“From street soldiers to political soldiers”: Assessing how extreme right violence has been criminalised in Portugal

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Abstract

Historical evidence points to the fact that extreme right-wing (ERW) violence has not always been prosecuted under terrorism legislation, but under various other criminal statutes. In Portugal, since the regulation of terrorism in the general Criminal Code in 1982, which was then replaced by counterterrorism (CT) legislation in 2003, there have been five terrorism convictions. However, none was related to ERW violence, despite the existence of numerous ideologically motivated crimes committed by groups and individuals occupying this side of the political spectrum. In this study, we aim to understand the reasons behind such penal selectivity in contemporary Portugal by comparing two legal files: the first case sentenced according to the Portuguese CT Law, whose defendant was a Spanish national, member of *Euskadi Ta Askatasuna* (ETA); and the first case of ERW violence sentenced after the introduction of the Portuguese CT Law, in which 36 alleged skinheads were sentenced for racial discrimination and incitement to hatred and violence, as expressed in section 240 of the Portuguese Criminal Code. We discuss how the Portuguese case can contribute to the international debate regarding the criminalisation of ideologically motivated violence.

Introduction

At the beginning of September 2020, the European Network Against Racism (ENAR) issued an urgent call for solidarity to support Portuguese anti-racist activists stating that "there has been a very concerning rise in racist attacks of the far right in Portugal" (ENAR 2020). This call was motivated by several extreme right-wing (ERW) inspired violent events that took place in Portugal in 2020, such as the racist slurs shouted at Moussa Marega, a Porto football player from Mali, who had to abandon the match, and the murder of Bruno Candé, a black actor shot four times by a neighbour shouting racist insults (Alberti 2020), whose perpetrator was recently convicted for qualified homicide aggravated by racial hate (Cristino 2021). In the summer of 2020, there have also been acts of intimidation, such as the silent vigil outside the NGO *SOS Racismo*, symbolising a Ku Klux Klan gathering (Franco et al. 2020). Finally, there

have been attacks against property, particularly at the headquarters of the NGO *SOS Racismo*, whose walls have been defaced with swastikas and racist slurs (Henriques and Fernandes 2020). This surge of ERW inspired violence and threats in Portugal has been traced to the rise of a far-right political party. Despite having gained only one seat in parliament in the October 2019 general election, its racist and xenophobic discourse has encouraged attacks against Roma and coloured people in Portugal (ENAR 2020).

Such a surge in ERW violence, perpetrated by different groups and inspired by various sources of ideology (including Islamophobia, white supremacy, anti-immigration, anti-government), has also been growing in other countries, posing serious risks to public and (in some cases) national security (Stevenson 2019). However, historically, at the international level, such violence has not been prosecuted under terrorism-related legislation, but under ordinary criminal law (see, for example, Nesbitt 2021). On the contrary, terrorism-related legislation has been substantially applied to Al-Qaeda (AQ)-type violence, as well as to the political-ideological violence which traditionally originated from 'suspect communities', such as the Irish (Hillyard 1993; Breen-Smyth 2014) and the Basque within the so-called ethno-nationalist separatist terrorism trend. The same applies to Portugal, where, to date, there have been five terrorism convictions, but none related to ERW violence, despite the not insignificant number of ideologically motivated crimes committed by ERW inspired groups and individuals in the last decades. The effects of such penal selectivity are clearly expressed by Michael Nesbitt (2021, p. 41), who considers that "the law punishes more seriously AQ-inspired extremism than it does far-right extremism and stigmatizes the former far more than the latter".

Therefore, in the present study we aim to explore the legal reasoning behind the penal selectivity regarding cases of ideologically inspired violence in contemporary Portugal. To do so we have collected and analysed the charging and sentencing of two legal files: the one initiated in early February 2010 that brought to justice one Spanish national, a member of *Euskadi Ta Askatasuna* (ETA), who received the first sentence according to the Law 52/2003 dated 22 of August, known as the Portuguese Counterterrorism (CT) Law; and the legal file that started in 2007 and brought to justice 36 alleged skinheads, who were sentenced for racial discrimination and incitement to hatred and violence, as expressed in section 240 of the Portuguese Criminal Code (this was the first case of ERW violence being sentenced after the introduction of the Portuguese CT Law in 2003).

In all four cases sentenced through CT legislation in Portugal to date (including the ethno-separatist case analysed in this paper and three Daesh-related cases), courts mechanically delivered sentences on the basis of potential violence, representing instances where "the associative, preparatory, and precautionary elements of new terrorism laws are being enacted and contested" (de Goede and de Graaf 2013, p. 327). In the ethno-separatist case, the Portuguese court considered that the mere existence of an internationally recognised terrorist organisation was definitely a threat to public peace and made use of what is known in criminal law as the theory of anticipation of criminal protection. Through this case it is possible to witness what Marieke de Goede and Beatrice de Graaf (2013, p. 314) considered to be "the premediation of violent futures during and surrounding terrorism trials". Subsequently, one would think that the criminalisation of ERW inspired violence as terrorism would operate according to this same logic of prevention and be applied to the case of Portugal, where from 2001 onwards there have been skinheads organised under the auspices of the Hammerskins Nation - Portuguese Hammerskins (HSN-PHS). Such nationalist militants are, according to the Portuguese courts, ideologically motivated, have a clear potential for violence, and the ability to commit extremely serious crimes against persons. However, their actually violent activities have not been criminalised as terrorism, but as racial discrimination and incitement to hatred and violence. Among other issues, one of the clearest consequences of this penal selectivity is that the defendant of the ethno-separatist case received a sentence of twelve years in prison, while the majority of the defendants of the ERW case received suspended prison sentences and the highest prison sentence was of four years and ten months.

In the following pages, we begin by situating this study in the relevant literature regarding the criminalisation of ERW violence, which will then inform the analysis and discussion of this article's results. We then delineate the background of the situation in Portugal regarding ERW violence and its criminalisation from the April Revolution of 1974 onwards, as we consider that such historical trajectory and contextualisation sheds light on the legal reasonings behind the latter. Subsequently, we outline this article's methodology and present the analysis of our case studies. In the discussion and conclusion that follow, we consider how the lessons learned from the Portuguese case can contribute to the international debate regarding the criminalisation of ideologically motivated violence. However, a caveat is in order: none of the authors is a legal scholar and this is not primarily a legal paper. The case studies are examined

historically and politically, in order to place them within larger debates on criminalising ideologically motivated violence, and particularly that committed by the ERW.

The conundrum of the criminalisation of ERW violence

The reasons behind the lack of criminalisation of ERW violence under terrorism legislation seem to be multiple. According to Daniel Koehler (2019), they can be related to legal complexities, as the prosecution and conviction of a terrorist organisation or individual can be more problematic than those for murder charges or possession of illicit arms. In this context, Koehler argues that

> far-right violence has a potential risk of being misunderstood and under-classified, thus creating the perception among victims of that violence that democratic countries "are blind on the right side" (Koehler 2019, p.1).

From Koehler's perspective, such a way of criminalising ERW violence has consequences in three different areas: for the victims it may lead them to feel marginalised, as what they have been subjected to is not recognised in the public discourse as something as severe as terrorism; for the general public it distorts what a security threat means, as the label 'terrorism' is only applied to certain actors; and for CT activities, influenced by the statistical representation of the threat, the lack of criminalisation of ERW violence as terrorism may lead to flawed assessments and policies (Koehler 2019, p. 7). Similarly, Jesse Norris (2020, p. 526) asserts that "correctly labelling right-wing terrorists as terrorists could have several important effects: establishing relevance to counterterrorism policy, promoting accountability, encouraging expended efforts to address right-wing threats, further stigmatising racist violence, stimulating more balanced media coverage, and undermining Islamophobia by showing that not all terrorists are Muslim".

Recently, some studies, drawing on critical theory, have examined the lack of terrorism convictions in what concerns ERW violence through the lens of unconscious cognitive bias in the creation of stereotypes that permeate all areas of society, including the criminal justice system (Corbin 2017; Breen-Smyth 2020; Norris 2020). Norris (2020, p. 523) offers an important snapshot of anti-Muslim bias in a variety of Western countries' CT policies and argues that "[d]ue to stereotypes associating terrorism with Muslims, many fail to perceive ideological violence by non-Muslims as terrorism". This idea has been further developed by

other scholars, who have situated such anti-Muslim bias within broader biases against the 'suspect community', the first embodiment of which was the Irish immigrant community in England (see Hillyard 1993). Although the Muslims living in the West in the era of the global war on terror followed suit from 2001 onwards (Pantazis and Pemberton 2009; Breen-Smyth 2014), anyone can be targeted by such a label as long as they "appear so to the security services or a suspicious member of the public" (Breen-Smyth 2020, p. 76). Members of the 'suspect community' are seen as security threats who need to be stopped from engaging in terrorist violence, which is fed by the media and government discourses and policies. This is exactly the kind of narrative context that leads security practitioners to neglect the all-encompassing threat of ERW violence, perceiving and presenting it "more as a public order problem, a problem of 'lone wolves' or disturbed individuals" (Kundnani 2012, p. 27). In this vein, Jude McCulloch and Sharon Pickering consider that integrating "national security into law enforcement under counterterrorism frameworks redraws and fortifies the imaginary border between the community to be protected and those they are to be protected from" (McCulloch and Pickering 299, p. 635). Such a schism being fed by racial, religious, and ethnic profiling (Harris 2002; Ansari 2005).

However, another important issue regarding the puzzle of ERW violence criminalisation is the role of criminal prosecutions of such cases in applying the terrorist label (Norris, 2020). ERW violence is much more frequently labelled as racially motivated or hate crime than as terrorism (Zedner 2021), even if it meets the criteria set out in existing terrorism-related legislation. This does not apply to members of the 'suspect community', who tend to be automatically labelled and subsequently accused and sentenced as terrorists. There are a couple of dynamics at play here, in addition to the already mentioned stereotypes. First, is the fact that ERW actors may be perceived as insiders or 'domestic extremists', while members of the 'suspect community' are perceived as outsiders. Second, is the fact that certain organisations are seen as terrorist at the international level, which influences their labelling at the national level. As an example, Leena Malkki and Daniel Sallamaa (2018) ascertained that in the case of Finland there is a general preference not to label as terrorism any type of ideologically motivated violence that has happened in the country, including ERW activities. Additionally, the existing international terrorism labelling of certain networks has led to the readily labelling as terrorism of their activities in Finnish territory.

A recent and rather exceptional case of judicial labelling of ERW violence as terrorism can be found in the UK, where the court designated the white supremacist murder of the Labour MP

Jo Cox as ‘terrorist’. This was a significant turning point which contributed, in 2016, to the proscription of the ERW organisation National Action (NA) and to the subsequent proscription of other ERW groups, such as the Scottish Dawn and the NS131 (National Socialist Anti-Capitalist Action). The UK’s Home Secretary at the time, Amber Rudd, affirmed that NA “is a racist, anti-Semitic and homophobic organisation which stirs up hatred, glorifies violence and promotes a vile ideology. It has absolutely no place in a Britain that works for everyone [...] proscribing it will prevent its membership from growing, stop the spread of poisonous propaganda and protect vulnerable young people at risk of radicalisation from its toxic views” (Rudd 2016 cited in Allen 2017, p. 652). Scholars agreed that NA’s proscription effectively dismantled the organisation and deterred some of its militants, however, they also pointed out to less positive consequences of such bans, including the adoption of different forms of activism and the investment on a digital footprint, which is much harder to eradicate (see Allen 2017; Macklin 2018).

Therefore, this body of research substantiates the claim made by McCulloch and Pickering that the use of the label ‘terrorism’ to criminalise ideologically motivated violence is not produced by the courts, but by the political establishment, as “[p]olitics and politicians essentially determine who is or is not a terrorist and what constitutes an act of terrorism without the need for evidence and without even a widely agreed definition of what and who constitute terrorism and terrorists” (McCulloch and Pickering 2009, p. 628). These authors consider that the application of such label and, consequently, CT legislation (combining elements of criminal justice and national security) aims at “targeting and managing through disruption, restriction and incapacitation those individuals and groups considered to be at risk” (McCulloch and Pickering 2009, p. 631). However, such dealings with 'at risk' individuals are deemed to be based on problematic counterfactuals and represent a dangerous, discriminatory, and counter-productive extension of state power (Heath-Kelly 2013; Pettinger 2017). Most research, as well as policy literature, for instance, overemphasise the role of ideology, and specifically religious ideology, in the radicalisation process, which is seen as the process preceding terrorist violence (Romaniuk 2015; Kundnani and Hayes 2018), ignoring other “systemic and structural factors that shape human motivations and influence (anti-)social behaviours” (Mythen et al. 2017, p. 195). Such tendency has led to disastrous practices such as the targeting and stigmatisation of specific communities (see Mythen et al. 2009; Kundnani 2014, 2015; Linkedilke 2014; Qureshi 2015; Pettinger 2020).

Moreover, the label 'terrorism' is morally charged (Banks 2018) and "a terrorist-related offence conjures images of extreme, even apocalyptic violence" (McCulloch and Pickering 2009, p. 636). So much so that different studies based on experimental designs found out that the public labelling of an individual or a group as 'terrorist' influences the audience's perceptions of that individual or group, as well as policy preferences on how to deal with them (Dunn et al 2005; Haider-Markel et al 2006; Montiel and Shah 2008; Baele et al 2019). Additionally, the study conducted by Baele and colleagues (2019) does not only demonstrate the impact of the label 'terrorist', but also that the category 'Islamist' is associated with terrorism. In this vein, advocating for ERW violence to be criminalised as terrorism, as explained above, might incur in unintended consequences, such as further targeting and harming the usual 'suspect communities' and social justice protesters (e.g., Black Lives Matter, anti-fascist movements) and reproducing damaging narratives of 'terrorism' and 'war on terror' (Zerkel 2021).

The following section provides an overview of the situation in Portugal regarding ERW violence and its criminalisation from the April Revolution of 1974 onwards. Its aim is not only to familiarise the reader with a case that has not been extensively researched, but also to set out the historical trajectory and contextualisation for the legal reasonings behind the criminalisation of ERW violence in contemporary Portugal.

ERW violence and its criminalisation in democratic Portugal under the rule of law (1974 onwards)

The movements of the Portuguese ERW in this period have been traced by Riccardo Marchi and Raquel da Silva (2019), who focused particularly on the politically violent organisations. These authors consider that the offensive of the ERW in Portugal was triggered by the events of the 25th of April 1974, when the *Movimento das Forças Armadas* (MFA) [Armed Forces Movement] carried out a military coup, also known as the April Revolution, overthrowing the authoritarian regime of *Estado Novo* [New State] and giving rise to the transition to democracy. This offensive can be divided into two different phases, spanning a period of four decades, which are explored in detail in the following two sections.

The transition to democracy period (1974-1976)

The first phase began with the defeat of the authoritarian regime and ended in the mid-1970s. It was composed of militants radicalised in the early 1960s as a consequence of the crisis afflicting the Portuguese overseas empire (the so-called colonies), characterised by the outbreak of the Colonial War (1961 – 1974) and by the anti-imperialist mobilisation of the extreme left-wing (ELW) student movement throughout the 1960s. With the fall of the regime, which initiated the process of democratic transition, this nationalist generation encouraged the emergent right-wing parties and movements, initially, in an attempt to safeguard the Portuguese presence in Africa through legal political means and, later on, to resist (violently) the advance of communism in Portugal (da Silva 2019). In this period, as part of a broad front of anti-communist resistance, the clandestine organisations associated with the commission of ERW violence were the *Exército de Libertação de Portugal* (ELP) [Liberation Army of Portugal], the*Movimento Democrático para a Libertação de Portugal* (MDLP) [Democratic Movement for the Liberation of Portugal], and the (inorganic) *Maria da Fonte* Movement. These organisations engaged in violent attacks throughout the so-called *Hot Summer of 1975* against left-wing political parties' headquarters, mostly located in the northern area of Portugal. These violent attacks did not cause severe human injuries or losses, despite following a clear terrorist modus operandi by detonating explosives and improvised incendiary devices (Dâmaso 1997). This wave of violence declined following the 25th of November 1975 military coup led by a coalition of moderate and conservative sectors that put an end to the revolutionary process started on the 25th of April 1974, comprising a profound defeat for the radicalised ELW (da Silva and Ferreira 2020). In this vein, most ELP and MDLP militants demobilised, which was encouraged by the fact that the anti-Communist component of the Council of the Revolution in collaboration with the anti-Communist parties began to (informally) negotiate a ceasefire with ERW organisations whose members would not have to face judicial consequences (Pinto 1998).

However, a few disenfranchised militants from different anti-Communist organisations did not demobilise, "some as revenge against the communists, others for money, running into a spiral of violence that quickly evolved into a more or less sophisticated form of terrorism" (Dâmaso 1997, p.20). These militants ended up integrating the so-called *Rede Bombista do Norte* [Northern Bombing Network], which was active between October 1975 and July 1976, during the withdrawal phase of clandestine organisations, which comprised ERW militants, but also ordinary police officers and criminals, who carried out dozens of bombings (Carvalho 2017). There are three main violent events that marked this period. Firstly, on the very same

day of the entry into force of the new constitutional law in Portugal – 2nd of April 1976 – a car bomb exploded killing a priest, who was also a left-wing candidate for the general elections that would take place a few weeks later, and a 19-year-old female student who accompanied him. Secondly, twenty days later, a suitcase was abandoned at the main entrance of the Embassy of Cuba in downtown Lisbon, containing an explosive charge of around six TNT kilograms, whose blast caused the immediate death of two Cuban diplomats and completely destroyed the building. Thirdly, in August 1979, a northern Portuguese businessman, allegedly connected to the funding of the ERW violent organisations active during the *Hot Summer of 1975* and listed to testify in court about such matters, was shot dead while driving through a local road. This Northern Bombing Network was brought to justice. A set of five out of the sixteen defendants in the legal file received prison sentences, ranging from three to twenty years for "crimes against State security and aggravated explosions causing death" among other related crimes (Dâmaso 1997, p. 205).

At this point in time, specific CT legislation did not exist in Portugal neither was the criminal offence of 'terrorism' mentioned in the Criminal Code. References to terrorist offences were only included in 1981, under the Law 24/81 dated 20 August, into a very old criminal code – which had been in force for nearly a century, since 1886. Besides, such inclusion only happened due to the appearance, in April 1980, of the domestic ELW organisation *Forças Populares 25 de Abril* (FP-25) [Popular Forces of 25th of April]. However, at a preliminary stage it just facilitated the criminalisation of the so-called, legally speaking, preparatory acts of terrorism, while the definition of terrorism was still absent in the Criminal Code (Pereira 2004; Ventura and Carvalho 2020). Afterwards, the new Criminal Code, which entered into force in September 1982, under the Decree-Law 400/82, included the legal definitions of both terrorist organisations and terrorism under its sections 288 and 289, respectively.

The established democracy period (1976 onwards)

The following phase of ERW inspired violence in Portugal started in the second half of the 1980s and still continues today. Its protagonists experienced neither the authoritarian regime nor the myth of a pluri-continental and multi-racial empire (Gallagher 1992; Pinto 1995; Marchi 2019). This generation started its political militancy a decade after the end of the decolonisation process, in a broadly consolidated democratic system, where leftist forces, like the *Partido Comunista Português* (PCP) [Portuguese Communist Party], actively participated

in the political and administrative organisation of the country (Maxwell 1999). The clandestine and violent actions of this phase were closely linked to the arrival in Portugal of the skinhead subculture towards the end of the 20th century and its organisational evolution at the beginning of the 21st century.

The Portuguese skinhead movement began to be structured in the late 1980s, integrating into the already existing nationalist organisation *Movimento de Acção Nacional* (MAN) [Movement of National Action]. However, despite theoretically being part of the MAN, the skinhead militant base consisted of autonomous and uncontrollable informal local cells. Symptomatic in this respect was the meeting in Porto in December 1989 between MAN leaders and the skinhead movement of the North in order to discuss the integration of the latter into the former, which ended in a violent clash (Marchi 2019). In addition, the skinhead base only occasionally adhered to the MAN's leadership strategy, being more concerned with the implementation of its subculture of belonging, characterised by the organisation of concerts, neo-Nazi aesthetics, and street violence (Pinto 1995). The growing number of episodes of inter-ethnic and/or political violence carried out by skinheads in the second half of the 1980s culminated in the murder of a militant of the *Partido Socialista Revolucionário* [Socialist Revolutionary Party] on 28th October 1989, by a group of neo-Nazis who intended to enter the headquarters of the ELW party to attend a concert. The eight skinheads involved in this incident were immediately identified, detained, prosecuted, and convicted. The alleged killer was sentenced to twelve years imprisonment, three individuals also received prison sentences between five and seven years, two individuals received suspended sentences of less than two years, while the remaining two were acquitted. This event also triggered a significant Judiciary Police[1] investigation, ordered by the Attorney General of the Republic, on the ERW landscape in Portugal, in order to determine the dimension of the skinhead phenomenon and its links to the MAN. Such investigation included wiretaps, house searches on the MAN's prominent militants and their subsequent interrogation. The Judiciary Police were able to demonstrate skinheads' membership of the MAN, but could not prove either a correspondence between the MAN structure and the skinhead movement, or the existence of a MAN project to organise the Portuguese skinhead movement (Marchi 2010). Despite these results, in July 1991, the Attorney General of the Republic requested that the Constitutional Court declare the MAN illegal. The request was based on three main legal

[1] The Judiciary Police belongs to the organic structure of the Ministry of Justice and assists the judicial and prosecuting authorities in criminal investigations under the direction of the Attorney General Office.

arguments, as explained by Marchi and da Silva (2019, p. 35): "1) article 46, number 4 of the Portuguese Constitution according to which organisations that embody a fascist and racist ideology are not permitted; 2) law number 64/78, which also forbids organisations that have a fascist ideology; and 3) article 10 of the legal status of the Constitutional Court enabling is the competence to state whether an organisation has adopted the fascist ideology and to decree its extinction". The conclusions of the Constitutional Court confirmed that the MAN was indeed an organisation which had a leading structure and a set of means targeted at a common goal. Regarding the deliberations over whether the MAN did or did not espouse fascist ideology, the Constitutional Court pointed out some characteristics of the movement that support such an accusation: its ultranationalist and antidemocratic character, as well as the apology of historical fascist regimes and personalities. With regard to violence, it was not possible to define the MAN as an *a priori* violent organisation. Thus, the Constitutional Court questioned whether it should be considered fascist purely by dint of its ideological characteristics. Given this legal-constitutional problem, the court decided not to resolve it, appealing to the fact that the self-dissolution of the movement had already removed all justification for a possible extinction measure (Ventura and Dias 2015). This prevented the Constitutional Court from undertaking the delicate task of inaugurating a legal precedent with respect to ERW organisations and therefore, those involved were spared the heavy penalties stipulated by the legal system. All this process caused not only the extinction of the MAN but also the dissipation of the ERW milieu, who returned to unstructured and non-hierarchic forms of mobilisation (Marchi 2019).

In this context, the next major event of ERW violence took place on 10th of June 1995, when ERW actors beat to death a Portuguese citizen of Cape Verdean origin. In the words of the main nationalist militants involved in this homicide, this episode marked their transformation "from street soldiers to political soldiers (Ventura and Dias 2015, p. 55-56). Their arrest and subsequent prosecution led to the sentencing, in 1997, of ten skinheads who were to serve sixteen to seventeen years imprisonment and of six skinheads who were to serve two to thirteen years imprisonment (Almeida 2015). This was the severest punishment ever, in Portugal, for violence committed by ERW militants and a severe setback to the nationalist circles. Nonetheless, despite being the strongest terrorist footprint of ERW actors in Portugal, this incident was not sentenced as such, but as qualified homicide aggravated by racial hate. The reasons behind this may be related to the fact that at this point in time, although there were already two sections within the Criminal Code regarding terrorism (section 300 on

terrorist organisations and section 301 on terrorism), they had very seldom been applied by the legal profession (Ventura and Dias 2015). These sections had been created solely to enable the sentencing of the terrorist activities of the ELW organisation FP-25. Therefore, from the early days of the existence of terrorism legislation in Portugal, it has never been applied to ERW violence, but only to conventional terrorist organisations, recognised as such both nationally and internationally.

At the beginning of the new millennium, the skinhead movement was strengthened by the creation of the Portugal Hammerskins (PHS), which for a brief period appeared at the forefront of the nationalist milieu (Marchi 2019). The PHS was, and still is, the Portuguese chapter of the international US founded Hammerskins Nation (HSN), which despite being a violent white supremacist group, formed in Dallas-Texas in 1988, has never been considered a terrorist organisation. As already mentioned, in 2007, a group of PHS members was brought to justice. However, despite the existence of a considerable number of facts to establish a case against the PHS, they were all unconnected and difficult to attribute to a single concerted strategy (Almeida 2015). Thus, the convictions ended up focusing on individuals and not really being linked to the PHS as an organisation. According to the PHS' defence lawyer (cited in Marchi and da Silva 2019, p. 38), "the public prosecutor was neither interested in promoting a constitutional procedure against the PHS, nor in a case against a collective organisation, but only in obtaining the highest number of individual convictions to dismantle the nationalist scene". In this sense, ERW-inspired actions were charged as hate-related crimes through section 240 of the Portuguese Criminal Code, concerning discrimination and incitement to hatred and violence.

In this period, in addition to the already mentioned Criminal Code sections regarding terrorism or aggravating considerations connected to political motives, there was also special legislation in Portugal enabling the criminalisation of ERW violence as terrorism (Ho 2005). Indeed, following the advent of 9/11, the approval of the Framework-Decision EU 475/JHA/2002 from the European Union (EU) paved the way to the definition of a new legislation regarding terrorism in Portugal. This new statute (Law 52/2003 or as it is widely known, CT Law) recognised as terrorism instrumental crimes (e.g., aggravated theft, robbery, fraud, extortion, forgery of documents), whenever they serve terrorist purposes (Ventura and Carvalho 2020). However, since its inauguration, this national CT Law 52/2003 has been subject to several amendments and extensions in order to meet international updates and, mostly, to follow-up the EU continuous legislative improvements by the transposition of a

number of more recent Framework-Decisions and Directives. The first couple of changes, introduced some five years later, in 2008 (Law 25/2008), concerned the criminalisation of money laundering and terrorism financing, establishing preventative and repressive measures to counter those illicit activities. Further amendments were made in 2011 (Law 17/2011), in order to target the use of the internet for terrorist purposes – from the spread of propaganda, public apology of and incitement to terrorism, to the radicalisation and recruitment of incoming members, training, plotting, and funding objectives. Following the wave of foreign terrorist fighters (FTF) responding to *Da'esh* public appeals and incitement to comply with *Hijrah* and join such organisation in Syria and Iraq, the fourth amendment over the Law 52/2003 occurred in 2015 (Law 60/2015). It comprised the intention of criminalising international travel to insurgent conflict areas when joining terrorist organisations, to commit and/or support terrorist acts. Finally, the fifth and last change to date, occurred in 2019 (through the Law 16/2019), updating the legal provisions to counter the threat posed by the FTF and their potential to execute terrorist attacks in Europe. In this context, it is important to note that this national CT Law (as well as similar pieces of legislation around the globe) was predominantly designed to prevent mass attacks perpetrated by AQ-type organisations and developed according to the evolution of this kind of threat, which explains its effectiveness in capturing individuals connected to AQ-inspired activities.

The subsequent sections provide the opportunity to understand how we approached our case studies in order to explore the legal reasoning behind the penal selectivity regarding cases of ideologically inspired violence in contemporary Portugal. We also discuss how the lessons learned from this national context can contribute to the international debate regarding the criminalisation of ideologically motivated violence.

Methods

This study uses a systematic content analysis of legal files and in doing so follows the three stages set out by Hall and Wright (2008, p. 79): "(1) selecting cases; (2) coding cases; and (3) analysing the case coding". Two legal files were selected for analysis: the first legal file where the Portuguese CT Law was applied, which pertained to the case of an ETA member (legal file NUIPC 17/10.7JBLSD); and the first sentencing of ERW inspired violence in Portugal after the introduction of the CT Law in this country, in 2003 (legal file NUIPC 1706/04.0PTLSB).

In both cases, we started by requesting permission to access the legal files from the courts where they were archived. This was followed by obtaining a copy of the accusation and sentencing sections for each of the legal files in question. In total, the four individual sections collected were composed of over 800 pages, which were initially coded by the second author. The approach to coding was as follows: to identify all the passages from the accusation and sentencing sections of the legal files that related to a particular legal reasoning, which were then assigned a code as a shorthand reference for the argument (Salehijam 2018). According to established procedures (Yin 1989), the first author conducted a mini audit of the data and summary documents and agreed with the coding and legal reasonings identified. This exercise enhanced the coherence of the analysis, enabling the emergence of new categories and refining of the existing ones with the aim of determining that the final legal reasonings were representative of the data.

Analysis

This paper analyses two cases of ideologically motivated violence that were brought to the Portuguese courts at different times and which were tried with different legislation. The trial of the ethno-nationalist separatist violence case started in 2011, while the trial of the ERW violence case started in 2007. The former invoked the CT Law 52/2003, while the latter invoked section 240 of the Portuguese Criminal Code, concerning discrimination and incitement to hatred and violence. In this section, we explore each one of these cases in turn and discuss the mechanisms behind the application of differing legislation to seemingly analogous cases of ideologically motivated violence.

The ethno-nationalist separatist case

The investigation of this case started in early February 2010 following an incident in the city of Caldas da Rainha, when two individuals driving a van did not obey a police request to stop during a road traffic operation control. Such a small infraction (in comparison to what followed) led to uncovering the fact that the two individuals driving the van were ETA members running a logistical support operation from Portugal, which included, for instance, the production, storage, and transport of explosives. According to the first pages of the accusation section of this legal file, the mere fact that there was clear, documented evidence

of the defendants' membership of the Spanish-based terrorist organisation ETA – in accordance with the statements and the information shared by the law enforcement and judiciary authorities from Spain – justified, *per se*, the application of the Portuguese CT Law. In this vein, ETA was described as "a group that practices terrorism, namely through homicides, bombings, using weaponry and explosives, with the aim of undermining the institutions of the Spanish State, all as a means of achieving the independence of the Basque Country", which was "already recognized as of a terrorist nature by several States and, also, by international entities, namely by the European Union and International Amnesty" (Departamento Central de Investigação e Ação Penal 2011, p. 1981). In this sense, the two men involved in this case were charged by the prosecutor leading the legal inquiry for "qualified theft, forgery, and possession of a prohibited weapon, with the intention of executing terrorist criminal offences, as defined by Law number 52/2003, from the 22nd of August" (Departamento Central de Investigação e Ação Penal 2011, p. 1980). One of the defendants was able to escape, while the other remained in pre-trial imprisonment. The trial commenced in October 2011 and the verdict was announced in January 2012, sentencing the defendant to twelve years' imprisonment for supporting and being a member of a terrorist organisation, possession of forbidden weaponry (explosives) with a terrorist purpose, three crimes of forgery, one crime of vehicle theft and a further criminal offence of duress and resistance. The Appeal Court, requested by the defendant, sustained the verdict of the First Instance Court. The defendant served his time in Lisbon, was released at its term by March 2019, then returned to the Basque Country.

This was the first case sentenced through the CT Law in Portugal. In this instance, it was proven in the trial that the defendant was a member of ETA, which is a Spanish organisation recognised internationally as terrorist. As described in the legal file:

> the mere existence of a terrorist organisation and its inherent dynamics constitute a potential for danger, on the basis of a crime of abstract danger (Gomes e Salgado 2005 cited in Tribunal Judicial da Comarca de Caldas da Rainha 2012, p. 56).

Thus, being a member of an internationally recognised terrorist organisation is in itself a crime of danger and a crime of abstract danger. Moreover, the court in charge of this case also considered that the application of the special CT legislation to this case was a preventative measure, since it was proven that there was a "terrorist intention", i.e., the intention to intimidate people of a certain race or religion (Dias 1999 cited in Tribunal Judicial da Comarca

de Caldas da Rainha 2012, p. 57). According to the court, the decision to apply this legislation, considering the "terrorist intention", aims to protect the public peace (Dias 1988 cited in Tribunal Judicial da Comarca de Caldas da Rainha 2012, p. 69-70).

The ERW case

This case brought 36 defendants to justice, facing accusations of racial discrimination, who were sentenced to hatred and violence, following section 240 of the Criminal Code. The accusation section of the legal file for this case is quite thorough regarding the chronology of events that brought the defendants to justice (which have also been described in the previous section), assigning them a clear identity as "Portuguese Neo-Nazi Skinheads" (Departamento de Investigação e Ação Penal de Lisboa 2008, p. 18). The *Frente Nacional* [National Front], created in 2004, was seen as the national structure that brought together the HSN-PHS and that "aimed to intervene, by means of violent actions in Portuguese society and to unleash a racial war, with the purpose of fighting for the supremacy of the white race and thus undermining the constitutionally established State institutions" (Departamento de Investigação e Ação Penal de Lisboa 2008, p. 26). This organisation was seen as expounding an "aggressive militarist orientation, translated into the permanent apology for violence through the use of weapons" (Departamento de Investigação e Ação Penal de Lisboa 2008, p. 28). Racism was also a clear component of this organisation, which promoted "racial hatred declaring that in Portugal there will be no place for black people, Jewish people, Roma people and homosexuals" (Departamento de Investigação e Ação Penal de Lisboa 2008, p. 28). Thus, the legal requirement of section 240 of the Criminal Code regarding the membership of an organisation that promotes discrimination, hate or violence according to race, colour, and ethnicity was met by the defendants' ideology and criminal practice.

The discriminatory views were spread through leaflets and stickers, but also through the website *Fórum Nacional* [National Forum], which was created in 2004 and managed by HSN-PHS members, particularly by two of the defendants in the present case. As proved during the trial, 13 defendants shared such kind of views in this website against black and Jewish people, as well as against Roma individuals and migrants. Moreover, it was also proven that one of the defendants wrote discriminatory lyrics, mainly against Jewish people, for a musical band called *Ódio* [Hate]. Given the content of the disseminated messages, the court issued the

verdict that these views not only constituted racial discrimination, but also fell into the concept of hate speech against minorities.

Besides discriminatory views and hate speech, the defendants were also accused (also within the remit of the section 240 of the Criminal Code) of incitement to violence due to the spread of messages which encouraged the acquisition of weapons and physical assaults against individuals pertaining to minority groups. One specific example is the trip to the town of Coruche, in the Ribatejo province, taken by some of the defendants, which was preceded by the dissemination of messages inciting other people to take on arms and join them to physically assault a local Roma community. One of the messages transcribed in the accusation document from the HSN-PHS *Fórum Nacional* was:

> Dozens of Roma people attack white people in Coruche, even now as I watch live [on TV] a Roma woman puts her hands on a white woman, they fire shots into the air, threaten the National Republican Guard [countryside military police], and the 200 native whites [residents of Coruche], fearfully, face them. […] Tomorrow and according to the TV news report, dozens or hundreds of gypsies are expected in the region. The nationalists who are available have a civic and patriotic obligation to travel to that place tomorrow. Nationalist ideologues, take the propaganda! Street activists, take the sticks! It is a call to arms!!! Tomorrow Coruche!!! (Departamento de Investigação e Ação Penal de Lisboa 2008, pp. 31-32)

The prosecution considered that this was a clear incentive to violence against a specific minority group, which did not occur because police officers were deployed to the locality. In this sense, it was not possible to prove that any definite violent act had been committed, only the intention to intimidate a specific minority group. In line with this, the court also clearly affirmed that this episode could not be simply considered as incitement to commit a crime (which would likely have brought up section 297 instead of section 240 of the Criminal Code):

> Thus, it was considered that despite there being an appeal for an armed presence, the main intended objective was a demonstration of supremacy and superiority before a determined ethnic minority rather than the commission of a specific and concrete crime. (Departamento de Investigação e Ação Penal de Lisboa 2008, p. 15033).

In this vein, twenty-three of the thirty-six defendants were sentenced to imprisonment, but most received suspended sentences. The highest prison sentenced was attributed to PHS's

leader and it was four years and ten months. Since this case was tried in 2008 it was technically impossible to resort to the CT Law regarding this single issue of incitement to violence, which was only introduced in the third amendment to this special piece of legislation (Law 17/2011). However, following that amendment, messages of incitement to ideologically motivated violence could also fall under the remit of CT Law, as the execution of actual violence is not needed to be considered as a terrorist crime.

Discussion and conclusion

In this study, we analysed two case studies in order to explore the legal reasoning behind the penal selectivity regarding cases of ideologically inspired violence in contemporary Portugal. In this sense, we started by offering a detailed analysis of the history of ERW violence in Portugal since the April Revolution of 1974, vis-à-vis the evolution of terrorism-related legislation in this country. Then, we analysed and discussed the charging and sentencing of two legal files in Portugal: the legal file initiated in early February 2010 that brought to justice one member of ETA, who was sentenced according to the Portuguese CT Law; and the legal file that started in 2007 and brought to justice 36 alleged skinheads, who were sentenced for racial discrimination and incitement to hatred and violence, as defined in section 240 of the Criminal Code. By examining these two cases, we aimed to understand why, in the presence of CT legislation, ideologically motivated violence is in some cases prosecuted as terrorism, but not in others.

One of the reasons why ERW violence is not prosecuted as terrorism can be the lack of applicable legislation, but also the hesitancy of prosecutors, who tend to be somehow reluctant to apply the charge, even when they could have recourse to it (Norris, 2020; Nesbitt 2021). As for Portugal, terrorism-related legislation has been in place since 1982 in the ordinary Criminal Code, which was motivated by the actions of a domestic ELW organisation, and then replaced by CT legislation in 2003, which, as already mentioned, is particularly apt to charge AQ-type organisations. Certain crimes, such as qualified homicide and qualified offenses to physical integrity can also be aggravated by issues such has “racial, religious, political or colour-generated hatred” (Law 48/1995), which have been applied in some cases of ERW violence mentioned in this study, but only related to racial hatred. In this country, as elsewhere, the international terrorist labelling of organisations strongly influences the same labelling at the national level – an ETA member was accused and sentenced under CT Law,

while ERW actors, who have, over time, belonged to different organisations which have not been considered terrorist at the national (e.g., MAN) or international (e.g., HSN) levels, were accused and sentenced under racial discrimination legislation. Thus, we consider that the reasons for the accusation and sentencing of the defendant in the ethno-separatist case under the CT Law can exemplify how defendants in ERW violence cases could have also been charged under similar legislation in Portugal. Thus, when judging the former case, the Portuguese court made use of what is known in criminal law as the theory of anticipation of criminal protection, i.e., the mere existence of a terrorist organisation is clearly enough to damage the general perception of security and it is definitely a threat to public peace. In that regard, the criminalisation of ERW violence as terrorism could operate in a way of prevention of this type of activity. In this vein, the same could have been applied to the existence of an ERW organisation, such as the skinheads organised under the auspices of the HSN-PHS from 2001 onwards, who were ideologically motivated, had a clear potential for violence, and the ability to commit extremely serious crimes against persons, posing an unavoidable threat and an abstract danger to society.

In sum, as in other national contexts, we surmise that in Portugal ERW criminal actions and activities do not tend to be sentenced as terrorism. It appears that due to the nature of the existing legislation, but also due to "tunnel vision" or "anchoring bias" (see Nesbitt 2021, p. 51), prosecutors traditionally tend to somewhat neglect or even despise this threat. Instead, they focus disproportionately on other forms of terrorism (e.g., AQ-inspired terrorism, ethno-nationalist separatist terrorism) and on organisations and networks recognised internationally as terrorist (Pantazis and Pemberton 2009; Koehler 2018; Malkki and Sallamaa 2018; Nesbitt 2021). The clearest example of this is that terrorism-related legislation in Portugal has, to date, only been applied to members of an ELW organisation, members of an ethno-nationalist separatist organisation, and members of an AQ-inspired organisation, despite the existence of three major ERW inspired violence legal files going through the Portuguese courts in the last three decades. Thus, this study shows once more, if any doubts were still standing, that ERW is rarely considered within the framework of terrorism-related legislation, uncovering the existing double standard and systemic discrimination in labelling certain types of ideologically motivated violence as terrorism, but not others. In this vein, despite all the evidence pointing to the ideological motives behind the violence committed by ERW militants in Portugal, the criminal justice system keeps treating them as 'street

soldiers', while treating other types of militants (namely ethno-nationalist separatists and AQ-inspired militants) as 'political soldiers'.

On the one hand, the labelling of ERW violence as terrorism and the attribution of the legal category of terrorist organisations to these groups could potentially contribute to the prevention and countering of this phenomenon (Koehler, 2018; Norris 2020). On the other hand, though, it is important to stress that the use of the label 'terrorism' and 'terrorist' should be used with caution, since it can be counterproductive and harmful, given the nature of certain counterterrorism practices, which have had damaging consequences for old and new 'suspect communities' around the globe (see Jackson 2015; Zedner 2021; Zerkel 2021). Additionally, it is important to consider existing analysis of the effects of criminalising ERW violence as terrorism, which can be found regarding the recent proscription of ERW organisations in the UK (see Allen 2017; Macklin 2018). Such practice has definitely led to the effective demise of those kind of organisations and has contributed to deter some ERW militants. However, other militants have simply taken different forms of activism which circumvent the proscription and are harder to eradicate, such as online activism.

Thus, we concur with Nesbitt (2021, p. 51) assertion that "[c]alling one group terrorists and another merely hateful matters". It matters because the weight of a terrorism-related sentence and of a hate crime-related sentence differ significantly. In addition, it matters because the stigma and practices associated with the terrorism label and with the hate crime label also differ significantly. All in all, different groups of people, exposing different political, religious, or ideological incentives should not be treated differently by the criminal justice system due to their own identity or type of hate. Such a double standard contributes to claims that ERW violence is not treated with the seriousness it deserves, exacerbating marginalisation and discrimination practices, and being simply unjust. However, simultaneously, we do not defend that ERW violence should be charged automatically as terrorism, as broadening the definition of terrorism might further entrap the usual suspects. We believe that the courts need to reflect on the legal and non-legal reasonings behind prosecution practices regarding ideologically motivated violence from all levels of the political spectrum and, going forward, make a fairer use of CT law.

Finally, it is important to note that this was a preliminary study approaching a very sensitive subject. Thus, further research is needed to assess when and in what circumstances ERW violence can and should be prosecuted under CT legislation and the actual consequences of

such practice. This needs to include comparative, cross-country analysis, using qualitative and quantitative methodologies. Further research is also needed to examine the existence of unconscious cognitive bias in the criminal justice system when it comes to build the accusation and to sentence episodes of ERW inspired violence. Apparently, and as seen in this study, such bias exists, but it can only be identified through measures such as the Implicit Association Test (IAT). This cognitive measure serves as a meaningful predictor of behaviour, namely the decision-making process that happens in the different instances of the criminal justice system, allowing the examination of whether police officers, prosecutors, and judges hold implicit associations between 'suspect communities' and criminal guilt, which do not apply to ERW actors.

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