THE AD HOC TRIBUNALS ORAL HISTORY PROJECT

An Interview with

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Q1: Can you start by telling us how you joined the ICTY?

Pocar: When I was asked in September 1999 by the Italian government to join the International Tribunal for the former Yugoslavia, I hesitated to accept, and finally said “yes” only after considering that the appointment that was offered to me was for a limited time, just to end the term of office of Judge Antonio Cassese who was going to resign after completing the trial he was presiding. It was an appointment for one year and nine months, after which there would have been a new election of all the judges of the Tribunal. That would have given me an opportunity not to continue without resigning. It was my first reaction, and that's why I accepted. I was not very convinced that the establishment of the Tribunal was a good initiative, and to some extent I shared the criticism that had been expressed by several international lawyers. But I was also attracted by the new task, and said to myself: “Well, let's try and see how it is.”

Q1: And what was the nature of those criticisms?

Pocar: First of all, the discussed legitimacy of the creation of the Tribunal by the Security Council; that's still challenged by some. Then, the retroactive jurisdiction, and the risk of retroactive application of the law. The Tribunal was created, like the Nuremberg Tribunal,
without previously resolving the legal issues that the Tribunal had to address. Therefore, most of the criticism expressed with respect to Nuremberg could apply to the ICTY. Finally, the procedure. I was not sure that the ICTY could fully respect the principles of fair trial enshrined in the human rights treaties, in particular in the International Covenant on Civil and Political Rights. In Nuremberg, such principles had been respected only in light of the legal doctrines of that time, but now human rights law has made great steps forward, and it was not obvious that the ICTY could go along with this development.

I had followed the case law, but it was very limited, Tadić essentially, and my doubts remained. However, as I said, I decided to try. After all, I considered that there would have been experienced judges at the Tribunal, with experience in international law and in criminal law, judges who had been judges before. I had never been a judge, and that also may explain my hesitation. And then when I joined, I humbly decided that I had to learn how it was. I was put on a case that nobody wanted, actually.

Q1: Which case was that?

Pocar: The Kunarać case, a rape case that did not attract the interest of many judges, probably because it did not involve high ranking perpetrators. But I realized that it was extremely interesting, even if the level of the three accused was indeed not very high. These were ordinary soldiers who participated in hostilities, who constituted a group that, besides fighting, organized a system of sex crimes and sexual exploitation of women detained as prisoners. Thus, the subject
matter of the case was interesting, because it was essentially the first case entirely devoted to this serious matter. There was some precedent in the ICTR, some precedent in Arusha, but that was the first case essentially.

**Q1:** And this is the first case of rape as a crime against humanity?

**Pocar:** Exactly, both as a war crime and as a crime against humanity. It was one in which the definition of the crime was made, and it has become a leading case in the end. It was entirely confirmed on appeal, and remained a reference case. It was not easy to find a solution in the first instance, because the bench was slightly split on some issues, but in the end we adopted a unanimous decision.

**Q2:** Who was on the bench with you?

**Pocar:** There was Judge [Florence] Mumba from Zambia, who presided, and Judge [David] Hunt from Australia. It was the only case where I sat on a trial. When leaving, Cassese recommended that I be put on appeal, but there was no position available in the appeals chamber. Claude Jorda had just been elected president of the Tribunal, and had joined *de jure* the appeals chamber, taking the position of the former president [Gabrielle] McDonald, and there was no seat available on appeal. Thus, I took the position of Cassese in Trial Chamber II.
But, in a way, I was lucky to have this opportunity to sit on a trial. Had I been assigned immediately to the appeals chamber, I would have missed it, as it happened to other judges who took an appeal position as soon as they joined the Tribunal. The trial experience is challenging and very formative for becoming a judge. But I remained in the trial chamber only until the conclusion of that case, and ended up being an appeals judge also during the *Kunarač* case.

When I arrived at the Tribunal in February 2000, the appeals chamber had just decided to go to Arusha to discuss the first appeal case of the ICTR, as well the review case of [Jean Bosco] Barayagwiza where the accused had been acquitted because of the violation of his pre-trial rights, and the prosecutor had requested its review submitting new facts. As the *Kunarač* case did not start until the end of March and one of the judges of the appeals chamber – Judge Wang – could not travel to Arusha because of health reasons, President Jorda asked me to fill in the gap and join the appeals chamber for this trip. So, I actually began my work as a judge in the ICTR.

**Q1:** And this is the case where he was being held in Cameroon?

**Pocar:** Exactly, in Cameroon. It was a difficult review case, it was on human rights, on the impact of undue pre-trial detention on the fairness of the trial. But it was a good case for me because I was just coming from fifteen years of membership on the Human Rights Committee under the International Covenant on Civil and Political Rights, during which the issues related to the fairness of criminal proceedings had been discussed innumerable times. So it was a typical
case in which I could bring a significant contribution based on my experience in dealing with human rights in another United Nations quasi-judicial body.

**Q1:** Because not everybody will know exactly what happened when he was detained in Cameroon, can you just explain?

**Pocar:** Mr. Barayagwiza was arrested in Cameroon at the request of the prosecutor of the ICTR, who was at the same time the prosecutor of the ICTY, Ms. Carla Del Ponte. He was detained in Cameroon instead of being transferred immediately to Arusha. The Cameroonian authorities didn't know what to do exactly under their constitution, I think; they didn't have a specific law under which to proceed to cooperate with the ICTR. Their institutions tended to rely on the general procedure for extradition, rather than a simple procedure for surrendering the accused to the Tribunal, and he remained around two years there in pre-trial detention before being transferred to Arusha. Eventually he was transferred to Arusha, and there again he remained for ninety days before being brought to a judge, which under human rights law is simply unacceptable. So there were some violations also after he was put under the control of the ICTR, but the length of the detention in Cameroon was the issue mostly under discussion.

Although the accused had been arrested at the request of the international Tribunal, according to the prosecution, newly discovered facts proved that the length of the detention was largely attributable to the Cameroonian authorities, not to the ICTR. Thus, the violation of his rights attributable to the Tribunal was ostensibly less serious than the appeals chamber had considered
in its previous judgment, which had concluded in favor of the release of the accused. Now, it is interesting to notice that the appeals chamber included three judges—this is a majority—who had taken the previous decision, and might have been initially inclined to confirm the previous decision. Two judges were new, including President Jorda and myself. I had no idea what to do at the beginning, so I studied the case, and listened to the parties before inclining towards a decision. And then we finally had deliberations on the case, and I felt already well integrated into the group. We stayed almost two weeks in Arusha. It was a time during which there was some relaxed activity, we heard another couple of cases, Semanza and the final appeal on Serushago, which was the first final appeal of the ICTR.

This reminds me now that I was present in the first final appeal and that I presided the last appeal of the ICTR, just last month. I was on the bench of around thirty appeal cases in Arusha, and I participated in adjudicating the first and the last. I believe that this is something unique, that I could not even imagine at that time, a fortnight after assuming my functions as an international judge.

Coming back to the appeal deliberations in Barayagwiza, they were held quite differently from today, because they were attended only by the judges, not like today when also their legal officers are present as well, their—

Q1: Law officers?
**Pocar:** The judges’ associates who were clerking for them, actually.

**Q1:** So now all those people are in deliberations?

**Pocar:** Now all of them are in deliberations, although they do not participate in the debate. They may be asked clarifications on preliminary drafts they have helped to prepare. But the curious thing was that out of the five judges composing the bench, only two were proficient both in English and in French, including myself.

**Q2:** And you didn't have any interpreters?

**Pocar:** No. And it was me interpreting. I was asked to be the interpreter of the chamber. But of course, I'm not an interpreter, I was not really able to do it. Sometimes I summarized an intervention in the same language I had listened to, and then translated the summary, thus probably losing the sense of what had been said, or not explaining the reasons adequately. I may even have made some of the colleagues believe that I was changing the meaning of some interventions. I did my best, but certainly while translating I was thinking of my own approach to the case, and may have reported some interventions as being more inclined to a solution closer to my thinking that they actually were. I certainly did not “manipulate” the debate, but I could have done so. And because I spoke English, French and Spanish, the native language of one of the judges, and also used that language in talking to him although he spoke like me also English and French, I do not know if all the bench followed the debate in the same way.
In any event, we reached a common agreement to revise the decision, and to revoke the release of the accused. How exactly to do it, through what precise reasoning, remained to be finalized after the preparation of a draft decision. On one thing there was full agreement at this stage. All my colleagues said to me, "Well, you do it." There was consensus, so I was obliged, at my first experience in a judicial bench—I had never been a judge before in my national system—to put that consensus on paper with an adequate reasoning.

**Q2:** And what was that like? Did you have experience from the work you did on the Human Rights Committee?

**Pocar:** Well, it was a human rights case essentially, implying issues of violation of fair trial principles, in particular of an unduly prolonged pre-trial detention, as enshrined in the International Covenant on Civil and Political Rights, that I had applied in numerous communications before the Human Rights Committee. The appeal decision was based on the consideration that the violation attributable to the organs of the tribunal was not so serious as it had been assessed in the previous judgment, and consequently not such as to entail a release as an appropriate remedy. The reasoning was that the gravity of the violation of the right of an accused to have a fair trial had to be balanced against the general interest of the international community to see a case of genocide prosecuted, and if the accused is guilty, to see him convicted. On the other hand, I was firm in maintaining that if there is a violation of human
rights, it has to be remedied. But then what could be the remedy? How could the violation be remedied if the release was revoked and the trial continued?

I proposed, and my colleagues accepted, to decide that the trial should go on notwithstanding the violation. If, at the end of the trial, the accused was convicted, the violation should be remedied by a reduction in the sentence. If, however, he was acquitted, he should receive a compensation as a reparation for the violation suffered. The United Nations would be responsible for paying the compensation that the trial chamber would decide. In other terms, the situation was to be dealt with according to the same criteria usually followed for violations of human rights by State authorities. Paying compensation for the violation is the only remedy when a *restitutio in integrum* is not possible. Eventually Barayagwiza was convicted, and he was recognized as responsible for genocide like his other two co-accused. But unlike the co-accused, who were sentenced to life imprisonment, he received a detention term, in order to compensate the violation suffered during his pre-trial detention. That was a precedent that was applied in the *Semanza* case. In another case where the accused (André) Rwamakuba was acquitted, the trial chamber decided for a monetary compensation. After some hesitation, on the advice of the legal counsel, the UN decided to pay.

**Q2:** How did they determine the compensation for—?

**Pocar:** I don’t remember exactly the criteria followed by the trial chamber. I remember that it was a violation of limited entity, and the chamber decided for a compensation of some thousands
of dollars. There was an appeal on the amount, but the appeals chamber rejected the appeal by referring to the discretion of the trial chamber in sentencing. But although limited in size, the precedent is significant as a matter of principle. If the United Nations decide to exercise criminal jurisdiction in lieu of states, the organization should be subjected to the same obligations imposed on states by international law when, in connection with a criminal proceeding, a violation of the rights of the accused occurs.

**Q1:** Could I take you back for just a moment, because you know there are so many different lines of thought here. With all the criticisms that you knew about the Tribunal, its jurisdiction, its legitimacy, and various other aspects, what were your first impressions when you arrived? I mean you were immediately involved in a trial, and then an appeal. What were your impressions of how this Tribunal was working?

**Pocar:** I had the impression it was trying to work well; that was my immediate impression. And while I had accepted the invitation of my government to become a judge of the ICTY with some hesitation, if not reluctance, with the intention of trying do my job without any further involvement, I was very soon attracted by the novelty of the challenges offered by the Tribunal and ended up being involved in them. My commitment increased and I devoted my attention entirely to the Tribunal. When I was asked to be on appeal for the cases of the ICTR we have just discussed, I knew that it was a temporary assignment. But Judge Wang resigned after one month, and the opportunity to take his place was offered to me, even if it appeared an unlikely prospect because, in the meantime, the trial to which I had been assigned, the *Kunarac* trial, was
about to start, and the president of the chamber did not want to delay the proceedings if I were to be reassigned to the appeals chamber. The discussion between President Jorda, who wanted me on appeal, and Judge Hunt, the presiding judge of the trial chamber, ended with a compromise whereby I was offered to join the appeals chamber, provided that I accepted to sit also on the trial that was about to begin. It was an excess of work, especially for a beginner like me that still had to learn most of the rules of the Tribunal, but I felt so involved in my function as a judge, that I accepted without hesitation.

I recognize that it was a good decision. Although for almost one year my work was sometimes a nightmare, because I had to participate in the hearings and deliberations of the appeal chamber during the trial, sometimes even during the short breaks necessary to allow the interpreters to take thirty minutes of rest. In less than one year I had learned most of what could permit me to sit together with colleagues who were far more experienced than me. After a few months, I was able to give my full contribution to the determination of the cases in which I was involved, and to discuss issues with my colleagues suggesting solutions and achieving majority on them. Just as an example, I happened to shape the solution that was finally retained on one of the most delicate issues of criminal law, the issue of the concurrence of crimes based entirely or partially on the same conduct of the perpetrator. That issue was resolved on appeal in the *Celebici* case, decided by a narrow majority that comprised me, but later accepted in all subsequent cases as the jurisprudence of the Tribunal. It was the choice made in that case that permitted us to convict, in the *Kunarac* case, the accused both for torture and rape for the same conduct and to identify the elements of rape as an independent crime, though accepting that the conduct of the perpetrator
could be characterized also as torture. Perhaps it was because I was at the same time sitting on appeal in the *Celebici* case and on trial in the *Kunarac* case that the decision in favor of cumulative convictions was reached, as the participation in both cases made me more attentive to the problem.

In any event, because of the fact that I was determinative in reaching that decision, I became one of the key judges of the Tribunal. Looking back at my hesitations in accepting to become a judge and to the initial reluctance to be too involved in the Tribunal’s activity, I could only be surprised by this change in my approach to the life of the institution. The initial idea of leaving after one year and a half vanished, and I participated in the following election, in 2001. The result was that I was the first elected judge by the vote of the General Assembly. And after fifteen years I am still here.

**Q2:** What was it like for you to be in a trial as a judge when you had not been a judge before?

**Pocar:** You learn quickly. You learn quickly to assess the credibility of witnesses. In the end—the problem is not to be affected personally by the content of the testimonies, especially in these type of trials where most of the witnesses are victims. I mean that you may be too impressed by the atrocities that are referred to in the testimony and may tend to believe the witness, without objectively considering the facts. But in the end, one learns quickly to be objective and to believe or not believe even the witnesses who are victims. In practice, I was normally in line with more experienced colleagues in assessing whether a witness was credible.
It is far more difficult to assess the credibility of a witness on appeal when you may look only at the record. And I believe that the Tribunal made many mistakes when it insisted in reviewing in detail the oral evidence on appeal; one should never do that on a regular basis, but only when the assessment of the first judge is clearly erroneous — but this is an exceptional case. Normally the credibility should not be revised on appeal. An appeal judge would assess it on the written record; he or she doesn't see, doesn’t hear the witness. A trial chamber that directly sees and hears the witness, and can also control if necessary the written record, is in a much better position to decide on credibility.

Thus, one should defer to the trial chamber on that matter and leave it the responsibility of deciding on credibility. It is in some way arrogant for an appeal chamber to pretend to better assess the credibility of a witness than the trial chamber, as the appeal chamber does not have all the elements available to the trial chamber to make the right decision. With respect to errors of law, it is a different issue, of course. But the Tribunal created a sort of intrusion in the trial chamber as if it were a civil law jurisdiction. In many civil law jurisdictions such in intrusion is possible, because that jurisdiction will repeat to some extent the trial on appeal, rehearing the witnesses and other evidence—it's a sort of a second instance and not just an appeal. It's a new opportunity to discuss the case, where the decision reached on appeal will be subject to revision, at least in law, by a higher court.
If you don't have a further remedy, I believe that the appeal chamber intervention should be restricted, and limited to checking the lower chamber’s decision according to certain standards, which should pay some deference to the trial instance, especially as far as the appreciation of the evidence is concerned, as is normally the case in common law jurisdictions. I always tried to be guided by a rigid respect for predetermined standards of appeal. I ended up applying criteria that were more common law criteria than civil law criteria. To the point that once a colleague, a very respected judge from a civil law country, half jokingly and half seriously accused me of being a “traitor” because I was reasoning, in his view, like a common lawyer!

In any event, I am referring now to cases in which there is no rehearing of witnesses on appeal. If some witnesses are reexamined, or new witnesses are heard on appeal, as was possible according to the rules of procedure and evidence of the Tribunal, of course you have a new case, and there should inevitably be less deference to the trial chamber. The Appeals Chamber made a limited use of this possibility, and restricted the submission of new evidence on appeal only to situations in which that was strictly necessary, as it was, in particular, in the case of the Blaškić appeal. Except for the cases in which new evidence was accepted on appeal, deference to the trial chamber in evidentiary matters should have been the rule, a rule which was too frequently disregarded by the Tribunal’s appeal benches. That’s why I ended up writing on this issue in my dissenting opinions. In this context, I think that an excessive intrusion in the assessment of the evidence by the trial bench has led eventually to wrong decisions based on the non-credibility of witnesses that the trial judges had regarded as credible. Maybe these wrong decisions ended up
in acquittals, and did not affect negatively the accused. But certainly they did not serve the purpose of reaching just outcomes in the cases.

Sometimes colleagues have defended their position on this matter by saying that a fair judicial system has to accept acquittals even when heinous crimes are charged. I agree with this, but I maintain that incorrect acquittals are not a good policy because justice must also meet the expectations of the victims, who are entitled to see perpetrators convicted. Justice has to be done also to the victims, not only to the accused. And must be seen as having been done. The accused must enjoy all the judicial guarantees provided for by the law, but should not be shielded beyond what these guarantees require. In this respect, my experience was not always good on appeal.

Other approaches were difficult to accept, of course. I was surprised, for instance, that several colleagues paid little attention to human rights law. I always regarded the layer of criminal justice as an additional layer to the protection of human rights. The human rights international system of guarantee consists of procedures targeting the states that violate the rights, but usually they do not consider the individual who commits the violation, leaving the state to punish him or her. Now, this system is clearly not sufficient in the presence of violations of a certain size, which are at the same time domestic and international crimes. In such a case, it is necessary not only to tell a state to remedy the violation, but also to present the state the alternative either to punish the perpetrators or to accept that the international community will do it. In that sense, international criminal justice is an additional protection of human rights. This implies that human rights are also the basis of international justice. However, I found that the decisions and
their reasoning sometimes ignored the human rights dimension of the problem—I mean, it would not pass positively the screening of any international human rights body.

Q1: Are you thinking of something in particular?

Pocar: Well, for instance, the appeals. During all my time at the Tribunal I was alone in maintaining that an accused acquitted on trial cannot be convicted on appeal, unless there is a further appeal against his conviction. Under international human rights law, the principle that any person convicted of a criminal offence is entitled to an appeal against the conviction is clearly enshrined in Article 14 of the International Covenant on Civil and Political Rights, and has to be observed by any court, including an international tribunal. It is true that some human rights conventions, in particular the European Convention on Human Rights, do not protect that right, but this is not a good reason to assert that the said right does not exist. The failure to protect a right only means there is no entitlement to it under the European Convention, it is not evidence that in international law the right does not exist, in particular under a universal instrument like the International Covenant. Simply, persons first convicted by appeals jurisdictions of the states parties to the European Convention would not be able to bring their case before the European Court of Human Rights. However, as the states parties to the European Convention are also parties to the Covenant, these convicted persons would still enjoy the protection afforded by the Covenant.
But what I found even more shocking is that some colleagues have maintained that the Covenant is not applicable by the ICTY and ICTR because it is a treaty binding on states, and not on international bodies created by the United Nations. It means forgetting, or ignoring, that the International Covenant was adopted by the General Assembly of the UN as a solemn declaration of principles, so that any UN body is bound to apply it. It means also denying the applicability, in proceedings before the Tribunal, of principles that states would be obliged to follow if the criminal prosecution were held domestically. As a matter of logic, it does not make sense that, if a UN body exercises jurisdiction in lieu of states, that body would be entitled to deprive the accused of rights he would have enjoyed if the prosecution were conducted before his national court.

Q1: Do you think that this concern with understanding the foundation of human rights went into the criteria established at the ICC for its judges? One list calling for criminal expertise along with the other calling for expertise on international law, including human rights?

Pocar: We cannot generalize situations, but most of the mistakes that, I think, we made were done by professional judges. It is a fact that the most creative solutions have been made by those who had not been professional judges in their countries. I don't speak of diplomats, because their profession has an approach which is not based on law but on other considerations in settling disputes. But the judges made sometimes mistakes because they—especially criminal judges—rarely have previous experience of international life, and of international law. So they miss sometimes the context in which they work. A judge, of course, has to be independent and
impartial, and not be influenced by political considerations, but a tribunal is not an abstract but a social institution, and it must be aware of the environment in which it works. The same applies to national judges. They have to be independent and apply the law impartially, but they have to know the social life of their country. They cannot be in an ivory tower and neglect what happens in the outside world. I had the impression that sometimes professional criminal judges acted as if they were working in their national environment, without an appreciation of the international context in which their decisions are to be received and implemented.

**Q1:** So they're de-contextualizing?

**Pocar:** Precisely. That doesn't mean that those who are international lawyers are necessarily the best judges, because they too may make mistakes and not understand correctly a legal issue. It depends on whether they are good international lawyers. But in general international judges should be aware of the context in which they work and have a good knowledge of international life. While the presence of international lawyers has been relatively good in the Ad Hoc Tribunals, it is very limited in the ICC, where the number of international lawyers has been and is extremely low. This may be one of the reasons why the ICC has had such a limited role in the development of international justice so far. Is there an interest of states parties to keep the Court at a low level and prevent it from impacting on international justice, because of the fear that it might become too powerful, especially if it prosecutes high ranking persons in the states’ governments? I prefer not to give an answer to this question.
Q1: And speaking of the international context, you referred earlier to justice and the importance of justice. What are your reflections now, looking at the ICTY and the ICTR? Do you think that they have served their purpose, have they served justice, are they operating well for an international context?

Pocar: Well, I would make distinctions as to their contributions to the development of international criminal law. On many issues, especially in the definition of war crimes and crimes against humanity, the two Ad Hoc Tribunals have brought a great contribution in that crimes that had not been defined sufficiently are now better explained in their elements. In this respect, the contribution given to the development of international criminal law has been prodigious, there's no doubt. Their contribution has perhaps been less significant in terms of the modes of criminal responsibility; some progress has been made, but there are lights and shades, and the case law reflects the difficulties that the tribunals have encountered in this regard.

Q1: And so that everybody understands what you're talking about, what did you—

Pocar: For instance, certain standards of criminal responsibility, such as that of command responsibility, which were highly disputed since the case law developed immediately after WW II, have been defined. Certainly there is progress as compared with the Yamashita case [concerning command responsibility of crimes committed by Japanese forces against civilians in WWII], which applied a standard essentially based on strict liability for a military commander, so some progress has been made. But not everything has been fully defined: the "effective
control” element, which has been strictly linked to the ability to prevent or punish, would probably require more in-depth consideration and refinement. More generally, the liability for committing a crime does not require further developments when perpetrators materially committed the crime. On ordering, quite a significant legal improvement has been achieved, in particular in the Blaškić case which tried to clarify the distinction between intent and negligence, in a manner that could result as valid both under common and civil law. Here there is a difficult issue of comparative law, because common and civil law are not on the same page, I mean on these matters, and it's difficult to combine them.

The most contentious mode of liability, however, has been aiding and abetting. This has been a nightmare because the search for an international definition started following an approach which remained undisputed for years, in the sense that a possible misunderstanding in the original definition given in the first case was immediately clarified in subsequent cases and led to coherent case law; then, however, there was a clear deviation in the Perišić appeal case through a tendentious interpretation of such case law, which was far from being acceptable. And that interpretation is still there in a way; it has been corrected but I'm not sure that there is a will to consider it completely defined.

**Q1:** And you're speaking of the Tadić case?

**Pocar:** I speak of the Tadić case, yes, which defined aiding and abetting in a way that might have given rise to different interpretations. But that definition was subsequently clarified in the
following cases and for years that clarification was coherently confirmed. The deviation was therefore surprising for the legal community, and provoked reactions not only in the ICTY and ICTR, but also in other international courts, like the Special Court for Sierra Leone, which criticized the deviation firmly in the Taylor case as being unacceptable under international customary law.

I have to add that, while the Perišić judgment was criticized on merely legal grounds, it also offered arguments for speculations based on political grounds, as its approach could be seen as a restriction of the standard of liability for aiding and abetting that might be favored by governments which provide weapons to a party in an armed conflict. I am not, of course, endorsing such speculations, and regard the judgment as wrong in law. But it is unfortunate that, in terms of appearance, the perception might have been that its approach could have been influenced by political considerations. Moreover, from a criminal policy point of view, if the Perišić appeals chamber approach had to be accepted, it would to a large extent set aside a mode of liability that plays a great role in prosecuting high ranking officials, thus frustrating the purpose of international justice, which is precisely to reach the high-level persons involved in the perpetration of international crimes.

Coming back to your question on Tadić, this case was probably the most significant one in terms of a contribution to the development of international humanitarian law, because it bridged the distinction between the regime applicable to international and non-international armed conflicts with respect to the prosecution of international crimes. The "grave breaches" regime of the
Geneva Conventions and their Additional Protocols of 1977 concerns only international conflicts, and was never accepted by states for domestic armed conflicts. But Tadić concluded, following a reasoning that I cannot explain here in detail, that there is under international law a regime for grave breaches in non-international conflict equivalent to the one applicable to international conflicts. This was an incredible contribution to the development of international criminal law, that could not have been imagined a few years earlier. And it is an achievement due to the colleagues who served as judges at the beginning of the life of the ICTY—Cassese, Abi-Saab, and others—who had the ability and the courage to propose this interpretation of the law.

**Q1:** And it's interesting when you look at all the ICC conflicts, which essentially are all non-international—

**Pocar:** Indeed, and that’s why this development is so important. Of course, the jurisprudence of the ICTY and of the ICTR has been significant also with respect to the definition of individual international crimes, for instance the crime of torture, although this is a crime well established in international law. However, there is a trend to apply the Torture Convention of 1984, which limits the scope of the crime to acts of torture committed by public officials. This is a serious limitation when acts of torture are committed in a non-international armed conflict. Only the combatants on behalf of the government will qualify as public officials, while the other side comprises armed groups, which are not public officials. Consequently, only the combatants on
behalf of the governments would be liable for acts of torture under the law. Is this an acceptable solution? Obviously not.

The ICTY case law reached an acceptable solution based on customary law, thus following an approach somewhat similar, or parallel, to the approach in Tadić. While recognizing that the 1984 convention provides for a standard reflecting customary law, the Kunarac trial bench concluded that that standard does not exhaust customary law, which has a wider scope, and includes also acts of torture committed by private actors in an armed conflict. In doing so, the trial chamber relied to a large extent on the ICCPR, where torture is defined in more general terms than in the Convention. The broader scope of Article 7 of the Covenant was recognized by the Human Rights Committee in a general comment, by stating explicitly that the provision applies also when torture is committed by private individuals. I remember it because I happened to be a member of the Committee when the general comment was adopted, and had myself made the proposal to insert the relevant paragraph into the text. And I remember that there was a long debate on this issue. Thus, it was natural for me to propose the same approach in dealing with the notion of torture in the field of criminal law, and colleagues in the bench had no difficulty in accepting it. As I said, such a proposal was in line with the development achieved by Tadić, as it aimed at streamlining the law applicable to international and non-international armed conflicts. For me, it was another opportunity to draw solutions from my previous experience in human rights law, and a further confirmation of my view that human rights and criminal law are and must be strictly connected. In the end, one ends up contributing to customary law if there are
more instances of taking the same position, because these positions establish an international practice.

**Q1:** And clearly it's been so important in the development of the Tribunals to have really strong legal minds with that kind of experience.

**Pocar:** Yes, but unfortunately, states are not necessarily going in that direction. They may nominate persons just because they have to give them a position, rather than opting for persons suitable of acting as able and efficient criminal judges. It is my feeling that at the beginning there was much support by states. I have the impression that, when states realized that justice could reach the high levels, heads of states, heads of government, their support became weaker. At the beginning, governments encouraged criminal justice as a shift of responsibility from the state to individuals, so that there would be less attention to state responsibility. What I am saying may be a speculation, but there have been cases in which a state did not provide evidence to the Tribunal that would have been in favor of a defendant who was a national of that state, because that evidence would have shown that high-ranking persons in the government and possibly the head of state were involved in the crimes. They thus sacrificed a soldier or a general in order to protect these high political levels.

Perhaps, when states started to realize that the case law could reach high levels, they reduced their support for international criminal justice, or tried to increase their control on the prosecutorial policy and the conduct of criminal prosecutions. I wonder whether this is what
exactly happened with the ICC, which is only formally supported by states. The reality is that the Assembly of States Parties is micromanaging the Court and reducing its freedom to act and thus its independent power.

Q2: So, are you saying that one of the ways that states do not support international criminal justice institutions is by not putting forward the best people?

Pocar: Yes. I think this is unfortunate, although one should not generalize, because there have been excellent international criminal judges also in the ICC. But states should do more, and try to select the best candidates, both as judges and as prosecutors, who would show full commitment and would be able to develop a coherent and solidly grounded jurisprudence. Sadly, the experience of the ICC shows that this is not always the case. Luckily, there are still some very experienced judges there too.

Q1: So you were talking legal developments, how you'd look back at the ICTY and ICTR and see they made very important contributions. And you were saying you would separate different aspects of the international justice context. I assume another aspect might be the judges, but what else were you thinking about in terms of their effect?

Pocar: In terms of justice, from the point of view of the Tribunals’ contribution to reconciliation and to bringing victims closer, I think that the result is limited. What do I mean? It is enough to look at the situation in Bosnia, where the country is still torn by ethnic confrontation in many
regards. The situation in Rwanda is slightly better, but justice in Rwanda was exercised by the ICTR unilaterally, and did not address all the perpetrators. In some respect this happened also in the ICTY, but to a lesser extent. Much depends on the prosecutor, of course. I believe that too much freedom was given to the prosecutor to decide the cases to be prosecuted, and too much freedom means also the risk that the prosecutor follows the influence of one side or the other. This clearly happened in Rwanda, where the government of Rwanda made clear as of the onset that it didn't want any case against any Tutsi, or it would not have supported the Tribunal and cooperated with it. And indeed there has been no case against a Tutsi. When Prosecutor Carla Del Ponte envisaged some investigations in that direction, the government reiterated its initial position. The reaction of the Security Council was to appoint another prosecutor for the ICTR, and to restrict the mandate of Ms. Del Ponte to the ICTY.

As I said, the situation in the ICTY was different, and the prosecutor could investigate in all directions. However, this did not prevent criticism of the Tribunal for being too much oriented toward prosecuting Serbs rather than Croats and Muslims, thus appearing to favor a political position of Western countries. A confirmation of this approach was seen sometimes confirmed at the trial and even more at the appeal level in light of some unconvincing acquittals, as mentioned earlier.

**Q1:** Do you think it's more the inside factors of who is the prosecutor, who are the judges, or the outside factors of politics, the international community?
**Pocar**: Well, I recognize that it's very difficult for a prosecutor to be totally independent. It is difficult for a domestic prosecutor, and for an international prosecutor even more difficult. Moreover, the international prosecutors have been not elected, but, unlike the judges, appointed by a political instance, represented by the UN Secretary-General, acting on advice of the Security Council, which is driven by five permanent members, the so called P5. It is therefore unlikely that a prosecutor would be appointed who would adopt a policy aimed at creating major problems to the five permanent members. I'm not necessarily blaming or criticizing prosecutors, but simply recognizing that they have to take into account the current structure of international society, which is only formally composed of subjects enjoying equal rights. In this context, some prosecutors were more courageous in taking initiatives, some were less, perhaps also depending on the times in which they served at the Tribunals. Notwithstanding the criticism that sometimes characterized her activity and her demeanor, that came also from myself, I regard Del Ponte as having probably been the strongest prosecutor of the ICTY.

**Q2**: It sounds like you were referring to the period where you were president. What are your thoughts about having been president of the Tribunal?

**Pocar**: It was probably one of the best periods for the Tribunal. I was lucky. Not because of me, but because we were at the peak of our work, the amount of work made it difficult to achieve timely results, so it was a challenge to accomplish it all. And it was the moment when indictments were closed by the Security Council, and almost all the cases were pending. Additionally, and unfortunately, at the beginning of my term we experienced the suicide of
Babić, and only one week later the sudden death of Milošević. The reputation of the Tribunal went very low, and the only answer possible was to continue working, and show that nonetheless the mandate of the Tribunal could be accomplished.

In a deeply de-motivated environment, under deep criticism by the great powers and by the Security Council, it was difficult to overcome those tragic events. I think I took the right decision by keeping calm and doubling our working capacity, rather that engaging in discussions with the media, as some would have liked. In my view, the only answer to criticism resided in dedicating our efforts to work as best and efficiently as possible, in order to regain our reputation. Our common efforts in that direction were successful, and, within less than one year, all criticism vanished. It was a time where my leadership was never challenged by my colleagues, and I owe much to them if I led the Tribunal into a safe harbor. I also have to mention the valid support I received by my vice-president, Judge Parker, who conducted on my behalf excellent inquires into the deaths of the two detainees, so well conducted that nobody could challenge their results. For me that period was a full-full-full-time job; I couldn't even think of doing anything else at the time. But it was a very interesting and challenging time.

**Q1:** What are your thoughts today about the *Milošević* case?

**Pocar:** Some mistakes were clearly made in dealing with this case. It was too big, first of all. There has always been at the Tribunal a tendency to prosecute and to write history at the same time, which one should never try to do. A case may contribute to history, but it cannot be aimed
at writing history. In a case one should concentrate on some counts, some charges, and limit the case to these charges, even if this will not bring closure to all the victims with respect to all their individual suffering. Thus, one should not bring sixty charges against an accused; it would lead to an exceedingly long trial. One should especially not do it in an environment where a court needs the cooperation of governments in order to have the witnesses appear before it. It takes time for achieving such cooperation. Moreover, the examination of witnesses always takes much time, almost double time than in a domestic trial, because of the translation problem. Any question put to a witness, who will speak neither English or French, will have to be translated before receiving an answer, which will in turn have to be translated. This makes the examination of witnesses time consuming, much more than in domestic cases.

The consequence is that a prosecutor, or a bench, should reduce the number of crimes so to deal efficiently with the trial. It probably was an error to merge the two original indictments that existed in this case, an error made by the prosecutor who asked the chamber to accept it, and of the judges who endorsed that choice. Additionally, it was clearly a mistake to interpret the right of the accused to defend in person in a wide sense, as it was interpreted by the trial chamber, thus allowing the accused to assume his defense, though benefitting from all the advantages inherent in a defense conducted by counsel. That mistake ended up influencing other cases. Recognizing such an extended right to Milošević, it had to be granted to any other accused. Recently, I read that there have been accusations by somebody in New York that it’s my responsibility, as president of the Tribunal, what happened with the Šešelj case. Because the trial chamber had refused his right to defend in person, he went on a hunger strike for more than one month. When
I learned from experts that this could lead to a situation where the person concerned could die, I had to intervene to prevent such a development of the situation. A few months earlier, Milošević had died by a heart attack in his cell, and just a week before Babić had committed suicide in the detention center. I could not allow this to happen again, and eventually I decided to propose to my colleagues that they accept an appeal from the accused, which was agreed upon by the whole Appeals Chamber and gave back to Šešelj the right to defend in person. On the one hand, this decision caused additional difficulties to the trial, but on the other hand, had Šešelj been denied the treatment given to Milošević—and to other accused after him—he could have claimed that the Tribunal was using two different standards, thus discriminating against him. Therefore, I still believe that it was correct to allow him to defend in person. The mistake was done in the first occasion in which the right to defend in person was granted unreasonably broadly.

This was a typical mistake made by lawyers when deciding to stick rigidly to domestic procedures in their countries. Under the rules of criminal procedure of some common law countries, an accused represented by counsel cannot take the floor in court, except when he decides to be heard as a witness. I personally experienced the situation where a common law colleague denied an accused the right to add something to what his counsel has said. That's why the accused use to pass written information to counsel during the hearing, but they are not allowed to address the court. It is different in civil law countries; if an accused wants to address the court, he is usually permitted by the presiding judge to do so, even if he is represented, as is normally the case, by counsel. I this is a better construction of the right to defend in person.
Now, clearly Milošević wanted to address the court, wanted to defend alongside his counsel, but was probably advised that he would not have been allowed to do so by a bench composed in its majority by common law judges. So he decided to defend in person, in order to speak directly to the bench. Had the bench made clear that he would have been allowed from time to time to address the court personally, I wonder whether he would have ever taken that decision.

**Q1:** So some of the civil law/common law differences played out in these sorts of issues, such as self-representation. In general, what was it like for you to work in this environment? You come from a civil law system, there are obviously many common law judges and lawyers, it was a real mixture at the Tribunal. So what was it like for you when you entered into that environment?

**Pocar:** Well, for me it was quite easy, actually. Although by education I was a civil lawyer, I had never practiced criminal law, so I was relatively open. Additionally, from my first legal studies and research, I have a tendency to approach the law from a comparative standpoint, to place legal rules in more than one system, and to see pros and cons of each system. Thus, comparative law means a lot to me. My doctoral thesis was on comparative law, although on civil procedure rather than criminal procedure. But comparing systems is a methodology that does not change with respect to different branches of law; it's a methodology, which allows one to understand the reasons that are behind the rules, and to assess or to try to assess what is good in one and another. Furthermore, the Italian system of criminal procedure had already moved, in the last decade of the last century, to a mixed system, in an attempt to merge the precedent
inquisitorial system with accusatorial principles inspired by common law. Thus, although I didn't practice that system, which came into force after my university studies, I felt quite comfortable with accepting common law principles as well. I didn't experience any real difficulty, probably also because I did not practice under my national law, and perhaps was more open than others to accepting new approaches. In fact, on many procedural standards I took positions that are closer to common law than to civil law.

Q2: If I can ask a follow-up question, and you've alluded to this several times in the last hour, this idea of environment—not just the common/civil law mix—what was it like to come into an institution made up of people from many different countries in the world? You have already talked about some of the linguistic issues. But was there a sense that everybody was pulling together in this really important new kind of institution? Was there a sense of solidarity across the different sections of the court, or were there lots of—?

Pocar: At the time there was. Initially there was quite a good collegiality in the court, and good cooperation, which has decreased now. However, there have always been good debates among the judges. And then I was used to different approaches because I had participated in a body for fifteen years that had eighteen components from all over the world.

Q2: The Human Rights Committee?
**Pocar:** Precisely. In the Committee I was already trained to have different views, depending on the different backgrounds of my colleagues. In particular, I had an extensive experience with common law on procedural rights of the accused under the ICCPR. Indeed, many of the difficult individual communications arose out of violations of procedural rights in Caribbean countries, hundreds of cases came from that region, and their consideration required an in-depth study and knowledge of the rules of criminal procedure in the countries concerned. These rules are common law rules, largely inspired by, when not entirely similar to, English common law.

**Q1:** Should I ask a final question, or would you like to?

**Q2:** Could I ask just one or two? Why do you think that the sense of collegiality has dissipated?

**Pocar:** Because there is no strong dialogue between judges now anymore; each does his work but we rarely meet to discuss together. We say hello in the corridor, that's it, except here and there. But there is no meeting among judges, except for the first round of deliberations; the later discussion occurs exclusively through an exchange of memoranda. I don’t know on what this depends, perhaps on the leadership of the Tribunal, which did not help creating a sense of collegiality. There are exceptions of course; for instance, in the last case of the ICTR in Arusha, there was a good sense of collegiality among the judges. We had excellent deliberations, and as presiding judge I was quite satisfied with the spirit of collegiality shown by my colleagues. The environment was so good that, although we had a big case, for which I had scheduled two days of deliberations, we finished a long agenda the first day in the afternoon.
[One interviewer tells the other to go ahead]

**Q1:** Well, it's a lot of responsibility to ask the last question, and I think I'm going to ask a very broad one, Fausto, and see what you would like to do with it. It's basically a question of where have we been and where are we going. So, if you think about — because you have such a perspective as a law professor, and as a judge and international lawyer — if you think back to Nuremberg, and then to the ICTY, ICTR, and you look into the future, what would your impressions be?

**Pocar:** Well, my impression is that justice, I mean international criminal justice, has just started its way. There was Nuremberg, and then during the Cold War no significant development occurred for forty years, for various reasons. The International Law Commission was tasked with preparing a code of international crimes and a statute of an international criminal court already in 1950, and didn't do it until 1996, a few years after the establishment of the ICTY and the ICTR, which had shown a need for doing so. There was international pressure to create a permanent court and the draft of the ILC arrived just in time for the Rome conference, convened to adopt the statute of the ICC. It was a big momentum for international justice, and it grew very quickly. The first judges and prosecutors of the ICTY and the ICTR had done excellent work in starting to define war crimes and crimes against humanity under customary international law, and paved the way for the Rome statute of the ICC.
Let me just recall, in this context, the adoption of leading judgments in some cases, like the
_Tadić_ case at The Hague, or the _Akayesu_ case at Arusha. There were several milestones
witnessing the progress of the law. This progress occurred very quickly, maybe too quickly, and
perhaps it had to be expected that the wave would go down, as it is happening now. It will
probably go up again—as normally is the case with waves—but when and how, it depends on the
sea. Sometimes the wave goes up and down immediately and the ceasing of the winds does not
allow it to go up again. But the winds will certainly blow again.

That’s why I remain optimistic. It's like in the field of human rights. The wave started at the end
of the Second World War, and brought the advent of international human rights. If one looks
back at human history, it's only seventy years ago, and progress has been prodigious in so little
time, although the wave went back very frequently here and there. The question whether we
achieved all that we wanted to reach can only be answered, and definitely, in the negative, but
one should look in the long, long term. What we have now is much more than we had earlier,
were it only because violations are not ignored, and have become a significant issue in
international relations. This motivates my optimism also with respect to the current, hopefully
temporary, unsatisfactory situation of international criminal justice.

**Q2:** May I ask one follow-up question? What has caused it to go down, and what do you think
would help it go back up?
Pocar: Going down is, I think, a natural phenomenon. States lose interest, maybe have other priorities now, and do not want to engage too much on criminal justice. Or the progress achieved by the first pioneers of international criminal justice has become a reason for concern for members of governments, in particular because justice has sometimes, not always, shown the ability and commitment to reach high ranks in the structure of states. Reactions to success are a natural phenomenon. How and when will the movement for international criminal justice go up again? It depends very much on politics and on what states want. If states decide to go in that direction, they will put in the right people to do it. But very much depends on the main actors in international society.

Q1: Thank you very much, Fausto. Thank you so much.

Q2: We really appreciate the time you have given us today.

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