Slobodan Praljak's Suicide and International Criminal Justice

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International Criminal Justice has made the front pages of both regional and international newspapers again. Just before the expiry of its mandate, the International Criminal Tribunal for the former Yugoslavia rendered two land sliding judgments: On 22 November 2017, the Trial Chamber convicted Ratko Mladic for committing genocide, and a week later the Appeals Chamber upheld the sentences of Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić. While the former judgment against Mladic, former commander of the Main Staff of the Bosnian Serb Army, was highly awaited, it is the latter judgment that is still making headlines way past the standard expiration-date of newsworthiness, and the reason for this extra amount of attention bestowed upon International Criminal Justice is bitter-sweet. The prolonged interest is neither due to the legal implications of the judgment nor its consequences for the victims, but rather the drama that unfolded in the courtroom during the pronouncement of the judgment. Upon hearing a judge confirm a 20-year prison sentence for his crimes against Bosnian Muslims during the 1990s conflict, a visibly agitated Slobodan Praljak, standing in the dock, firmly announces his denial of all accusations and his refusal to accept the sentence – swiftly raises his hand to his mouth and empties a small glass vial in one big gulp. He proclaims to have drunk poison as the stunned judge, helpless in the face of such an outlandish and movie-esque situation, meekly calls out to him to stop and hurries to suspend the session.

A video of the scene went viral within hours. Since then, newspapers have been speculating about the motives of Praljak's suicide, the kind of poison he drank (which has now been confirmed to be cyanide) and the way he smuggled the small container into the courtroom. Amidst all this desire to turn the judgment against Praljak into a James Bond movie, not a single word has been dedicated to a seemingly obvious question: How does his suicide affect his punishment? More specifically, did he avoid or in a way fulfill his punishment?

The question is certainly not new and is closely related to a legal-philosophical perspective on the purposes of punishment. Its empirical relevance is evident – take, for instance, the United States: The suicide rates amongst prison inmates are high (approximately 200 per year) – in fact, twice as high as in the general population, and they may be even higher than statistics suggest because of a tendency to underreport such incidents. Even on the international level, the scenario of a suicide by a convicted war criminal is not uncommon: Hermann Goering committed suicide in prison following his conviction of war crimes by the Nuremberg Tribunal. What do we make of these suicides? Did Praljak just do the Tribunal's work by punishing himself? Or did he escape punishment? And, beyond the scope of his own life and death and even the victims' fates: What does his suicide mean for the goals of International Criminal Justice?

To answer these questions, it is worth to recall the form and rationale of punishment, in other words: what punishment is and what purpose it has. Punishment can have different forms and not every form necessarily belongs to the realm of criminal law. That is to say: Not all punishment is criminal punishment, but all criminal punishment is punishment. A whole range of sanctions are regarded as "civil" in nature and therefore exempt from the implications of imposing punishment. Forms of punishment outside the realm of criminal punishment, just to name a few, include damages, deportation, disbarment, and impeachment. Criminal punishment is a disposition on the basis of a legal

authorization as a result of a distinctive process of the criminal law.

Thus, criminal punishment is part of a larger concept of punishment. And even within criminal punishment, the ways to punish vary, ranging from death, at one extreme, to a suspended sentence at the other. What criminal punishment always presupposes is a formal judgment of guilt or censure. This formal judgment can of course appear in several forms: As judgment by single judge or a panel of judges, by jury, or merely through a penal order. Was Praljak criminally punished then? Yes and no. No, if we subscribe to the idea that punishment conceptually implies the hierarchical superior authority and must therefore be inflicted by that authority (Hobbes, Leviathan, Tuck, ed. (1991), 214). Yes, because even though he escaped the full measure of punishment to which he was potentially subjected by the Tribunal's sentence, the verdict of the court already expresses the requisite condemnation. The process of subjecting offenders to trial, conviction and the associated moral blame would, in most cases, surely suffice to focus the attention of offenders on the wrongness of their behavior. After all, guilt and blame are two necessary but distinct prerequisites of punishment: While guilt is culpable blameworthiness, blame is a social reaction (Morris, The Brothel Boy and Other Parables of Law (1992), 152).

To determine whether or not Praljak escaped punishment, it therefore needs to be explored what impact the actual implementation of the designated punishment has on punishment as a concept. In that regard, the criminal law is caught between two (main) fires: retribution and deterrence, both in several varieties. Retribution, being an absolute (or even absolutist) approach, prescribes that the offender should not be punished for any purpose but retribution; that is to say that from this perspective, punishment is considered a fair balance for the wrong of the offence. Deterrence, commonly – especially in Civil Law systems – equated with prevention, means that it is expected that punishment will prevent offences in the future, that is, it will at least deter the relevant offender (and hopefully others). Now consider Praljak's suicide in the light of these two purposes of punishment, starting with the latter: Evidently Praljak himself will certainly not commit any future crimes, so – however cruel this may sound – the purpose of deterrence can be considered fulfilled.

But how about the retributive element? This question is a little harder to answer. In terms of everyday language, Praljak escaped punishment. People talk about a criminal "paying his debt to society"; we express satisfaction or dissatisfaction when a criminal "gets what is coming to him" or "gets off lightly". The condemned murderer is said to be "paying" for his crime. In ancient times – or legal systems that still have the death penalty – if the accused dies or commits suicide before he can be executed, he is said to have "cheated the gallows". Strictly speaking, however, a retributive justification of punishment merely indicates that Praljak deserved censure – his hard treatment, that is the prison sentence, must find some other justification (Matravers, in Tonry, ed., Retributivism (2011), 34).

Thus, does a retributive view to punishment really exclude punishment by one's own hands? The death penalty is a good example here: There is an understanding that the death penalty comports with the concept of human dignity, in that it treats humans as responsible moral beings. In other words, an individual may actually achieve dignity by being put to death. This view emerged amidst the debate in the USA on whether death row inmates have a right to die by refusing to appeal. Some view this refusal to appeal analogous to the terminal patient's asserted right to die in refusal of treatment or antidysthanasia cases. A strong rejection of this view has been voiced over 200 years ago by no one less than Immanuel Kant. In Kant's view, suicide has nothing to do with respect of dignity, but in fact with the opposite – using oneself as an object or means: "If [someone] destroys himself in order to escape from a trying condition he makes use of a person merely as a means to maintain a tolerable condition up to the end of life. A human being, however, is not a thing and hence not something that can be used merely as a means, but must in all his actions always be regarded as an end in itself. I cannot, therefore, dispose of a human being in my own person by maiming, damaging or killing him." (Groundwork of the Metaphysics of Morals, Ed. and Trans. Mary Gregor (1997), 4:429).

In Kant's view any person who commits suicide destroys himself in order to achieve some end, and in so doing, uses himself as a means to that end. Transposed to the Praljak case: Praljak used his own death as a means to express his innocence and his protest against the conviction and sentence, even though he had the duty to refrain from suicide and self-mutilation. Of course, it is hard to escape a feeling of doubt as to this view – not least because it seems obvious that suicide does not always have a goal, nor is it always a means to an end. Emile Durkheim,

founder of the French school of sociology, divided the causes of suicide into three categories: egoistic (suicide to counter social norms), altruistic (suicide to help others, such as in a lifeboat situation), and, most importantly for our purposes, anomic (suicide resulting from despair). Prison suicides very often belong to the latter category, including "panic over continued isolated or segregated confinement, a feeling of powerlessness to protect oneself from harm or victimization, and last-ditch attempts to convey depth of commitment to a significant person on the outside who has withdrawn emotional or moral support." (DeRosia, Living Inside Prison Walls (1998), 34). Praljak's motives are still a matter of speculation, but who is to say that he did not act out of despair?

The question whether Praljak escaped punishment by committing suicide can therefore not be answered on an abstract level of punishment theory. That leaves the last question: What does his suicide mean for the goals of International Criminal Justice? While retribution as a justification for punishment is still rather popular in national legal systems, its position on the international level is much weaker. The reason is obvious: First, International Criminal Law lacks a consolidated punitive power in its own right, since it does not operate pursuant to a legislative body, but instead claims the ability to punish without the status of a sovereign nation. Drawing on the previously mentioned idea that punishment conceptually implies a hierarchical superior authority: Strictly speaking, without such an authority, there can be no punishment, so for Praljak all bets were off anyway. To provide the opposite example: In 399 BC, Socrates inflicted on himself the death sentence by willingly drinking hemlock, because he felt he was obliged to obey the laws of his government – even though he could have easily convinced the jury to acquit him of the charges of impiety and corrupting the youth of Athens (Stone, The Trial of Socrates (1988), 18, 197). Socrates even rejected an escape plan of his friend Crito. To me, it seems doubtful that Socrates would have done the same standing in the dock of an International Criminal Tribunal. Lacking the confines of a nation state, such a tribunal need to try a little harder to justify the punishment of perpetrators who very often do not even recognize that Tribunal's legitimacy. Second, if punishment was in fact the compensation for the offender's wrongdoing, how could this compensation possibly look in the face of mass murder? A full balance of the wrongs committed is plainly unthinkable.

Thus, on the international level retribution is clothed in an expressivist appearance, i.e. as the expression of condemnation and outrage of the international community, where the international community in its entirety is considered one of the victims. The stigmatization and punishment for gross human rights violations in service of the confirmation and reinforcement of fundamental human rights norms can justify a right to punish of an International Criminal Tribunal that lacks the authority of a state. When in the Erdemović case the majority of the ICTY Appeals Chamber concluded that duress "does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings", it was criticized that the majority "focused not on what Erdemović did but rather on what others might do in the future". (Robinson, 21 LJIL (2008), 946). In this vein, the ICTR Appeals Chamber has emphasized that it was "an institution whose primary purpose is to ensure that justice is done". When in 2010 the ICC Trial Chamber I ordered a stay of the proceedings against Lubanga due to the Prosecutor's non-compliance with a court order, the Appeals Chamber reversed the imposition of that stay, stating inter alia: "A stay of proceedings is a drastic remedy. It brings proceedings to a halt, potentially frustrating the objective of the trial of delivering justice in a particular case as well as affecting the broader purposes expressed in the preamble to the Rome Statute."

Given this justification of punishment, what the world community is trying to achieve through trials like those against Praljak is a communicative effect: To show the world that there is justice on an international level and that no perpetrator of grave international crimes can escape it. That is why International Criminal Law seeks to achieve retributive and deterrent effects of punishment through creating a certain perception of international criminal trials; that is why the protection of due process rights is perceived as absolutely crucial in order to restore international peace and strengthen the trust of the international society in legal norms; and that is why Nazi perpetrators were not shot. Instead, the former President of the USA, Harry S. Truman, remarked at the start of the trials before the International Military Tribunal of Nuremberg in 1945: "[T]he world should be impressed by the fairness of the trial. These German murderers must be punished, but only upon proof of individual guilt at a trial." (cited in Biddle, In Brief Authority (1962/1972), 372).

In light of all this, what can be said about Praljak's suicide? From the perspective that focuses on the expressive view of punishment on an international level, Praljak did not escape punishment – at least, not completely. He received his

formal judgement and the facts of his case were laid out in detail before the eyes of the world to establish, once and for all, the truth. However, he partly defeated the plan of the international community to use him for the purpose of showing the world that it is the world community that decides about the fate of war criminals, perpetrators of gross human rights violations and the like. It cannot be denied that, in rejecting the judgment and taking his own life before the punishment intended for him could be implemented, he very publicly reclaimed some control over his own fate by taking it out of the hands of the tribunal. Proponents of a purely retributivist theory of punishment would find no harm in this, since perpetrators should be respected and not be used for any utilitarian purposes (such as preventing others from committing crimes) anyway. The idea that punishment by the society respects the convicted criminal was already acknowledged by Socrates before drinking hemlock: "If I am condemned now, it will clearly be my privilege to suffer a death that is adjudicated by those who have superintended this matter to be not only the easiest but also the least irksome to one's friends" (as reported by Hermogenes to Xenophon and cited in (Stone, The Trial of Socrates (1988), 184).

The world community, however, concedes a blow to its desire to communicate its anti-impunity agenda when suicide as Martyrdom of convicted war criminals becomes fashionable. In the fragile International Criminal Justice System, that has been under attack by Realists and of course political opportunists ever since, a communicative and expressivist purpose of punishment that is supposed to strengthen the validity of (international) norms requires more than just blame and denunciation; it requires (proportional) hard treatment. In a way, Praljak's suicide is the best example for this: Praljak did not acknowledge his wrongdoing and yet rejected his sentence – he rejected the whole package of punishment, including his sentence. In addition, the argument of respecting the perpetrator can work both ways: Respecting him or her as a person with the consequence of not using punishment for social purposes but purely as retribution; or with the consequence of acknowledging that punishment has a social purpose and is rarely in the condemned person's interest or legitimate from his or her perspective (this is an argument that may follow from Hobbes' right to resist and has been made by Ristroph, 97 California Law Review (2009), 604). Last but not least, hard treatment is a necessary prerequisite for an essential goal of International Criminal Justice: restorative justice, whether in the form of compensation or restitution or otherwise. As Antony Duff – who has for a decade been combining retributive, restorative and communitarian punishment ideas – rightly points out, repentance, reform, reparation and reconciliation cannot be induced by a merely formal condemnation but by hard treatment (Duff, in Tam, ed., Punishment (1996), 17, 24).

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References

Francis Biddle, *In Brief Authority* (Westport, Conn.: Greenwood Press 1962/1972)

Victoria R. DeRosia, *Living Inside Prison Walls* (Westport, CT: Praeger 1998)

Antony Duff, Punishment, citizenship and responsibility, in: *Punishment, Excuses and Moral Development*, edited by Henry Benedict Tam (Aldershot: Avebury 1996)

Thomas Hobbes, *Leviathan*, edited by Richard Tuck (Cambridge: Cambridge University Press 1991)

Immanuel Kant, *Groundwork of the Metaphysics of Morals*, edited and translated by Mary Gregor (Cambridge: Cambridge University Press 1997)

Matt Matravers, in *Retributivism Has a Past – Has it a Future?* , edited by Michael Tonry (Oxford: Oxford University Press 2011), 30-45

Norval Morris, *The Brothel Boy and Other Parables of Law* (Oxford: Oxford University Press 1992)

Alice Ristroph, Respect and Resistance in Punishment Theory, 97 *California Law Review* (2009), 601-632

Darryl Robinson, The Identity Crisis of International Criminal Law, 21 *Leiden Journal of International Law* (2008), 929-963

Isidor Feinstein Stone, *The Trial of Socrates* (London: Head of Zeus 1988)

Case Law Sources (chronologically)

ICTY, *Prosecutor v. Prlic et al.*, Appeals Chamber Judgment Volumes I-III, 29 November 2017 (IT-04-74-A)

ICTY, *Prosecutor v. Mladic*, Trial Judgment Volumes I-V, 22 November 2017 (IT-09-92-T)

ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Appelas Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010 (ICC-01/04-01/06-2582)

ICTR, *Prosecutor v. Barayagwiza*, Appeals Chamber Decision (Prosecutor's Request for Review or Reconsideration), 3 November 1999 (ICTR-97-19-AR72)

ICTY, *Prosecutor v. Erdemović*, Appeals Chamber Judgement, 7 October 1997 (IT-96-22-A)

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