005) suggest that soldiers can be considered victims of the state and corporations that generate wars. The image of the soldier as a "hero" with great social support that endured until World War II has received less social support and a more ambiguous reception when soldiers and combatants from wars such

as Vietnam, the Gulf, or Afghanistan returned home (Alker & Godfrey, 2016). This view has given way to much more complex perspectives, mixing the image of the soldier as both aggressor and victim.

In this latter sense, in contemporary wars, especially since the Vietnam War and the pacifist movements against the war, a more favourable social perception of the soldier as a victim has emerged. The view of the military as victims is increasingly frequent in British media reports on Iraq and Afghanistan. In many cases, a transition from the image of hero to victim is observed, not only in social perception but also in the self-perception of ex-soldiers and ex-combatants. In this sense, the conception of the soldier as a victim implies challenging *victimological alterity* and the profound self-referential control that crime and positivism have exercised over this area of study.

5.- Conclusions

The uniqueness of war as a space for the normalization of violence makes it a subject of great interest and a challenge both for Criminology in general and, more specifically, for Victimology. In the case of the latter discipline, understood as a sub-specialty of Criminology that constitutes *the other side* of the criminological lens, war, and armed conflicts should occupy a preferential place of attention. Especially concerning the impact and the needs of the victims they generate. After all, war creates a diversity of victims of all kinds: the innocent, but also those who perpetrate violence themselves, directly or indirectly. Noteworthy here are soldiers and combatants, who can be socially regarded either as criminals or as victims, depending on the circumstances.

The impacts of war, and consequently the needs of the victims, evolve. The negative consequences of war can persist long after hostilities cease and may even span generations. Therefore, it is necessary to better understand the

dynamics of victimization and victimhood in the context of war and conflict to improve interventions. Paraphrasing the verses of the beautiful song by León Gieco that opens this text, we must not allow war to be indifferent to us from the perspectives of both Criminology and Victimology.

References

Agnew, R. (1992). Foundation for a general strain theory of crime and delinquency. *Criminology*, 30(1), 47–87.

Álvarez, A. (2016). Genocide in the context of war. In R. McGarry & S. Walklate (Eds.), *The Palgrave handbook of criminology and war*, 99–116. Palgrave.

Alker, Z., & Godfrey, B. (2016). Soldiers and victims: Conceptions of military service and victimhood, 1914–45. In R. McGarry & S. Walklate (Eds.), *The Palgrave handbook of criminology and war*, 133–150. Palgrave.

Berkowitz, L. (1989). Frustration-aggression hypothesis: Examination and reformulation. *Psychological Bulletin*, 106(1), 59–73.

Carpenter, R. C. (2006). Recognizing gender-based violence against civilian men and boys in conflict situations. *Security Dialogue*, 37(1), 83–103.

Daems, T. (2020). ¿Tienen las sociedades las víctimas que se merecen? Un estudio sociológico sobre la victimización. *InDret*, 2, 351–372.

Echeburúa, E., & Cruz-Sáez, M. S. (2015). De ser víctimas a dejar de serlo: Un largo proceso. *Revista de Victimología*, 1, 83–96.

Felson, M. (2002). *Crime and everyday life*. Pine Forge Press.

Gottschall, J. (2004). Explaining wartime rape. *The Journal of Sex Research*, 41(2), 129–136.

Jamieson, R. (Ed.). (2016). *The criminology of war*. Routledge.

Kauzlarich, D., Matthews, R. A., & Miller, W. J. (2001). Toward a victimology of state crime. *Critical Criminology*, 10(3), 173–194.

Lewis, D. A. (2009). Unrecognized victims: Sexual violence against men in conflict settings under international law. *Wisconsin International Law Journal*, 27(1), 1–49.

McGarry, R., & Walklate, S. (2011). The soldier as victim: Peering through the looking glass. *The British Journal of Criminology*, 51(6), 900–917. <http://www.jstor.org/stable/23639897>

Mendelsohn, B. (1956). Une nouvelle branche de la science bio-psycho-sociale: La victimologie. *Revue Internationale de Criminologie et de Police Technique*, 10, 95–109.

Morillas Fernández, D. L., Patró Hernández, R. M., & Aguilar Cárceles, M. M. (2014). *Victimología: Un estudio sobre la víctima y los procesos de victimización*. Dyckinson.

Mullins, C. W. (2016). Sexual violence during armed conflict. In R. McGarry & S. Walklate (Eds.), *The Palgrave handbook of criminology and war*, 117–132. Palgrave.

Ruggiero, V. (2005). Criminalizing war: Criminology as ceasefire. *Social and Legal Studies*, 14(2), 239–257.

Shultz, P. (2021). “I used to be a strong man, but now I am not”: Gendered vulnerabilities and harms. In *Male survivors of wartime sexual violence: Perspectives from Northern Uganda*, 74–101. University of California Press.

Walklate, S. (1989). *Victimology*. Routledge.

Walklate, S., & McGarry, R. (2016). Conclusion: Taking account of war, making it count. In R. McGarry & S. Walklate (Eds.), *The Palgrave handbook of criminology and war*, 445–460. Palgrave.

Wemmers, J. A., & Manirabona, A. (2014). Defining victims: A proposed typology for victims of war crimes and their need for reparation. In I. Bantekas & E. Mylonaki (Eds.), *Criminal approaches to international criminal law*, 316–337. Cambridge University Press.

Crimes e Cores, Encontros e Desencontros: A Justiça Castrense portuguesa em Guiné-Bissau (1963 -1974)

Crimes and Colors, Encounters and Disencounters: Portuguese Military Justice in Guinea-Bissau (1963-1974)

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⁶⁸ This work was supported by FCT – Fundação para a Ciência e Tecnologia, I.P. by project reference 2022.05692.PTDC and DOI identifier <<https://doi.org/10.54499/2022.05692.PTDC>>.

Resumo

A presente reflexão busca examinar como o Sistema de Justiça Militar lidou com os acusados de crimes comuns durante a Guerra Colonial na Guiné (1963-1974). Após a revogação do Estatuto do Indigenato, em 1961, a legislação passou a tratar cidadãos, assimilados e indígenas de maneira formalmente equitativa. Assim, a pesquisa busca comparar as penas aplicadas a militares nascidos em Portugal e na Guiné, observando o tratamento dado pelo Tribunal aos combatentes com diferentes locais de origem. Para tanto, foram analisados 347 casos penais, arquivados no Arquivo Histórico Militar do Tribunal Militar Territorial da Guiné, com foco nas sentenças aplicadas a militares nascidos tanto na metrópole quanto na colônia. Utilizando um método comparativo, a análise organizou os dados numa grelha que incluiu informações sobre absolvições, condenações, penas substituídas, penas suspensas e processos não concluídos. Os resultados sugerem que não houve discriminação judicial com base no local de nascimento dos combatentes, contribuindo para um entendimento mais profundo das dinâmicas entre a Administração da Justiça e o contexto colonial.

Palavras-chave: Crimes. Relação colonial. Guerra. Sentenças.

Introdução

Este estudo tem como objetivo analisar como o Sistema de Justiça Militar português distribuiu jurisdição aos ex-combatentes da Guerra Colonial acusados da prática de crimes não militares na Guiné-Bissau (1963-1974). A pesquisa investiga se houve tratamento diferenciado nas punições aplicadas aos integrantes do Exército nascidos em Portugal e àqueles recrutados localmente na Guiné, conduzidas pelo Tribunal Militar Territorial

(TMT). Ao comparar as sentenças impostas a esses dois grupos, a pesquisa busca entender como a relação colonial influenciou as decisões judiciais.

A relação entre colonizador e colonizado passou por complexas mudanças ao longo do tempo. Em 1938, por exemplo, Portugal implementou o Regulamento do Recenseamento e Cobrança do Imposto do Indígena, que estabelecia condições para que os indígenas passassem a ser considerados cidadãos (ou assimilados). Isso incluía abandonar os costumes tradicionais, aprender a língua portuguesa e adotar práticas da sociedade portuguesa e a monogamia, conforme o Diploma Legislativo n. 237 (1931).

Em 1961, todavia, com a revogação do Estatuto do Indigenato, iniciou-se uma nova fase na relação colonial, garantindo tratamento igualitário entre os nascidos na metrópole e nas colônias. Durante a Guerra Colonial (1961-1974), combatentes naturais de Portugal (antiga metrópole) e da Guiné (antiga colônia) lutaram juntos no mesmo Exército (Rodrigues, 2017). Assim, a questão que se coloca é: caso algum desses combatentes cometesse um crime, haveria realmente imparcialidade no tratamento judicial?

Esta pesquisa, enfim, se propõe a analisar os processos-crime envolvendo ex-combatentes das Forças Armadas Portuguesas (FAP) na Guiné-Bissau (1963 – 1974). O foco da investigação está nos processos comuns, ou seja, nos crimes comuns cometidos pelos membros do Exército português durante a Guerra do Ultramar. O estudo foi desenvolvido no âmbito do meu projeto de dissertação do mestrado em Ciências Criminais da Escola de Direito da Universidade do Minho. A recolha de dados para esse projeto foi desenvolvida enquanto bolseiro de investigação do projeto “InJUSTiceWar”⁶⁹, coordenado pela investigadora principal, a Professora Doutora Fátima Rodrigues, da Faculdade de Direito da Universidade do Porto. O projeto buscou

⁶⁹ Universidade do Porto – Faculdade de Direito. (2024). InJUSTiceWar: Crime and justice administration in the Portuguese Colonial War (1961-1974). <https://www.up.pt/fdup/en/research/research-projects/injusticewar/> (Consultado em 17 out. 2024).

compreender os processos-crime instaurados contra combatentes portugueses nas ex-colônias africanas, como Angola, Moçambique e Guiné-Bissau.

1. Objetivos

A investigação tem como objetivo principal realizar uma análise comparativa das sanções penais aplicadas a militares portugueses acusados de crimes comuns durante a Guerra. A pesquisa busca comparar as sentenças impostas aos militares recrutados em Portugal com aquelas aplicadas aos recrutados localmente na Guiné-Bissau, a fim de investigar se o TMT tratava de forma igualitária os combatentes nascidos na metrópole e na colônia, considerando possíveis influências raciais e culturais nos julgamentos decorrentes da relação colonial. Para atingir esse objetivo, o estudo é estruturado em três objetivos específicos:

i) Descrever a relação histórico-social entre Portugal e a Guiné de 1963 a 1974, analisando como o contexto político afetou a interação entre colonizador e colonizado e o tratamento dos combatentes; *ii)* Examinar como a justiça castrense portuguesa enfrentou o fenômeno da relação colonial em tempos de guerra, investigando-se identidade colonial influenciou, de alguma forma, os julgamentos dos militares e *iii)* comparar as penas aplicadas a combatentes nascidos em Portugal e na Guiné, identificando possíveis disparidades no tratamento judicial nas decisões do TMT.

A reflexão visa oferecer, finalmente, uma compreensão mais aprofundada do funcionamento do Sistema de Justiça Militar durante a Guerra Colonial na Guiné (1964 - 1973). Buscamos, reiterar-se, compreender se as decisões judiciais foram influenciadas pelas dinâmicas do poder colonial e pelo contexto da Guerra Subversiva no continente africano.

2. Método

Foram analisados 353 casos oriundos do TMT da Guiné, o que corresponde a aproximadamente 36,17% do total disponível no Arquivo Histórico Militar (AHM). Essa amostra oferece uma visão significativa dos processos documentados, embora uma análise mais abrangente dependa de uma investigação futura e mais profunda dos cadernos processuais armazenados naquele arquivo.

Para análise, utilizamos o método comparativo, que permite observar alguns aspectos das decisões proferidas nos processos criminais julgados pelo TMT da Guiné, envolvendo combatentes do Exército colonial sob sua jurisdição. A comparação se concentrará em dois grupos distintos: os membros do Exército naturais da Metrópole e aqueles nascidos na Colônia. Essa divisão contribui para uma compreensão mais precisa dos dados investigados.

O método comparativo, frequentemente usado em estudos criminológicos, analisa semelhanças e diferenças entre fenômenos sociais em diversos contextos culturais, históricos e geográficos. Esse processo permite identificar padrões e variações nos processos sociais e integra abordagens qualitativas e quantitativas, oferecendo uma visão mais ampla dos eventos sociais e, particularmente, dos aspectos relacionados ao fenômeno da guerra abordados nesta investigação (Agra, Leite, Sousa, & Quintas, 2015).

A ferramenta utilizada para a extração dos dados foi uma grelha, que apresenta a naturalidade dos réus no contexto da guerra e os respectivos casos criminais, organizados pela frequência com que cada localidade aparece. O instrumento de coleta de dados, ainda, inclui uma ampla variedade de regiões, refletindo uma distribuição geográfica diversificada de réus. Essas categorias fornecem um volume considerável de informações, contudo, daremos ênfase ao local de nascimento dos réus.

3. O Sistema de Justiça da era colonial

Estudos sobre a atuação do sistema de justiça nas relações coloniais demonstram que as estruturas jurídicas serviram como ferramentas de controle e dominação, acentuando desigualdades e silenciando as comunidades locais. Em vez de oferecer imparcialidade, o sistema judicial operava como um meio de legitimação do poder colonial. Um exemplo disso foi a Nova Zelândia, onde o sistema de justiça britânico marginalizou as práticas tradicionais dos maoris substituindo-as por um modelo punitivo focado no encarceramento, o que ampliou a exclusão e a desconexão cultural. (Pratt, 2004).

A Argélia também enfrentou situação semelhante: o sistema de justiça francês gradualmente enfraqueceu o sistema judicial muçulmano local. (Roussel, 1876). Ao impor um modelo colonizador, marcado pela complexidade processual e pela barreira linguística, tornou-se a justiça menos acessível para os argelinos, reforçando a dominação colonial. Esse modelo discriminava os nativos com sanções mais rigorosas do que as aplicadas aos colonos franceses, consolidando a desigualdade.

Criminólogos contemporâneos, como Eugenio Raúl Zaffaroni, indicam que a “colonização punitiva” persiste em práticas penais modernas, que ainda marginalizam grupos específicos (Zaffaroni, 2017). Em Portugal, Nuno Camarinhas ressalta que o sistema de justiça no império colonial dependia fortemente da figura do magistrado para validar e manter o controle político nas colônias (Camarinhas, 2010).

Maria Paula Meneses (2018), igualmente, critica o Sistema de Justiça Colonial português, que operava como um mecanismo de opressão, ignorando a dignidade das populações nativas e legitimando desigualdades. Esmeralda Simões Martinez (2012) também destaca que a “Justiça Especial” estabelecida nas colônias restringia o acesso dos nativos aos direitos dos cidadãos da metrópole, com normas excludentes aplicadas por meio do direito consuetudinário. (Martinez, 2012; Meneses, 2018).

O Sistema de Justiça colonial funcionava como um instrumento de dominação, desprezando as tradições locais e consolidando hierarquias raciais e culturais que ainda perduram nas sociedades pós-coloniais. No contexto da Guerra Colonial portuguesa, questiona-se como o Sistema de Justiça Militar atuava “interna corporis”. Havia distinções no tratamento de combatentes da Colônia e da Metrópole ao julgar casos criminais, especialmente após 1961, com novas questões jurídicas e sociais em jogo? A pesquisa busca responder a essas perguntas, explorando se a Justiça Militar adotou práticas imparciais ou perpetuou desigualdades entre combatentes nascidos em Portugal (metrópole) e na Guiné (colônia).

Entretanto, com a publicação do Decreto-Lei n.º 43.893/1961, que revogou Decreto-Lei n.º 39666, Estatuto dos Indígenas Portugueses das Províncias da Guiné, Angola e Moçambique, abandonaram-se conceitos como "assimilação ética" e justificativas ideológicas para a dominação colonial. Isso marcou um avanço formal no reconhecimento da igualdade jurídica entre colonizadores e colonizados. Para verificar se, de fato, havia práticas discriminatórias no Sistema de Justiça Militar colonial, este estudo analisou 347 casos criminais no Tribunal Militar Territorial (TMT) da Guiné, envolvendo combatentes nascidos em Portugal e na Guiné entre 1963 e 1974. A tabela abaixo, em sínteses, apresenta a situação processual dos combatentes acusados durante o período:

Tabela 01 – Status processual dos casos analisados:

Situação processual dos réus	Frequência absoluta (%) (Naturais da Colônia)	Frequência absoluta (%) (Naturais da Metrópole)	Total
Absolvidos	7 (3.91%)	13 (3.91%)	3.91%
Condenados	65 (34.44%)	111 (34.44%)	34.44%
Penas substituídas*	42 (24.65%)	84 (24.65%)	24.65%
Penas suspensas*	16 (7.44%)	22 (7.44%)	7.44%
Não foi possível apurar	30 (29.55%)	121 (29.55%)	29.55%
Total	102 (100%)	245 (100%)	100%

* Levar em consideração que os casos de penas substituídas e suspensas integram o universo dos condenados.

Os resultados mostraram que, ao contrário do esperado, o local de nascimento dos acusados não influenciou os desfechos jurídicos. Combatentes nascidos na Guiné, ou seja, recrutados na ex-colônia, tiveram maior percentual de absolvições e penas mitigadas ou suspensas. Apesar de uma taxa mais alta de condenações entre locais em relação aos metropolitanos, os dados indicam que as penas eram frequentemente substituídas para os réus nascidos na colônia.

Essa análise sugere que o TMT aplicava a legislação de maneira relativamente equitativa, sem evidências claras de hierarquias discriminatórias em função do local de nascimentos dos combatentes acusados. Mesmo no contexto colonial, o sistema de justiça penal-militar parece ter refletido o princípio de igualdade jurídica trazido pela revogação do Estatuto do Indígena a partir de 1961.

A investigação também examinou diversos aspectos, incluindo o número de processos instaurados contra combatentes oriundos da colônia e da metrópole, analisando suas frequências absolutas e relativas. Além disso, foram classificadas as naturezas dos crimes em seis macrocategorias: Crimes Contra a Honestidade, Crimes Contra a Ordem e Tranquilidade Pública, Crimes Contra a Propriedade, Crimes Contra a Segurança da Comunidade, Crimes Contra a Segurança das Pessoas e Crimes Contra o Estado. Por fim, foi avaliada a situação processual dos réus.

No entanto, há limitações inerentes a esta pesquisa, como o número de casos analisados, devido ao tempo restrito imposto. Ainda assim, os resultados oferecem novas perspectivas sobre o funcionamento da Justiça Colonial portuguesa durante a Guerra, apontando caminhos para investigações futuras sobre as dinâmicas de poder e justiça em contextos coloniais.

Conclusão

O estudo analisou os processos penais contra ex-combatentes do Exército Português na Guiné-Bissau (1963-1974), durante a Guerra Colonial, com foco em crimes comuns julgados pelo TMT da Guiné. A pesquisa examinou possíveis disparidades de tratamento entre militares naturais da metrópole (Portugal) e da colônia (Guiné-Bissau), contextualizando as análises com a abolição do Estatuto do Indigenato e o ideal de assimilação colonial.

Dos 347 casos analisados, 245 envolviam militares nascidos em Portugal e 102, nascidos na Guiné. Os réus da colônia tiveram maior taxa de absolvição e penas suspensas ou convertidas em sanções disciplinares, enquanto os metropolitanos registraram mais casos arquivados ou resolvidos por anistia. Apesar da maior proporção de condenações entre os nascidos na colônia, as diferenças não foram expressivas, e a legislação aplicada pelo TMT demonstrou tratar os réus de forma relativamente equitativa, sem grandes evidências de discriminação com base no local de nascimento dos combatentes acusados da prática de crimes não militares.

A pesquisa desafia percepções comuns de que os integrantes naturais da colônia seriam amplamente desfavorecidos, destacando o papel do Sistema de Justiça Militar na configuração das relações de poder e tensões coloniais. Contribui, ainda, para o uma compreensão mais abrangente sobre a atuação do Sistema de Justiça português durante a era colonial.

Referências

Agra, C. da, Leite, A. L., Sousa, P., & Quintas, J. (Coord.). (2015). *Homicídios conjugais: Estudo avaliativo das decisões judiciais*. Comissão para Cidadania e Igualdade de Género – CIG. <https://repositorioaberto.up.pt/bitstream/10216/83304/2/125824.pdf>. (Consultado em 2 fev. 2024)

Camarinhas, N. (2010). *Juízes e administração da justiça no Antigo Regime: Portugal e o império colonial, séculos XVII e XVIII*. Lisboa: Fundação Calouste Gulbenkian/Fundação para a Ciência e a Tecnologia.

Cann, J. P. (1996). *Portuguese counterinsurgency campaigning in Africa 1961-1974: A military analysis*. Department of War Studies - King's College, University of London.

Cann, J. P. (2005). *Contra-subversão em África: Como os portugueses fizeram a guerra em África, 1961-1974*. Prefácio.

Martinez, E. S. (2012). *Uma justiça especial para os indígenas: Aplicação da justiça em Moçambique (1894-1930)* (Tese de doutorado, Universidade de Lisboa, Faculdade de Letras, Departamento de História). Repositório Institucional da Universidade de Lisboa. <https://repositorio.ul.pt/handle/10451/7314>. (Consultado em 15 jul. 2024)

Meneses, M. P. (2018). Colonialismo como violência: A “missão civilizadora” de Portugal em Moçambique. *Revista Crítica de Ciências Sociais*, (n.º especial). <https://journals.openedition.org/rccs/7741> (Consultado em 3 jun. 2024).

Portugal, Ministério da Guerra. (1897). *Código de Justiça Militar: 1896*. Imprensa Nacional.

Portugal. (1919). *Código Penal: Nova publicação oficial ordenada por decreto de 16 de setembro de 1886*. Diário do Governo, de 20 de setembro de 1886. Imprensa da Universidade.

Pratt, J. (2004). *Colonization, power and silence: A history of indigenous justice in New Zealand society*. In B. Galaway & J. Hudson (Eds.), *Restorative justice: International perspectives* (pp. 137-155). <https://www.ojp.gov/ncjrs/virtual-library/abstracts/colonization-power-and-silence-history-indigenous-justice-new> (Consultado em 1 jul. 2024).

República Portuguesa. *Regulamento do recenseamento e cobrança do imposto indígena*. Aprovado por Diploma Legislativo n.º 237, de 26 de Maio de 1931. Luanda: Imprensa Nacional, 1931.

Rodrigues, F. da C. (2017). Antigos combatentes africanos das Forças Armadas Portuguesas: A guerra colonial como território de (re)conciliação (1. ed.). Camões, Instituto da Cooperação e da Língua Portuguesa.

Roussel, C. (1876). *La justice en Algérie: Les tribunaux indigènes*. *Revue des Deux Mondes* (1829-1971), 16(3), 678-697. <https://www.jstor.org/stable/44751603>. (Consultado em 10 jun. 2024).

Zaffaroni, E. R. (2017). *Colonização punitiva e totalitarismo financeiro: A criminologia do ser-aquí*. Editora Contexto.

English

Abstract

This study examines how the Military Justice System handled those accused of common crimes during the Colonial War in Guinea-Bissau (1963–1974). After the repeal of the Estatuto do Indigenato in 1961, laws began to treat citizens, assimilated individuals, and indigenous people in a formally equal way. This research compares the sentences given to soldiers born in Portugal and those born in Guinea, focusing on how the Tribunal handled combatants from different places of origin. A total of 347 criminal cases were analyzed, all archived in the Military Historical Archive of the Territorial Military Court of Guinea, with emphasis on the sentences given to soldiers from both the metropole and the colony. Using a comparative approach, the analysis organized the data into a grid that included information on acquittals, convictions, substituted sentences, suspended sentences, and unresolved cases. The findings suggest that there was no judicial bias based on the

birthplace of the combatants, contributing to a deeper understanding of the relationship between the justice system and the colonial setting.

Keywords: Crimes. Colonial relationship. War. Sentences.

Introduction

This study aims to analyze how the Portuguese Military Justice System assigned jurisdiction over former combatants of the Colonial War accused of committing non-military crimes in Guinea-Bissau (1963–1974). The research investigates whether there was differential treatment in the punishments imposed on Army members born in Portugal compared to those locally recruited in Guinea, as handled by the Territorial Military Tribunal (TMT). By comparing the sentences given to these two groups, the study seeks to understand how colonial relations influenced judicial decisions.

The relationship between colonizers and the colonized went through many complex changes over time. In 1938, for example, Portugal introduced the Regulation for the Census and Collection of the Indigenous Tax (*Regulamento do Recenseamento e Cobrança do Imposto do Indígena*), which set conditions for indigenous people to be considered citizens (or assimilated). This included giving up traditional customs, learning the Portuguese language, adopting practices from Portuguese society, and following monogamy, as outlined in Legislative Diploma No. 237 (1931).

In 1961, however, the abolition of the Indigenous Law (*Estatuto do Indigenato*) marked the beginning of a new phase in colonial relations, promising equal treatment for those born in mainland Portugal and in the colonies. During the Colonial War (1961–1974), soldiers from Portugal (the former mainland) and Guinea (the former colony) fought together in the same Army (Rodrigues, 2017). This raises the question: if one of these

soldiers committed a crime, would the judicial system truly treat them impartially?

This research aims to analyze criminal cases involving former combatants of the Forças Armadas Portuguesas (FAP) in Guinea-Bissau (1963–1974). The focus of the investigation is on common criminal cases, specifically non-military crimes committed by members of the Portuguese Army during the Colonial War. The study was developed as part of my master's dissertation in Criminal Sciences, from the School of Law, University of Minho. The data collection was done as a research grant holder of the InJUSTiceWar Project, led by Principal Investigator Professor Fátima Rodrigues – Faculty of Law at the University of Porto. The project seeks to understand the criminal cases brought against Portuguese combatants in the former African colonies, including Angola, Mozambique, and Guinea-Bissau.

1. Objectives

The main objective of this research is to conduct a comparative analysis of the criminal sanctions imposed on Portuguese military personnel accused of common crimes during the War. The study aims to compare the sentences given to soldiers recruited in Portugal with those applied to locally recruited soldiers in Guinea-Bissau, in order to investigate whether the Territorial Military Tribunal (TMT) treated soldiers born in the mainland (Portugal) and in the colony (Guinea) equally, considering potential racial and cultural influences on the judgments shaped by the colonial relationship. To achieve this objective, the study is structured around three specific goals:

i) To describe the historical and social relationship between Portugal and Guinea from 1963 to 1974, analyzing how the political context influenced the interaction between colonizer and colonized, as well as the treatment of soldiers; *ii)* To examine how the Portuguese Military Justice System dealt with the colonial relationship during wartime, investigating how colonial

identity may have influenced the military trials; *iii*) To compare the sentences imposed on soldiers born in Portugal and in Guinea, identifying potential disparities in judicial treatment in the decisions of the Territorial Military Tribunal (TMT).

The reflection ultimately aims to offer a deeper understanding of the functioning of the Military Justice System during the Colonial War in Guinea (1964–1973). The goal, once again, is to examine whether judicial decisions were shaped by the dynamics of colonial power and the context of the Subversive War on the African continent.

2. Method

A total of 353 cases from the TMT of Guinea were analyzed, accounting for approximately 36.17% of the total available in the Military Historical Archive (AHM). While this sample offers valuable insights into the documented cases, a more comprehensive analysis would require further, in-depth examination of the case files stored in the archive.

For this analysis, we employed the comparative method, which enables the examination of key aspects of the decisions issued in criminal cases tried by the TMT of Guinea, involving colonial Army combatants under its jurisdiction. The comparison focuses on two distinct groups: Army members born in mainland Portugal and those born in the colony. This distinction facilitates a more accurate understanding of the data analyzed.

The comparative method, often used in criminological studies, examines similarities and differences between social phenomena across various cultural, historical, and geographical contexts. This approach enables the identification of patterns and variations in social processes, integrating both qualitative and quantitative methods to provide a broader perspective on

social events, particularly those related to the phenomenon of war explored in this investigation (Agra, Leite, Sousa, & Quintas, 2015).

The data extraction tool was a grid that recorded the defendants' places of origin in the context of the war and their respective criminal cases, organized by the frequency of occurrence for each location. The data collection instrument also encompassed a broad range of regions, reflecting a diverse geographical distribution of defendants. While these categories provide a significant amount of information, the focus will be primarily on the defendants' places of birth.

3. The Justice System in the Colonial Era

Studies on the functioning of the justice system in colonial relations show that legal structures served as tools of control and domination, exacerbating inequalities and silencing local communities. Rather than providing impartiality, the judicial system functioned as a means to legitimize colonial power. One example of this was in New Zealand, where the British justice system marginalized traditional Maori practices, replacing them with a punitive model centered on incarceration, which deepened exclusion and cultural disconnection (Pratt, 2004).

Algeria also faced a similar situation: the French justice system gradually weakened the local Muslim judicial system (Roussel, 1876). By imposing a colonial model characterized by procedural complexity and language barriers, justice became less accessible to Algerians, reinforcing colonial domination. This model discriminated against natives by imposing harsher sanctions than those applied to French settlers, further entrenching inequality.

Contemporary criminologists, such as Eugenio Raúl Zaffaroni, point out that "punitive colonization" persists in modern penal practices, which continue to marginalize specific groups (Zaffaroni, 2017). In Portugal, Nuno Camarinhas

highlights that the justice system within the colonial empire relied heavily on the magistrate's role to validate and sustain political control in the colonies (Camarinhas, 2010).

Maria Paula Meneses (2018) also critiques the Portuguese colonial justice system, arguing that it functioned as a tool of oppression, disregarding the dignity of native populations and legitimizing inequalities. Similarly, Esmeralda Simões Martinez (2012) highlights that the "Special Justice" established in the colonies limited natives' access to the rights afforded to metropolitan citizens, enforcing exclusionary norms through customary law (Martinez, 2012).

The colonial justice system operated as a tool of domination, disregarding local traditions and reinforcing racial and cultural hierarchies that still persist in post-colonial societies. In the context of the Portuguese Colonial War, questions arise about how the Military Justice System functioned *internally*. Were there differences in how colonial and metropolitan combatants were treated when criminal cases were judged, particularly after 1961, as new legal and social issues came into play? This research aims to explore these questions, examining whether Military Justice adopted impartial practices or perpetuated inequalities between combatants born in Portugal (the metropole) and those from Guinea (the colony).

However, with the publication of Decree-Law No. 43.893/1961, which repealed Decree-Law No. 39.666, the Statute of Portuguese Natives from the Provinces of Guinea, Angola, and Mozambique (*Estatuto dos Indígenas Portugueses das Províncias da Guiné, Angola e Moçambique*), concepts such as "ethical assimilation" and ideological justifications for colonial domination were abandoned. This marked a formal advancement in the recognition of legal equality between colonizers and colonized. To assess whether discriminatory practices existed within the colonial Military Justice System, this study analyzed 347 criminal cases from the TMT of Guinea, involving combatants born in Portugal and Guinea between 1963 and 1974. The table

below summarizes the procedural situation of the accused combatants during this period:

Table 01 – Procedural status of the analyzed cases:

Procedural Status of Defendants	Absolute Frequency (%) (Natives of the Colony)	Absolute Frequency (%) (Natives of the Metropole)	Total
Acquitted	7 (3.91%)	13 (3.91%)	3.91%
Convicted	65 (34.44%)	111 (34.44%)	34.44%
Substituted Sentences*	42 (24.65%)	84 (24.65%)	24.65%
Suspended Sentences*	16 (7.44%)	22 (7.44%)	7.44%
Unable to Determine	30 (29.55%)	121 (29.55%)	29.55%
Total	102 (100%)	245 (100%)	100%

*Note: Substituted and suspended sentences are considered part of the convicted category.

The results showed that, contrary to expectations, the birthplace of the accused did not influence the legal outcomes. Combatants born in Guinea, that is, those recruited from the former colony, had a higher percentage of acquittals and mitigated or suspended sentences. Despite a higher conviction rate among locals compared to those from the metropolis, the data indicates that sentences were frequently substituted for defendants born in the colony.

This analysis suggests that the TMT applied the legislation in a relatively equitable manner, with no clear evidence of discriminatory hierarchies based on the birthplace of the accused combatants. Even within the colonial context, the military criminal justice system seems to have upheld the

principle of legal equality established by the repeal of the Indigenous Law (Estatuto do Indígena) in 1961.

Various aspects were examined, including the number of cases initiated against combatants from both the colony and the metropolis, analyzing their absolute and relative frequencies. Additionally, the crimes were classified into six broad categories: crimes against honesty (sexual dignity), crimes against public order and peace, crimes against property, crimes against community security, crimes against personal security, and crimes against the state/government. Finally, the procedural status of the defendants was evaluated.

Nevertheless, this research has inherent limitations, such as the limited number of cases analyzed, due to time constraints. Despite this, the findings offer valuable insights into the functioning of Portuguese Colonial Justice during the War, highlighting potential directions for future studies on power and justice dynamics in colonial settings.

Conclusion

This study examined criminal cases against former Portuguese Army combatants in Guinea-Bissau (1963-1974) during the Colonial War, focusing on common crimes tried by the TMT of Guinea. The research explored possible disparities in the treatment of military personnel born in the metropolis (Portugal) and in the colony (Guinea-Bissau), framing the analysis within the context of the abolition of the Statute of Indigeneity and the colonial assimilation ideal.

Of the 347 cases analyzed, 245 involved military personnel born in Portugal and 102 born in Guinea. Defendants from the colony had a higher rate of acquittals and sentences that were either suspended or converted into disciplinary sanctions, while those from the metropolis had more cases

archived or resolved through amnesty. Although there was a higher proportion of convictions among those born in the colony, the differences were not significant, and the legislation applied by the TMT seemed to treat the defendants in a relatively equitable manner, with no strong evidence of discrimination based on the birthplace of the combatants accused of non-military crimes.

The research challenges common perceptions that individuals born in the colony were widely disadvantaged, highlighting the role of the Military Justice System in shaping power relations and colonial tensions. It also contributes to a broader understanding of the functioning of the Portuguese Justice System during the colonial era.

References

Agra, C. da, Leite, A. L., Sousa, P., & Quintas, J. (Coord.). (2015). *Homicídios conjugais: Estudo avaliativo das decisões judiciais*. Comissão para Cidadania e Igualdade de Género – CIG. <https://repositorioaberto.up.pt/bitstream/10216/83304/2/125824.pdf>.

(Consultado em 2 fev. 2024)

Camarinhas, N. (2010). *Juízes e administração da justiça no Antigo Regime: Portugal e o império colonial, séculos XVII e XVIII*. Lisboa: Fundação Calouste Gulbenkian/Fundação para a Ciência e a Tecnologia.

Cann, J. P. (1996). *Portuguese counterinsurgency campaigning in Africa 1961-1974: A military analysis*. Department of War Studies - King's College, University of London.

Cann, J. P. (2005). *Contra-subversão em África: Como os portugueses fizeram a guerra em África, 1961-1974*. Prefácio.

Martinez, E. S. (2012). *Uma justiça especial para os indígenas: Aplicação da justiça em Moçambique (1894-1930)* (Tese de doutorado, Universidade de Lisboa, Faculdade de Letras, Departamento de História). Repositório Institucional da Universidade de Lisboa. <https://repositorio.ul.pt/handle/10451/7314>. (Consultado em 15 jul. 2024)

Meneses, M. P. (2018). Colonialismo como violência: A “missão civilizadora” de Portugal em Moçambique. *Revista Crítica de Ciências Sociais*, (n.º especial). <https://journals.openedition.org/rccs/7741> (Consultado em 3 jun. 2024).

Portugal, Ministério da Guerra. (1897). *Código de Justiça Militar: 1896*. Imprensa Nacional.

Portugal. (1919). *Código Penal: Nova publicação oficial ordenada por decreto de 16 de setembro de 1886*. Diário do Governo, de 20 de setembro de 1886. Imprensa da Universidade.

Pratt, J. (2004). *Colonization, power and silence: A history of indigenous justice in New Zealand society*. In B. Galaway & J. Hudson (Eds.), *Restorative justice: International perspectives* (pp. 137-155). <https://www.ojp.gov/ncjrs/virtual-library/abstracts/colonization-power-and-silence-history-indigenous-justice-new> (Consultado em 1 jul. 2024).

República Portuguesa. *Regulamento do recenseamento e cobrança do imposto indígena*. Aprovado por Diploma Legislativo n.º 237, de 26 de Maio de 1931. Luanda: Imprensa Nacional, 1931.

Rodrigues, F. da C. (2017). Antigos combatentes africanos das Forças Armadas Portuguesas: A guerra colonial como território de (re)conciliação (1. ed.). Camões, Instituto da Cooperação e da Língua Portuguesa.

Roussel, C. (1876). *La justice en Algérie: Les tribunaux indigènes*. *Revue des Deux Mondes* (1829-1971), 16(3), 678-697. <https://www.jstor.org/stable/44751603>. (Consultado em 10 jun. 2024).

Zaffaroni, E. R. (2017). *Colonização punitiva e totalitarismo financeiro: A criminologia do ser-aqui*. Editora Contexto.

A Natural Battlefield: Exploring the Intersection Between War Criminology and Green Criminology

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Abstract

Although Criminology has seen a rapid and vast evolution throughout the last decades, comprising several areas of interest to promote social well-being, it has been at loss concerning both war and the environment. This work, however, intends to look at the intersection between these realities, to understand how war and green crimes are at stake, giving an attentive look at victims that are usually overlooked. By examining the confluence of war criminology and green criminology, this study aims to uncover the multifaceted impacts of armed conflict on environmental degradation. It delves into the often neglected consequences of warfare on ecosystems and

⁷⁰ This work was supported by FCT – Fundação para a Ciência e Tecnologia, I.P. by project reference 2022.05692.PTDC and DOI identifier <<https://doi.org/10.54499/2022.05692.PTDC>>.

communities, highlighting the environmental crimes committed during conflicts and their far-reaching effects. This work seeks to bring attention to the invisible victims of such crimes, fostering a comprehensive understanding of the intertwined nature of war and environmental harm, and advocating for more inclusive and interdisciplinary approaches in criminological studies.

Introduction

Historically, War Criminology has been a neglected field within criminology, with sparse research and information on the topic. Jamieson (2002, 2017) reverses this trend by arguing that more attention should be paid to studying crimes committed during wartime, crimes of war, and war's general impacts on society. In recent years, War Criminology has, therefore, gained increased relevance internationally (Jamieson, 2017; McGarry & Walklate, 2015). McGarry and Walklate (2015) developed further the discussion of criminology and war, emphasizing that the violence and harm stemming from armed conflict are often overlooked since war itself generates a context in which the social and legal norms to which we are accustomed take on different forms.

It is clear that many deviant behaviours commonly studied by criminology also occur within war. Various wartime dynamics, including human rights violations and related transgressions, can be conceptualized as crimes that should no longer be legitimized or denied by political and legal institutions. Instead, they must be subject to criminological scrutiny. War creates new forms of crime and violence (Jamieson, 2002, 2017), and criminology can thus contribute to studying wartime practices and their consequences for various individuals (McGarry & Walklate, 2015). There is a clear need to develop a particular criminology to analyse war-related crimes (Jamieson, 2002, 2017), presenting a critical analysis of the effects of war on civil society, and examining the psychological and social consequences of crimes committed during these conflicts and how these consequences can extend into the post-conflict period.

This places Green Criminology in a similar position to the Criminology of War, since both are essentially underexplored fields within criminology. Green Criminology is an interdisciplinary and pioneering area of inquiry into environmental harm. Over the last ten years, Green Criminology has generated significant interest, mainly due to the increasing salience of environmental issues in contemporary society (Potter, 2010). It does not restrict itself to studying environmental infractions in the strict legal sense but instead reaches for a broader definition of crime than traditional legal frameworks. Green Criminology examines not only legal infractions but also practices and behaviours that are legally permissible but cause significant environmental harm. It focuses not only on environmental laws but also on their application, the underlying processes, and how regulatory systems are applied to maintain habitats, protect species, and prevent negative impacts due to industrial or other damaging human activities (White, 2008, 2011, 2013).

Attention to these topics increasingly constitutes a contemporary urgency to tackle today's issues academically, in public circles, and within the political realm. Green Criminology is essentially a response to the increased international awareness of environmental crises, including ecosystem degradation, air and water pollution, resource depletion, and the inequalities linked to these imbalances. Environmental issues are strongly attached to social concerns, providing fertile ground for inequalities and conflicts—a condition that calls for an independent, interdisciplinary criminological input. This field extends beyond merely identifying and penalizing harmful environmental behaviours. It calls for critical reflection on the complex relationship between humans and the natural world, challenging traditional conceptions of property, exploitation, and rights. Such reflection invites a re-evaluation in light of the urgent need to protect the environment and social justice (White, 2008).

The emergence of Green Criminology as a serious tool for analysis and practice, therefore, stems from the challenges issued by a culture of overconsumption and unbridled exploitation of natural resources. It is not

about being a passive observer of environmental harm; instead, it adopts a critical and transformative approach that questions those systems promoting environmental degradation (White, 2011).

Central to this perspective is the notion of "environmental crime" itself, defined variably across its interdisciplinary boundaries. For some, it is a term applied strictly to legal definitions; in contrast, for others, any environmental or ecological damage should be considered criminal, irrespective of whether it is legally constructed as such (White, 2013). This critical approach covers direct damage to the environment as well as the effects human practices have on ecosystems and other species.

Despite this progress, the concept of environmental crime continues to face challenges in its definition and practical application. Many environmentally harmful activities, like deforestation, pollution, and heavy resource exploitation, remain legally permissible, even with devastating consequences for the environment and local communities. This paradox exposes the fragility of current legal norms and reinforces the need to reassess them in light of ecological justice (White, 2011). Since it was initially proposed, Green Criminology has focused on crimes and environmental harms that affect human and non-human life and ecosystems as a whole (Brisman, 2014). In doing so, it challenges ethical and legal assumptions, urging societies to reflect on the long-term consequences of their choices (White, 2008).

The Intersection Between War Criminology and Green Criminology

We find a more significant area of overlap regarding the impact of armed conflicts on the environment and biodiversity. Not only do armed conflicts result in immense human suffering, but they also leave profound and long-lasting marks on the environment. Environmental impacts are significant and manifest through the destruction of natural resources, loss of biodiversity, and challenges to sustainable practices (Tucker, 2012). The ecosystems incur

severe damage before, during, and after conflicts due to water contamination, habitat destruction, and soil and air pollution, represented by deforestation, pollution from bombed factories and infrastructure, and toxic and even radioactive waste. In addition to the harm inflicted against civilian populations, it results in the decline of species' adaptive capacities (Francis & Krishnamurthy, 2014).

The human cost of war is still high (Francis & Krishnamurthy, 2014). Millions of people are exposed to insecure environments characterized by attacks, bombings, and demolition of homes, which may lead to health hazards due to toxic substances. In addition, agricultural areas are usually targeted, with irrigation systems destroyed and water supplies disrupted, further exacerbating the socioeconomic problems of refugee crises and overwhelming essential services. These issues create a cycle of degradation that is challenging to reverse, compounded by insufficient legal frameworks to address wartime environmental damage (Khan, 2022).

Within this framework, criminology needs to approach these devastating impacts, particularly through the lenses of War Criminology and Green Criminology. The latter emphasizes environmental damage, in particular, to address and solve these problems for post-conflict reconstruction to prevent irreversibility. Traditionally, discussions about biodiversity and the environment are anthropocentric — they revolve around human interests. This would be similar to criminology, which concentrates on human behaviour and attitudes. Green Criminology is shifting this paradigm, however, by emphasizing the intrinsic values of biodiversity, thereby considering the environment as inherently valuable and capable of victimization (South, Brisman & Beirne, 2013).

Most biodiversity hotspots host armed conflicts, harbouring half of all species on Earth and being vital for ecosystem health. The destruction caused by war usually leads to the collapse of an ecosystem, threatening the local flora and fauna and destabilizing global ecology - habitat devastation results in species extinction and irreparable environmental damage. While abandoned war

zones may sometimes recover biodiversity, this process is slow and often hindered by residual pollution, land-use changes, and persistent toxic waste (Francis & Krishnamurthy, 2014; Khan, 2022). Water pollution is a critical issue, often exacerbated by military strategies targeting enemy water supplies. Tactics such as contaminating water sources with chemical, biological, or nuclear weapons create significant health and environmental risks. This further underlines the need for urgent strategies to protect and restore water resources during the conflict. Air pollution is also exacerbated in cases of conflict because of military emissions and the use of chemical weapons, which release toxic pollutants harmful to public health and the environment. These impacts must be addressed to protect public health and the environment. Soil pollution is yet another grave concern during armed conflicts. Explosions and military activities disrupt the horizons, leading to erosion, contamination, and loss of fertility. Soil degradation affects food security and ecosystem quality and requires considerable effort to restore (Biswas, 2000; Lawrence, Stemberger, Zolderdo, Struthers & Cooke, 2015).

Moreover, military activities lead to habitat destruction, deforestation, and wildfires, seriously threatening species dependent on such habitats. The loss of habitats creates cascading effects that jeopardize species' survival and degrade vital natural resources (Biswas, 2000). Armed conflicts also intensify climate change challenges. The destruction of infrastructure increases greenhouse gas emissions, while reliance on fossil fuels during conflicts raises carbon footprints. These factors hinder global climate mitigation efforts and complicate sustainable recovery and adaptation strategies. Post-conflict reconstruction often prioritizes conventional energy, exacerbating emissions. Recognizing the link between armed conflicts and climate change is essential for developing effective policies to address these interconnected crises (Francis & Krishnamurthy, 2014; Khan, 2022).

Conclusion

Armed conflicts have a far-reaching environmental impact. While the human cost of war is immense, the environmental impact is equally important and often overlooked. It is essential to recognize these impacts and take immediate action to prevent long-term damage and ensure a sustainable future for our planet.

In order to address this issue, international laws and regulations protecting the environment should be strengthened during conflicts. Much more proactive measures and closer regulation are required to ensure, at least during the war itself, that the environment receives the necessary protection to minimize damage and allow recovery. Only through the development of proper policies and international collaboration can we ensure that the environmental impact of such conflicts will be correctly controlled, letting our planet remain a home for life.

It is also to be expected from Criminology to learn what kind of behaviour is or is not to be regarded as criminal, particularly in the extreme environment of war where human behaviours often function with little inhibition. It is imperative to consider the period before and after the war and, therefore, approach this phenomenon as a whole, which will better address emerging environmental concerns within armed conflicts.

References

- Biswas, A. K. (2000). Scientific assessment of the long-term environmental consequences of war. *The environmental consequences of war: Legal, economic, and scientific perspectives*, 303, 315.
- Brisman, A. (2014). Of Theory and Meaning in Green Criminology. *International Journal for Crime. Justice and Social Democracy*, 3(2), 21–34. doi:10.5204/ijcjsd.v3i2.173

Jamieson, R. (2002). Towards a criminology of war in Europe. In *The New European Criminology* (pp. 498-524). Routledge.

Jamieson, R. (Ed.). (2017). *The Criminology of War*. Routledge.

Khan, M. (2022). The environmental impacts of war and conflict. *Institute of Development Studies*. doi: <https://doi.org/10.19088/k4d>.

Lawrence, M. J., Stemberger, H. L., Zolderdo, A. J., Struthers, D. P., & Cooke, S. J. (2015). The effects of modern war and military activities on biodiversity and the environment. *Environmental Reviews*, 23(4), 443-460.

McGarry, R., & Walklate, S. (2015). Introduction: Placing War Within Criminology. In *Criminology and War* (pp. 1-18). Routledge.

Potter, G. (2010). What is Green Criminology. *The Sociological Review*, 20(2), 8-12.

South, N., Brisman, A., & Beirne, P. (2013). A guide to a green criminology. In *Routledge International Handbook of Green Criminology* (pp. 43-58). Routledge.

Tucker, R. P. (2012). War and the Environment. *A Companion to Global Environmental History*, 319-339.

White, R. (2008). *Crimes Against Nature: Environmental Criminology and Ecological Justice*. Willan.

White, R. (2011). *Transnational Environmental Crime: Toward an Eco-global Criminology*. Routledge.

White, R. (2013). What is to be done about Environmental Crime? In *The Routledge Handbook of International Crime and Justice Studies* (pp. 445-467). Routledge.

Transitional Justice, International prosecution and Universal Jurisdiction in the Palestine-Israel context.

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Abstract

This brief essay aims to share reflections and contemporary debates on the relationships and dynamics between Transitional Justice (TJ) and international prosecution, in the Palestine-Israel context. Even though International Tribunals face increasing critiques on the incapability to provide accountability for alleged perpetrators of genocide, crimes against humanity, and war crimes in the Israeli-Palestine context, they are still used as an arena for legal action from a variety of different actors. This contribution briefly highlights the ongoing debate about the usefulness of Transitional Justice mechanisms regarding the Palestine-Israel context and presents some insights on Universal Jurisdiction. Going back in time, the case proposed is the "Sabra and Shatila case" against Ariel Sharon and other Israeli officials

before Belgian courts, filed in 2001 by 23 Palestinian and Lebanese individuals.

Key-words: Transitional Justice; Universal Jurisdiction; Palestine-Israel.

Introduction

After 1 year of the ongoing Israeli-waged attack on the Gaza Strip, with 40.000+ casualties among Palestinians, without counting all the victims before the 7th of October 2023, international tribunals have been used by different actors to assess the crimes that are being committed.

When I gave my presentation at the Conference “InJUSTiceWar” at the University of Porto on the 22nd of July 2024, the International Court of Justice had just issued a landmark Advisory Opinion on the “Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem” (19th of July 2024), while just a few months before, on the 20th of May 2024, the ICC prosecutor Karim Khan applied for an arrest warrant against Israeli Prime Minister Netanyahu, Israeli Minister of Defense Yoav Gallant and 3 Hamas members. Therefore, my presentation about the relationship between Transitional Justice mechanisms and international prosecution focused on the role of the ICJ and the ICC and these recent updates.

For this publication, I would prefer to reflect on Universal Jurisdiction mechanisms⁷¹ and specifically the Sabra and Shatila case against Ariel

⁷¹ My interest in Universal Jurisdiction comes from my participation in the project “Justicia sin fronteras por crímenes de Estado: Enseñanzas de la aplicación de la jurisdicción universal en la Argentina” directed by Dr. Julieta Mira (Universidad de Lanús,

Sharon, filed in 2001 in Belgium. Looking at what happened to this attempt to prosecute an Israeli leader some 20 years ago can highlight some complicated issues about international prosecution and its ability to provide justice and guarantees of non-repetition, especially regarding Palestine.

This paper will discuss 1) the role of Transitional Justice mechanisms and their critical application in Palestine; 2) the use of international tribunals focusing on Universal Jurisdiction. 3) the “Sabra and Shatila” case against Ariel Sharon and other Israeli officials for the 1982 massacres in the Sabra and Shatila camp in Lebanon.

The conclusion will provide a critical approach to the use of Transitional Justice mechanisms, taken in their classic liberal top-down design and International Tribunals. At the same time, I conclude strengthening the need for a permanent ceasefire, accountability, truth and reparations for the Palestinians under Israeli occupation.

Transitional Justice and Palestine

Transitional Justice is known as a conception of justice associated with periods of political change and characterized by a set of legal and non-legal responses to massive human rights violations during repressive predecessor regimes. TJ has four pillars: 1) Truth Seeking 2) Prosecutions 3) Reparations 4) Institutional Reforms. Recently, UN Special Rapporteur on Transitional Justice Salvioli has proposed to integrate a fifth pillar of TJ, namely memory (Salvioli, 2020). Following Ruti Teitel's Genealogy of Transitional Justice (Teitel, 2014) it is possible to identify three historical phases of TJ: 1) The post-World-War II Phase based on the Nuremberg Trials; 2) The Post-Cold-War Phase and 3) Steady-State TJ and Globalization. Three quite different

Buenos Aires). Project PICT 2020 Serie A 03654, funded by the Agencia Nacional de Promoción de la Investigación, el Desarrollo Tecnológico y la Innovación. I take this opportunity to thank Julieta Mira and the other scholars that engaged in this project.

sets of events have entered this debate: first, the collapse and dismantlement of the Soviet Union and state communist regimes in Eastern Europe; second, the transition in parts of Africa, Asia, but most especially Central and Latin America (Brazil, Argentina, Chile, Uruguay, El Salvador, Paraguay...); third, the collapse of apartheid in South Africa. Traditional Justice field or “non-field” (Bell, 2009) has 4 basic pillars: 1) Truth seeking; 2) Prosecution; 3) Reparations; and 4) Institutional reforms.

Transitional Justice, to briefly sum up, applies to the “aftermath” of large-scale abuses committed and implies the use of different mechanisms as: Criminal prosecutions; Truth Commissions; material and symbolical reparations; Institutional reforms.

Rosemary Nagy (2008, p. 276) argues that this standardization of mechanisms and approaches has critically led to a narrowed and depoliticized scope of TJ, with a “privileging of legal responses which are at times detrimentally abstracted from lived realities”, specifically with the implementation of trials and truth commissions that tend to structure specific conceptions of violence and justice. In this sense, a purely legalistic approach that prefers trials and truth commissions can be seen as a “one-fits-all” liberal approach that is not able to grasp and work with structural violence or ongoing inequalities.

As Transitional Justice mechanisms face different challenges to be applied, especially in fragile democracies and in contexts of ongoing conflicts, the case of Palestine defies TJ. From 1948 (the Nakba-Catastrophe - for the Palestinians and the official foundation of the State of Israel) till now, large-scale abuses, war crimes and crimes against humanity have been committed against the Palestinians and, what is often called, the “Israel-Palestine conflict” has not ended. In the situation in Palestine, large-scale abuses committed by the Israeli occupation cannot be singled out as “events” in a specific time, but they are an ongoing process. The “aftermath”, the “post-conflict” situation in which classical TJ mechanisms would apply, is not present yet. We could ask, together with Khoury: “What counts as a historical

injustice? When does a historical justice begin and end? What are we transitioning to and from? And how do we transition?" (Khoury, 2023, p. 162).

Sirleaf (2024) considers that Palestine is a "litmus test for Transitional Justice". The author argues that transitional justice as a field seems premised on "a sort of racial aphasia or a forced forgetting" and "an unwillingness to confront the persisting and imperial operation of race in society [...] Transitional justice, until recently, has tended to restrict our gaze to the most recent atrocities, which inhibits our ability to consider the racialized and colonial roots of the present moment in the field" (Sirleaf, 2024, p. 176).

Transitional Justice scholars that privilege the term "conflict" and "peace-building" are, according to Browne (2021), failing to address settler colonialism as the root cause of the "rich tapestry of 'justice' issues, the majority of which remain unresolved due to, inter alia, Israeli intransigence, international inertia, and the blind backing of a western sponsored neoliberal 'peacebuilding' agenda" (Browne, 2021, p. 3).

These authors, among others, underline how Transitional Justice "classical" mechanisms have privileged a legalistic approach that focuses on a "post-injustice" society and that tends to overlook the colonial and racial patterns of ongoing violence and inequality. This critical approach is of value, also for other contexts marked by processes of colonization and racial oppression. One example is post-apartheid South Africa and its Truth and Reconciliation Commission, considered by some authors as "colonized by Transitional Justice" (Roberts, 2020) or as "neoliberal reconciliation" (Bowsher, 2020). At the same time, we must recognize here that scholars have engaged in critical approaches toward TJ for a while, especially targeting top-down approaches and development agendas. It is also true that the phenomenon of settler colonialism in Palestine has received less scholarly attention than other examples, such as Canada and Australia (see also Cunneen, 2023; Nagy, 2021; Park, 2015; among others), and the invitation here is to "radicalize

Transitional Justice” (Park, 2020), for it to be a tool of transformative justice and decoloniality.

International prosecution and Universal Jurisdiction

One of the pillars of TJ, Justice, means accountability and prosecution of crimes against humanity, genocide and war crimes. The Resolution 2171/2014 of the UN Security Council⁷² stresses:

The fight against impunity and to ensure accountability for genocide, crimes against humanity, war crimes and other egregious crimes has been strengthened through the work on and prosecution of these crimes in the international criminal justice system, ad hoc and mixed tribunals as well as specialized chambers in national tribunals; and recognising in this regard the contribution of the International Criminal Court, in accordance with the principle of complementarity to national criminal jurisdictions as set out in the Rome Statute, towards holding accountable those responsible for such crimes; and reiterating its call on the importance of State cooperation with these courts and tribunals in accordance with the States’ respective obligations.

The idea of accountability, especially internationally, is not new, but was cemented by the Nuremberg and Tokyo trials after World War II and culminated with the building of the International Criminal Court (ICC) on the grounds of the Rome Statute. The experience of the ad Hoc Courts for the Former Yugoslavia and Rwanda, as well as the lessons coming from the mixed courts of Sierra Leone, Cambodia and Lebanon, among others, busts

⁷²

Available
<https://documents.un.org/doc/undoc/gen/n14/513/73/pdf/n1451373.pdf>

at:

a general hope for a global recognition of the need for international accountability and prevention.

On the 20th of May 2024 the ICC prosecutor Karim Khan applied for an arrest warrant against Israeli Prime Minister Netanyahu, Israeli Minister of Defense Yoav Gallant and the Hamas members Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri, and Ismail Haniyeh⁷³ for the ongoing war on Gaza.

In March 2021, the same tribunal opened an investigation over crimes committed in the occupied Palestinian Territory since June 13, 2014. This followed Pre-Trial Chamber I's decision on 5 February 2021 that the Court could exercise its criminal jurisdiction in the Situation and, by majority, that the territorial scope of this jurisdiction extends to Gaza and the West Bank, including East Jerusalem.

The International Court of Justice is examining a case brought by South Africa against Israel on Genocide in Gaza and requested preventive measures on the 26th of January 2024. The same Court, on the 19th of July 2024, issued a landmark Advisory Opinion on "Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem", determining that the Palestinian territories constitute one political unit and that Israel's occupation since 1967, and the subsequent creation of Israeli settlements and exploitation of natural resources, are illegal under international law⁷⁴.

⁷³ Ismail Haniyeh, Hamas political leader, was assassinated in Teheran (Iran) on the 31st of July 2024, with a strike that targeted his residence. Israeli forces killed Yahya Sinwar on the 17th of October 2024, in Gaza.

⁷⁴ Advisory Opinion available at: Advisory Opinion of 19 July 2024

In this brief contribution, I am not dealing specifically with the ongoing work of the ICC and the ICJ on Palestine, but I will focus instead on the prosecution of international crimes at domestic courts, namely “Universal Jurisdiction”.

Universal jurisdiction gives domestic courts the ability to prosecute certain crimes even if they were not committed on its territory, by one of its nationals, or against one of its nationals. In this case, domestic courts act as a surrogate of the international community to prosecute those who committed genocide, crimes against humanity and war crimes everywhere (Gilchrist, 2022). The idea is that there shouldn’t be any “safe haven”. Universal jurisdiction enabled Israel to abduct from Argentina and prosecute a senior Nazi official, Adolf Eichmann, in 1961 for his role in the Holocaust during World War II and Langer (2011) points out how the end of the Cold War and its bipolar framework further opened up the landscape for universal jurisdiction prosecutions.

The landmark case for universal jurisdiction is the Pinochet case: when Augusto Pinochet Ugarte, the former head of state of Chile, was arrested in London on an international warrant and extradition request from the Spanish judge Balthazar Garzon in 1998 (Bianchi, 1999). Although Pinochet was eventually found not to have the mental capacity to stand trial and was released and returned to Chile, it set forth an important precedent as a British court found that he could be extradited to Spain on charges of torture and conspiracy to commit torture.

Maximo Langer (2011) analyzes some difficulties: since international crimes are often committed by state officials, the political branches of the prosecuting states must be willing to pay the international relations costs that the defendant’s state of nationality would impose if prosecution and trial take place. As these costs can be substantial, universal-jurisdiction-prosecuting states have strong incentives to concentrate on defendants who impose low international relations costs because it is only in these cases that the political benefits of universal jurisdiction prosecutions and trials tend to outweigh the costs. In this same line of thought Gallagher stresses:

“Particularly when the target-defendants are from powerful countries, the results do not necessarily bode well for those who favor accountability (as a tool for deterrence through public assignment of individual criminal responsibility and resulting punishment, as well as a mechanism for redress) over impunity (whether through the failure to investigate or prosecute known serious violations, or by according certain individuals, notably high-level officials, immunity)” (Gallagher, 2009, p. 1115).

Ultimately, prosecuting a head of State or a state official in a domestic court for international crimes is often a delicate political choice that considers diplomatic pressures, international relations, and resources. The above-mentioned Pinochet case in London, as well as other cases like Rios-Montt in Spain (Ross, 2016) or Donald Rumsfeld in Germany, France, and Spain (Gallagher, 2009), show these dynamics very well. In the following chapter, the “Sabra Shatila” case before Belgian courts is taken as an example, to show these “steps back, steps forward” (Roht-Arriaza, 2004) of Universal Jurisdiction, and the failures of international prosecutions in the Palestine-Israel context.

The Sabra and Shatila case at Belgian courts

In June 1982, Israel launched a massive invasion of Lebanon, headed by Defense Minister Ariel Sharon. The aim was to defeat and destroy the Palestine Liberation Organization (PLO), the internationally recognized representative of the Palestinian people, which was based in Lebanon at the time.

During the invasion, between 16th and 18th of September, 3,500 Palestinian refugees⁷⁵ were killed by Israel's proxy militia, the Phalange. The mass slaughter of Palestinian refugees and Lebanese nationals, with the horrific images of mutilated bodies and desperate survivors, circulated around the world and sparked great outrage. The United Nations General Assembly called it an "act of genocide"⁷⁶.

Years later, 23 Palestinians and Lebanese individuals who were personally injured and/or lost close family members or property as a result of these events filed a complaint as parties civiles in the Brussels Criminal Court on June 18, 2001.

The Complaint named "Ariel Sharon, Amos Yaron, and other Israeli and Lebanese leaders responsible for the massacre, killing, rape, and disappearance of civilians that took place in Beirut between Thursday 16 and Saturday 18 September, 1982 in the camps of Sabra and Shatila and the surrounding area." (Hurwitz, 2009, p. 270).

Filed under Belgium's broad universal jurisdiction statute, the 1993 Act Concerning the Punishment of Grave Breaches of the Geneva Conventions, as amended by the 1999 Act Concerning the Punishment of Grave Breaches

⁷⁵ There is no certainty about the exact number of victims. Estimations have always varied widely between 700 to 3500. The lowest number (between 700 and 800 victims) has been produced by the IDF and was used by the Israeli Commission of inquiry (The Kahan Commission, 1983). The Lebanese authorities published higher figures in the middle of October 1982. The historian Bayan al-Hout (2004) conducted fieldwork between 1982 and 1984 on casualties in Sabra and Shatila. She identified 1390 cases: 906 dead and 484 "missing". Amnon Kapeliouk, an Israeli journalist, worked on a reconstitution of the events soon after the slaughter and published the results of his research in 1982: Sabra and Shatila. Inquiry Into a Massacre [Sabra et Chatila: enquête sur un massacre]. In A. Kapeliouk's opinion, the number of victims reached 3 000 - 3 500. He added to the 2000 death formally listed and recognized by the Lebanese authorities three other kinds of victims. See also: Signoles Aude (2008), Sabra and Chatila, Mass Violence & Résistance, available at: <http://bo-k2s.sciences-po.fr/mass-violence-war-massacre-resistance/fr/document/sabra-and-chatila>.

⁷⁶ GA Resolution 37/123 (December 1982). Point D. Available at: Mideast situation/Jerusalem/Golan/Lebanon/Genocide - GA resolution - Question of Palestine

of International Humanitarian Law ("the 1993/1999 Law" or "the Law")—the allegations of acts of genocide, crimes against humanity, and war crimes were founded on international customary law and on 'ius cogens' which relate to these crimes." (Hurwitz, 2009).

At that time, several States had universal jurisdiction laws, with different scopes and strength, but the Belgian law was considered as the most far-reaching, a palatable venue for victims' claims for justice. The Belgian Law was a model of pure universal jurisdiction, covering genocide, war crimes and crimes against humanity and requiring no nexus between the acts, the accused and the state of Belgium. Immunity attached to the official capacity of the accused was not considered an impediment for prosecution.

There is not enough space here to recount all the steps and stages of the investigation for the Sabra and Shatila case in Belgium, but it is important to remark how all the investigation suffered from political and diplomatic pressure coming from the State of Israel and the U.S. Government. In June 2003, at a press conference following the NATO defense ministers meeting in Brussels, U.S. Defense Secretary Donald Rumsfeld threatened that American officials might stop attending NATO meetings in Belgium "because of a law that allows 'spurious' suits accusing American leaders of war crimes." Rumsfeld said the United States would withhold any further funding for a new NATO headquarters building until the matter is resolved, any "resolved" he meant that the investigation against the most powerful U.S. ally in the Middle East had to be dissolved (Hurwitz, 2009, p. 307).

Not even a month passed, and the Belgian political parties achieved a new agreement: they decided to withdraw the Law and approved on the 5th of August a new amended one. Hurvitz considers that this new law cannot be considered a Universal Jurisdiction one, but rather an international criminal law with limited possibilities for "universal"/extraterritorial jurisdiction (Hurvitz, 2009).

Roht-Arriaza (2004) analyzed how the modified law gave immunity to heads of state, heads of government, and foreign affairs ministers. It tightened the required contacts with the forum state, allowing the Belgian courts to hear complaints only when the suspect has a Belgian nationality or lives in Belgium, the complainants are Belgian or have lived there legally for three years at the time of the alleged crimes, or if a treaty requires Belgium to exercise jurisdiction. In addition, it removes the ability of the victim to initiate proceedings. The decision to proceed now rests entirely with the state prosecutor. Finally, Roht-Arriaza points out the most problematic aspect of the new amended Law: the prosecutor must reject a complaint if, under the concrete facts, the case should be heard by a court with international jurisdiction or in the place where the crimes were committed or where the suspects are found.

The amendment of the Belgian law, together with a similar amendment of the Spanish Law in 2009, is considered a major set-back in the universal defense of human rights and accountability for atrocious state-sponsored crimes: "Faced with the theoretical possibility of multiple prosecutions for the same course of action, in an effort to create an orderly process of prioritization Spain and Belgium, through different means, have in effect superimposed a nationality tie (or at least something close to it) on something they are still calling universal jurisdiction" (Roht-Arriaza, 2004, p. 388).

As the same time in which this can be considered a "fall" of universal jurisdiction principles, several states in the EU, especially Germany and France, have and are still using UJ against, for example, Syrian war criminals (Fowler, 2024), and alternative venues for justice have been pursued by victims in Latin America. Argentina, for example, has become a prominent venue for Universal Jurisdiction claims, hosting several cases such as the case brought by the Spanish victims of the Franco regime and the Rohingya victims against Myanmar for the crime of genocide, among others (Mira, 2023).

Conclusion

The Sabra and Shatila case against Ariel Sharon in Belgium offers a good example on how complicated and fragile is international prosecution against powerful state agents. In the balance, pointed out by Langer, between costs and benefits for a prosecution state to host such cases, it seems likely that political pressures and diplomatic conflicts will arise and bar prosecution. To focus on “low-cost” defendants and limit the scope of Universal Jurisdiction seems a more convenient option for a number of states. In the case of Palestine-Israel this attempt to prosecute Arien Sharon in Belgium some 20 years ago, highlights also how pressure and political threats can come not only by the defendant’s state (Israel) but also from its most powerful ally on the global stage (U.S.A). 20 years after this attempt, we are watching the ongoing cases at the ICC and ICJ, that are suffering from similar kinds of political attacks, while the courts themselves are also accused to be biased and “colonial tools” and incapable to provide justice for the Palestinians in general and the Gazans, in particular.

International Prosecution seems unlikely to provide that transformative and substantial justice that many victims, activists and scholars are claiming, but still are used as arenas of legal and political strategies that can lift up international criminal prosecution for atrocious crimes and assert the inviolability of human rights for all.

It is fundamental to engage in a critical approach of both Transitional Justice mechanisms, taken in their classic liberal top-down design, and International Tribunals. At the same time, I also underline the need for a permanent ceasefire, truth and reparations for the Palestinians under Israeli occupation, as well as international prosecutions that can properly address this context of ongoing state-sponsored colonial violence.

Bibliography

Bell, C. (2009). Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'. *International Journal of Transitional Justice* 3(1), 5–27.

Bianchi, A. (1999). Immunity versus human rights: the Pinochet case. *European Journal of International Law*, 10(2), 237–277.

Bowsher, J. (2020). The South African TRC as Neoliberal Reconciliation: Victim Subjectivities and the Synchronization of Affects. *Social & Legal Studies*, 29(1), 41–64.

Browne, B. (2021). Disrupting Settler-Colonialism or Enforcing the Liberal 'Peace'? Transitional (In)Justice In Palestine-Israel. *Journal of Holy Land and Palestine Studies*, 20(1), 1–27.

Cunneen, C. (2023) Settler Colonial States and Transitional Justice. In J. Meierhenrich, A. L. Hinton, & L. Douglas (Eds.), *The Oxford Handbook of Transitional Justice*.

Fowler, A. (2024). Comparing universal jurisdiction in Europe and in Latin America: a vehicle for international justice or for colonial reckoning?. *The International Journal of Human Rights*, 1–22.

Gallagher, K. (2009). Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture. *Journal of International Criminal Justice*, 7(5), 1087–1116.

Gilchrist, H. (2023). No Hiding from Justice: Universal Jurisdiction in Domestic Courts. *Texas International Law Journal*, 57(2), p. 215.

Hurwitz, D. R. (2009). Universal Jurisdiction and the Dilemmas of International Criminal Justice: The Sabra and Shatila Case in Belgium. In D. Hurwitz, M. L. Satterthwaite, & D. Ford (Eds.), *Human Rights Advocacy Stories*. Foundation Press.

Khoury, N. (2021). Transitional Justice in Palestine/Israel: Whose Justice? Which Transition?, In L. H. Farsakh, *Rethinking Statehood in Palestine: Self-Determination and Decolonization Beyond Partition*. University of California Press.

Langer, M. (2011). The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes. *The American Journal of International Law*, 105(1), pp. 1-49.

Mira, J. (2023). El principio de la jurisdicción universal en la Argentina: El juzgamiento penal de los crímenes del franquismo y la persecución al pueblo Rohingya. *Revista de la Carrera de Sociología Enramados y Perspectivas*, 13(13), 336-376.

Nagy, R. (2008). Transitional Justice as Global Project: Critical Reflections. *Third World Quarterly*, 29(2), 275-289.

Nagy, R. (2021). Transformative justice in a settler colonial transition: implementing the UN Declaration on the Rights of Indigenous Peoples in Canada. *The International Journal of Human Rights*, 26(2), 191-216.

Park, A.S.J. (2015). Settler Colonialism and the Politics of Grief: Theorising a Decolonising Transitional Justice for Indian Residential Schools. *Human Rights Review*, 16, 273-293.

Park, A. J. S. (2020) Settler Colonialism, Decolonization and Radicalizing Transitional Justice. *International Journal of Transitional Justice*, 14(2), 260-279.

Roberts, R.S. (2020). How 'Transitional Justice' Colonized South Africa's TRC. *Modern Languages Open*, 0(1), p. 34.

Roht-Arriaza, N. (2004). Universal Jurisdiction: Steps Forward, Steps Back. *Leiden Journal of International Law*, 17(2), 375-389.

Ross, A. (2016). The Ríos Montt case and universal jurisdiction. *Journal of Genocide Research*, 18(2-3), 361-376.

Salvioli, F. (2020). Memorialization processes in the context of serious violations of human rights and international humanitarian law: the 5th pillar of transitional justice. In: report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Human Rights Council. 9th of July 2020.

Sirleaf, M. V.S. (2024). Palestine as a Litmus Test for Transitional Justice. *The International Journal of Transitional Justice*, 18(1), 162-188.

Teitel, R. (2003). Transitional Justice Genealogy. *Human Rights Journal*, 16, pp. 69-94.

Between Three Worlds: The Kidnapping of Vincent Stanton in Macao during the Opium War

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Abstract

This presentation is derived from a chapter of my thesis and an article, merely adding a criminological perspective. During the Opium War, the British naval blockade in June 1840 led to Chinese soldiers being sent to Macau to arrest British subjects. This escalated tensions, resulting in the British seizing Chinese merchant ships and goods. In retaliation, the Viceroy of Canton placed bounties on British officers' heads. This communication focuses on one incident, the 'kidnapping of Vincent Stanton,' a British tutor, which sparked significant concern during the war. While the Portuguese Governor responded cautiously, British demands for action increased. Despite assurances from Chinese officials, doubts persisted about Stanton's fate. Eventually, it was confirmed that Stanton had been abducted and taken to Canton. The Portuguese and Chinese authorities collaborated to secure Stanton's release, defusing tensions. However, British naval forces attacked

Chinese troops near the Barrier Gate, leading to a decisive British victory. This prompted a Portuguese military response and diplomatic efforts to prevent further conflict. In this presentation, I would show how the Portuguese authorities acted with the English and the Chinese authorities.

Introdução

Este capítulo, derivado de uma secção da minha tese e de um artigo, introduz uma perspectiva criminológica sobre os acontecimentos durante a Guerra do Ópio. Em junho de 1840, o bloqueio naval britânico levou a um aumento das tensões e com o envio de soldados chineses destacados para Macau para prender súbditos britânicos. Esta escalada resultou na apreensão de navios e mercadorias chinesas pelos britânicos, provocando a colocação de recompensas sobre oficiais britânicos pelo Vice-rei de Cantão. O foco deste capítulo é o "rapto de Vincent Stanton", um tutor britânico cuja abdução gerou grande preocupação. Enquanto o Governador Português respondeu com cautela, as exigências britânicas por ação intensificaram-se. Apesar das garantias das autoridades chinesas, a incerteza sobre o destino de Stanton persistiu até que se confirmou que ele tinha sido levado para Cantão. A ação do governador português e das autoridades chinesas levaram a mais um escalar de tensões que culminou com a batalha da porta do cerco.

De uma perspectiva criminológica, este episódio pode ser analisado através de várias lentes. Uma delas é o conceito de guerra de encarceramento, onde as prisões e as políticas de rapto são vistas como extensões das estratégias de guerra direcionadas a civis. Além disso, explora-se a noção de guerra corporativa, sublinhando como as companhias coloniais não só apoiaram o aparelho militar, mas também funcionaram como extensões dos interesses coloniais do Império Britânico. Este capítulo demonstra a complexa interação entre as autoridades portuguesas, britânicas e chinesas na gestão de conflitos e na manutenção das dinâmicas de poder colonial durante a Guerra do Ópio.

Orientalismo Vs. mandato do céu

Considero importante destacar duas perspectivas dominantes para compreender a China: uma perspectiva europeia, influenciada pelo conceito de *Orientalismo* de Edward Said, e uma perspectiva chinesa, baseada no conceito do *Mandato do Céu*, presente na filosofia chinesa desde a Dinastia Zhou. Segundo Cabral (2013), o conceito de *Mandato do Céu* assume-se como uma ideia em que o poder era conferido pelo Céu, atribuindo ao imperador o direito de governar sobre tudo o que estivesse 'debaixo do Céu'. Esse "tudo" referia-se ao mundo conhecido pelos chineses, ou seja, à China como entidade territorial.

Nesta lógica, a extensão do mandato do imperador era geograficamente ampla, mas impraticável, pois incluía povos europeus, mesmo que este domínio não fosse efetivamente exercido. A ideia de que o imperador dominava nações como a França e o Império Britânico não era real, embora muitos chineses da época acreditassem nessa ideia. Esta visão manifesta-se na forma como designavam os britânicos como "bárbaros" e os portugueses como "estrangeiros submissos" (Lin Zexu, 1839).

Por outro lado, o *Orientalismo* consistia, essencialmente, na lente através da qual as nações europeias viam o Oriente. Segundo Said (1979), as potências ocidentais observavam e moldavam as suas relações com o continente asiático através de dinâmicas de fascínio e poder, algo que se intensificou após a Embaixada de Macartney. Macau tornou-se, então, um palco fundamental durante a guerra, especialmente para o público britânico, em que a arte expressava o mesmo orientalismo. As pinturas da cidade e das vitórias militares da Grã-Bretanha contribuíam para criar uma noção de identidade nacional britânica, apresentando "várias camadas narrativas enquanto espaço colonial português na China e espaço histórico essencial ao China Trade britânico e norte-americano" (Puga, 2024, p. 124).

O caminho para a guerra

Desde a chegada dos europeus à China, desenvolveu-se um negócio altamente lucrativo entre este país e o Japão, que envolvia a troca de prata japonesa por produtos chineses, como ouro, seda e, mais importante, chá. Wakeman (2008) descreve o sistema comercial como uma estrutura de subordinação hierárquica, em que os funcionários imperiais emitiam regulamentações e estabeleciam monopólios comerciais com os europeus.

Com o declínio desse comércio, a Inglaterra rapidamente começou a acumular dívidas significativas devido ao consumo excessivo de chá. O único produto que conseguia compensar essa balança comercial era o ópio, que já era traficado em pequenas quantidades provenientes da Índia. Contudo, em 1819, devido ao aumento da procura e à redução de preços, o consumo de ópio aumentou exponencialmente (Wakeman, 2008, p. 172).

Esse comércio enfrentou ainda a entrada de novos traficantes europeus, que enviavam navios fortemente armados “to sell opium directly off their decks at small coves on the Fukien and Chekiang coast. This created new markets, new addicts, pushing the sales of the drug ever higher.” (Wakeman, 2008, p. 163).

Devido a este fator económico, a China, que inicialmente registava lucros astronómicos, rapidamente acumulou um prejuízo de \$38,000,000 entre 1828 e 1836, o que também acelerou a colonização da Índia (Wakeman, 2008, p. 173). Spence (1975) afirma que o número de caixas de ópio exportadas de Bengala e da Turquia chegou a 10,000. Segundo Cabral (2013, p. 236), a corte do imperador Daoguang estava dividida entre duas facções: uma mais liberal, que via vantagens económicas no comércio de ópio, e uma facção moralista, que manifestava preocupações quanto à saúde pública e à dignidade nacional.

Outro problema era o impacto social que o tráfico de ópio estava a causar na sociedade chinesa. Para Wakeman (2008, pp. 178-185), não se sabe ao certo

o número de viciados, pois várias fontes da época apresentavam valores divergentes; ainda assim, as classes mais afetadas eram as médias, compostas por oficiais imperiais, soldados manchus, comerciantes e pequena nobreza rica. Moralmente, o ópio era visto como algo que subvertia a ordem confucionista, sendo interpretado como “It would mean the end of the life of the people and the destruction of the soul of the nation” (Wakeman, 2008, p. 179). Spence (1975) argumenta que o problema do ópio na China imperial possui paralelismos com sociedades contemporâneas, envolvendo tanto questões de desvio social quanto de desigualdade econômica. O autor destaca ainda um terceiro ponto relacionado à saúde, dado que o ópio era também utilizado na China para fins medicinais.

Spence (1975) debate igualmente o aspecto legal da proibição do ópio, que começou no século XVIII de maneira extremamente ambígua. Por exemplo, os produtores e consumidores eram punidos de forma mais leve do que os traficantes, que poderiam receber até 100 golpes, embora ao mesmo tempo o ópio pudesse ser tarifado. Somente em 1813 foram implementadas medidas mais rigorosas, impondo penalizações mais severas, que na prática se mostraram ineficazes. Em 1839, o imperador Daoguang nomeia Lin Zexu para pôr fim ao tráfico. Inicialmente, Lin toma várias medidas junto dos consumidores e traficantes, mas, ao ver a ineficácia dessas ações, opta por medidas repressivas, como a apreensão das arcas de ópio e o cerco às feitorias estrangeiras. Como relatado pelo delegado: “caso queiramos tê-los na mão, deveremos cobri-los de mercês. Por qualquer irregularidade que cometam, sujeitá-los-emos à lei” (Lin Zexu, 1839, p. 78).

Estas medidas culminaram em forte pressão sobre o governo britânico, exercida pelos poderosos lobies de ópio. O conflito escalou para uma expedição militar contra o Império Chinês, ainda que não tenha existido uma declaração formal de guerra por parte da Rainha Vitória.

O papel das Companhias na Guerra

Para a análise criminológica do conflito da Guerra do Ópio, é relevante considerar os aspetos abordados por Whyte (2015) no capítulo da obra *Criminology and War: Transgressing the Borders*, editada por Walklate & McGarry (2015). O autor parte da premissa de que a regulação da guerra não só evita e limita os danos dos conflitos, mas também legitima a própria guerra, explorando o papel das empresas no seu decorrer. O papel da Companhia das Índias Orientais britânica e de indivíduos privados neste contexto é imprescindível para compreender o conflito. Desde o início do período colonial, a violência e o uso do poder militar privado pelas empresas foram comuns na exploração e controlo de recursos e rotas comerciais. Whyte (2015) defende que a utilização de grupos privados permitia ao Estado — neste caso, o Império Britânico — salvaguardar a sua imagem pública sempre que era necessário tomar medidas que poderiam gerar grande condenação pública ou resistência local.

Durante a Guerra do Ópio, observa-se claramente esse fenómeno, pois o ópio era mal visto pelo público britânico, especialmente após a divulgação da carta do delegado Lin nos periódicos britânicos. No entanto, verifica-se que a própria Companhia das Índias Orientais criou testas de ferros, além de empresas voltadas especificamente para o tráfico de ópio, o que gerou uma classe de mercadores altamente poderosa. Assim, esses indivíduos permitiam, como aponta o autor, que o império britânico salvaguardasse a sua imagem num comércio lucrativo, mas moralmente condenável para a maioria dos europeus e autoridades chinesas (Wong, 1998).

Outro ponto destacado por Whyte (2015) é a possibilidade de investimento privado em iniciativas coloniais. Finalmente, o autor argumenta que o uso de forças militares privadas permitia a manutenção de rotas comerciais a um custo reduzido para o Estado. No caso da Guerra do Ópio, muitos dos navios de guerra pertenciam à Companhia das Índias Orientais, assim como grande parte dos efetivos militares, como regimentos provenientes da Índia.

Whyte (2015) observa que, na prática, estas companhias funcionavam para os estados da época como grupos mercenários funcionam atualmente, permitindo aos governos contemporâneos proteger sua imagem, tanto a nível legal como público, e reduzir os custos em operações diárias e prolongadas. Whyte também propõe que a relação facilitada entre estados beligerantes e empresas é sempre intermediada por funcionários estatais, o que permite aos estados reduzir o risco político e financeiro e expandir sua capacidade militar. Aplicando este conceito à Guerra do Ópio, Afonso (2018) destaca duas situações: primeiro, “os mercadores americanos e britânicos traficaram pequenas armas de fogo que entregavam aos viciados em ópio ou aos donos das casas de ópio para que pudessem resistir ao avanço das autoridades chinesas” (Afonso, 2018, p. 42). Em segundo lugar, “Durante o conflito, os portugueses começaram a traficar armas de fogo para a China, usando pequenos navios de pesca, que desciam a Boca do Tigre e adquiriam as mesmas armas, transportando-as para Cantão” (Afonso, 2018, p. 42).

Esta situação culmina numa crise diplomática, em que o representante britânico apresenta uma queixa formal, alegando violação da neutralidade. Em resposta, o governador convoca uma reunião do Leal Senado para pôr fim ao tráfico de armas. Este fenómeno estava presente mesmo antes da guerra, quando o delegado Lin já defendia a compra de armamento europeu para o exército chinês, chegando a adquirir um navio de guerra britânico e canhões franceses (Afonso, 2018; Saldanha, 2000).

Whyte conclui que as empresas funcionam como motores do militarismo dos estados e que os próprios estados asseguram que essas empresas lucram com o expansionismo. Este conceito aplica-se claramente à Guerra do Ópio. Com o fim da primeira guerra, as concessões obtidas eram essencialmente comerciais, como a abertura de vários portos na China, a concessão de Hong Kong — uma “Macau inglesa” — como base de operações comerciais britânicas, e a exclusão do ópio do tratado, permitindo uma negação implícita do envolvimento tanto britânico quanto chinês neste comércio (Afonso, 2018).

O caso de Vincent Stanton e a Guerra de Prisão

Para analisar o conceito de “guerra prisional” no contexto da Guerra do Ópio, utilizamos o conceito de Ruth Jamieson (2015), segundo o qual essa prática envolve a captura, tratamento, manutenção e troca de prisioneiros de guerra como meio estratégico. Em 22 de março de 1839, o delegado Lin Zexu, como medida coerciva, prendeu e reteve todos os comerciantes britânicos nas feitorias em Cantão, suspendendo a venda de bens e o fornecimento de criados chineses para forçar os traficantes a abandonar a cidade (Vasconcelos de Saldanha, 1998). Em resposta, Charles Elliot, representante britânico, buscou o apoio do governador português em Macau para garantir a segurança dos súbditos britânicos, o que foi aceito sob a condição de que esses súbditos não realizassem tráfico em Macau.

No entanto, a posição portuguesa tornou-se cada vez mais precária: por um lado, Macau cooperava com as autoridades locais chinesas, que pressionavam para que entregassem os súbditos britânicos; por outro, os portugueses mantinham a proteção desses britânicos para preservar seus acordos com a Inglaterra. A pressão chinesa, que incluía ameaças de cerco e corte de abastecimento de água e comida, era uma tática conhecida pelos portugueses desde seu estabelecimento em Macau, pois as autoridades chinesas fechavam a cidade quando suas ordens não eram acatadas.

Lin Zexu emitiu um edital de expulsão e prisão de todos os traficantes de ópio, abrangendo todos os súbditos britânicos em território chinês. Em fevereiro de 1840, a posição de neutralidade de Macau sofreu novo teste com a mobilização de cerca de 2.000 soldados chineses, comandados pelo Tao Tai, para cercar a cidade e prender os britânicos que ali residiam, com o objetivo de “fazer os portugueses sentirem o terror, para assim respeitarem as leis” (Gonçalves, *Documento nº6*, p. 103). A crise foi evitada quando o Tao Tai se comprometeu a não invadir Macau em troca da promessa de que mais britânicos não desembarcariam na cidade.

Em junho de 1840, Lin Zexu, enfurecido pelo bloqueio naval britânico ao rio das Pérolas, ordenou a captura de oficiais britânicos. Incapazes de capturá-los, os chineses passaram a deter civis britânicos, como ocorreu em Macau no dia 5 de agosto de 1840, quando Vincent Stanton, tutor de uma família de mercadores, foi sequestrado enquanto nadava na baía de Macau (Afonso, 2018). A reação em Macau foi rápida, e as autoridades portuguesas pressionaram os chineses por respostas, que inicialmente alegaram desconhecer o ocorrido. Surgiram então duas teorias: a primeira sugeria que Vincent teria sido raptado por chineses atraídos pela recompensa oferecida por Lin; a segunda propunha que ele teria sido levado pela correnteza e se afogado. No entanto, em 10 de junho, surgiram rumores de que Vincent estava preso em Cantão (Afonso, 2018, p. 28; Fay, 1998, p. 246; Hanes & Sanello, 2004, p. 107). Em seguida, o governador português enviou o Tao Tai para negociar a libertação de Vincent, destacando o impacto negativo que tais ações poderiam ter para Macau. Essas negociações, contudo, foram infrutíferas, refletindo um dos elementos centrais da guerra prisional: seu uso como combustível moral e legitimador do conflito.

Para as autoridades chinesas, a captura de britânicos transmitia à corte imperial uma imagem de combate eficaz ao tráfico de ópio e de justiça rígida contra os infratores, conforme os editais do delegado Lin. Ao descrever os britânicos como criminosos que desrespeitavam a lei, as autoridades chinesas buscavam manter a paz social, baseando-se na moral confucionista, onde o ato criminal era considerado mais grave do que suas motivações, e a justiça se dava no equilíbrio ético entre o crime e a punição: "restaurar o equilíbrio ético de um governo justo, trocando o espírito ferido da vítima pela vida do culpado" (Wakeman, 2008, p. 190).

Para os britânicos e portugueses, esses eventos sustentavam duas percepções fundamentais da retórica orientalista: a de que as autoridades chinesas eram arbitrárias, severas e autocráticas, e a de que o conflito com a China, incluindo a Guerra do Ópio, era legítimo e necessário. No caso britânico, também buscava-se legitimar uma possível tomada de Macau e o estabelecimento de privilégios comerciais na China.

Ruth Jamieson (2015) observa, em seu estudo sobre a guerra prisional na Irlanda do Norte, que as prisões são palcos de batalha moral, onde o conflito entre o ofensor e o Estado se desenrola. No contexto da Guerra do Ópio, as prisões tornaram-se também uma arena de disputa moral, não entre o ofensor e o Estado, mas entre dois estados. Para os chineses, a detenção dos britânicos que violavam a lei servia como exemplo para quem desobedecesse suas autoridades. Para o Império Britânico, esses raptos fortaleciam a ideologia liberal de livre comércio e destacavam o suposto abuso cometido pelo Estado chinês contra súditos britânicos.

Importante ressaltar que havia um choque entre dois sistemas jurídicos distintos. Apesar de o sistema chinês parecer arbitrário aos olhos europeus, as penas eram, para a época, consideradas humanizadas. Muitos europeus, porém, insistiam que os crimes fossem julgados segundo suas próprias leis, não as da China (Said, 1979).

Conclusão

A análise dos diferentes aspectos criminológicos e históricos da Guerra do Ópio revela a complexa intersecção entre interesses estatais, poder econômico e estratégias políticas que caracterizaram o conflito e moldaram a forma como foi conduzido.

Em primeiro lugar, destacamos o papel das empresas privadas, como a Companhia das Índias Orientais, na expansão do Império Britânico. A partir das observações de Whyte (2015), vimos que, ao permitir que empresas atuassem com força militar e financeira, o império britânico conseguiu manter um comércio altamente lucrativo e eticamente contestado, ao mesmo tempo em que projetava uma imagem de distanciamento frente às ações impopulares e eticamente ambíguas, como o tráfico de ópio. As empresas operavam como uma extensão indireta do poder militar e econômico do

Estado, poupando gastos e reduzindo os riscos políticos associados às operações militares coloniais.

Por outro lado, ao examinar o conceito de “guerra prisional” discutido por Jamieson (2015), identificamos como as prisões e detenções de britânicos e chineses também serviram como ferramentas estratégicas e morais durante o conflito. A prisão de comerciantes e civis britânicos por autoridades chinesas era usada para comunicar o compromisso da China com o cumprimento de suas leis e a proteção de seu território e moralidade social. Em contrapartida, o Império Britânico usava esses incidentes para construir uma narrativa de opressão e arbitrariedade, legitimando, assim, sua intervenção militar e o objetivo de expandir suas concessões comerciais. Esse cenário reflete a colisão entre sistemas jurídicos e culturais profundamente distintos, com o sistema chinês sendo considerado arbitrário e punitivo pela maioria dos observadores europeus, enquanto os britânicos se viam como defensores de um modelo de justiça e comércio livres.

Por fim, a análise também evidencia como os incidentes de sequestros e retenções de estrangeiros, tanto britânicos quanto chineses, e a prisão de civis, funcionaram para ambos os lados como uma maneira de manipular a opinião pública e fortalecer as justificativas morais e políticas para a guerra. Como ressalta Jamieson (2015), as prisões se tornaram uma arena de batalha moral entre duas nações, com cada lado projetando sua própria narrativa para consolidar o apoio popular e garantir a continuidade dos objetivos de guerra.

Em resumo, a Guerra do Ópio e os conflitos associados evidenciam a maneira como, sob o verniz do comércio, os interesses coloniais e econômicos eram mascarados por narrativas de legitimação política e moral, além de estratégias de coerção que envolviam tanto forças militares quanto atores privados. Esse conflito serve de exemplo claro de como a militarização e o uso de empresas privadas, junto a complexas estratégias de captura e retenção de prisioneiros, se tornam ferramentas essenciais para a sustentação de guerras e para a expansão do poder imperialista.

Bibliografia

Afonso, D. (2018). Representações da Primeira Guerra do Ópio em Macau (1839-1842) [Dissertação de mestrado, Universidade do Minho]. RepositóriUM. <https://hdl.handle.net/1822/58792>

Cabral, L. (2013). De Quianlong a Mao Zedong. Em S. Lam, *A Herança de Confúcio Dez ensaios sobre a China* (pp. 234-270). Braga: Húmus.

Fay, P. W. (1998). *The Opium War 1840–1842*. North Carolina: The University of North Carolina Press.

Hanes III, W. T., & Sanello, F. (2004). *Opium wars: The addiction of one empire and the corruption of another*. Sourcebooks, Inc..

Puga, R. M. (2024). Macau na Geopolítica e na Cultura Visual Vitorianas: A Guerra do Ópio e a Presença Britânica na China no (Guia do) Panorama Description of a View of Macao (1840), de Robert Burford. *Revista de Estudos Anglo-Portugueses* (32), 109-163.

Said, E. W. (1979). *Orientalismo*. Lisboa: Edições 70.

Saldanha, A. V. (2000). *Para a Vista do Imperador*. Macau: Instituto Português do Oriente.

Spence, J. (1975). Opium Smoking in Ch'ing China. Em F. Wakeman, Jr., & C. Grant, *Conflict and Control in Late Imperial China* (pp. 143-173). California: University of California Press.

Wakeman, F. (2008). *THE CAMBRIDGE HISTORY OF CHINA* (Vol. XX). Cambridge, Reino Unido: Cambridge University Press. Obtido de [file:///C:/Users/User/Downloads/John%20K.%20Fairbank%20-%20The%20Cambridge%20History%20of%20China_%20Volume%2010,%20Late%20Ch'ing%201800-1911,%20Part%201-Cambridge%20University%20Press%20\(1978\).pdf](file:///C:/Users/User/Downloads/John%20K.%20Fairbank%20-%20The%20Cambridge%20History%20of%20China_%20Volume%2010,%20Late%20Ch'ing%201800-1911,%20Part%201-Cambridge%20University%20Press%20(1978).pdf)

Walklate, S., & McGarry, R. (2015). *Criminology and war Transgressing the borders*. Oxfordshire: Routledge.

Whyte, D. (2015). Civilising the corporate war. In S. Walklate, & R. McGarry, *Criminology and war* (pp. 38-54). Oxfordshire: Routledge.

Wong, J. (1998). *DEADLY DREAMS*. Cambridge: Cambridge University Press.

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English

Introduction

This chapter, derived from a section of my thesis and an article, introduces a criminological perspective on the events during the Opium War. In June 1840, the British naval blockade heightened tensions, leading to Chinese soldiers being deployed to Macau to arrest British subjects. This escalation resulted in the British's seizure of Chinese ships and goods, prompting the Viceroy of Canton to place bounties on British officers. The focus of this chapter is the 'abduction of Vincent Stanton,' a British tutor whose kidnapping caused great concern. While the Portuguese Governor responded cautiously, British demands for action intensified. Despite assurances from Chinese authorities, uncertainty about Stanton's fate persisted until it was confirmed that he had been taken to Canton. The actions of the Portuguese Governor and Chinese authorities further escalated tensions, culminating in the Battle of the Barrier Gate.

From a criminological perspective, this episode can be analyzed through various lenses. One is the concept of incarceration warfare, where arrests and kidnapping policies are viewed as extensions of wartime strategies targeting civilians. Additionally, the notion of corporate warfare is explored, highlighting how colonial companies not only supported the military apparatus but also served as extensions of the colonial interests of the British Empire. This chapter demonstrates the complex interaction between Portuguese, British, and Chinese authorities in managing conflicts and maintaining colonial power dynamics during the Opium War.

Orientalism vs. Mandate of Heaven

It is important to highlight two dominant perspectives for understanding China: a European perspective influenced by Edward Said's concept of *Orientalism* and a Chinese perspective based on the *Mandate of Heaven*, a concept rooted in Chinese philosophy since the Zhou Dynasty. According to Cabral (2013), the *Mandate of Heaven* represents the idea that power was granted by Heaven, giving the emperor the right to rule over everything 'under Heaven.' This 'everything' referred to the world as known to the Chinese, i.e., China as a territorial entity.

Under this logic, the emperor's mandate extended geographically far but was impractical, as it included European peoples even if this dominion was not effectively exercised. The idea that the emperor ruled nations like France and the British Empire was not real, though many Chinese of the time believed it. This view was reflected in the way the British were referred to as 'barbarians' and the Portuguese as 'submissive foreigners' (Lin Zexu, 1839).

On the other hand, *Orientalism* represented the lens through which European nations viewed the East. According to Said (1979), Western powers observed and shaped their relationships with the Asian continent through dynamics of fascination and power, something that intensified after the Macartney

Embassy. Macau became a crucial stage during the war, particularly for the British public, where art expressed the same Orientalism. Paintings of the city and Britain's military victories contributed to creating a sense of British national identity, presenting 'multiple narrative layers as a Portuguese colonial space in China and a historically essential space for British and American China Trade' (Puga, 2024, p. 124).

The Path to War

Since the arrival of Europeans in China, a highly lucrative trade developed between the country and Japan, involving the exchange of Japanese silver for Chinese goods such as gold, silk, and, most importantly, tea. Wakeman (2008) describes the trading system as a hierarchical structure in which imperial officials issued regulations and established trade monopolies with Europeans.

As this trade declined, England quickly began accumulating significant debts due to excessive tea consumption. The only product capable of balancing this trade deficit was opium, which had already been smuggled in small quantities from India. However, by 1819, due to increased demand and reduced prices, opium consumption skyrocketed (Wakeman, 2008, p. 172).

This trade further expanded with the entry of new European traffickers who sent heavily armed ships to "to sell opium directly off their decks at small coves on the Fukien and Chekiang coast. This created new markets, new addicts, pushing the sales of the drug ever higher." (Wakeman, 2008, p. 163).

Due to this economic factor, China, which initially registered astronomical profits, quickly incurred losses of \$38,000,000 between 1828 and 1836, accelerating the colonization of India (Wakeman, 2008, p. 173). Spence (1975) states that the number of chests of opium exported from Bengal and

Turkey reached 10,000. According to Cabral (2013, p. 236), Emperor Daoguang's court was divided between two factions: a more liberal one that saw economic advantages in the opium trade and a moralist faction concerned about public health and national dignity.

Another problem was the social impact that opium trafficking was having on Chinese society. For Wakeman (2008, pp. 178–185), the exact number of people with an addiction is unknown as various contemporary sources presented differing figures; nonetheless, the most affected classes were the middle classes, including imperial officials, Manchu soldiers, merchants, and the wealthy minor nobility. Morally, opium was seen as something that subverted the Confucian order, being interpreted as 'It would mean the end of the life of the people and the destruction of the soul of the nation' (Wakeman, 2008, p. 179). Spence (1975) argues that the opium problem in imperial China has parallels with contemporary societies, involving both issues of social deviance and economic inequality. The author also highlights a third point related to health, given that opium was also used in China for medicinal purposes.

Spence (1975) also discusses the legal aspect of the prohibition of opium, which began in the 18th century in a highly ambiguous manner. For instance, producers and consumers were punished more lightly than traffickers, who could receive up to 100 blows, although, at the same time, opium could be taxed. It was only in 1813 that stricter measures were implemented, imposing harsher penalties, which in practice proved ineffective. In 1839, Emperor Daoguang appointed Lin Zexu to end the trafficking. Initially, Lin took various measures targeting consumers and traffickers. However, upon seeing the ineffectiveness of these actions, he opted for repressive measures, such as seizing chests of opium and besieging foreign factories. As the delegate reported: 'If we want to have them in our hands, we should cover them with favors. We shall subject them to the law' for any irregularity they commit (Lin Zexu, 1839, p. 78).

These measures culminated in solid pressure on the British government, exerted by powerful opium lobbies. The conflict escalated into a military expedition against the Chinese Empire, although there was no formal declaration of war by Queen Victoria.

The Role of Companies in the War

For a criminological analysis of the Opium War conflict, it is relevant to consider the aspects addressed by Whyte (2015) in the chapter of the work *Criminology and War: Transgressing the Borders*, edited by Walklate and McGarry (2015). The author starts from the premise that regulating war not only avoids and limits the damage of conflicts but also legitimizes war itself, exploring the role of companies during its course. The role of the British East India Company and private individuals in this context is essential for understanding the conflict. From the beginning of the colonial period, companies' violence and using private military power were common in exploiting and controlling resources and trade routes. Whyte (2015) argues that the use of private groups allowed the State — in this case, the British Empire — to safeguard its public image whenever measures were necessary that could generate significant public condemnation or local resistance.

During the Opium War, this phenomenon was observed, as opium was poorly regarded by the British public, especially after the publication of Lin's letter in British newspapers. However, the East India Company itself created front companies, as well as enterprises specifically dedicated to opium trafficking, which gave rise to a mighty merchant class. Thus, as the author points out, these individuals allowed the British Empire to safeguard its image in a profitable trade that was morally condemned by most Europeans and Chinese authorities (Wong, 1998).

Another point highlighted by Whyte (2015) is the possibility of private investment in colonial initiatives. Finally, the author argues that using private

military forces allowed for the maintenance of trade routes at a reduced cost to the State. In the case of the Opium War, many warships belonged to the East India Company, as did much of the military personnel, including regiments from India.

Whyte (2015) observes that, in practice, these companies operated for the states of the time as mercenary groups do today, allowing contemporary governments to protect their image legally and publicly and reduce costs in daily and prolonged operations. Whyte also proposes that the facilitated relationship between warring states and companies is always mediated by state officials, enabling states to reduce political and financial risks while expanding their military capacity. Applying this concept to the Opium War, Afonso (2018) highlights two situations: first, 'American and British merchants trafficked small firearms that they delivered to opium addicts or opium house owners so they could resist the advance of Chinese authorities' (Afonso, 2018, p. 42). Secondly, 'During the conflict, the Portuguese began smuggling firearms to China, using small fishing boats that went down the Boca do Tigre and acquired the same weapons, transporting them to Canton' (Afonso, 2018, p. 42).

This situation culminated in a diplomatic crisis, in which the British representative filed a formal complaint, alleging a violation of neutrality. In response, the Governor convened a meeting of the Loyal Senate to end the arms trafficking. This phenomenon was present even before the war, when delegate Lin already advocated the purchase of European weaponry for the Chinese army, even acquiring a British warship and French cannons (Afonso, 2018; Saldanha, 2000).

Whyte concludes that companies function as engines of state militarism and that states themselves ensure that these companies profit from expansionism. This concept applies to the Opium War. At the end of the first war, the concessions obtained were essentially commercial, such as the opening of various ports in China, the granting of Hong Kong — an 'English Macau' — as a base for British commercial operations, and the exclusion of

opium from the treaty, allowing an implicit denial of both British and Chinese involvement in this trade (Afonso, 2018).

The Case of Vincent Stanton and the Prison War

To analyse the concept of “prison war” in the context of the Opium War, we use Ruth Jamieson’s (2015) concept, which defines this practice as involving the capture, treatment, maintenance, and exchange of prisoners of war as a strategic tool. On March 22, 1839, Commissioner Lin Zexu, as a coercive measure, detained and held all British merchants in the factories of Canton, suspending the sale of goods and the provision of Chinese servants to force the traffickers to leave the city (Vasconcelos de Saldanha, 1998). In response, the British representative Charles Elliot sought the support of the Portuguese Governor in Macau to ensure the safety of British subjects, which was granted on the condition that these subjects would not engage in trafficking in Macau.

However, the Portuguese position became increasingly precarious: on the one hand, Macau cooperated with the local Chinese authorities, who pressured them to hand over the British subjects; on the other hand, the Portuguese maintained their protection of the British to preserve their agreements with England. Chinese pressure, which included threats of siege and the cutting off of water and food supplies, was a tactic familiar to the Portuguese since their establishment in Macau, as Chinese authorities would close off the city when their orders were not obeyed.

Lin Zexu issued an edict for the expulsion and arrest of all opium traffickers, encompassing all British subjects on Chinese territory. In February 1840, Macau’s neutral position faced a new test with the mobilization of around 2,000 Chinese soldiers, commanded by the Tao Tai, to encircle the city and arrest the British residing there, with the aim of “making the Portuguese feel terror so that they would respect the laws” (Gonçalves, *Document number*

6, p. 103). The crisis was averted when the Tao Tai agreed not to invade Macau in exchange for a promise that no more British individuals would disembark in the city.

In June 1840, Lin Zexu, enraged by the British naval blockade of the Pearl River, ordered the capture of British officials. Unable to seize them, the Chinese began detaining British civilians, as occurred in Macau on August 5, 1840, when Vincent Stanton, the tutor of a merchant family, was kidnapped while swimming in Macau Bay (Afonso, 2018). The reaction in Macau was swift, and Portuguese authorities pressed the Chinese for answers, who initially claimed ignorance of the incident. Two theories then emerged: the first suggested that Vincent had been kidnapped by Chinese individuals attracted by the reward offered by Lin; the second posited that he had been carried away by the current and drowned. However, on June 10, rumours surfaced that Vincent was imprisoned in Canton (Afonso, 2018, p. 28; Fay, 1998, p. 246; Hanes & Sanello, 2004, p. 107). The Portuguese Governor subsequently sent the Tao Tai to negotiate Vincent's release, emphasizing the negative impact such actions could have on Macau. These negotiations, however, proved fruitless, reflecting one of the central elements of prison war: its use as moral fuel and a legitimizing factor for the conflict.

For the Chinese authorities, the capture of British individuals conveyed to the imperial court an image of effective combat against opium trafficking and strict justice against offenders by Commissioner Lin's edicts. By portraying the British as criminals who disrespected the law, Chinese authorities aimed to maintain social peace, basing their actions on Confucian morality, where the criminal act was considered more severe than its motivations. Justice was achieved through the ethical balance between crime and punishment: "restoring the ethical balance of a just government by exchanging the wounded spirit of the victim for the life of the guilty" (Wakeman, 2008, p. 190).

For the British and Portuguese, these events supported two fundamental perceptions of Orientalist rhetoric: that Chinese authorities were arbitrary,

severe, and autocratic and that the conflict with China, including the Opium War, was legitimate and necessary. In the British case, it also legitimized a potential takeover of Macau and established trade privileges in China.

Ruth Jamieson (2015) observes, in her study of the prison war in Northern Ireland, that prisons are moral battlegrounds where the conflict between the offender and the State unfolds. In the context of the Opium War, prisons also became an arena for moral dispute, not between the offender and the State but between two states. For the Chinese, the detention of British individuals who violated the law served as an example for those who disobeyed their authorities. For the British Empire, these kidnappings reinforced the liberal ideology of free trade and highlighted the alleged abuses committed by the Chinese State against British subjects.

It is essential to note the clash between two distinct legal systems. Although the Chinese system appeared arbitrary to European eyes, the punishments were, for the time, considered humane. Many Europeans, however, insisted that crimes should be tried according to their laws, not China's (Said, 1979).

Conclusion

The analysis of the different criminological and historical aspects of the Opium War reveals the complex intersection between state interests, economic power, and political strategies that characterized the conflict and shaped its conduct.

First, we highlight the role of private companies, such as the East India Company, in expanding the British Empire. Based on Whyte's (2015) observations, we saw that by allowing companies to operate with military and financial power, the British Empire managed to sustain a highly profitable and ethically contested trade while projecting an image of detachment from unpopular and ethically ambiguous actions, such as opium trafficking. These

companies operated as an indirect extension of the State's military and economic power, saving costs and reducing the political risks associated with colonial military operations.

On the other hand, by examining the concept of "prison war" discussed by Jamieson (2015), we identified how the imprisonment and detention of British and Chinese individuals also served as strategic and moral tools during the conflict. The detention of British merchants and civilians by Chinese authorities was used to demonstrate China's commitment to enforcing its laws and protecting its territory and social morality. Conversely, the British Empire used these incidents to construct a narrative of oppression and arbitrariness, thereby legitimizing its military intervention and the goal of expanding its commercial concessions. This scenario reflects the collision between profoundly distinct legal and cultural systems, with most European observers considering the Chinese system arbitrary and punitive. At the same time, the British perceived themselves as defenders of a model of free justice and commerce.

Finally, the analysis also demonstrates how the incidents of kidnappings and detentions of foreigners, both British and Chinese, and the imprisonment of civilians functioned for both sides as a way to manipulate public opinion and strengthen moral and political justifications for war. As Jamieson (2015) highlights, prisons became a moral battleground between two nations, with each side projecting its narrative to consolidate popular support and ensure the continuation of war objectives.

In summary, the Opium War and its associated conflicts illustrate how, under the veneer of commerce, colonial and economic interests were masked by narratives of political and moral legitimacy and coercive strategies involving both military forces and private actors. This conflict serves as a clear example of how militarization and the use of private companies, along with complex strategies of prisoner capture and detention, become essential tools for sustaining wars and expanding imperial power.

References

Afonso, D. (2018). Representações da Primeira Guerra do Ópio em Macau (1839-1842) [Dissertação de mestrado, Universidade do Minho]. RepositóriUM. <https://hdl.handle.net/1822/58792>

Cabral, L. (2013). De Quianlong a Mao Zedong. Em S. Lam, *A Herança de Confúcio Dez ensaios sobre a China* (pp. 234-270). Braga: Húmus.

Fay, P. W. (1998). *The Opium War 1840–1842*. North Carolina: The University of North Carolina Press.

Hanes III, W. T., & Sanello, F. (2004). *Opium wars: The addiction of one empire and the corruption of another*. Sourcebooks, Inc..

Puga, R. M. (2024). Macau na Geopolítica e na Cultura Visual Vitorianas: A Guerra do Ópio e a Presença Britânica na China no (Guia do) Panorama Description of a View of Macao (1840), de Robert Burford. *Revista de Estudos Anglo-Portugueses* (32), 109-163.

Said, E. W. (1979). *Orientalismo*. Lisboa: Edições 70.

Saldanha, A. V. (2000). *Para a Vista do Imperador*. Macau: Instituto Português do Oriente.

Spence, J. (1975). Opium Smoking in Ch'ing China. Em F. Wakeman, Jr., & C. Grant, *Conflict and Control in Late Imperial China* (pp. 143-173). California: University of California Press.

Wakeman, F. (2008). *THE CAMBRIDGE HISTORY OF CHINA* (Vol. XX). Cambridge, Reino Unido: Cambridge University Press. Obtido de [file:///C:/Users/User/Downloads/John%20K.%20Fairbank%20-%20The%20Cambridge%20History%20of%20China_%20Volume%2010,%20Late%20Ch'ing%201800-1911,%20Part%201-Cambridge%20University%20Press%20\(1978\).pdf](file:///C:/Users/User/Downloads/John%20K.%20Fairbank%20-%20The%20Cambridge%20History%20of%20China_%20Volume%2010,%20Late%20Ch'ing%201800-1911,%20Part%201-Cambridge%20University%20Press%20(1978).pdf)

Walklate, S., & McGarry, R. (2015). *Criminology and war Transgressing the borders*. Oxfordshire: Routledge.

Whyte, D. (2015). Civilising the corporate war. Em S. Walklate, & R. McGarry, *Criminology and war* (pp. 38-54). Oxfordshire: Routledge.

Wong, J. (1998). *DEADLY DREAMS*. Cambridge: Cambridge University Press.
Obtido de
file:///C:/Users/User/Downloads/(Cambridge%20Studies%20in%20Chinese
%20History,%20Literature%20and%20Institutions)%20J.%20Y.%20Wong
%20-
%20Deadly%20Dreams_%20Opium,%20Imperialism%20and%20the%20A
rrow%20War%20(1856-1860)%20in%20China-
Cambridge%20University%20

As Falácias da Juridificação da Guerra

The Fallacies of the Juridification of War

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O Direito é, quase por definição, e não pode deixar de ser na sua essência um sistema articulado e impositivo que se quer estruturante, não podendo contentar-se com um carácter tentativo e avulso, ou como mera panaceia ou lenitivo de carácter legal puramente reactivo. Nesse sentido, aplicado à guerra, o Direito configura uma tentativa de reter a guerra, repor-lhe uma ordem, balizá-la, de alguma forma, domesticá-la. Todavia, a força última ou primeira da guerra, a sua gramática é inexpugnável a essa captura, por causa da guerra absoluta que a define como fenómeno específico. O motor da guerra é a guerra absoluta enquanto desconformação (para não dizer descrição) vital e de horizontes de sentido intrínseca a qualquer guerra e qualquer acto que a sirva é, pelo contrário, conforme à gramática da guerra em si. Mais, até se poderia dizer que actos mais desconformes serviriam melhor essa gramática destrutiva e caótica, pulverizadora de todos os nexos

de sentido e de ordenamento da vida comum. Assim sendo, não valendo tudo, mas estando a solução na estratégia como ética do conflito, falar em crimes de guerra não faz sentido, porque pressupõe a presença do Direito como sistema configurador na guerra, a capturado essencial da guerra nas malhas do Direito. Assim o Direito revela-se antinómico e incapaz de penetrar no nervo da guerra para a normativizar. A violência bélica integrável, moldável, controlável pela ossatura do Direito é mesmo um oxímoro.

Porque a guerra é o oposto do Direito, por isso é guerra, o “ser” desta começa a ser justamente para além das regras, comprazendo-se nesse para além. Ademais, o sonho do Direito prevê já o enquadramento *a priori* da guerra pressupondo a violência, a violência aceitável, bem entendido. Mas essa, como violência, já suplantou *ab initio* as regras de convivência entre comunidades e precisamente por tal facto se chegou à violência, à violência bélica. Quer isto dizer que a guerra é desde sempre outra coisa que não as regras. A guerra emerge porque pensamos não podermos evitar ter de nos bater, mas de um modo que essa violência não se veja constrangida em tudo *a priori*, que não arranque aos soluços mesmo antes de começar, caso contrário a solução violenta deixa de ser solução pela violência e o uso da violência, ao denegar-se a sua própria gramática, deixa de fazer sentido. De certa forma, pois, “a guerra faz-se para que a crueldade não tenha medida” (Couto, 2019, p. 88). Na verdade, a codificação da guerra enquanto tal revela uma tremenda aporia, uma verdadeira falácia mesmo, por melhores e justas que sejam as intenções: codificar as acções bélicas é colocá-las debaixo dos auspícios da Lei, do prestígio da legalidade, transmitindo (voluntariamente ou não) a ideia de que aquelas acções bélicas executadas ao abrigo da lei podem, por esse facto, ser motivo, pelo menos, de um mínimo de elogio. Quando não só as acções bélicas, porque marcadas no seu âmago pela violência indómita, não se deixam nunca fixar numa intensidade dita razoável nem configuram por essência tal intensidade, ao contrário, mas sobretudo porque o Direito queria afinal (e não poderia evitar deixar de querer, para atingir os seus propósitos) *desbilicizar* a guerra – Mas se se quer *desbilicizar*,

por que razão haverá guerras ou acções bélicas dignas de consideração, precisamente aquelas caucionadas pelo Direito?(!) Além do mais, como se conclui de forma manifesta de todo o argumento, *desbilicizar* é tornar a guerra numa outra coisa distinta da guerra. Todavia, como dissera Mezenzio a Eneias, “não se comete um delito ao matar um inimigo nem eu vim para a guerra pensando de outro modo” (Vergílio, 2020, p. 291)⁷⁷. Nem o poderia pensar, justamente porque a guerra é aquela excepção (mesmo em relação à excepção soberana) em que o homicídio está permitido e até justificado, ou melhor, em que se mata sem se poder ser considerado homicida, porque o Direito não vigora nem na sua forma activa nem na forma de suspensão, como acontece com a soberania em estado de excepção, nem se pode dizer que esteja completamente ab-rogado. Por essa razão, na guerra embora alguém possa ser acusado de homicídio, não haverá, no entanto, maneira alguma de esgrimir prova de acordo com a própria natureza do exercício, da acção, quer dizer do acto bélico em função da (*des-*)natureza da guerra; desnorteante, desregrada, desfazedora de normas, abrasando os horizontes de sentido. Ferindo, desse modo, o âmago do Direito, enquanto sistema de normas que regula as condutas humanas, ainda quando essas mesmas normas (direitos, garantias, deveres) ficam bloqueadas, suspensas ou inactivadas pelo poder discricionário do soberano actuando em estado de excepção. Tudo porque a violência bélica totalmente controlável ou integrável na ossatura do Direito é um oximoro. Tal significaria um trivial e domesticado estar ao dispor, quando precisamente se recorre à violência como ferramenta de rotura, instrumento extremo, inapelável porque a situação deixa de estar sob controlo, o apaziguamento ou o entendimento já não são possíveis, o outro não se verga aos meus mais ponderosos planos, enfim, o comércio normal dos homens rompe-se, mesmo aquele já de si

⁷⁷ Pela mesma época, Diodoro Sículo, na sua *Biblioteca Histórica*, pronunciava-se do mesmo modo, afirmando que toda a guerra é uma exclusão das leis e da justiça que vigoram entre os homens. Citado por (Payen, 2018: 98). Nunca ouvi dizer que não se podia matar em guerra”, afirma já no nosso tempo um ex-combatente soviético da guerra do Afeganistão... Na verdade, é mesmo merecedor de louvor (Alexievich, 2017: 182).

“anormal”, quando vigora o estado de excepção, onde a norma e a vida se sobrepõem, sendo quase impossível distinguir observância de transgressão⁷⁸. A violência que não comporte no seu âmago nada de ultimamente irascível (portanto, inabordável pelo Direito) não é o que é suposto ser e o mal moral há muito teria sido eliminado da convivência humana. E, na verdade, já os gregos tinham desmontado a ideia de um qualquer exercício de justiça protagonizado pela violência em si, por via da juridificação dessa mesma violência. Como respondem os habitantes de Melos ao ultimato ateniense, na guerra do Peloponeso, caso aqueles se atenham ao Direito e se recusem a ceder, será a guerra e com ela a destruição, caso cedam, será a servidão.

⁷⁸ A guerra mimetiza muito o estado de excepção, ou melhor, o estado de excepção mimetiza muito a guerra. Contudo, há uma diferença não despidiçanda: enquanto no estado de excepção, observância e transgressão não são discerníveis senão pela discricionariedade do soberano e dos seus agentes, porque lei e vida não parecem querer recortar campos distintos, podendo qualquer simples acção ser sancionável por uma lei que, precisamente por estar suspensa dos seus comandos próprios, dos seus limites garantistas, parece querer abarcar tudo como em aluvião - *ex-ceptio* é literalmente capturar o que está fora, e não havendo margens, só uma força-de-lei sem lei, não há propriamente um fora da lei, um âmbito do permitido assegurado, extraterritorial, digamos assim, em relação à lei, a qual parece coincidir ou sobrepor-se à vida; na guerra não há essa sobreposição entre lei e vida, antes uma rotura com a vida e também com a lei que nela se gera, independentemente da modalidade tomada por essa lei. Assim, na guerra, transgressão e observância não são discerníveis porquanto a vida se apresenta às avessas, e os processos da vida comum em estado de simulacro. Mas porque há esse simulacro, pode, por vezes, a guerra aparentar uma maior normalidade, inclusive legal, em relação ao estado de excepção. Todavia, para complicar ainda mais a coisa, até porque o imo da guerra (guerra absoluta) não perfaz toda a sua fenomenologia, nem desfez até hoje por completo o controlo político, apoderando-se de uma determinada guerra no seu todo, a norma na guerra não está liminarmente ab-rogada, ora figurando de um modo mais activo ou de um modo mais suspensivo, dependendo das circunstâncias, sem que coincida, neste último caso, por inteiro, com a conformação político-jurídico do estado de excepção. É que, como a guerra é um mundo, ou para dizê-lo com maior propriedade, um *des-mundo* ou um *quebra-mundos* à parte, para melhor tentar controlá-la o soberano pode ver-se na necessidade, ou na tentação, de lhe atribuir um regime normativo “suavizado” e menos suspensivo dos comandos legais propriamente ditos do que aquele que vigora no estado de excepção. Escusado será dizer que a gramática e a lógica próprias da guerra responderão a essa injunção conforme o desenrolar dos acontecimentos, tornando maior o carácter da excepção bélica relativamente ao estado de excepção soberano, incrementando o aleatório e o esfaleamento de nexos de sentido, a intrínseca normativização tão essencial ao Direito.

Em qualquer dos casos, o Direito e a força não se atraem, repelem-se (Tucídides, 2009, p. 439)⁷⁹.

Talvez por todo este ancestral panorama Clausewitz tenha desestimado as restrições do Direito face à guerra e na guerra, ainda mais numa época pautada pelo crescente protagonismo da soberania. Referindo-se a ínfimas restrições auto-impostas, dificilmente dignas, de menção, e certas cláusulas do Direito Internacional, sem afectar o uso da força de modo essencial. Se não vale tudo para deflagrar a violência e para a concretizar, sob pena da guerra nos tragar, o remédio (ético e metafísico) não está na politização soberana da guerra, nem no Direito, não negando os contributos deste último, apenas rejeitando as suas pretensões maximalistas de conformação (Clausewitz, 1986, p. 75).

Diverso é, neste ponto, o uso da guerra como estado de excepção soberano, em rigor, ao abrigo do estado de excepção soberano. Nesse caso, não há qualquer preocupação maior em codificar ou deixar de codificar a guerra, porquanto o próprio estado de excepção, enquanto vigência da Lei sob a forma da sua suspensão e não pura e simples ab-rogação da Lei, configuraria, na aparência, o agarrar por dentro da guerra pelo Direito na muitíssimo paradoxal situação limite protagonizada pela excepção. Para além do referido, atrás e em baixo, em nota de rodapé sobre o soberano poder querer excepcionalizar a guerra da excepção, intentando nela fazer vigorar uma suspensão do regime legal mais limitada, pensando também no potencial do adversário e no contexto internacional envolvente.

Porém, à parte a especiosa e não dirimida querela sobre a posição do soberano face à Lei, a questão neste ponto é a tentativa soberana de estender a sua suserania à guerra, aplicar-lhe o politicamente prévio estado

⁷⁹ O helenista Pascal Payen refere quanto para os gregos a guerra suspende o Direito, argumentando ademais com outras passagens além desta sobejamente conhecida de Tucídides (Payen, 2013: 103-104, 358).

de excepção. A mais poderosa e ao mesmo tempo a mais fruste tentativa de controlar na íntegra a guerra, exactamente porque a mais forte e no entanto falhada. A mais feroz tentativa, para os súbditos seus pacientes, de canalizar as energias livres, soltas do comum do direito do tempo ordinário, em favor da soberania, potenciando assim a disciplina férrea desta e de caminho açaimando a guerra. Porém, o querer soberano de fazer coincidir ontologicamente, tornar simultâneo, sincrónico, o estado de excepção com a excepção que a guerra em si configura nunca é atingido, chega sempre tarde para emascular o indómito coração da guerra, quando não é esse mesmo furor soberano a acicatar (involuntariamente) a ascensão aos extremos. O erro é, por conseguinte, de perspectiva: confundir ambos estados de excepção, por assim dizê-lo; a guerra, recordemo-lo, é uma excepção na (e da) excepção, ou melhor, um mundo à parte. Nada disto obsta, parece óbvio, a que o estado de excepção soberano aplicado à guerra embora tenha um êxito relativo, o tenha na realidade, sendo mesmo um bom índice para caracterizar o seu funcionamento, como quando matar um inimigo no próprio território, motivo de eventual encómio e condecoração, se pode transmutar de repente numa acusação de homicídio se entretanto se formalizar o fim das hostilidades; situação insinuada por nunca mais num magnífico conto irónico de Italo Calvino (Calvino, 1995, pp. 22-24).

Em qualquer caso, a Lei e a sua sistematicidade incontornável parecem incapazes de lidar proficientemente com a guerra. Provavelmente a melhor solução, ou a menos má, reside na estratégia enquanto ética do conflito, uma ética kenótica. Todavia, esse é um outro estudo em curso.

Bibliografia

Alexievich, Svetlana (2017), *Rapazes de Zinco*, Amadora, Elsinore.

Calvino, Italo (1995), *A Memória do Mundo*, Lisboa, Teorema.

Clausewitz, Carl von (1986), *On War*, Princeton, Princeton University Press.

Couto, Mia (2019), *O Universo num Grão de Areia*, Alfragide, Caminho.

Payen, Pascal (2013), *Les Revers de la Guerre en Grèce Ancienne. Histoire et historiographie*, Paris, Odile Jacob.

Payen, Pascal (2018), *La Guerre dans le Monde Grec (VIII – I siècles avant J.-C.)*, Paris, Armand Colin.

Tucídides (2009), *La Guerre du Péloponnèse*, Paris, Gallimard.

Vergílio, *Eneida* (2020), 5ªed., Lisboa, Bertrand.

English

Law is, almost by definition, and cannot help but be, in its essence, an articulated and impositive system that aims to be structured and cannot be satisfied with a tentative and random character or as a mere panacea or palliative of a purely reactive legal nature. In this sense, applied to war, Law constitutes an attempt to restrain war, restore order to it, mark its boundaries, and, in some way, domesticate it. However, the ultimate or primary force of war, its grammar, is impregnable to this capture because of the absolute war that defines it as a specific phenomenon. The engine of war is absolute war as a vital disfiguration (to say nothing of its de-creation) and intrinsic to any war, and any act that serves it is, on the contrary, conforming to the grammar of war itself. Moreover, one could even say that more disconfirm acts would better serve this destructive and chaotic grammar, pulverizing all links of meaning and order of everyday life. Thus, while not everything is permissible, the solution lies in strategy as the ethics of conflict; speaking of war crimes makes no sense because it presupposes the presence of Law as a configuring system in war, the captured essence of war within the meshes of Law. Thus, Law reveals itself as antinomic and incapable of

penetrating the nerve of war to normativize it. The war violence that is integrable, moldable, and controllable by the framework of Law is itself an oxymoron.

Because war is the opposite of Law, this is why it is war; its “being” begins precisely beyond the rules, relishing in that beyond. Moreover, the dream of Law already foresees the prior framing of war, presupposing violence, and acceptable violence, of course. Nevertheless, that, as violence, has already surpassed from the outset the rules of coexistence between communities, and precisely for that reason war emerged, war violence. This means that war has always been something other than rules. War emerges because we think we cannot avoid fighting, but in a way that this violence is not constrained by everything *a priori*, that it does not start in fits and starts even before it begins; otherwise, the violent solution ceases to be a solution by violence, and the use of violence, by denying its grammar, ceases to make sense. In a certain sense, then, “war is made so that cruelty has no measure” (Couto, 2019, p. 88). In fact, the codification of war as such reveals a tremendous aporia, a true fallacy, no matter how good and just the intentions are: to codify military actions is to place them under the auspices of the Law, under the prestige of legality, transmitting (voluntarily or not) the idea that these military actions, executed under the Law, can, for that very reason, be the cause, at least, of some minimal praise. When not only military actions, because marked at their core by untamed violence, can never be fixed in an intensity deemed reasonable nor configured by essence such an intensity, on the contrary, but mainly because Law would ultimately (and could not avoid wanting to) *unmilitarize* war – But if one wants to *unmilitarize*, why would there be wars or military actions worthy of consideration, precisely those endorsed by Law? (!) Furthermore, as can be manifestly concluded from the whole argument, *unmilitarizing* is turning war into something distinct from war. However, Mezêncio told Aeneas, “One does not commit a crime by killing

an enemy, nor did I come to war thinking otherwise” (Vergil, 2020, p. 291)⁸⁰. One could not think otherwise precisely because war is that exception (even to the sovereign exception) where homicide is permitted and even justified, or rather, where one kills without being considered a murderer because Law does not prevail either in its active form nor in the form of suspension, as is the case with sovereignty in a state of exception, nor can it be said to be completely abrogated. For this reason, in war, although someone can be accused of homicide, there will be no way to present evidence by the very nature of the exercise, the action, that is, the military act in function of the (*dis*-)nature of war; disorienting, unruly, norm-dismantling, scorching the horizons of meaning. Thus, wounding the very core of Law, as a system of norms that regulates human conduct, even when those same norms (rights, guarantees, duties) are blocked, suspended, or inactivated by the discretionary power of the sovereign acting in a state of exception. All because war violence that is fully controllable or integrable into the framework of Law is an oxymoron. That would mean a trivial and domesticated existence at disposal, when precisely violence is resorted to as a tool of rupture, an extreme, unappealable instrument because the situation is no longer under control, appeasement or understanding are no longer possible, the other does not bend to my more ponderous plans, in short, the ordinary commerce of men is broken, even the already “abnormal” one, when the state of exception prevails, where the norm and life overlap and it is almost impossible to distinguish observance from transgression⁸¹. Violence

⁸⁰ At the same time, Diodorus Siculus, in his *Bibliotheca historica*, expressed himself in the same way, stating that all war is an exclusion of the laws and justice that prevail among men. Cited by (Payen, 2018: 98). I have never heard that one could not kill in war,” says a former Soviet combatant of the Afghanistan war in our time... In fact, he is truly deserving of praise (Alexievich, 2017: 182).

⁸¹ War closely mimics the state of exception, or rather, the state of exception closely mimics war. However, there is a significant difference: while in the state of exception, observance and transgression are discernible only through the discretion of the sovereign and their agents, because law and life do not seem to want to demarcate distinct fields, any simple action may be punishable by a law which, precisely because it is suspended from its own commands, from its protective limits, seems to want to encompass everything as in a flood—ex-ceptio is literally to capture what is outside, and

that carries in its core nothing of an ultimately irascible nature (therefore, unapproachable by Law) is not what it is supposed to be, and moral evil would long have been eliminated from human coexistence. The Greeks had already dismantled the idea of any exercise of justice led by violence in itself through the juridification of that same violence. As the inhabitants of Melos respond to the Athenian ultimatum in the Peloponnesian War, if they adhere to the Law and refuse to yield, there will be war and, with it, destruction; if they yield, there will be servitude. In either case, Law and force do not attract; they repel (Thucydides, 2009, p. 439)⁸².

Perhaps because of this ancestral panorama, Clausewitz dismissed the restrictions of Law about war and in war, especially in an era marked by the growing prominence of sovereignty. This refers to minimal self-imposed restrictions, which are hardly worthy of mention, and specific clauses of international Law that do not affect the use of force in an essential way. If not everything is allowed to trigger violence and to carry it out, under threat

since there are no margins, only a force-of-law without law, there is not properly a "beyond the law", a scope of the permitted assured, extraterritorial, so to speak, in relation to the law, which seems to coincide with or overlap life; in war, there is no such overlap between law and life, but rather a rupture with life and also with the law that is generated within it, regardless of the form that law takes. Thus, in war, transgression and observance are not discernible because life presents itself upside down, and the processes of common life are in a state of simulation. But because of this simulation, war can, at times, appear to have a greater normality, even legal, in relation to the state of exception. However, to complicate things even further, since the core of war (absolute war) does not encompass its entire phenomenology, nor has it fully undone political control, taking hold of a particular war in its entirety, the norm in war is not outright abrogated; it may appear in a more active form or in a more suspensive form, depending on the circumstances, without fully coinciding, in the latter case, with the political-legal configuration of the state of exception. The fact is that, since war is a world, or to put it more properly, a des-world or a world-breaker apart, in order to better attempt to control it, the sovereign may find themselves in the necessity, or temptation, to assign it a normative regime that is "softened" and less suspensive of the legal commands than the one that prevails in the state of exception. Needless to say, the grammar and logic proper to war will respond to this injunction according to the unfolding of events, increasing the character of the military exception relative to the sovereign state of exception, enhancing the random and the fragmentation of links of meaning, the intrinsic normativity that is so essential to Law.

⁸² The Hellenist Pascal Payen notes that for the Greeks, war suspends the Law, further arguing with other passages besides this well-known one from Thucydides (Payen, 2013: 103-104, 358).

that war may swallow us, the remedy (ethical and metaphysical) is not in the sovereign politicization of war, nor in Law, not denying the contributions of the latter, just rejecting its maximalist pretensions of conformation (Clausewitz, 1986, p. 75).

It is different at this point when using war as a sovereign state of exception in a rigorous state of exception sovereign. In this case, there is no more significant concern to codify or not codify war, as the state of exception itself, while the Law's suspension, and not a pure and straightforward abrogation of the Law, would seemingly configure the inside-taking of war by Law in the paradoxical extreme situation presented by the exception. In addition to what has been said earlier, in footnotes, about the sovereign power wanting to exceptionalize war from the exception, attempting to make it fit into a suspension of the legal regime in a more limited way, also considering the potential of the adversary and the surrounding international context.

However, aside from the specious and unresolved dispute regarding the sovereign's position about the Law, the issue at this point is the sovereign attempt to extend its suzerainty to war, applying the politically prior state of exception to it. The most powerful and, simultaneously, the most futile attempt to control war entirely, precisely because it is the strongest and yet failed. The fiercest attempt, for its patient subjects, to channel the free energies unleashed from the ordinary time law in favor of sovereignty, thereby enhancing its iron discipline and simultaneously sharpening the war. However, the sovereign's desire to ontologically coincide, to make simultaneous, synchronized, the state of exception with the exception that war itself configures is never achieved, always arriving too late to emasculate the untamed heart of war, when not that very sovereign fury (involuntarily) spurs the rise to extremes. The error is, therefore, a matter of perspective: confusing both states of exception, so to speak; war, let us recall, is an exception in (and of) the exception, or rather, a world apart. None of this prevents, it seems obvious, that the sovereign state of exception applied to war, although it has relative success, has it in reality, even being an excellent index to characterize its functioning, as when killing an enemy on one's

territory, a cause for eventual praise and decoration, can suddenly turn into a charge of homicide if the hostilities are formalized as over; a situation hinted at forever in a magnificent ironic tale by Italo Calvino (Calvino, 1995, pp. 22-24).

In any case, Law and its unavoidable systematism seem incapable of dealing proficiently with war. Probably the best solution, or the least bad, lies in strategy as the ethics of conflict, a kenotic ethics. However, that is another ongoing study.

References

Alexievich, Svetlana (2017), *Rapazes de Zinco*, Amadora, Elsinore.

Calvino, Italo (1995), *A Memória do Mundo*, Lisboa, Teorema.

Clausewitz, Carl von (1986), *On War*, Princeton, Princeton University Press.

Couto, Mia (2019), *O Universo num Grão de Areia*, Alfragide, Caminho.

Payen, Pascal (2013), *Les Revers de la Guerre en Grèce Ancienne. Histoire et historiographie*, Paris, Odile Jacob.

Payen, Pascal (2018), *La Guerre dans le Monde Grec (VIII – I siècles avant J.-C.)*, Paris, Armand Colin.

Tucídides (2009), *La Guerre du Péloponnèse*, Paris, Gallimard.

Vergílio, *Eneida* (2020), 5ªed., Lisboa, Bertrand.

Victims are not forgotten actors: Case of genocide victims from Nuremberg to Yugoslavia

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Abstract

The evolution of war crime trials from Nuremberg to the Yugoslav Tribunal underscores a significant shift in the role and recognition of victims and witnesses. Initially marginalized, victims have gradually gained prominence in the pursuit of justice throughout the 20th century. This paper explores the journey from victim invisibility to acknowledgment, tracing pivotal moments such as the creation of the Genocide Convention in 1948 and subsequent trials. The Nuremberg Trials, while groundbreaking, exemplified a perpetrator-centric approach that sidelined victims. The focus on retribution overshadowed the voices of those who suffered, perpetuating collective amnesia and hindering post-war recovery. However, subsequent trials, notably the International Criminal Tribunal for the former Yugoslavia (ICTY), marked a turning point. Recognizing the necessity of victim and witness participation, the ICTY established measures to protect and empower them, setting a precedent for international criminal justice. Central to this

transformation is the acknowledgment of victims as seekers of truth rather than mere instruments of vengeance. The inclusion of victims in trials not only contributes to the recovery of facts but also serves as a validation of their suffering and a repudiation of impunity. Despite challenges such as witness intimidation and limited resources for reparations, the ICTY's efforts have significantly elevated the status of victims in transitional justice. Looking ahead, initiatives like the International Criminal Court (ICC) and truth commissions offer promising avenues for victim recognition and redress. By prioritizing victim and witness protection, these institutions continue the legacy of trials like the ICTY while addressing the shortcomings of past approaches. Ultimately, the evolution from Nuremberg to the present underscores the imperative of centering victims in the pursuit of justice, ensuring that their voices are not only heard but also integral to the process.

Introduction

The paper intends to follow the trajectory of war crime trials from the Nuremberg to the Yugoslavia, in order to understand the importance of victims in these trials and its evolution through the 20th century. The paper will establish that the initial side-lining of the victims/witnesses has been gradually rectified. It will also display how the two trials play an important role in striking a contrast in the treatments of the victims/witnesses and how their role has garnered increasing relevance overtime bringing them to the mainstream such that they are not "forgotten actors" anymore.

Who is a 'victim' of genocide?

While instances of mass extermination have plagued the world since time immemorial, the term 'genocide' was coined by Raphael Lemkin in as late as 1944. It took a holocaust of a continental scale for the world to recognise

genocide as a crime, and it was codified in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention)⁸³. Article II of the Convention defines 'genocide'.

Despite recognising the crime, victims were invisible in transitional and international criminal justice after World War II (Karstedt, 2010). In the international and national tribunals that began dealing with the aftermath of war and genocide in 1945, victims' voices were (mainly) not heard, and they were rarely called witnesses in these trials (Karstedt, 2010). In the Nuremberg Trials, the primary witnesses were the offenders, and most of the documents used in the proceedings were written by the perpetrators and used brutal language (Alexander, 2002). This was primarily explained through the widespread atmosphere of vengeance, which solicited retribution, culminating in fears of chaos, bloodshed, and large-scale conflicts. 'Staying the hands of vengeance' implied that ousting the victims from procedural justice mandated the attainment of symbolic justice for all to compensate for their (deliberate) absence (Taylor, 2012). The exclusion of victims' voices resulted in collective amnesia, arguably aiding the reconciliation process. However, there is no evidence to prove that the active role of victims would have interfered with post-war recovery (Karstedt, 2010).

Gradual understanding of the idea that victims may be driven by the quest for 'truth' and not in pursuit of vengeance paved the way for their larger inclusion. 'Truth' involves 'recovery of facts' and the 'clarification of morality'; hence, discovering the truth is an admission of their suffering as a reality and as wrongdoing (Cohen, 2001). The sweeping amnesia resulted in a wave of amnesties granted by most European countries to large groups of collaborators. Prior to the 1960s, various amnesties covering ever-increasing groups of culprits at higher levels had been enacted, frequently under the

⁸³ General Assembly resolution 260 A (III), Article 2.

guise of other laws (Friedrich, 2007). It was only after the 1960s that this sense of denial transformed at the behest of emerging human rights voices in their quest against the trivialisation of violations and the consequent impunity. The Auschwitz trial in the mid-1960s and the Majdanek trial in the 1970s finally detracted from the perpetrator-centric trial system and included the victims for the first time in the post-Nazi justice mechanism.

In 1985, the Magna Carta for victims came with The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse developed under The United Nations Crime Prevention and Criminal Justice Programme. The document recognised victims' entitlement to mechanisms of justice and prompt redress. It defined 'victims' as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that violate criminal laws operative within Member States, including those laws proscribing criminal abuse of power." The horizon was widened by including people under the broad definition of 'victim' irrespective of the identification, apprehension, prosecution or conviction of the perpetrator or any familial connections with them. The term also includes "the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation."

Victims/Witnesses as Forgotten Actors in Criminal Trials – Nuremberg Trials

Trials and prosecutions of perpetrators are not only responsible for the delivery of justice but are also seen as tools of social reconstruction, having the ability to mould the larger collective mindset, social healing and gradual onset of peace in a society scarred with atrocity wounds. Criminal prosecutions continue to be one of many components of any significant effort made by a post-conflict society to achieve justice in the wake of widespread

violence, along with the discovery of the truth, the lookout for and identification of missing persons, reparations for victims and their rehabilitation, institutional reform, and remembrance (Shelton, 2005).

The International Military Tribunal at Nuremberg (IMT/Nuremberg trials), established in 1945, was the first landmark criminal trial in international and transitional criminal justice, created to hold the Nazi regime accountable for war crimes spread across Germany and Europe. Unlike previous perpetrators of genocide, the Nazis had created a systematically detailed inventory of crimes, which provided documentary evidence for the trial. Heavy reliance on documentary evidence, essentially the accounts of perpetrators, minimised, if not entirely ignored, the victims and witnesses of the crimes. The victims were almost absent and not represented as witnesses in the courts. The Nuremberg trials have thus, intentionally or unintentionally, contributed to the conspiracy of silence, particularly about the nature and significance of the survivors' Holocaust experiences, despite attempting to adopt the most apt judicial process (Mander & Lemkin, 1945). The IMT dealt with a limited number of Nazi criminals from the top leadership echelon without any consideration for the victims. The identities of the victims and the persecution they had faced remained largely irrelevant to the tribunal (Karstedt, 2010). Without gaining more concrete forms of justice, such as restitution, victims were only used to rationalise and authorise the punishment of offenders (Moffett, 2012).

This attitude towards the victims can be attributed mainly to a misplaced idea of 'victim recognition' and the aim of ensuring 'symbolic justice' to the victims/witnesses who were kept at bay 'to stay the hand of vengeance'. American dominance in the tribunal highlighted crime against peace as the prime accusation, and hence the crimes against humanity were considered manifestations of aggression. This focus on aggression took an international law approach instead of a criminal law one, which recognised states and civilisation as the primary victims, marginalising individual victims and witnesses (Bloxham, 2013). The involvement of the Soviet Union and the prevention of its criminalisation led to a deliberate exclusion of rape and

sexual assault victims from the trial. The non-existence of rape as a crime in Article 6, the fact that only two of the thirty-three witnesses were women and their absence as drafters, judges or lawyers led to further denial of justice to female victims (De Brouwer, 2005). As a result, Nuremberg was more driven by the Allies' self-serving desire to punish Nazi leaders for beginning the Second World War than by focusing on alleviating the plight of victims (Bass, 2001).

Change of Course – International Criminal Tribunal of Yugoslavia

The United Nations Security Council passed Resolution 808 on February 22, 1993, which announced plans to form an ad hoc criminal tribunal designed to bring the perpetrators of war crimes in the former Yugoslavia to justice. Almost fifty years after Nuremberg, another war tribunal was established to address the ongoing humanitarian crisis and ethnic extermination in the former Yugoslavia. The International Criminal Tribunal for former Yugoslavia (ICTY) was finally established in May 1995⁸⁴. This was a turning point in the history of war crime trials regarding the visibility and participation of victims and witnesses.

Apart from the emerging notion of human rights and humanitarian laws, the ICTY was also driven by necessity in its changed discourse regarding victims and witnesses. The prosecutors in the Nuremberg trials relied heavily upon the documented evidence. However, such extensive accounts with explicitly structured implicating proof did not exist in the case of Yugoslavia. This made

⁸⁴ The Tribunal consists of three separate organs: (1) the Chambers (judiciary-two trial chambers and one appeals chamber); (2) the Office of the Prosecutor (prosecution, investigation and special advisory); and (3) the Registry (includes administration and Victims and Witnesses Units).

it imperative for prosecutors to rely on reports of eyewitnesses and victims to identify and punish the wrongdoers (Momeni, 1997).

The ICTY stands out for recognising victim and witness protection as essential to an international criminal trial. Witness intimidation is a persistent problem in international war crime trials (Zoglin, 2005). A neutral, impartial organisation offering assistance and security to witnesses and victims from both the prosecution and the defence was established as the Victim and Witness Section (VWS) within the Registry (Kravetz, 2013). Apart from the physical security of the witness, it is also responsible for their protection outside of the court and in providing assistance to testify. In addition, it offers impartial threat assessments for on-the-ground witnesses and has an immediate response system.⁸⁵

ICTY is also known for setting a precedent in its first case, the Tadic case, which recognised the court's statutory duty to protect victims and witnesses (Sassòli & Olson, 2000). The prosecutor requested protective measures for witnesses, including anonymity so that victims and witnesses could not be identified to the accused person or his attorneys and confidentiality so that they could not be revealed to the public or the media (Momeni, 1997). Considering the importance of witness testimony in the cases of international crimes that occur in chaotic situations, the court conceded to most of the measures demanded. The issue of anonymity of the victims before the accused and their lawyers raised questions regarding (1) fair trial, (2) the rights of the accused to confront and cross-question witnesses and (3) threatening the foundation of justice which lies in the presumption of innocence (Falvey, 1995). On the contrary, the ongoing volatility of the

⁸⁵ Information Booklet for ICTY Witnesses—Victims and Witnesses Section, ICTY Registry, 2007, p. 19. See Rule 34 of the Rules. The VWS has three units: an Operations Unit, a Support Unit and a Protection Unit. In 2011, the Operations and Support Units assisted 494 witnesses travelling to The Hague to give evidence. The Protection Unit coordinated responses to threats received by witnesses before, during and after their court testimony. It also worked to relocate witnesses. See ICTY's 2011 Annual Progress Report, para 86, available at www.icty.org.

anarchic situation in Yugoslavia served as a continuous deterrence for the victims from testifying as they feared retaliation or targeted abuse. This, coupled with the tribunal's inability to afford long-term protection to the victims/witnesses, resulted in the tribunal granting anonymity to three witnesses in the said case⁸⁶. To strike a neat balance between the rights of both parties, the Tadic case set out a five-pronged test to grant anonymity to the vulnerable victims/witnesses from the accused and their lawyers. While scholars like Professor Falvey argued that this was a breach of the fair trial mandate, others accepted that a fair trial does not particularly mean a 'perfect' trial and a 'slight disadvantage' to a certain degree to the accused could be acceptable.⁸⁷

A significant achievement for the tribunal was the addition of systematic rape to the list of war crimes. The identification of rape as a new gender-related crime and its execution as means to attain malicious political ends like ethnic cleansing was a huge step for survivors (Simonovic, 1999).

Has it met the expectations of victims of war crimes?

In the case of Yugoslavia, the victims were initially preoccupied with finding humane living conditions and sustainability, while they had little understanding of the workings of ICTY. This awareness increased with the arrest and trial of Dusko Tadic and other feared prominent perpetrators of mass atrocities. This was also followed by the removal from power of specific individuals who terrorised targeted ethnic groups, making organised violence

⁸⁶ Opinion and Judgment, Prosecutor v. Tadic, Case No. IT-94-1-T (Trial Chamber, Intl. Trib. for the Prosecution of Persons Responsible for Serious Violations of Intl. Humanitarian Law Committed in the Territory of Former Yugo. since 1991, May 7, 1997) <<http://www.un.org/icty/970507jt.htm>>

⁸⁷ *Jarvie v The Magistrate's court of Victoria at Brunswick* (1995) 1 VR 84

against returnees significantly recede (Hodzic, 2010). The accountability that they witnessed helped many victims overcome their fears and traumas, beginning to reconstruct their lives in the neighbourhood, which was essentially one big crime scene and was still rather hostile to them (Hodzic, 2010). In due course, the political discourse overtook the illusion of the much anticipated judicial transformation. The perception that some sentences were inadequate, the withdrawal of indictments of some low-ranking officials (identified by most victims as their immediate violators) and early releases of convicted persons alienated the victims, increasing a sense of insecurity and futility despite their contributions through testimonies (Hodzic, 2010).

As mentioned earlier in the paper, victims are often driven by the quest to discover the truth and the act of testifying in the trial makes them a part of the truth-finding process. Trial courts do not provide the appropriate platform for victims to personally and publicly express their grief or find catharsis in the process. A criminal trial, unlike a truth and reconciliation committee, has legal representatives and rigid procedural aspects, which do not allow for an explicit display of grief, falling short of the expectations of victims of gross humanitarian abuse who are grieving grave losses (Van Den Wyngaert Hon, 2011).

Another issue arises with reparation and compensation in international criminal justice systems. The resources are limited, and it is practically not viable to provide sufficient compensation to a large number of victims of mass atrocities. Several cases have witnessed nominal compensation or a complete lack of it, further adding to the disappointment of the said audience (Van Den Wyngaert Hon, 2011).

Conclusion: Victims are no Longer Forgotten Actors in International Criminal Trials

A pre-requisite for transitional justice is the cooperation of individual states. The International Court of Criminal law (ICC), established in 2002, is based on the premise of national ratification and acceptance. The ICTY set the cornerstone for establishing a permanent international criminal court at Hague, with the interests of victims and witnesses at its heart. The ICC has well-established procedures for victim and witness protection. It also has a trust fund to provide compensation and reparations to those who apply for the same.

In December 2010, the UN Security Council established a new ad hoc body, the Residual Mechanism, which will continue the “jurisdiction, rights and obligations and essential functions” of the ICTY, as well as maintain the Tribunal’s legacy. One essential function of this new body will be the protection of victims and witnesses.⁸⁸ The truth commissions like that of South Africa have provided a safe space for the victims to tell their stories, recount their losses and narrate the extent of brutality they had suffered. This, in addition to including emotions in the truth-finding process without hindering the procedural objectivity of the trial, also helped counter the impunity and invisibility of the many perpetrators involved in these crimes.

Despite its misgivings, the ICTY transformed the position of victims/witnesses in transitional justice. From Nuremberg, where their absence was considered necessary for peace and stability, to the current global scenario, where their presence is a pre-condition to any form of justice being done (as it must also be seen to be done).

⁸⁸ UN Security Council Resolution 1966 (2010)

Bibliography

Alexander, J.C. (2002). On the Social Construction of Moral Universals. *European Journal of Social Theory*, 5(1), 5–85. Available at: <https://doi.org/10.1177/1368431002005001001>.

Bass, G.J. (2001). Stay the hand of vengeance: the politics of war crimes tribunals. *Choice Reviews Online*, 38(06), 38–3557. Available at: <https://doi.org/10.5860/choice.38-3557>.

Bloxham, D. (2013). From the International Military Tribunal to the Subsequent Nuremberg Proceedings: The American Confrontation with Nazi Criminality Revisited. *History*, 98(332), 567–591. Available at: <https://doi.org/10.1111/1468-229x.12024>.

Cohen, S. (2001). *States of Denial: Knowing about Atrocities and Suffering*. 1st edn. Polity Press.

Danieli, Y. (2006). Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in International Law. *Cardozo Law Review*, 27(1633), 11.

De Brouwer, A.L.M. (2005). Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR. *Gender, Sexualities and Law* [Preprint].

Falvey, J.L.Jr. (1995). United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia. *Fordham International Law Journal*, 19(2), 475. Available at: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2229&context=ilj>.

Friedrich, J. (1984). *Die kalte Amnestie: NS-Täter in der Bundesrepublik* (German Edition). Originalausg. Fischer Taschenbuch Verlag.

Hodžić, R. (2010). Living the Legacy of Mass Atrocities: Victims' Perspectives on War Crimes Trials. *Journal of International Criminal Justice*, 8(1), 113–136. Available at: <https://doi.org/10.1093/jicj/mqq008>.

Karstedt, S. (2010). From Absence to Presence, From Silence to Voice: Victims in International and Transitional Justice Since the Nuremberg Trials. *International Review of Victimology*, 17(1), 9–30. Available at: <https://doi.org/10.1177/026975801001700102>.

Kravetz, D. (2013). The Protection of Victims in War Crimes Trials. *Victims of International Crimes: An Interdisciplinary Discourse*, 149–163. Available at: https://doi.org/10.1007/978-90-6704-912-2_9.

Mander, L.A. and Lemkin, R. (1945). Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress. *The American Historical Review*, 51(1), 117. Available at: <https://doi.org/10.2307/1843099>.

Moffett, L. (2012). The Role of Victims in the International Criminal Tribunals of the Second World War. *International Criminal Law Review*, 12(2), 245–270. Available at: <https://doi.org/10.1163/157181212x634153>.

Momeni, M. (1997). Balancing the procedural rights of the accused against a mandate to protect victims and witnesses: an examination of the anonymity rules of the International Criminal Tribunal for the former Yugoslavia. *Howard Law Journal*, 41, 155.

Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, (1994). UN Doc. A/49/342-S/1994/1007. United Nations.

Sassòli, M. and Olson, L.M. (2000). Case Report, Judgment, The Prosecutor v. Dusko.

Tadic, Case No. IT-94-A, ICTY Appeals Chamber, 15 July 1999," *American Journal of International Law*, 94, pp. 571–578.

Available at: <https://archive-ouverte.unige.ch/unige:45885>.

Shelton, D. (2005) *Encyclopedia of Genocide and Crimes Against Humanity*. MacMillan Reference Library.

Simonovic, I. (1999). The Role of the ICTY in the Development of International Criminal Adjudication. *Fordham International Law Journal*, 23(2), 440. Available at:

<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1674&context=ilj>

.

Taylor, T. (2013) *The Anatomy of the Nuremberg Trials: A Personal Memoir*. 1st edn. Skyhorse.

Van Den Wyngaert Hon, C. (2011). Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge. *Case Western Reserve Journal of International Law*, 44(1), 475. Available at: <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1102&context=jil>.

Zoglin, K. (2005). The Future of War Crimes Prosecutions in the Former Yugoslavia: Accountability or Junk Justice?. *Human Rights Quarterly*, 27(1), 41–77. Available at: <https://doi.org/10.1353/hrq.2005.0012>

Understanding Gendered Destructivity: A Study of Vietnam War through Nguyễn Phan Quế Mai's *The Mountains Sing* (2020) and *Dust Child* (2023)

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Abstract

In 1998, at the First Ladies' Conference on Domestic Violence in El Salvador, Bill Clinton stated, "Women have always been the primary victims of war." Whether primary or not, war as a human-made occurrence affects humans and also its environment at large. Individuals' engagement in armed conflict can be both facilitated and hindered by traditional gender roles, which impose specific behaviours and expectations on men and women. The focus of this research will be on how war affects both men and women, as well as how they cope with the experience. Using Vietnamese poet and novelist Nguyễn Phan Quế Mai's fictional works *The Mountains Sing* (2020) and *Dust Child* (2023), the study will examine the Vietnam War and its aftermath.

In his book *War and Gender: How Gender Shapes the War System and Vice Versa* (2001), Joshua S. Goldstein elaborates on the intricate connection between war and gender. He contends that gender is a critical factor in determining the nature, conduct, and results of war, and that war itself serves to entrench and sustain gender disparities. As per Goldstein (2001), "Across cultures and through time, the selection of men as potential combatants (and of women for feminine war support roles) has helped shape the war system" (p. 9). Using Goldstein's lens, the study will shed light on how war functions beyond the concept of primary and secondary victimhood, encompassing everyone with its various forms of destructivity. In order to promote gender equality, reduce violence associated with conflicts, and develop a more inclusive and lasting peace, it is crucial to understand and manage these dynamics.

Keywords: Destructivity, Gender, Victimhood, Vietnam War, War

In times of war, a nation does not divide according to its intersectional connections; instead, it leads to widespread devastation among the populace. The consequences of war, nonetheless, can differ depending on an individual's closeness to the conflict zone or the area of strife. The entire situation is complicated by the effort to categorise the victims into different hierarchies and to quantify the pain or stress resulting from such delicate circumstances. In 1998, during the First Ladies' Conference on Domestic Violence in El Salvador, Bill Clinton remarked, "Women have always been the primary victims of war." This assertion not only marginalises the comprehensive military strength engaged at the front lines but also positions women in a precarious circumstance. War, as a profoundly destructive phenomenon, obliterates lives and depletes resources; nevertheless, a comprehensive reassessment of the entire hierarchy of victims is warranted, given that the concept of "victimisation" is inherently subjective. Drawing from Clinton's statement, this study stresses how war impacts both men and women in the context of the Vietnam War of 1975. For the purpose of discussion, the study has taken two pieces of researched and historical fiction by Nguyễn Phan Quế Mai, a Vietnamese novelist and poet who gained international visibility with her debut novel titled *The Mountains Sing*, which was published in 2020. This novel focuses on a generational saga of Tran Dieu Lan and her family. Lan is a Vietnamese woman who belonged to the landowning class in North Vietnam. She witnesses firsthand exploitation and oppression of Vietnamese peasants under French colonial rule followed by Japanese occupation during the Second World War. The narrative functions in flashbacks and flash forwards. While the flashbacks are of Lan's journey from her nativity to Hanoi in North Vietnam during the Vietnam War, the flash forward focuses on the present narrative of Huong, the granddaughter of Lan, who is growing up under Lan's care in post-war Vietnam. The former not only generates curiosity about her family's history but also feels the undercurrents of loss and sadness that run in the household. Mai's second novel, *Dust Child*, published in 2023, also focuses on the aftereffects of the Vietnam War. Working in a similar flashback and flash forward fashion, this text narrates the stories of Dan, an American War veteran; Trang, Dan's

former girlfriend in Vietnam; and Phong, who has grown up unbeknownst of his parentage; he is the abandoned child of a Black American soldier and a Vietnamese woman. This novel also centres on Amerasians, people of mixed American and Asian descent, and their condition pertaining to their hybrid identity in Vietnamese society. Reading literature based on war not only reflects the tumultuous nature of the war but also spikes readers' engagement with the narrative through the author's creative interventions. Examining gender in these works helps to understand how cultural narratives around masculinity and femininity were constructed and challenged during the Vietnam War, influencing both personal identities and national narratives.

Theoretical Framework and Methodology

The purpose of this study is to examine how and why the entire system of war has been gendered when it comes to destruction at various levels. To provide a critical lens, Joshua S. Goldstein's book *War and Gender: How Gender Shapes the War System and Vice Versa* has been taken in which he provides a comprehensive analysis of the intricate relationship between war and gender, challenging traditional narratives and offering a multidimensional perspective on how gender roles influence and are influenced by armed conflict. Goldstein, a Professor Emeritus of International Relations at American University, contends that comprehending this relationship is crucial for understanding the dynamics of warfare and its societal ramifications. He initiates his analysis by exploring the historical formulation of gender roles within the framework of warfare. He posits that masculinity is frequently characterised by aggression, courage, and dominance, resulting in a veneration of violence within male culture. On the other hand, femininity is often linked to tranquilly, caregiving, and supportive functions. This dualistic understanding not only moulds personal identities but also impacts collective societal perspectives on conflict and militarism.

Goldstein (2001) posits that these entrenched gender norms can perpetuate cycles of violence and hinder the pursuit of peace. The book traces the evolution of gender roles in warfare from the early 20th century to contemporary conflicts, using significant wars such as World War I and II as case studies. Goldstein (2001) highlights how women's participation in the workforce during wartime, starting from the mythical Amazon matriarchies in the battle of Amazon and Greeks to the inclusion of women in combat roles in countries such as Canada, Denmark, France, Spain, Australia, and more during the 1990s, has challenged traditional gender roles, as they took on roles previously reserved for men. This shift not only contributed to the war efforts but also laid the groundwork for post-war movements advocating for women's rights. The author emphasises that the impact of war on gender roles is not linear; rather, it is marked by periods of regression and advancement.

Goldstein's analysis underscores the critical yet often overlooked contributions of women in wartime. He documents women's involvement not only as carers and supporters but also as active participants in combat and resistance movements. This portrayal counters the narrative that women are mere victims in wartime scenarios, showcasing their agency and resilience. By recognising women's diverse roles, he urges a reevaluation of historical narratives that tend to marginalise their experiences.

The author explores the intricate psychological and social ramifications of war on men, with a particular emphasis on the detrimental effects that societal expectations of masculinity can engender, such as mental health challenges and aggressive conduct. He examines the ways in which the militarisation of masculinity fosters environments that pressure men to adhere to aggressive norms, frequently leading to enduring psychological trauma. Goldstein further underscores the significance of intersectionality in comprehending the complexities of gender and warfare. He posits that gender is not an isolated construct; rather, it intersects with race, class, sexuality, and various other identities, thereby influencing individual experiences within the context of conflict. This sophisticated perspective underscores the intricacies of wartime

experiences and promotes a more comprehensive understanding of the interplay between diverse identities in the context of conflict.

In his concluding chapters, Goldstein (2001) addresses the aftermath of war and the renegotiation of gender roles during peacetime. He points out the challenges faced by returning soldiers and the persistent inequalities that women encounter in post-conflict societies. He advocates for policy changes and greater awareness of these issues, emphasising the need for a more inclusive approach to understanding war and its impacts on all genders.

The study takes into account the two novels written by Mai and seeks to analyse it from Goldstein's idea of *universal gendering of war*, wherein he explores why there is a generalised perspective of males as heroes and women as non-combatants. Connected to this is also his idea of *militarised masculinity*, which explores how manhood is often associated with the motivation to fight and how women are utilised to maintain this contention that soldiers are usually masculine. He uses *gender* to cover masculine and feminine roles and bodies alike, including the (biological and cultural) structures, dynamics, roles, and scripts associated with each gender group (Goldstein, 2001, p. 2). His study also deals with the consequences of war, which include rape and exploitation, and how both genders are involved in such effects. The analyses shall include instances from the text juxtaposing it with Goldstein's discussion and findings from the book. The contention is to highlight how women, represented by Lan from *The Mountains Sing* (2020), and men, represented by Dan from *Dust Child* (2023), functioned in the Vietnam War and how they engaged in the discourse of gendered destructivity caused by war. Through this, the study seeks to highlight ways in which war affects both genders in possibly different ways, bringing in the idea that the hierarchies of victimhood depend highly on the situation or one's proximity with the traumatic event rather than gender. Victimhood, which can be said as the state or condition of being a victim, which generally means someone who has suffered harm, injury, or hardship as a result of the actions or behaviours of others, is a rather subjective experience.

Women in war: supporters or heroes?

In *The Mountains Sing*, the central figures are women, and it chronicles their experiences of suffering, resilience, and healing amidst the horrors of war. The narrative unfolds with Trần Diệu Lan, a youthful individual residing in the countryside of Vietnam amidst the tumultuous periods of the Land Reform and the Vietnam War. Her family confronts significant adversities, encompassing land confiscations, widespread hunger, and the harsh realities of conflict. Throughout the conflict, Lan embarks on a journey from her village of Nghe An to Hanoi, strategically placing her children in secure locations, with the intention of returning for them once the war concludes. In the current narrative, Lan serves as a grandmother who conveys stories and traditions that foster resilience and hope within her granddaughter, Huong. In her adolescent years, Huong exhibits a profound curiosity regarding her family lineage and attempts to explore the intricacies of her ancestral culture. Her uncles, sons of Dieu Lan, along with her father, were all actively involved in the war, resulting in the loss of several lives. The reappearance of her estranged mother, a nurse in one of the war camps, coupled with her unsettling behaviour, prompts Huong to critically examine the essence of war. The narrative concludes with Lan's return alongside Huong to her village, where they explore locations tied to their family history, in the aftermath of the Vietnam War.

Goldstein (2001), in the second chapter of the book, "Women Warriors: The Historical Record of Female Combatants", studies cases of women's participation in armed conflict from mythology to contemporary times. He states of a documented case of the "Amazon corps" of the eighteenth and nineteenth centuries of the Dahomey Kingdom of West Africa, which was a major clan in the slave trade. The Amazon Corps was a group of women soldiers who "dressed, ate, and behaved as the men did (p. 63)" and showed as much courage as men did. While discussing women's participation in mixed gender units, he mentions the Vietnamese communist war against the French and US colonial rule. Even before that, pertaining to the Chinese invasion of Vietnam, there was the case of "first-century Vietnamese sisters

Trung Trac and Trung Nhi (who) are said to have raised an army that expelled Chinese invaders 2,000 years ago (p. 121)". Further while discussing about women's role in the Vietnam War, Goldstein states,

"Women did serve in local militia units in the North—working in the fields with rifles slung over their shoulders—but these areas were far from the "front." Nonetheless, women in the North played an important part in shooting down US airplanes and capturing pilots (p. 80)."

The narrative of *The Mountains Sing* presents Lan, a character who endures both physical and psychological torment, facing exploitation while perpetually grappling with the spectre of mortality. Conversely, her daughter, Ngoc, actively engages in the conflict as a nurse at the front lines, driven by the desire to locate her husband, whose fate remains uncertain following his involvement in the war. In her role as a mother, she decides to leave her daughter, Huong, in the care of Lan while she embarks on a quest to find her husband. Her decision also contradicts the traditional expectations of motherhood, wherein she was expected to assume the roles of provider and protector for her child. She embodies the myriad Vietnamese women whose narratives of bravery and resilience have remained largely unacknowledged. Throughout history, there have been women who have taken up arms and engaged in combat, despite the prevailing preference for men within military ranks. Goldstein (2001) states about the cross-dressers, especially women who disguised as men to participate as combatants, such as Franziska Scanagatta, who served in the campaigns of the 1797 and 1799 French Revolution and was promoted to lieutenant in 1800 but was made to leave the army after her gender was unveiled (p. 107).

Even though Goldstein has exhaustively mentioned women's participation in war and conflict, the reason this area remains mainly men-dominated has also been explored. Bill Clinton in her speech also said,

Women lose their husbands, their fathers, their sons in combat. Women often have to flee from the only homes they have ever known. Women are often

the refugees from conflict and sometimes, more frequently in today's warfare, victims. Women are often left with the responsibility, alone, of raising the children (First Ladies' Conference on Domestic Violence, 1998, para. 9).

It is likely that these factors influenced her characterisation of women as the primary victims; nonetheless, the narrative of women regarding their status as primary victims, or victims of war in general, diverges from that of men. This analysis of victimisation, aimed at designating a specific gender as the primary victims, not only complicates the discourse surrounding gender equality but also calls into question our comprehension of those affected by war and conflict. One of the reasons that emerge is the manner in which women themselves perpetuate this gender disparity. To elucidate this point, one can refer to a particular episode in the chapter entitled "Destination" from *The Mountains Sing*, wherein Lan acquires self-defence skills from Master Van and, when faced with a crisis, successfully confronts a robber to safeguard Mrs. Chau, her employer. In return, Lan was not only fired from the job but was her physical might cause a great deal of insecurity in Mrs. Chau, as she says,

"You're quite a fighter, Dieu Lan. There's no telling what somebody with your skills might be capable of. If you can bring down a man like that, who's to say that you might not think of overpowering me in the same way? If you took it into your head to do it, you could probably beat me senseless" (p. 252).

The aggression inherent in the act of fighting likely served as a catalyst for Mrs. Chau's conception of femininity. Lan's adept handling of a man wielding a weapon has placed her in a realm that diverges significantly from the conventional perception of women as submissive figures. Traditionally, the notion of women conforming to their roles as nurturers and support systems falters during crises, when the need for physical and psychological empowerment becomes paramount, particularly as civilians are also affected when conflict arises. Lan's resilience not only enabled her to endure the Land

Reforms of 1955, but she also instilled a sense of preparedness and consciousness in Huong during the Vietnam War, when they were compelled to depart from Hanoi and find sanctuary in the nearby village of Hoa Binh. This situation can be best explained by what Goldstein (2001) states,

the war system works to push women away from killing roles except in the direst emergencies such as when defending their homes and children. This does not necessarily protect women participants from harm. Women have faced great danger on the battlefield, whether as nurses in front-line trenches, as powder-carriers aboard ships and in artillery units, or as helicopter pilots ferrying male troops around. What these women generally do not share with the men around them is the task of aggressive killing (p. 127).

Aggressiveness is an aspect which Lan, even in the act of self-defence, does not reflect. While attacking the robber, she made sure she did not do any severe harm to him. Lan states, "I don't believe in violence. None of us has the right to take away the life of another human being" (p. 14). This statement might demonstrate one of the thinking patterns that women carry. Goldstein (2001) states of Whiting and Whiting who conducted a study of six widely differing cultures worldwide in 1975 and found that "[g]irls are more nurturant and boys more aggressive" (p. 136).

Even Lan, who faced a physical assault by a group of men while journeying from her village to Hanoi, acquired the skill of self-defence not merely for her own protection but also to assist and shield others in similar circumstances. The concept of resistance is inherently a consequence of conflict here. The conflict compelled her to acquire the physical skills necessary to seize any opportunity for survival in the face of potential threats. The narrative illustrates a profound evolution in Lan, transitioning from a woman engulfed in loss and perpetual fear to one who not only acquires the skills to safeguard her family but also demonstrates remarkable awareness during moments of crisis, extending her assistance to others in need. A significant aspect of engaging in warfare pertains to the capacity to withstand it. These

Vietnamese women, remaining away from the front lines, opted to engage in the conflict by addressing the incursions of adversaries into their communities. The intersection of the struggles faced by men in combat and women in civilian roles lies in the fundamental drive for survival. Both genders endeavour to safeguard, persevere, and navigate the challenges posed by the traumatic event, a notion that is clearly articulated in the text.

Another important aspect of the entire discourse on gendered destruction is sexual exploitation. Even in the Vietnam War, sexual violence has been used as a tactic of war, including rape, forced prostitution, and sexual slavery. Elizabeth (Liza) Anderson, in her academic work titled *"AN EVERYDAY AFFAIR" Violence Against Women during the Vietnam War* (2020), states,

"In 1971, the activist group Vietnam Veterans Against the War organized the Winter Soldier Investigation, in which 109 veterans gave testimony about the abuses they had witnessed overseas. Fourteen veterans described sexual violence against women. Some of them spoke about more than one incident and several said that this kind of conduct was common" (p. 19).

This occurrence of sexual engagement, even when institutionalised, during the Vietnam War, has led to a complex interplay of socio-cultural fusions between the West and East. It also highlights the troubling perception of women as mere objects for male sexual gratification. "Locally, Vietnamese prostitutes and girlfriends were widely visited by US soldiers. US Green Berets had over 25 contacts with prostitutes per man, on average. By 1973, 300,000-500,000 women worked as prostitutes in South Vietnam..." (Goldstein, 2001, p.346). This presents an additional rationale for the gender imbalance observed in times of war and conflict. The concept of "comfort women" not only commodified prostitution but also drew young girls into the said trade in the pursuit of rapid monetary gain amid the nation's economic decline. In *Dust Child*, the Vietnamese sisters, Trang and Quynh, resided in Phu My Village in South Vietnam, where they toiled in the rice fields, remaining ever vigilant against potential incursions from the Northern Communists in their vicinity. It was through Han, Trang's closest friend, who

has been engaged in endeavours in Saigon and has amassed considerable wealth, that these two sisters became ensnared in the elaborate deception of serving as comfort women for American soldiers. Han states, "My job...it's not with an American company. I work in a bar. I go there, drink Sai Gon Tea and earn money" (p. 26). Even though she knew that her half-hearted information would be misleading, such that Trang agreed to go for the job on Han and Quynh's insistence, thinking that "In Sai Gòn she and Quynh would be drinking tea, nothing else. No man would be allowed to touch them" (p. 33).

This illustrates a distinct example of how women contribute to the expansion of the prostitution sphere by leveraging poverty as a motivating factor. The prevailing framework that portrays women as susceptible in periods of war and conflict is perpetuated not only by entrenched masculine norms but also by the conventional women who uphold this gender inequality. This section aims to illustrate that, despite war being predominantly a male-dominated arena; the involvement of women in this context is undeniable. Moreover, as previously articulated, it is not solely dictated by masculine conventions. The repercussions of war manifest in varied ways, contingent upon the individual's interaction with the traumatic occurrences; nonetheless, the trauma itself endures, both felt and recalled. To better articulate, as Goldstein (2001) states,

Neither men nor women benefit from war at the expense of the other gender. Women do not get a good deal, on balance, when men bear the burden of protecting them, nor do men get a good deal when they run around playing war while women bear, the costs. Rather, both genders lose in war, although they lose in somewhat different ways (p. 402).

Redefining Masculine Vulnerability

Dust Child explores the experiences of a Vietnam veteran named Dan, who grapples with PTSD and persistent flashbacks related to his involvement and existence in Vietnam during the war. The emphasis is placed on a soldier, a male figure. His past encompasses a Vietnamese bar girl named Kim and their child, who was born out of love without matrimony and whom he never encountered. A parallel narrative unfolds with Phong, a man of mixed racial heritage, who experiences a profound sense of alienation within Vietnamese society due to his appearance. He is labelled the “dust child,” embodying the notion of belonging nowhere. The narrative centres on Dan's journey to Vietnam alongside his wife, Linda, providing him an opportunity to confront his past and, in doing so, gain insight into the origins of his PTSD.

Goldstein (2001) posits that traditional masculinity glorifies violence and dominance. This notion is evident in characters like Dan, who embody the soldier archetype. He states,

Like many nineteen-year-olds he thought he was invincible. It had taken him about a month in Viet Nam to lose that illusion. He was only twenty-three when he left the army, but he felt sixty. The knowledge of death has robbed him of his youth (p. 13).

The perception of being “invincible” has been cultivated within the military, despite the relentless challenges posed by the act of combat that attempt to subvert it. Dan's experiences in combat bolster the notion that masculinity is synonymous with toughness and emotional detachment, resulting in emotional suppression and a failure to adequately process trauma. “The difficulty some veterans have in connecting emotionally with other people reflects a “hardening” of men in combat - an extension of what training in masculinity already has taught boys before they see war” (Goldstein, 2001, p. 268). Dan's hesitance to reveal his vulnerabilities resonates with Goldstein's assertion that societal norms frequently compel men to maintain a stoic demeanour, even when confronted with trauma. This emotional

restraint not only secludes him but also hinders his ability to embody the roles of a supportive partner and father, thereby perpetuating cycles of misunderstanding and emotional estrangement within his family. Dan not only exhibits a lack of compassion towards Kim (whose real name is Trang), upon learning of her pregnancy but also conceals his history with her, from his spouse, Linda. Furthermore, his recollections of the fatalities of his fellow soldiers, alongside the numerous Vietnamese lives lost at their hands, intensified the gravity of his psychological distress.

Caught in the middle, returning from “a bullshit war and a bullshit Army,” these veterans found it especially hard to reconnect with society or to talk about what they had been through, and thus perhaps suffered longer-lasting and deeper psychological aftershocks from their combat experience (Goldstein, 2001, p. 271).

Dan’s manifestations of PTSD can be seen through multiple instances, such as while travelling through a flight, any mention of war, or even seeing any woman’s slight resemblance to Kim. Even though he was attending a PTSD group for his mental health but did not want to disclose it because “he hadn’t wanted to be diagnosed with any mental health issue that could lead to him losing rights, even getting his driver’s license taken away” (p.16). Dan, both as a war veteran and as an individual, embodies the countless men who engaged in warfare and persist in grappling with its repercussions in silence, often without recognition or the pursuit of assistance. This may reflect the extent to which conventional ideals of masculinity have permeated the psyche of men, rendering emotional expressions as perceived indicators of weakness rather than of authentic human experience. This behaviour is also reinstated by the already prevailing patriarchal society, such that

Culture after culture features rites of passage from boyhood to manhood. Only select men can achieve “manhood,” and it must be won individually. In many cultures’ initiation rituals, older males systematically inflict pain and injury on young ones, who must hold up without flinching or face life-long shame (Goldstein, 2001, p. 264).

As the narrative approaches its denouement, Dan's quest for emotional transparency emerges as a critique of conventional gender expectations. His articulation of the atrocious deeds he committed as a fighter pilot, along with the remorse of forsaking Kim and their unborn child, serves not only to unravel the years of trauma he has endured but also to preserve his marriage with Linda and foster a renewed connection with Kim's sister Quỳnh and her family. Following the emotional upheavals and the resolution of his inner conflicts, alongside the news of Kim's passing, Dan's perspective on life undergoes a profound transformation. He, together with Linda, dedicates their efforts to assist those impacted by the war while persistently pursuing the search for his and Kim's daughter, Hoa. Through the process of articulating his challenges, he embarks on a journey to reconfigure the very essence of masculinity. This corresponds with Goldstein's assertion that the transformation of gender norms can facilitate healing and foster healthier relationships. Dan's transformation illustrates the potential to transcend stringent norms, indicating that vulnerability and emotional expression can harmoniously coexist with masculinity. The narrative not only exemplifies the detrimental effects of gender norms but also suggests the possibility of transformation and restoration through emotional bonds and comprehension.

Conclusion

The traditional roles assigned to genders in warfare have evolved over time, influenced by changing societal perspectives, legislative reforms, and the growing involvement of women in military and combat roles. Nonetheless, it is imperative to recognise that various forms of destruction, including sexual exploitation or indiscriminate violence directed at a particular gender, differ significantly in their intensity. The prevalence of men confronting the grim realities of combat at the warfront may surpass that of women, while instances of rape and sexual exploitation appear to disproportionately impact women compared to men in wartime contexts. Nevertheless, the repercussions of war should not be regarded as strictly gender-specific. To

ensure that peace and security initiatives are inclusive and effectively address the needs of all impacted groups, it is essential to consider and tackle the intersectional connections that intersect, including race, ethnicity, class, disability, sexual orientation, and more. Moreover, it serves as vital to consider the intricate relationship between war and gender to ensure that the policies and regulations surrounding security and peacemaking are continually updated and reflect the multifaceted nature of traumatic experiences.

References

Abbas, R. (2024, March 6). *Cynthia Enloe: Militarised Empires Around the World*. WILPF. <https://www.wilpf.org/cynthia-enloe-militarised-empires-around-the-world/>

Anderson, E. (Liza). (2020). "AN EVERYDAY AFFAIR" *Violence Against Women during the Vietnam War* [The University of Texas at Austin]. <https://repositories.lib.utexas.edu/server/api/core/bitstreams/283bf81d-f8e7-4cfe-b468-6ed922988722/content>

Bingle, M. P. (n.d.). *The Forgotten Sexual and Gender-Based Violence of the Vietnam-American War: Is Justice too Late for Vietnamese Victims and Survivors?* 26(2).

Bromfield, N. (2019). *Vietnam War* (pp. 1702–1708).

Cockburn, C. (2013). War and security, women and gender: An overview of the issues. *Gender and Development*, 21(3), 433–452.

Ferguson, K. E. (2001). Reading Militarism and Gender with Cynthia Enloe. *Theory & Event*, 5(4). <https://muse.jhu.edu/pub/1/article/32648>

Ferguson, R. B. (2021). Masculinity and War. *Current Anthropology*, 62(S23), S108–S120. <https://doi.org/10.1086/711622>

First Ladies' Conference on Domestic Violence San Salvador, El Salvador – November 17, 1998 (as delivered). (n.d.). *National Archives*. Retrieved October 29, 2024, from https://clintonwhitehouse3.archives.gov/WH/EOP/First_Lady/html/generals_peeches/1998/19981117.html

Gilgun, J., & Mcleod, L. (1999). Gendering Violence. *Studies in Symbolic Interactionism*, 22.

Goldstein, J. S. (2003). *War and Gender*. Cambridge University Press.

Jiménez, D. (2015). 'Las mujeres que derrotaron a América: Los vencedores' 'The Women Who Defeated America: The Victors' (non-fiction). *Absinthe*, 22(1). <http://hdl.handle.net/2027/spo.13469760.0022.109>

Karner, T. (n.d.). *Fathers, Sons, and Vietnam: Masculinity and Betrayal in the Life Narratives of Vietnam Veterans with Post Traumatic Stress Disorder*.

Libraries, B. U. (n.d.). *Research: Vietnam War: Databases: Historical Newspapers*. Retrieved October 29, 2024, from <https://library.bu.edu/vietnam/databases>

Mai Que, N. P. (2021). *The Mountains Sing*. Oneworld.

Mai Que, Nguyen Phan. (2023). *Dust Child: A Novel*. Hachette Book Group.

Miller, N. K. (n.d.). *The Girl in the Photograph: The Vietnam War and the Making of National Memory*.

Mizoguchi, N. (2010). *The Consequences of the Vietnam War on the Vietnamese Population* [UC Berkeley]. <https://escholarship.org/uc/item/0sh7j7s9>

Nash, A. (2007). Victims by Definition. *Washington University Law Review*, 85, 1419.

Pitt, J. (2021, July 23). *American Masculinity After World War II*. The National WWII Museum | New Orleans. <https://www.nationalww2museum.org/war/articles/american-masculinity-after-world-war-ii>

Rummel, R. J. (n.d.). *STATISTICS OF VIETNAMESE GENOCIDE AND MASS MURDER*. Retrieved October 19, 2024, from <https://www.hawaii.edu/powerkills/SOD.CHAP6.HTM>

Smith, H. (2003). War and Gender. How Gender Shapes the War System and Vice Versa. Goldstein, Joshua S. Cambridge, Cambridge University Press, 2001, 523 p. *Études internationales*, 34(1), 138–141. <https://doi.org/10.7202/006936ar>

Mujeres en guerra: aproximación analítica a la representación de la mujer en las llamadas “revistas de guerra” durante la Guerra Civil española

Women at war: an analytical approach to the representation of women in the so-called ‘war magazines’ during the Spanish Civil War

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Abstract

Durante la Guerra Civil española, la propaganda impresa fue determinante en la formación de una cultura de 'tiempos de guerra'. Las revistas fueron auténticos laboratorios de propaganda, donde se dieron cita artistas, escritores, militares y políticos. Tanto el frente republicano como el frente nacional pusieron en marcha diversas revistas por todo el territorio. La propaganda, según Pizarroso (2005), tiene un comportamiento holístico ya que "se dirige en primer lugar a la propia vanguardia para sostener la moral combatiente; luego a la propia retaguardia que nutre de hombres y pertrechos a la vanguardia; también a los neutrales para impedir que se alíen al enemigo, para mantenerlos en su posición equidistante o para atraerlos hacia nuestra causa; se dirige también al enemigo tanto a su vanguardia como a su retaguardia. En este caso es cuando podemos hablar de guerra psicológica". Entre todos estos objetivos encontramos a la mujer como víctima y protagonista de la situación de un país en guerra. Esta contribución supone una aproximación analítica a la representación de la mujer en diferentes publicaciones periódicas editadas durante el período bélico, tanto del bando nacional como del bando republicano.

Introduction

The Spanish Civil War (1936-1939) was the bloodiest conflict Western Europe had experienced since the end of World War I in 1918. The Spanish Civil War involved the confrontation between the democratic government of the Republic (Republican Front) and the military uprising against this government (National Front). During the Spanish Civil War, printed propaganda was decisive in the formation of a 'wartime' culture. Magazines were authentic propaganda laboratories, where artists, writers, soldiers and politicians met. Both the Republican Front and the National Front launched a number of magazines throughout the country. Propaganda, according to Pizarroso (2005), has a holistic behaviour as 'it is directed firstly at the vanguard itself to sustain combatant morale; then at the rearguard itself, which supplies the vanguard with men and equipment; also at the neutrals to prevent them from joining the enemy, to keep them in their equidistant position or to attract them to our cause; it is also directed at the enemy, both at its vanguard and its rearguard. It is in this case that we can speak of psychological warfare'. Among all these objectives, we find women as victims and protagonists of the situation in a country at war. This contribution is an analytical approach to the representation of women in different periodicals published during the war period, both on the national and republican sides.

1. Propaganda and war

The phenomenon of propaganda is inextricably linked to the history of war and acts as another weapon.

If propaganda had been a fundamental weapon in the First World War, in the Spanish Civil War, due to its ideological character, it was to play an even more important role: the 'battle of propaganda'. The Spanish Civil War was

a testing ground for armaments and military tactics, but it was also a pioneer in the field of information and propaganda (sound films and radio).

The first question to ask is propaganda for what? The phenomenon of collective persuasion is inherent in all human societies from their most primitive forms; In order to make people capable of facing the horror of war, their emotions and feelings are manipulated, and that is propaganda.

War propaganda is directed in the first place to the vanguard itself to sustain the combatant morale; then to the rearguard itself which nourishes the vanguard with men and supplies; also, to the neutrals to prevent them from allying with the enemy, to keep them in their equidistant position or to attract them to our cause; it is also directed to the enemy both to his vanguard and to his rearguard. It is in this case that we can speak of psychological warfare (Pizarroso, 2005).

The second question is what does this propaganda look like? With regard to propaganda Franco's side (Pizarroso, 2005), unlike the Republican side, when the Francoist side consolidated itself territorially in the early stages, it had far fewer instruments at its disposal to disseminate its propaganda. The big cities had remained loyal to the Republic and, with them, newspapers, newsprint, the most powerful radio stations, studios and film equipment. Slowly, with Italian and German foreign aid, these shortcomings were gradually being remedied.

In relation to the propaganda of the Republican side (Pizarroso, 2005): the area that remained loyal to the legitimate government had a much larger infrastructure for propaganda in the press, radio, cinema, publishing houses, etc., from the outset. Largo Caballero's government, in its reshuffle of 4 November 1936, created a Ministry of Propaganda. Negrín would make the Ministry of Propaganda disappear, replacing it with an Under-Secretariat under the Ministry of State, which indicates the importance given to propaganda abroad.

2. Magazines during the Spanish Civil War

During the Spanish Civil War, printed propaganda was decisive in the formation of a 'wartime' culture (Crusells, 2000; Peral & Sáez, 2015; Sevillano, 2014). Magazines were authentic propaganda laboratories, where artists, writers, soldiers and politicians met. The phenomenon of propaganda is inextricably linked to the history of war and acts as another weapon. If propaganda had been a fundamental weapon in World War I, in the Spanish Civil War, due to its ideological nature, it was to play an even more important role, giving rise to a veritable 'propaganda battle'.

Sánchez Vigil, Oliveda and Nebreda (2022) indicate that illustrated magazines played a fundamental role in the communicative process during the first third of the 20th century.

Illustrated magazines developed in the last decade of the 19th century following European models.

The first modern magazines, in terms of format and content, were *Blanco y Negro* (1891) and *Nuevo Mundo* (1894), which competed for hegemony for more than a decade until the appearance of *Mundo Gráfico* (1911), which gave absolute priority to graphic information and illustrated sections. These three general information magazines were the main ones in terms of circulation and coverage until the appearance in the late 1920s of *Estampa* (1928) and *Crónica* (1929), which were also very popular.

The presence, trajectory and success of magazines during the first third of the 20th century in Spain made this medium a useful continuity for the objectives of the war context. The Spanish population was accustomed to and familiar with this medium of communication and consumed them.

It was in this context that the so-called 'war magazines' emerged. Both the Republican Front and the National Front launched various magazines and publications throughout the country. The collections worked on in this

contribution are those available in open access in the digital newspaper library of the National Library of Spain, the digital newspaper library of the Historical Archive of the city of Barcelona, as well as in the collective catalogue of the network of libraries of the state archives (CCBAE) corresponding to the State Archives of the Ministry of Culture and Sport of the Government of Spain. Fundamentally, the CCBAE provides access to the work through a very extensive inventory of periodicals and magazines during the Spanish Civil War, through the so called Kiosco digital de la Guerra Civil española (Spanish Civil War Digital Kiosk). This inventory provides digital access to almost a hundred different titles, which have a series of characteristics justified by the characteristics of this war.

Firstly, they are publications that correspond to a territorial diversity, i.e. there are publications that are specific to one area (Aragon, Valencia or Barcelona) and coexist with other publications from a national geographical area.

Secondly, territorial diversity also leads to linguistic diversity, and so we find magazines written entirely in Catalan (*Companya*, *revista de la dona*).

Thirdly, there is a very diverse target readership, and thus, for the Republican zone, we find publications published for militia units, for the different political parties and trade unions; magazines that were organs of expression and propaganda for the different Corps, Brigades, Divisions, Regiments, Squads, etc. into which the Popular Army of the Republic was organised, as well as headers published in the rearguard (refugees in Catalonia, support services for the sick and wounded, magazines for children, etc.), and finally, feminist magazines and 'wall newspapers', considering the concept of 'war magazine' in a broad sense) and, finally, feminist magazines and 'wall newspapers'. The magazines documented for the national zone also present their heterogeneity.

Fourth, not all publications cover the entire war period (they were published for a time, as the war progressed or receded through the territories). And

finally, the catalogue sample is very fragmented, as only a few copies are catalogued.

3. Analytical approach to war magazines as a support for the representation of women during the war period

Two magazines have been chosen for the study sample, based on the criteria of being magazines aimed at women, of being a support for their representation and of having a large number of copies available. The first of these is the magazine *Companya: revista de la dona*, from the republican zone, and the second is *Y: revista de la mujer nacional sindicalista*, from the national zone.

The aim was to analyse how women are represented in wartime in very different ways by the two sides and how this representation is also a form of ideological propaganda.

The first magazine to be analysed is *Companya: revista de la dona*. It began publication on 11 March 1937 (issue 1 of the collection) and ceased publication on 8 March 1938 (issue 18 of the collection). It was a magazine that had been in existence for barely a year, something that happened with most of the magazines on the Republican side, which disappeared as they lost territory and power during the war.

It is a type of women's magazine from the Republican zone and is published by the Women's Union of Catalonia, with illustrations by Lorenzo Goñi and Fried-Feld.

The Women's Union of Catalonia was created at the 1st National Women's Congress, which took place on 6, 7 and 8 November 1937 at the Palau de la Música in Barcelona. The aim of this association was to create an environment that would bring together all the anti-fascist women in Catalonia, members and non-members of parties and trade unions, to work

together in the rearguard. Its president was Dolors Bargalló and they were joined by 30,000 women in 1938.

All issues of the magazine were published in Catalan.

When carrying out the analysis of this first magazine, a series of axes of content were taken into account: on the one hand, that relating to women in the rearguard, where the presence and tasks of women at work were identified, above all replacing the men who went to the front. Their presence is relevant in the factories, in mass production, in the countryside, etc. The type of clothing worn by the women is striking, very masculine in general. It is clear that women are valid, capable and necessary for any job.



Image 2. Women in the rearguard doing a variety of jobs, *Revista Companya*, January, 1938, Centro documental de la memoria histórica, Ministerio de Cultura, Spain.

On the other hand, a second analytical axis has been assigned to women in war/in war, where women are recognised as direct victims of war, and caregivers, in charge of minor children, orphans or family in general, as well as protagonist of refugee groups, especially with children and elderly people.



Image 3. Women victims of war and the tragedy of refugees, *Revista Companya*, March, 1937, Centro documental de la memoria històrica, Ministerio de Cultura, Spain.

There is a third analytical axis which has to do with the presence of female political references in the magazine. In this case, there is evident allusive and explicit content alluding to women on the Republican side and countries that support this ideology, generating a model of women to be followed.



Imagen 4. Political references and women's paradigms of women in China and Russia, *Revista Companya*, December 1937, Centro documental de la memoria histórica, Ministerio de Cultura, Spain.

Finally, there is one last axis, which has to do with women in the world of cinema. Cinema was a symbol of modernity understood in terms of mass culture from the 1920s onwards. Leisure was then articulated around cinema and variety shows, and also around the theatre, which was a fundamental axis of Spanish popular culture, and which attracted a good number of spectators. The magazines included content by film artists, attributing to them the characteristics of the modern woman, who became the representative of the Republican side.



Image 5. Women in film (model of modern rebel actress), *Revista Companya*, June, 1937, Centro documental de la memoria histórica, Ministerio de Cultura, Spain.

The second magazine analysed is *Y: revista de la mujer nacional sindicalista*, a magazine published in and by the national side, whose publication begins in February 1938 and ends in January 1946. It is a magazine of the side that won the war and, therefore, not only continues throughout the war period but is also published a few years after the victory.

It is a magazine published by the Women's Section of the Falange Española Tradicionalista y de las J.O.N.S., first in San Sebastián and then in Madrid, after the victory of the national side.

Born in the middle of the Civil War, this monthly magazine is the organ of the Women's Section of the Spanish Falange, created by Pilar Primo de Rivera, sister of José Antonio Primo de Rivera, the founder of the Spanish Falange party.

The name of the publication, whose subtitle was the magazine of national unionist women, is therefore consistent with the Falange's ideology of recovering Spain's past greatness so that it could be a mirror in which the new Spain resulting from the victory in the Civil War could look at itself.

The activities of the Falange Women's Section are the predominant information in the publication, but there is a wide variety of content.

The main themes analysed in relation to the representation of women in this magazine are, firstly, that of women at war, in which the consequences of the atrocities of the other side (Republican side) and the salvation of the situation thanks to the work of the Nationalist side are made clear.



Image 6. Women at war, doing support work at the front, *Revista Y*, February, 1938, Centro documental de la memoria histórica, Ministerio de Cultura, Spain.

Secondly, an axis has been identified around models and guidelines for women, as the magazine offers recommendations on what a woman should be like, what dangers she should avoid, and situating her main role around the family.





Image 7. Models and guidelines for women (the enemies of the national trade unionist woman), *Revista Y*, March, 1938, Centro de documentación de la memoria histórica, Ministerio de Cultura, Spain.



futuras madres



En el Estado, la mujer madre ha de ser la cristiana y más respetada, faltarán las palabras que publicó Hitler en su programa fundacional, y como conocemos toda la razón que le asalta y sobrecoge la importancia que para nuestra paz tiene en los momentos actuales el conseguir una gran cantidad de hijos sanos, prósperos de cuerpo fuerte, que como no sólo una población sino una nación, cooperen a la conservación de este fin.

La mujer digna de tener en cuenta que han sido en el mundo, perfectamente Alemania, Italia y el Japón, en donde las mujeres más espiritualmente creídas a España, las que han hecho una labor científica, política y social en favor de la madre y del hijo. En la España que tenemos una la Iglesia, laica de Falange o laica de un Avance Social, ya se esfuerza esta otra por la madre y el hijo, por una España, mejor.

A la que nosotros queremos añadir con una serie de consejos a las futuras madres. Se trata de conseguir una situación de hijos, pero entendiendo bien que la cuestión de educación ha de ser una, y para que el hijo no esté considerado hoy que empieza por el árbol. Cuidados físicos, higiénicos, si tratar de educar en la familia, oírlos que las dificultades por que pasan las madres son en su mayor parte, la consecuencia de la falta de higiénicamente, impuesta por la vida social en los países civilizados. Por lo tanto la futura madre que se levanta desde la primera infancia, educada por la buena dirección de la buena madre, toda una vida en una vida al aire libre y con una educación, laica como la nuestra sea.

Creemos entonces que además de una preocupación por una buena escolaridad, por una ocupación, naturalmente

de la adolescente y desde la juventud toda la atención que merece es que nosotros es que la vida se transforme en mujer. En este último un momento intelectual en la vida de la mujer y hay que sacar este problema de frente, tanto en el aspecto biológico como en el psicológico, evitando las dolencias que a cada una de ellas, por la realidad es más fuerte que todas las dolencias y esta llega de un modo inevitable; no se puede evitar que de una potencial naturalmente bien dirigida, depende muchas veces todo el porvenir de una mujer; es la edad en que se pasa en la vida toda la complejidad del organismo y un buen funcionamiento de ella la persona inteligente, laboriosa, fuerte que obtendrá en un modo fuerte que dará la idea de resaca de la vida, en la que se tenga la garantía de que se educada, de que se tenga la

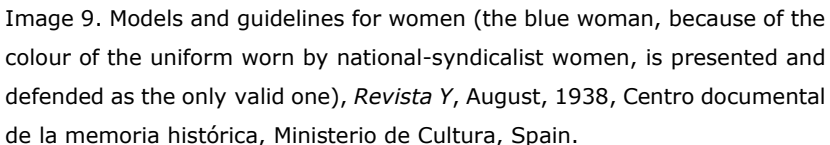
de que, en vez, sean los hijos sanos y fuertes que el futuro necesita.

Pues entre ellas son ocupaciones de todos los problemas de trabajo es relación con la futura madre y, damos a conocer aquellas enfermedades evitables que pueden tener una repercusión directa para el feto, evitando el que esta nueva vida del feto de la completa madurez y sin tener, al hacer la educación que debe llegar a un sujeto educado, sano y con pocas enfermedades de vida, desde ahora hasta llegar a obtener un hijo sano y sano que sea la felicidad del hogar y la progenie de que después será un sujeto sano, inteligente, espíritu, trabajador, biológicamente perfecto, con un sentido religioso y al fin de la vida, es decir, un ser que biológicamente y moralmente sea orgullo de España.

Diego LUGER.



Image 8. Role models and guidelines for women (mothers-to-be), *Revista Y*, February, 1938, Centro documental de la memoria histórica, Ministerio de Cultura, Spain.



Thirdly, it has been identified that this magazine also includes national and international political references. Images and texts of political references related to the magazine's ideology at a national and international level are included.



Image 10. Political references for national-sindicalist women (Francisco Franco), *Revista Y*, February, 1938, Centro documental de la memoria histórica, Ministerio de Cultura, Spain.



Discusses the reliability and the Japanese sources of the data obtained, especially in light of the 1940s.

Major contributions have been by members of Peter Higgs's group, who investigated the Higgs (1964a,b) mechanism for the origin of mass, and by the Higgs (1964c) group at the University of Edinburgh, who investigated the Higgs (1964d) mechanism for the origin of mass. The Higgs (1964e) group at the University of Edinburgh, who investigated the Higgs (1964f) mechanism for the origin of mass, and the Higgs (1964g) group at the University of Edinburgh, who investigated the Higgs (1964h) mechanism for the origin of mass.

Se nos permite advertir que los términos de Frenet, la base de Frenet, el concepto de curvatura, el concepto de torsión, el concepto de derivada covariante, etc., no son los mismos que los que se encuentran en la literatura matemática, sino que son los que se utilizan en el contexto de la física.

*Figurali, ex. 10000. In: Museo gia A. Venturoli, in
Napoli, sotto Museo di Napoli (per il governo di
Napoli, sotto Museo di Napoli). Napoli, 1900.*

[illegible]

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et continuèrent ainsi à les accompagner, de l'île d'Yeu de la
ville, jusqu'à la Grosse Pointe, jusqu'à l'entrée de la
Baie de l'Estuaire, jusqu'à l'entrée de la Baie de
l'Estuaire, jusqu'à l'entrée de la Baie de l'Estuaire.

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Finally, the magazine, despite being published in wartime, devotes pages to fashion trends of the time and fashion resources for women and the whole family.

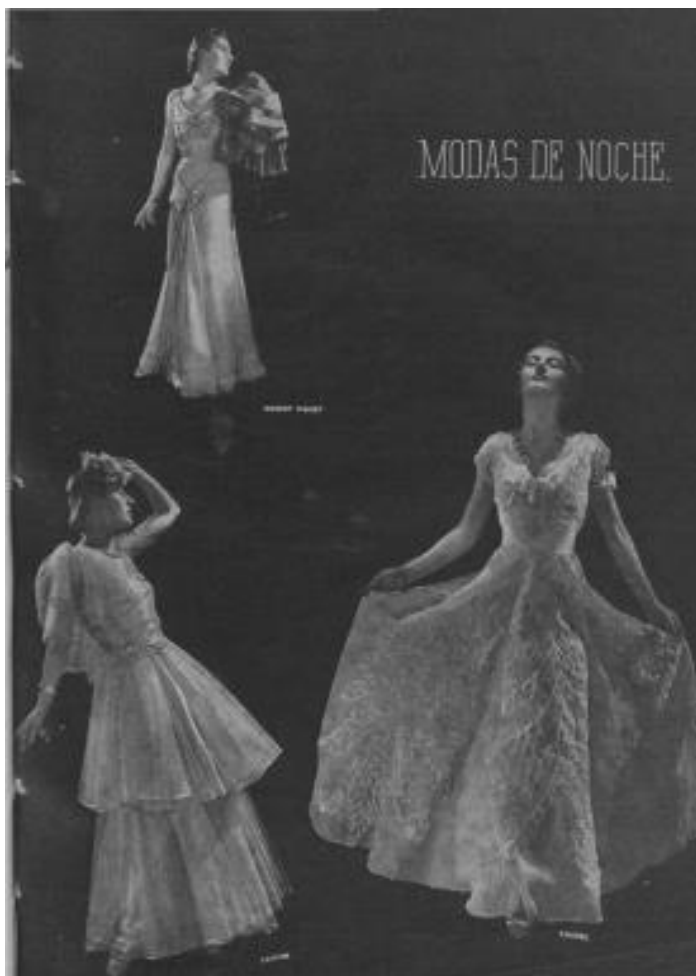


Image 12. Fashion trends (evening dresses), *Revista Y*, May, 1938, Centro documental de memoria histórica, Ministerio de Cultura, Spain.



Image 13. Fashion trends (proposals for the street or for sport), *Revista Y*, June, 1938, Centro documental de la memoria histórica, Ministerio de Cultura, Spain.

Conclusions

This study has shown that magazines are a very interesting support for the mechanisms of persuasion and propaganda around the idea of a country at war in the case of the Spanish Civil War, as there are many and varied publications that were published during the war period and which were important ideological supports for both sides.

Through the analysis carried out, it can be affirmed that women at war is a polarised discourse in the selected magazines, as they reflect the ideological polarisation of the Spanish Civil War, characterised by a spirit of opposition and fratricide.

Thus, the Republican side presents a free, independent woman, with a strong focus on work, with certain political loyalties and with a more androgynous role assumption and aesthetic: on the other hand, the National side offers the opposite image, that of a woman whose reason for being is her family and husband with whom she must have a certain behaviour, a lover of fashion, of what is understood as 'women's things', of work and a follower of very specific political references.

The woman is therefore both victim and accomplice.

These archetypes, polarities and binary reductionisms are also present in current armed conflicts: Ukraine-Russia or Palestine-Israel, but the supports are different, such as social networks.

Gloria Fuertes, Spanish poet and war child during the Spanish Civil War said that the only good thing that the civil war gave her was that it made her a pacifist. Let us not forget that.

Bibliography

Centro Documental de la Memoria Histórica (Quiosco digital de la Guerra Civil española)

(s.f.)[https://www.cultura.gob.es/cultura/areas/archivos/mc/archivos/cdmh/biblioteca/gui asdelectura/kioscoguerracivil.html](https://www.cultura.gob.es/cultura/areas/archivos/mc/archivos/cdmh/biblioteca/gui%20asdelectura/kioscoguerracivil.html)

Cruells, M. (2000). *La Guerra Civil española: cine y propaganda*. Ariel.

Peral, E., Saéz, F. y Alarcón, R. (2015). *Métodos de propaganda activa en la Guerra Civil española*. Iberoamericana Vervuert.

Pizarroso, A. (2005). La Guerra Civil española, un hito en la historia de la propaganda, *El Argonauta Español*, Nº 2.

Sánchez Vigil, J.M., Oliveda, M. and Nebreda, L (2022). Análisis de portadas en revistas de información general durante la Segunda República. *Human Review: International Humanities Review / Revista Internacional de Humanidades*, Vol. 15, Nº 2.

Sevillano, F. (2014). La propaganda y la construcción de la cultura de guerra en España durante la Guerra Civil. *Studia historica. Historia contemporánea*, Nº 32, 225-237.

INJUSTICE WAR

CRÉDITOS DA IMAGEM

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