THE AD HOC TRIBUNALS ORAL HISTORY PROJECT

An Interview with

Alex Whiting

International Center for Ethics, Justice and Public Life

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RH | Session One

Interviewee: Alex Whiting | Location: Cambridge, MA

Interviewers: David P. Briand (Q1) and Leigh Swigart (Q2) | Date: 11 December 2014

Q1: This is an interview with Alex Whiting for the Ad Hoc Tribunals Oral History Project at Brandeis University's International Center for Ethics, Justice and Public Life. The interview takes place at Harvard Law School in Cambridge, Massachusetts on December 11, 2014. The interviewers are Leigh Swigart and David Briand.

Thank you so much for having us. This is the second interview that we've done so far; our first was with Ben Ferencz, the Nuremberg prosecutor.

Whiting: Oh, that's great.

Q1: A good place to start. A good foundation there.

Whiting: I'm humbled to be the second one.

Q1: We're so happy to have you, so thank you so much. I wonder if we could start with you talking a little bit about where you're from, a little bit about your early life, and then getting into your education and the move in the direction of international criminal justice. Wherever you'd like to start.

Whiting: Okay. I grew up in Chicago. I had a little bit of international background from the start because my mother is French. My father's American, from Boston, but a French professor. When I was in high school we lived in Paris for a year. International work had always kind of appealed to me. For college I went to Yale. I also went to Yale Law School and my interest in law school was really not about criminal law, and certainly not about international criminal law because at the time it didn't exist. I graduated in 1990, so there was no such thing as international criminal law; it was a field that didn't exist. Between college and law school I'd worked for the ACLU [American Civil Liberties Union] in Washington on national security and civil liberties, and my interest really was about U.S. foreign policy, civil liberties, and politics. That was really what I wanted to get into, and I did work on that in law school, so it was international in that sense but more about U.S. policy towards the world.

I got involved in criminal law completely by accident. I tell this story often to students because it's a story about how life can take you in unexpected directions. I had not thought for a second about doing criminal law. In fact, in my first two years of law school I hadn't taken a single criminal law course because at Yale it's not required—it's required before you graduate, so I was going to do it in my third year. My second year I applied to the Civil Rights Division of the Justice Department, because it was civil rights, and I got the job for the summer.

They assigned me to the criminal section of the Civil Rights Division, so I actually called them up and talked to a woman there named Diane Petrie—I still remember her

name—and said, "I have no interest in doing criminal. Can I be put in the housing section?" Because that's what I had been working on at the time—I was doing a housing clinic. She said—and this completely determined my life, I mean this completely changed my life—she said, "Oh, you're crazy. The criminal section is the cool section where everybody wants to go. Nobody has ever asked to be transferred out of the criminal section. Why don't you think about it and call me back in a few days?" So I did. I asked around, and she was right, so I said, "Okay, I'll try it."

I went there and I loved it—I just loved the work. I really bonded with them and they offered me a job for after law school from that summer. That led to both my career as a prosecutor, but also for reason's I'll tell you in a second, connected me—led to the international prosecution. So I went there—I started in 1991 because I clerked for a year after law school—and I worked there for several years, and then eventually I came to Boston as a prosecutor. I loved being a prosecutor. Even though I had never imagined doing that kind of work, it turned out to be a perfect fit for lots of reasons. I just loved the work.

Q1: This is in the state's attorney's office?

Whiting: Yes, I was—

Q1: The U.S. Attorney's Office.

Whiting: It was the U.S. Attorney's Office, right. So first the Justice Department for three and a half years, and then I came up here to the U.S. Attorney's Office where I did organized crime. So a career in prosecution—but the second thing is that when the Yugoslavia tribunal and then the Rwanda Tribunal were set up in 1993 and 1994, they drew heavily from the Civil Rights Division. A number of people from the Civil Rights Division went over to help set it up.

Q2: I had never heard that. Interesting.

Whiting: Yes, and in fact some of them are still there. I was just on the phone—one of my oldest friends from that time is a guy named Alan Tieger. If you ever have the chance to talk to him you should. He was one of the four federal prosecutors on the Rodney King case, which occurred shortly after I started, and I worked a little bit in the background on that case. He has been at the ICTY [International Criminal Tribunal for the former Yugoslavia] for twenty years and he was the lead prosecutor on the [Radovan] Karadžić case, which just finished, and a number of other prosecutors. The idea was that doing police brutality is a little bit—. There are similar kinds of issues and dynamics to doing state sponsored violence, war crimes, so when that happened it put—. I was in the Civil Rights Division and I wasn't really ready at that time to go over and do it, but it put it on my radar. I thought, "Wow, that's something that'd be really cool and interesting to do." That's 1993 and 1994.

In 2001, when I was here and I was figuring out what's the next step, I applied. I had stayed in touch with people, I'd followed what they were doing, and it seemed like great work. Again it was sort of this accidental thing; it just was because I knew about it and knew that it was possible as an American prosecutor to go over and do it that I thought, "Wow, sure, I'll do it." Just by coincidence, my—in the meantime I had married a woman who is half Dutch—her mother grew up in The Hague—so it was like the stars aligning. She was enthusiastic about going to live in the place where her mother had grown up. We had two little kids and it seemed like a fun adventure. I applied and I got it, and we moved over there.

When I applied they were hiring at that time because Slobodan Milošević had just surrendered, and in fact when I interviewed the thought was that I would work on that case. By the time I arrived—because there was always a lag in time—they had already staffed up the case and I ended up working on the flip side on the KLA [Kosovo Liberation Army] cases for a period of two or three years, which turned out to be an enormous blessing because although the big cases tend to be—lawyers are always drawn to do the big case. They tend to be the nightmare cases to do and working on the Milošević case was incredibly difficult—really complicated staffing, management issues on that case, and a lot of miserable people on that case—so it was a blessing. At the time I was disappointed but it was in retrospect such a blessing that I didn't work on that case.

Q2: Now that you say that your mother is French, are you a French speaker?

Whiting: Yes. I mean, proficient. Maybe not completely fluent, but yes.

Q2: Was that an advantage when you were working at the ICTY to—you worked under Carla Del Ponte, right?

Whiting: I did.

Q2: And French was her primary language.

Whiting: French was her primary language. I could speak French with her, so it was an advantage. I don't think it was much of an advantage getting me hired—maybe a little bit more when I went to the ICC [International Criminal Court] that that was a consideration. I was hired as an American and worked in English mostly—almost all the time. I think it may be an advantage in that it signaled that I had some international experience and international perspective because one concern always in hiring Americans is whether they have that international perspective or whether they're going to come over and try to do it the American way.

Q2: Well, it is the best way, isn't it? [Sarcasm]

Whiting: Of course. Of course. [Sarcasm]

Q2: How did that work in the prosecutor's office for people who had no French at all? You had the French-speaking chief prosecutor. Were there tensions? How did they communicate?

Whiting: She could speak in English. It's broken, it was sometimes difficult, but she would—that was no problem.

Q2: She was the one that accommodated the others.

Whiting: Yes. At the ICTY, the vast majority of people spoke English and not French. At the ICC it's different; there's many more French speakers at the ICC and many more cases which involved French, so it's a much more prominent language at the ICC.

Q1: Before we get too far ahead, I wonder if we could go back a little bit. What stuck out—or what sticks out—in your mind about your time at Yale and Yale Law School? What do you recall about that time and your experience there? Any specific influential instructors or experiences that you had—?

Whiting: At Yale College, my closest friend in college was a guy who grew up in Paris in a very interesting household because his father was Egyptian and was a publisher of a magazine on Africa, and had been at one point expelled from France for his writings. A very political and international family, and he was my closest friend, and interestingly enough he lives in Beverly now, so we still hang out.

Q1: Beverly, Massachusetts?

Whiting: Yes.

Q1: I'm from Beverly.

Whiting: Oh, really? Okay.

Q1: I grew up there.

Whiting: So he lives up in Beverly.

Q1: Oh, that's so funny.

Whiting: He's a doctor here in Boston. So that kind of continued my international interest perspective, and I was a history major, but focused on American foreign policy. In law school my academic mentor was Harold [H.] Koh, and he has remained influential in my life. Again, there was something of a disconnect between my law school experience—what I focused on in law school and what I thought I was going to be doing—and what I ended up doing, because I didn't really focus on criminal law. I took a couple of criminal law courses my third year of law school, but that hadn't been—that

was only because I realized from the summer, so it was only at the end of my law school that it connected to what I would be doing.

Q2: So you learned criminal law through practical experience?

Whiting: Yes, largely. Of course, I got some background from the courses I took, but it was largely—sure, on the job training. Yes, absolutely. Part of what you do when you go to the Civil Rights Division is they send you to the U.S. Attorney's Office in Washington to prosecute local misdemeanors for six months to get experience appearing in court, talking to judges, and doing trials, so that was also kind of a crash course in doing the work.

Q1: What's an example of an experience that you had with Harold Koh that was informative in your time at Yale?

Whiting: I wrote my long paper under Harold's supervision, and I wrote it on the Iran-Contra affair and about the funding of the Contras using the weapons, selling the weapons, and whether Congress could control that. I think the thing that Harold brought to me was I guess two things—first, from that and also from taking a course with him was first a kind of commitment to international law and taking international law seriously. When you're a law student and a budding lawyer it's easy to understand how domestic law is law, and how it looks like law—it has all the components of law—and international law looks different. There can be a real question about, is it really law?

Because it's so difficult to enforce, and it's made differently, and it's enforced differently, so it's sometimes hard to know whether to take it seriously as law. That was one thing. The second thing was commitment to human rights and thinking about international law through that lens and promoting human rights. I didn't think at the time that those would be things that would carry with me later, but they did.

Q1: You graduated Yale in 1990?

Whiting: Yes.

Q1: Did you have any overlap with John [C.] Yoo?

Whiting: John Yoo? You mean—

Q1: From the OLC [Office of Legal Counsel] during the [George W.] Bush administration.

Whiting: No, I didn't. Was he then—?

Q1: The author of the so-called "torture memos."

Whiting: Right, but was he there at that time? No, I don't think—

Q1: I believe he graduated in 1992 from Yale Law School.

Whiting: Oh, okay. I didn't even realize that. I didn't realize that. I did know Jack [L.] Goldsmith, and he and I remain friends. Of course, he's here. I knew Jack, but I didn't even—until you've just said this I didn't even realize that I overlapped with John Yoo, and certainly I did not know him.

Q1: Alright. I was going to ask, based on the recent disclosures about the CIA [Central Intelligence Agency] interrogation methods—not that most of that wasn't disclosed before—if you had had any interactions, or what your reaction was to the recent disclosures. That's kind of getting off track, but—

Whiting: I don't have any sort of John Yoo reaction, but I think it's been very strange to have this movement over the last twenty years to have accountability for international core crimes, and the U.S. has played a huge role in that, and admirably so. The ICTY would not have succeeded without the support of the U.S. in so many different ways—personnel, money, but also political diplomatic support. It's critical to this and the ICTR [International Criminal Tribunal for Rwanda]. The U.S. has a proud story to tell about accountability and promoting accountability.

On the other hand, we have this parallel story about going down the path of torture and no accountability. What I have found strange—and I have taught a reading group about it here for a couple of years—is why not accountability? Why is accountability so hard for

the torture? In these past couple of days, there have been some articles about it and some discussion, but it's largely from three sources—academics, NGOs [nongovernmental organizations], and foreigners. There's a *New York Times* article today I'm quoted in and the headline is something like, "Prosecution or Accountability Might Occur Overseas" ["Americans Involved in Torture Can Be Prosecuted Abroad, Analysts Say"], but why not here in this country? Why has it been so hard—? We know some of the reasons, but is there any principled reason why there isn't accountability? Why we don't have prosecution for these crimes? There's a strange disconnect there.

Q2: It's so easy to criticize immunity in other places—

Whiting: Right.

Q2: —but essentially we have a system of immunity for top leaders.

Whiting: Right, and what is the—some people have tried to make arguments about "the motives were different, the times were different, the scale was different," but I'm not sure any of those are persuasive.

Q1: I wonder if you could talk a little bit about the adjustment from the systems of domestic law here, and then adjusting to international law at the ICTY.

Whiting: That's a great question. The ICTY and the other ad hoc tribunals, and the ICC in fact, as you know combine different ways of procedures of criminal justice. Broadly speaking, the common law system and the civil law system, and—

Q1: Sorry, could you just give a real quick blurb explaining the difference, just for the lay people?

Whiting: Sure. Broadly speaking—and this is very general because there's much finer grain distinctions and it's more of a spectrum than two poles—but broadly speaking the two poles are—the common law system, which is what we have in the U.S. and in the UK and Australia, is party driven. The prosecution brings its case, the defense fights that case and brings a case if it wants to, and the role of the judge is to be essentially an uninformed neutral arbiter of the fight between the parties. It's led by the parties and the judge sort of stands back and judges.

The civil law system kind of flips that; it's a judge driven process and the parties are kind of secondary and in service of the judge. The work of the judge and the role of the judge is as a neutral party to try to get to the truth, investigate and consider all of the facts, almost like a commission—what we would think of a commission to get to the truth of what happened. The parties are there as a check to say, "You should think about this" or "You should think about that," but it's driven by the judge.

Prosecutors in a common law system are used to putting a case together and presenting it, investigating—particularly prosecutors from the U.S. I have say—sort of joking aside about U.S. exceptionalism—U.S. prosecutors are in fact extremely well trained to do this work, and different from many prosecutors around the world, even from common law countries. U.S. federal prosecutors in particular are trained to do everything in the process—they're trained to lead an investigation, and lead complex investigations, and they're trained to do the writing, the putting the case together, the advocacy—everything from beginning to end.

There are very few prosecutors in the world who have that complete training. For example, in the UK those roles are divided up between solicitors who put the case together and barristers who present in court. In civil law countries, the prosecutors aren't used to leading a case in court. They have no experience doing cross-examination; they're much more deferring to the judge. In fact, it's better to hire investigative judges, but investigative judges also don't have the training in terms of advocacy, in terms of fighting for a case. They try to always go back to more a neutral, truth-seeking function.

The ICTY was—even though it combined both systems to some extent—it was in fact largely a common law system, largely party driven. The judges are largely uninformed arbiters of the facts and the law. For lawyers coming from common law systems, it is an easier transition than lawyers coming from civil law countries, but still it is a transition for everybody. The thing that I remember being struck by there is that everybody would show up essentially thinking their system was the best system, was the way to do it, and

they would kind of—your early discussions would be about how—this is how you do it, and this is how you bring a case, this is how you put together a case, and your system makes no sense, and so forth.

Over time as you were there both sides really started to appreciate some of the features of the other system. There are many common law lawyers who went there and over time came to believe that a civil law approach to these cases actually would be better because the common law system is extremely inefficient, because you have the parties fighting each other. Instead of just cutting through it and trying to get to the truth, the idea is that by two sides taking sort of extreme positions and fighting about it that's how you get to the truth. Maybe so, and it has advantages, but it is without question very inefficient and inefficiency in the international setting is difficult because it's expensive and there are rare resources.

So a lot of common law prosecutors came to think, "You know, really we love the common law system. It's great for domestic crimes. For international crimes, a civil law approach would be better." On the other hand, the civil law lawyers appreciated one thing in particular about the common law system and that is cross-examination, which is not really a feature of the civil law system. Not that evidence isn't tested but it's not quite in the same way, and they really came to love that feature. The melting and kind of mutual appreciation would happen slowly but it did occur.

Q2: Did you find that there was resentment on the part of legal practitioners from the Balkans that this was such an unfamiliar kind of procedure that they were—trial procedure, and—?

Whiting: I imagine that there was that resentment, and in some cases I think it would show itself. Many of the practitioners from the Balkans, perhaps because of the culture of the Balkans under Communist times, tended to be extremely respectful towards authority and towards judicial bodies—and here we're putting aside some of the defendants who weren't always respectful. The lawyers in my experience tended to be pretty respectful so you wouldn't necessarily see the resentment, but it would surface sometimes. It had to have been there because they were really disadvantaged by the process because they were completely unfamiliar. One of my trials—a trial with that guy, Milan Martić [Points to an article pinned to his wall]—the lawyer who represented him was a Serb lawyer from Belgrade, and he was often completely over-matched by the process and he just didn't know how to navigate it.

It was an interesting thing about the lawyers from the Balkans and the Serb defendants—the cases against the Serb defendants tended to be the strongest cases at the court. The Serb defendants, for their own cultural and political, and ideological reasons, tended to hire local lawyers, Serb lawyers, who were often overmatched and less qualified whereas the defendants from Croatia, KLA defendants, and Bosnian Muslim defendants—and those were the weakest cases—they would hire lawyers from the UK, France, and the United States who were completely familiar, completely fish in water in this system.

Much better qualified lawyers. So the weakest prosecutions went up against the strongest lawyers, and the strongest prosecutions went up against the weakest lawyers. It was an unfortunate mismatch in terms of prosecution and defense.

Q2: When you're talking about that it recalls some of the discussions I've read about and heard about, about this inequality of arms between the prosecution and defense, and that has been corrected somewhat at the ICC, and at the Special Court for Sierra Leone. Did you find that there was a—that the defense tended to be kind of blown out of the water by this big prosecutorial machine, or—?

Whiting: No, I think that's overstated in my view. I think that in many cases the defense had huge advantages because they had access to information that we didn't have. The prosecution was big and had resources, but it also had huge obligations and huge difficult tasks of managing information, because they had millions and millions of documents. I found that the defense was given the time, the resources to do the cases. Of course, sometimes they were difficult to do and they faced some of the same challenges we faced in getting evidence, but a lot of times the difficulties they faced were self-inflicted because they went down the wrong road or they hired people that weren't really suited for the job. But I really felt like they were given—the court bent over backwards to make sure that they had adequate resources and ability to defend—. I know some defense lawyers would disagree with that, but that's my perspective.

Q2: What about the ICC? Do you see a difference in the way that the defense is supported at that court?

Whiting: I think it's probably gone even further, and the procedures at the ICC are heavier, so they give more—there is more process that gives the defense more opportunities to challenge a case. The defendants at the ICC tend to hire—at this point there is a kind of professional defense bar that has developed and they tend to draw from that bar, so even if they have a local lawyer involved in the case they will always have one of the experienced international lawyers. They tend to be better equipped in that respect, and they get all the resources and time that they need, so it's probably even more than at the ICTY. Perhaps it's gone even too far in terms of—I think that the ICC process is now too heavy, too involved, complicated with three stages—arrest, confirmation and trial, and appeal, which I think is unfortunate and probably overdone—prosecutor speak.

Q1: You had the opportunity to apply to work at the Office of the Prosecutor [OTP], is that right?

Whiting: Which Office of the Prosecutor?

Q1: For the ICTY. That's how you got there?

Whiting: Yes. As I recall there was an—on the web site you would just—I don't remember at the time if you did it electronically or if you downloaded it and did it and

sent it in. No, I remember I did send it in, and I remember that because I sent it in and I faxed it. I think I faxed it and then after I faxed it I was looking at my cover letter and I realized that I had written "the Hague" and "the" I had not capitalized. And this is totally me, I thought, "Oh, they're going to look at that and think, 'This guy is not international at all if he doesn't know that it's The Hague with capitals,'" so I redid the cover letter and I resent it, and I said, "Forget about that one. Take this one instead."

Q1: Right. It worked though.

Whiting: It worked. I'm sure that was the difference. [Laughter]

Q1: Right, exactly. When you were first brought in to the OTP—after we interviewed Ben Ferencz, we're wondering how much did the legacy of Nuremberg factor into your experience at the ICTY? Was that on your mind at all? Was it on the minds of people in the OTP?

Q2: Was it invoked?

Q1: It was the first war crimes tribunal since Nuremberg, so—

Whiting: Not really. A close friend of mine who actually teaches here, Larry Lessig, gave me Telford Taylor's book on the Nuremberg tribunals when I got the job, but I didn't even finish it; I have read part of it but I haven't finished it. The only way it really got invoked

was almost in a negative way at the courts, and that is you would sometimes hear, "Well, the Nuremberg trials—" which were twenty-one defendants at the main trial? I don't remember whether it's twenty-one, twenty-two?

Q2: Something like that, yes.

Whiting: Right? All the top people, a big massive trial done in about a year, so why are these cases taking years and years and years, right? It was a negative precedent that it can be done much more quickly and so forth. Of course the answer to that is that between Nuremberg and the ad hoc tribunals the notions of due process and what is required for due process had completely changed. Nuremberg was fine, a fine process for the time, but in today's world is extremely deficient in terms of process, in terms of notice and opportunity, and so forth.

Of course the other thing is that the quality of the evidence was completely different there because the Allied forces were occupying Germany, had access to all the documentation which was carefully done, access to all the witnesses, access to the defendants that the ad hoc tribunals don't have. I've written this in some article—Nuremberg was a—for the ad hoc tribunal lawyer, prosecutors, was a dream case—an easy case to do compared to what the ad hocs have done. Now the ICC looked back at the ad hocs and think, "Wow, those cases were easy," right? So each stage has sort of increased exponentially the challenges. In terms of a kind of legacy or the ghosts of the former prosecutors and judges, that really wasn't present.

Q1: Sure.

Q2: Speaking of having access to the witnesses and all those kinds of things, I'm just curious about how all the language stuff worked in the prosecution and also defense. How did you work with interpreters and translators, and was it easy or were there all kinds of roadblocks? Were you always confident that the translation and interpretation was being done well?

Whiting: Well, that's a major challenge. That was always the major challenge, trying to work through interpreters, because it slows things down, makes it much more cumbersome. In court you lose some of the immediacy and the tools have less force in court when you're going through translators. The direct examination, and in particular the cross-examination feels—it's completely different using an interpreter because one of the things about cross-examination is you try to make it quick and you lose that with an interpreter. In terms of the court practice it kind of slows things down, and then in terms of gathering evidence and talking to witnesses, also kind of cumbersome.

Over time I began, and I think a lot of people began to understand the language a little bit, and I could hear—there were certain things I could hear as they were talking; of course I still had to rely on the interpretation, so that was an advantage. Of course, interpretation is only about eighty percent—when you're having oral interpretation interpreters will only interpret only about eighty percent and that would sometimes lead

to difficulties because things could be lost or misunderstood. More and more in the later years both teams would use native speakers to sit and kind of listen and check the interpreters, and would alert the parties if something had been misinterpreted—if something important had been misinterpreted or lost, or hadn't been interpreted. Then, more and more, you would have people stand up and say, "I think the interpretation missed this" or "I think this should be interpreted differently."

Q2: So they were just a member of either the prosecutor or defense team?

Whiting: Yes.

Q2: And were they legally trained or—?

Whiting: Sometimes. Sometimes they'd be legally trained, sometimes not.

Q2: So they were just sort of an expert set of ears?

Whiting: Right, right.

Q2: How interesting.

Whiting: Which I think is a good idea. I think that's important because you can't expect the interpreters to perform that function, and the nature of interpretation only allows for

about eighty percent to be interpreted. Of course, since you're doing it in real time there are sometimes nuances that can be missed.

Q2: Were people in the OTP encouraged to study Bosnian-Croatian-Serbian? What do you call it, BCS?

Whiting: BCS. Yes. Um, not—I mean—

Q2: They didn't offer classes? They—

Whiting: I think there probably were classes, I think there were opportunities; I think some people did do that probably. The reality is that it would be impossible to get up to the sort of proficiency that would make a difference. One thing I discovered in doing the cases is that it mattered a lot to witnesses, victims, courtroom personnel who were from the region if you took the time to learn how to pronounce things right—because of course we had to say names and villages and so forth.

Q2: Place names and—uh huh.

Whiting: Right, and if you learn how the accents worked and how to say it correctly that really meant a lot to people.

Q2: Oh, interesting.

Whiting: I remember when I did make that effort people would tell me how much they appreciated it.

Q2: And would you do that? You would work with somebody who was a speaker and say, "How do you pronounce Srebrenica," or whatever it is, or—?

Whiting: Yes. Some of the more prominent words have—there's a kind of Western pronunciation like "mil-LOW-sa-vich" [Milošević] but in fact it's "mil-LAW-sa-vich." It's pronounced slightly differently, so learning the actual way to pronounce it was important.

Q2: Oh, they say "mil-LAW-sa-vich"?

Whiting: "Mil-LAW-sa-vich."

Q2: I always thought that was sort of a British pronunciation.

Whiting: No, no, no.

Q1: They were just doing it right.

Q2: [Laughs] But that's always the case with the Brits.

Whiting: Right, for sure.

Q1: When you first came into the ICTY, what was the environment of the Office of the Prosecutor at that point? What do you recall about that time?

Whiting: The thing I recall about it is that it was in a way very silo-ed in a sense by case, so you would get assigned to a team, and the team usually corresponded to either a case or a set of cases. I was assigned to Team Seven, and Team Seven was responsible for all the KLA cases. Within the team, both on the prosecution side and the investigation side, there was a kind of hierarchy of people—there was a senior trial lawyer, and then. I was hired initially as a P-4 lawyer, which is a trial lawyer, the senior—

Q2: [Laughs] No, I was just laughing because the whole UN [United Nations] "P" lingo that ends up being so significant to people that if someone has a P-3 or a P-4—

Whiting: It's really interesting. It's very status-conscious—

Q2: I don't even know what the "P" stands for.

Whiting: Professional.

Q2: Oh, professional, okay.

Whiting: Right. So I was a P-4 trial attorney; the senior trial lawyer is a P-5. Eventually I became the P-5 trial lawyer. So you'd be kind of within your case, and then there was a—in addition to the common law-civil law thing about lawyers, there was also a prosecutor-investigator thing going on within the court because how the prosecutors worked with investigators—. There are different conceptions about how that should be done, and in the early years of the ICTY, the investigators would investigate on their own—they'd be in charge of the investigation—and then they would present the case to the prosecutors, who would take it from there, which is one model of how investigators and prosecutors worked together.

Shortly before I came, Carla Del Ponte—on the recommendation of an American prosecutor—had changed the system and put the prosecutors in charge of everything—put them in charge of the investigation and the prosecution, which is the American model for complex investigations, and absolutely required in these cases, but the cultures hadn't completely adjusted to that.

For example, the team I was on, I got assigned to, the head investigator was a guy named Matti Raatikainen, a Finnish investigator who could be on one of these Scandinavian crime drama shows—a classic investigator who was macho, drank too much, completely silent Finnish guy, a man of few words, and hated prosecutors, thought he should be in charge of everything. Not only did we have to work together, we shared an office. Our cooperation quickly disintegrated to a point where he would not talk to me across the

table but would send me emails instead [Laughs] both so he wouldn't have to open his mouth to talk to me, but also so that all his points would be documented. He was always trying to make a record.

The one way to think about it is that you're kind of—there are all these different circles that you're dealing with. You're dealing with silo-ed case of prosecutors and investigators, you're dealing with how you interact with the investigators, and then you're arriving there and you're trying to find fellow Americans, like, "How are you dealing with this place? How is it working out?" I of course had some friends there from before, so they were kind of mentors. You're navigating all of those different circles within the institution.

Q2: Were things still, by the time you got there, still in flux with the rules being adapted?

Whiting: Oh, yes.

Q2: What did that do to your daily routine when all of a sudden the rules of procedure and evidence would be changed? What would that mean for the actual work that you carried out?

Whiting: Well, you would adjust, and many of the rules that got—many of the important changes were at the instigation of the prosecution. For example, when I was there I did end up working a little bit on the Slobodan Milošević case. Because I was working on the

Serb crimes in Croatia—and that's why I prosecuted that case, Milan Martić—and there was some overlap with Slobodan Milošević, so I worked a little bit on that. One of the things that I worked on was—you know, that case was so massive that one thing the prosecution wanted to do was start to call witnesses, and rather than go through the whole direct examination just show them their statement, they would say, "Yes, this is my statement. I've read it through. It's all true and accurate," and then, let's have cross-examination. So you'd short circuit the direct examination by just admitting their prior statement.

Q2: Which is a civil—I mean it's the written—

Whiting: A little bit, right. It draws a little bit on the civil model; the difference of course is that under the civil model that written statement would be taken by a neutral investigative judge, whereas these statements had been taken by investigators and prosecutors. As I recall we made the motion and the trial chamber rejected it, said, "No, you can't do that," and we appealed, and the appeals chambers said, "Sure, you can do that, that's fine," and sort of fit it under the rules. Then the rules were explicitly changed, adapted to explicitly allow that process. It's called the "92 *ter*." That's the rule.

Q2: And then the defense obviously could do the same thing.

Whiting: The defense could do the same thing, right. All this to say that for the most part the changes in the rules did not feel like all of a sudden it drops down on you from up

high and you have to shift. It was much more in an organic process that developed and the prosecution had a role in it and participated in the development of the process. So it would often make sense, the changes in the rules.

That was also kind of the exciting thing about the place is that when you're working as a U.S. prosecutor there's a lot of interesting stuff about what you do, but in terms of a novel development or a novel legal issue, if you get one of those a year it's amazing. [Laughter] But here you're constantly dealing with that and thinking about how you could do this differently and do it better, and that's what's sort of fun about the place; that was what was so energizing and addictive about the place is that you're constantly having debates among yourselves and with the judges and the defense about, "Well, what is the best way to do this? What's fair? What's efficient? What makes sense? How do we do—what's legitimate and what's not?" That gets played out both in discussions and in the litigations, so that was a fun part.

Q2: Do you know Michael Bohlander—the German guy—who's at the ICTY? Now he teaches at a—

Whiting: No.

Q2: Oh, really?

Whiting: No.

Q2: I thought he was—maybe he was in chambers, I can't remember. He teaches at Durham University and he's German. He has been doing research and writing for a couple of years where he posits that the heavy presence of the Anglo-American sort of legal practitioners—and also their inability to speak other languages—has privileged the English language and also all the common law procedures to the detriment of the development of international criminal law because it's very one-sided. I just am kind of curious what you think of that.

Whiting: I think that there is some truth to that. Part of what you feel at the ICC is that it's—one theme I feel of the ICC, and I don't want to overstate this, but it does sometimes feel like kind of the revenge of the French because the French always felt marginalized at the ICTY because of the dominance of the Americans. When I became a senior trial lawyer, I think there were thirteen senior trial lawyers and eleven were Americans, so incredible domination by the U.S. at that court—language, procedure, personnel. The French—the ICC is much more their court, so that's much more—they really promote French language, French perspective, French personnel, and French bureaucracy.

Q2: And French wine, maybe?

Whiting: Yes, and French wine. [Laughter] So I think that's true, but at the same time I will say that perhaps what has been missed, and probably missed forever, is a model that would really be largely civil law. What would this look like if it were a judge driven

process and a judge investigator? What if you made it ninety-five percent or ninety percent civil law instead of how it is now, which is probably, even at the ICC, it's probably eighty percent common law, that's been missed. In terms of more blending of the systems that's very hard to do, and I think that you'll hear a lot of people talk about, "Oh, you picked the best, and it makes it more international," and all the virtues of the blending—

Q2: But they still have to work together.

Whiting: They have to make sense together, and more and more people are pointing out, "You have the head of a chicken and the body of a dog, and it's incoherent," and they don't—. These pieces, they have to make sense individually but also in connection with each other, and the example that we just talked about, about the statements, that's a perfect example of it. You import this one little piece but you have to think about all the other dimensions and how it works with all the other steps in the process. I'm not sure that there are missed opportunities in blending but certainly a missed opportunity in having a more predominantly civil law system, which would have advantages but also of course disadvantages.

Q2: When you say that the ICC is the revenge of the French, I like that, but it's still eighty percent common law. Is it more that they have staff and the language is used more?

Whiting: Well, to be more precise I would say that the investigation phase and the phases leading up to the court procedures are still very common law because it's very party driven. The prosecution is responsible for investigating and initiating a case, it brings the case to the court, and then the defense can investigate its own case and respond to the prosecution's case. The feeling in court is different though. The judges who are drawn more predominantly from civil law countries are much more active as a rule at the ICC than they were at the ICTY. You had some of that at the ICTY, but not as much as at the ICC, so they play a much bigger—they're playing a much bigger role in evaluating the case, pushing the case forward, participating in the proceedings, asking questions, getting themselves informed. As I mentioned before, generally at the ICTY the judges would not—everything they learned about the case would be from the pleadings and from what happened in the courtroom. But many judges at the ICC demand having all the documents and evidence before the trial begins, and they study it all, and prepare, and they come to court as prepared as the parties, so they ask questions and they check things and so forth.

Q2: Do you like that, as a prosecutor?

Whiting: It has advantages. It can be incredibly inefficient, and it can be—as a prosecutor, generally I like to control the case. I like to be the one—I like to be in control of the witness and the presentation of the evidence, and having the judge asking questions can sometimes be helpful because they clarify what it is that you haven't clarified. That's helpful and productive both for your own case and the truth—I see that—but it can also

cause confusion, and sometimes they have a different perspective or a different view of the evidence and their interventions can sometimes become inefficient or it can cause confusion.

Q2: It sounds like there's unpredictability that goes along with the judges intervening.

Whiting: Right, and when you move to that you're more dependent on the quality of the judges. That is emerging as a major issue at the ICC because there are some judges who have judicial experience that's terrific, but there are many judges who don't—who are politicians, diplomats, academics, or who have some judicial experience but it's not relevant judicial experience. That then becomes really difficult if you have a judge who is playing a more prominent role in the case and the judge doesn't know what he or she is doing.

Q2: Isn't the Assembly of States Parties [ASP] kind of pulling out and saying they need to have judicial experience?

Whiting: Yes. There is huge awareness about this issue and right now at the ASP they're doing the judicial elections, and I think there's a recognition that you need stronger, better judges.

Q2: I remember there was that Japanese judge who didn't even have a law degree?

Whiting: Yes. Oh, yes.

Q2: I think that they wanted to have Japan on board so much that—

Whiting: Right, and Japan is a major funder of the court.

Q2: Because there's such explicit qualifications out there, as opposed to ICJ [International Court of Justice] where they say you have to have the equivalent of a high judicial experience in your home country—but how did they ever actually—how did she ever get vetted through the thing when she didn't have—?

Whiting: Well, it's a political process. That's the problem.

Q2: Yes, clearly. When you look at your experience at the ICTY compared to ICC, what's your evaluation? Which one do you like more? What stands out? How do you think about those two in relation to one another?

Whiting: I wouldn't say I liked one or—they're very different experiences, and part of it was the different courts, and part of it was my role was different in the two courts. At the ICTY I was a trial attorney and then a senior trial attorney, so I focused on running one case at a time, whereas at the ICC I was essentially management. First I was the investigation coordinator so I was managing all the investigations, and then the

prosecution coordinator, doing that on the prosecution side. It was a different kind of perspective; I wasn't involved in one case.

Then the institutions are different. The ICTY when I was there was a bustling, very active, busy, busy place. When I was there, there were typically six trials running at once. People worked incredibly hard there. I worked all the time, but I always work all the time. But that was the culture—"Roll up your sleeves. Practical solutions. Let's figure this out. Cut through the bureaucracy." That was the mentality. The ICC is very different. There's usually one or two trials running at a time, and it feels much more formal, much more bureaucratic.

Q2: Yes, that's true.

Whiting: It was really quite striking. It feels different that way. It's much more formal, and that I think is also part of the French and European influence.

Q2: Do you think there's a difference in the way—people who were working at the ICC in all kinds of positions—it's a permanent institution. They're there; this could be their life long job as opposed to a temporary one. Does that influence the atmosphere?

Whiting: Definitely. I actually think that's an important unappreciated problem at the ICC, and one that I actually tried to raise while I was there, but with not a huge amount of success. At the ICTY, people knew that it was a temporary institution and they went with

that expectation. Some people stayed there forever, which was good to have some institutional knowledge, but many people would come for five years and then leave—go to a different institution, go home. There's a lot of coming and going and nobody expected to stay there forever.

The ICC is very different. There are people who come and not only do they hope to stay there forever, but they hope to have a career. They don't want to stay there forever in one job and they hope to have a career that develops. They advance. The problem with that is that at the ICTY, because there was so much activity and so many opportunities, some people could do that because you would get a lot—you could go into court, do a trial, get witnesses, do investigation work. You could get the experience that would justify getting promoted to the next level, right?

The ICC, since there's so little activity, it's very hard for people to get that kind of experience. What happens is that people come and the people who come with those expectations—they come with a lot of idealism. This is an incredible job, an incredible institution—overblown expectations about what the court can do, so they come and over time one of two things can happen—either they hit a ceiling because they're not getting enough experience to advance or they are promoted beyond their competency in which case they are in over their head; they're not really able to do a good job. Either instance leads to frustration, burnout, bad feelings within the court. It's a real problem because if you get to a certain point, if you stay there five years, six years, seven years it becomes hard to leave, because where do you go?

Q2: Yes, exactly. I know that everybody was jumping ship from the ad hocs to go to the ICC. I'm kind of curious—what are attitudes like at the ICC toward Americans given that the U.S. is not a party to the court? Is there some sense that you really shouldn't be here?

Whiting: Definitely. Absolutely. Sometimes that would be overt. I was the investigation coordinator and I had competed for the prosecution coordinator job. I competed against somebody who had been at the court for a long time and is from a state party. When I got the job he was furious because I was from a non-state party. Even though I do have French citizenship, that doesn't count for the court because they only count your primary citizenship. After I left he got the job so he's—it's fine now. He and I ended up working well together and remain friends. But initially that was an issue.

As an American you learn to signal that you're a certain kind of American. You learn to—so it's not just citizen of a non-state party, but also suspicion of Americans and American parochialism, so you signal that you're not that kind of American—you're not that American who believes in exceptionalism and so forth. You say certain things; you learn how to work things, signals into the conversation to allay concerns. It's definitely an issue, and there are very few Americans at the court.

Q2: That's what I thought. In the beginning I think there were probably none, right? And then they started to slip in?

Whiting: Right. They slip in for two reasons—one, because the first prosecutor—who taught here at Harvard and had worked with Americans—liked to have Americans, and he recognized—I think correctly so—that Americans had something to bring, both in terms of skills as I talked about before but also I think he taught that it was a great way to try to, over time, draw the U.S. into the court. The second thing is that because the ad hoc tribunals were so heavily staffed by Americans, many people with the experience in this field are Americans and if the court wants to get people who have experience it has to draw, to some extent, some Americans. So there's always been some little group of Americans there but it's not an enormous number, and it's always an issue.

Q1: You were the lead council on three cases at the ICTY?

Whiting: Right.

Q1: Okay. How do cases—in your experience, how did they come together? What was the process of gathering evidence, witness statements? Take us through what that was like and what your experience was.

Whiting: Okay.

Q1: Maybe take one as an example.

Whiting: Right. I'll just preface it by saying that the cases came together in different ways and information became available in different ways, so it's not one story. The case that I played the biggest role in putting together was the first case I did—one of the KLA cases. The way that came to us is that at the time Kosovo was operated by—there was a military force in Kosovo that was maintaining order, and there was a civilian force called UNMIK, the UN Mission in Kosovo. They had a kind of civilian police component and they would gather evidence of crimes.

What had happened is a Kosovar Albanian had come into the UNMIK and had said, "I was detained as a prisoner by the KLA during the war in 1998. I was detained with my father and a lot of other people, and there was an execution of twelve or thirteen of us. I survived the execution and my father was killed in the execution. I can tell you who was involved and I can tell you where the bodies are. If you dig up the bodies, you'll find this person, this person, and this person." So they did a little bit of investigation, gathered some information, and then they presented it to us, and we thought, wow, this is a potentially interesting case. I don't remember if they dug up the bodies or we did, but the bodies were dug up—it may have been them—and they matched.

Then we got the case and we started to—we had to investigate it covertly because we didn't want to alert the defendants because they would flee, so we could only do a certain amount of investigation, but we were able to find a few witnesses who corroborated, victims who had survived, and gather a certain amount of information. Then we charged the case. We got an indictment, and we had—

Q2: And arrested them?

Whiting: We did, yes. That was quite amazing because we—what we wanted to do was arrest—I guess we had three—let me think about this for a second. I guess we were trying to arrest three people and also do searches. We wanted to search the location where they had been held because what happened in this case was that the KLA had identified Albanians that they suspected had collaborated with the Serbs. Some of them maybe had, but collaboration in a very innocuous way—not collaboration about military secrets but economic collaboration, for example. They had taken those Albanians suspected of collaboration, put them into kind of a makeshift prison in a farmhouse in Lapušnik, in Kosovo, and had beaten them, tortured them, and also put a few Serbs there that they had captured. At a certain point the Serbs were about to retake that part of Kosovo where the village was, so they marched all the remaining prisoners into the hills and executed them, and this one guy survived.

Our team went down to Kosovo to do the arrest operation and we went to the U.S. military base in Kosovo in February—unbelievably cold and snowy. We asked the military—the Kosovo force, K-4—to do the arrest because we didn't trust the UN mission to keep the information confidential. We arrived and we said, "Okay, these are the three people we need to arrest," and each day they would say, "We know where A and B are, but we don't have eyes on C." "Alright, let's wait." Then the next day it would be, "We've lost all of them." The next day it would be, "We've got these two but not this one."

We were there for ten days, locked down in this military base. We'd spend the days working out at the gym, going to the movies at night, eating unbelievable food—the food at an American military base is unbelievable, and just waiting and sleeping in these barracks. Eventually they said, "Okay, we got all three. We're going to do it." They in fact missed one; they got two out of the three. The other one was later arrested in Slovenia. This is the military so they said, "Okay, we're going to do the arrests at four in the morning, so for the staging we need you in buses at two in the morning, ready to go to the sites," and everything. So we're sitting in the freaking cold, dying. [Joking] They did the arrest, and we went to the camp, and we did a search, and photographed it—we were hoping to find blood and traces, but of course it was years later, we didn't find anything.

Q1: Also probably frozen.

Whiting: Yes, frozen.

Q1: You can't really dig it—

Whiting: Yes, exactly. It turns out that one of the persons we arrested was the wrong guy—he had been misidentified. We had to release that guy and got the right guy. Then the important thing was that we—okay, we had them arrested then we continued the investigation. Now we could do it overtly. We got a lot of evidence after that in finding witnesses. In particular, the interesting thing that we did is we interviewed a lot of people

from the KLA—a lot of insiders, some of whom sort of came over to our side and some of whom were hostile witnesses but still gave us important information. We continued to develop the case that way. Then the thing about that case is that there was intense witness intimidation, so as we approached trial, one by one of our witnesses started to drop out. The routine was that—I'm sorry if I'm talking in too much detail.

[INTERRUPTION]

Whiting: The defendants were represented by these incredible lawyers from the UK—some of the best lawyers from the UK. The lawyers said, "We want to interview some of your witnesses. Here's what we propose. We will record the interviews. We'll invite you to the interview. At the beginning of the interview we'll ask the witness if they want the prosecution there or not. If they say yes you can attend the interview; if they say no you'll have to leave. We'll interview them; we'll do it on tape. If there's any allegation that we've tampered with them or anything, you can request it and we'll show you the tape." How can we say no to that, right?

Q2: Right.

Whiting: We couldn't say no to that. We would meet with our witnesses when they got requested—asked to go—and they would say, "Yes, I want you there. I want you there." We would come to the interview—our investigator would come to the interview to be present and they would say, "Do you want the prosecution there?" And they'd say, "No."

We would have to leave. They'd be interviewed and a couple of days later they'd say—and there was no—and they'd say, "It was a perfectly proper interview. I no longer want to be a witness."

Q2: So what was the intimidation?

Whiting: The intimidation was done in the shadows; it wasn't done in the room.

Q2: Oh, I see. okay.

Whiting: It wasn't done in the room. In fact these people were being reached, and their families were being reached and they were being threatened. We had one witness who had relocated himself to France, so we thought, "Okay, that guy's safe." Some of his family had gone with him, so we thought, "He's completely safe. We're not going to have any problem there." I remember this. I was with the investigator—another Finnish investigator but a completely different kind, a really great investigator—and we were in Kosovo working on something. The investigator got a call from this witness and the witness said, "I'm here in Kosovo to be interviewed by the defense."

We said, "Why did you do that? Why did you come to Kosovo to be—?"

He said, "Well, they asked me to." Of course, what they did is they put pressure on the family he had in Kosovo, so he had to come back. We said, "Okay, we want to meet with

you." So we met with him late at night; it was ten o'clock at night, the side of a deserted road, and he drives, and he comes into the car. The investigator was sitting next to him in the car and he told me later he could feel his legs shaking next to him. He was so scared. He dropped out after his interview and we went to France; we went to his house to try to talk to him. His brother answered the door and would not let us see him. That case was really troubled because there were a lot of witnesses who did testify, and I thought we had enough evidence to convict all three, but we ended up only convicting one of them.

Q2: Speaking of being scared, did you find some of this work scary? Did you have anything—experience in the U.S. that was comparable in any way?

Whiting: Well, I did organized crime.

Q2: Right, but that's like—

Whiting: For the most part, when we were investigating the KLA case in Kosovo, it was still—while we were still investigating the case, it was still at a time when the tribunal—by Kosovo, and Albanians and KLA members—the tribunal was seen as a friend, as a positive thing, because it was largely prosecuting Serbs. We benefited from that, like, "Oh, you guys are from the ICTY. You're great. We love you, we love you." I did go to Kosovo once when the trial was under way. The trial was broadcast all the time in Kosovo, so I was on TV all the time, and so that time when I went I had to have

protection and stay in the military base and so forth. When I would walk around I had that experience of people kind of like, "I've seen you—"

Q1: Right, yes. "Your face looks familiar."

Whiting: So that was a little bit—but never otherwise sort of threatened or feel any danger or anything, no.

Q1: Okay. We're getting pretty close to noon.

Whiting: I'm sorry, I would love to—I've got to get my son by 12:30.

Q1: No, of course. We would love to come back for a follow-up session.

Whiting: I would love to. I could talk about this all night and day so if you guys are still indulgent and patient, and happy to talk about it—and I have some really good stories to tell.

Q1: And we'd love to hear them.

Q2: We'd love to hear them. Divide it up then nobody gets tired, so—that's great.

Whiting: That would be great; I'd love to do that.

Q2: Oh, thank you so much.

Q1: Yes, thanks very much. I'll go ahead and shut this off now.

[END OF INTERVIEW]