

A U.S. role in legacy issues resolution



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The conflict in Northern Ireland grabbed headlines around the world as a never-ending armed conflict for the better part of three decades.

Over 3,600 lives were lost and countless more were forever changed before the struggle concluded in 1998.

A new generation has since grown up in peace and reaped the benefits of stability and new economic opportunities.

Meanwhile mechanisms to address the past have been held hostage by political gridlock around legacy issues of truth, justice and reconciliation.

Nineteen years on, the road to political consensus has been as long and windy as any rural back-road in the province.

Persistent failure to come to terms with the past deflates public confidence in political institutions and undermines a hard-won peace.

The U.S. has played a prominent role in the peace process in the North and continued to engage in diplomatic efforts to securing a sustainable and meaningful peace.

U.S. diplomat Richard Haass and Dr. Meghan O'Sullivan travelled to Northern Ireland in 2013 to initiate talks on unresolved issues including flags, parades and the past.

Dealing with the past refers to how to investigate and engage in truth recovery for over 3,000 unsolved murder inquiries related to the conflict.

The U.S. led talks broke down without achieving agreement but were nonetheless a significant step towards developing consensus around contentious issues. These efforts are part of the U.S. government's long-standing commitment to securing, protecting and strengthening a peaceful Northern Ireland.

Following the unsuccessful Haass talks, momentum again appeared to build in 2014 when the Northern Ireland Executive and the government signatories of the Good Friday Agreement, agreed to a set of proposals culminating in the Stormont House Agreement of 23rd December 2014.

However, implementation of the SHA stalled due to disagreements between the parties.

Further talks between the UK and Irish governments led to the publication of "A Fresh Start, the Stormont Agreement and Implementation Plan" in November 2015.

Yet, the Fresh Start Agreement failed to realize any means to deal with the past. When referring to paragraphs 21-55 of the SHA, all that could be said was the following:

"While progress has been made on most aspects of the legacy of the past, we have been unable to agree a way forward on some of the key issues."

The SHA had proposed to set aside funding to deal with the past including specific measures to preserve personal accounts from the Troubles.

Indeed the 2014 SHA proposed to set



Richard Haass and Meghan O'Sullivan.

aside £150 million to address legacy issues over 5 years.

Two years later the legislature has yet develop a plan to implement any part of the Agreement, including the more time sensitive components of dealing with the past.

One of the mechanisms agreed to in the SHA was the creation of an oral history archive, to act as a central repository for personal accounts of the Troubles.

The archive was envisioned to bring together existing oral histories and eliciting additional accounts.

Language in the SHA stresses the importance of ensuring the operational independence of the archives and acknowledges the need to take measures to protect contributors as well as careful consideration of when the information collected should be made publicly available. However, the Executive's policy papers on the archive indicate that limited protections have been put in place for contributors thus far.

The absence of adequate legal protections for potential contributors is concerning because it may result in losing these accounts forever and along with them important lessons from the past.

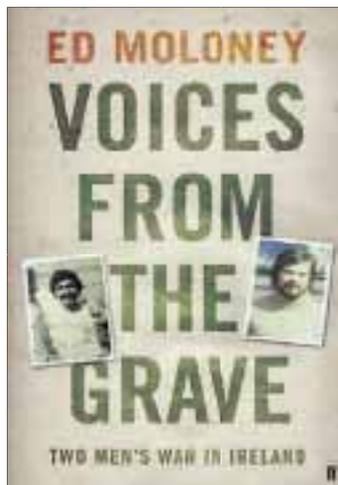
Potential contributors to an oral history archive have good reason to exercise caution and keep their secrets to themselves.

In the context of these political efforts to collect and learn from the past, actions of the local Public Prosecution Service (PPS) acting on behalf of the Police Service of Northern Ireland (PSNI) raise red flags.

For several years now the PPS has been embroiled in a number of legal battles over its efforts to obtain confidentially recorded interview tapes recorded for an academic research project at Boston College known as the "Belfast Project."

Recordings of the interviews had been donated to the college by former combatants on the condition of strict confidentiality for the lifetime of the contributors.

The hope was to record accounts from former paramilitaries on both sides of



the conflict.

However, this all began to fall apart in 2010 when Ed Moloney, the lead researcher on the college project, published a book fittingly entitled "Voices from the Grave," after the deaths of two of the interviewees, which disclosed the existence of the oral history project.

It was further disclosed that Dolours Price, who had served a sentence in relation to the IRA bombing of the Old Bailey, had provided interviews for the project.

Once the tapes became known to law enforcement in Northern Ireland, efforts were taken to find a way to acquire them.

Since the tapes were outside of the jurisdiction of Northern Ireland law enforcement, the PPS submitted a request for international legal assistance to the U.S. Attorney General's office.

The PPS issued a request for information pertaining to a high-profile murder in 1972 of Jean McConville, a mother of ten whom the IRA suspected of being an informer.

It is believed that the International Letter of Request (ILOR) sought information from the interviews of Brendan Hughes (deceased) and Dolours Price in relation to Jean McConville's murder.

A second subpoena broadened the scope of inquiry to include any and all

references to Jean McConville in the entire oral history project, in any interview of any interviewees.

Boston College sought to quash the subpoena and Ed Moloney (as Project Director) and Anthony McIntyre (researcher for the Republican participants) intervened to protect the confidentiality of the interviews.

Following the decision of the U.S. District Court for the District of Massachusetts to deny the motion to quash the subpoena and order the release of 85 interview tapes, in May 2013, the U.S. Court of Appeal for the First Circuit ordered a more limited release of several tapes relevant to the murder and disappearance of Jean McConville.

The First Circuit Court had reviewed the documents in camera and determined that some of the documents were not in fact relevant to the request and could not be seized.

These documents made their way to Northern Ireland where they have been used to charge Ivor Bell with aiding and abetting in the kidnap, killing and burial of McConville. In August 2016, the Magistrate's Court in Northern Ireland determined there was sufficient evidence for case to proceed to trial.

Lawyers claimed that Bell, 79, suffers from dementia, which will render him unable to follow the court proceedings.

Meanwhile, other tapes from the Belfast Project have made their way into the possession of authorities in Northern Ireland including those of loyalist ex-prisoner, Winston Churchill Rea.

In June 2016, Mr. Rea was charged for his involvement in the murders of two Catholic workmen based on interview tapes obtained from the Boston College archive.

The PSNI took action to acquire the tapes when Mr. Rea told the Belfast Telegraph that he would seek return of his tapes from the archive after another former loyalist wrote to Boston College demanding his interviews be returned.

Both men expressed concern about the impact the continuing threat of prosecutions will have on future generation's ability to learn from the past.

Most recently, the PPS targeted one of the former researchers on the project, Mr. McIntyre, for his alleged involvement in paramilitary activities during the Troubles.

Like Rea, Mr. McIntyre's tapes became subject to a subpoena after he mentioned on a BBC Spotlight program that recent attempts by authorities to acquire the tapes put him "at as much risk as anyone."

Both of these examples illustrate that the PSNI will initiate investigations when interviewees begin to talk about their involvement in the Troubles in the course of an oral history project.

Rea's investigation began when he indicated that he wanted his recordings back whereas McIntyre found himself under investigation after making a comment that he was at just as much of a risk as anyone if his tapes were to be released.

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Pursuant to Section 7(5) of the Crime International Cooperation Act 2003 (CICA), law enforcement agencies in Northern Ireland have authority to seek international assistance where the information is needed to support an actual, ongoing investigation into particular offences.

The question arises, if these investigations are only started based on vague statements that these recordings are potentially incriminating, how do law enforcement officials meet their burden of demonstrating that the request has been made in good faith subject to an ongoing investigation?

What protections are available against the state's intrusion upon an individual's accounts made in confidence for the purposes of future academic research?

Instruments which provide for international cooperation for the purposes of law enforcement are designed to serve the admirable aim of preventing criminals from escaping detection by leaving a particular jurisdiction or, for example, attempting to avoid jurisdiction by stashing a murder weapon across a state's border.

It is axiomatic that the power to compel the production of personal recordings implicates fundamental privacy rights of the individual under investigation.

An essential question arises as to how a foreign national, with no access to a U.S. court, may assert such privacy rights for the protection of his private correspondences.

The First Amendment provides no relief in such circumstances.

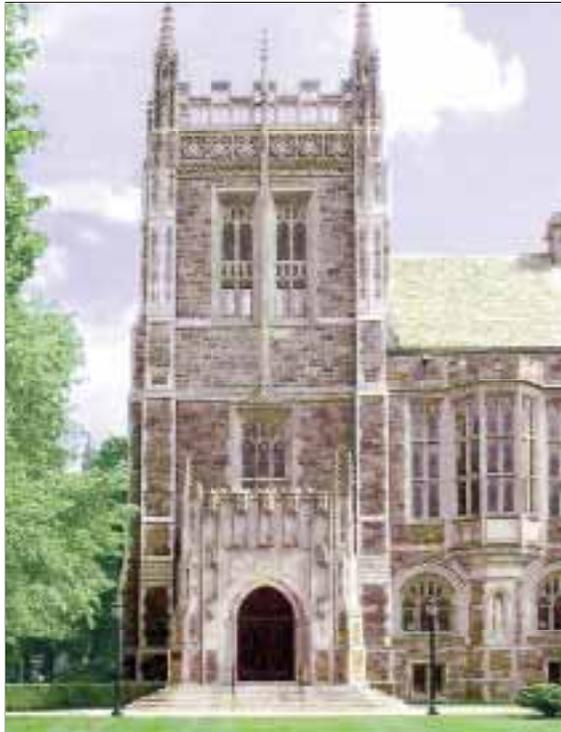
The U.S. courts found that Belfast Project participants had no First Amendment basis to challenge the subpoena.

Instead, the courts considered only the relevance of the information contained on the tapes to the subpoena issued by the U.S. government.

The failure or inability of the U.S. judicial system to intervene has ultimately given the PPS the green light to continue in its invasive investigations into conflict-related crimes from the Troubles.

Whereas Mr. McIntyre had no recourse to challenge the subpoena for his private correspondences in the U.S., he has asserted a challenge in Northern Ireland courts based on his right to privacy under Article 8 of the European Convention of Human Rights (ECHR).

Proceedings in the U.S. were conducted in secret and documents have been held under



The Burns Library at Boston College, repository for the Belfast Project.

seal. Mr. McIntyre only discovered that his interviews would be compromised because Boston College notified him of the subpoena.

If Boston College had not felt obliged to inform McIntyre of the subpoena request, he would never have known (and indeed the U.S. public would never have known) that his interviews, held at a private university, were in the process of being turned over by the U.S. Attorney General to law enforcement authorities in Northern Ireland.

The level of secrecy surrounding these proceedings is similar to that of grand juries, but without protections against prosecutorial zeal.

Despite originating from the Magna Carta, grand jury proceedings are no longer used anywhere in the United Kingdom, including Northern Ireland.

Unlike a grand jury, which relies upon a finding of probable cause that the defendant committed a crime to move forward, the ILOR subpoena process turns over documents to a foreign jurisdiction based on reasonableness of the request.

These proceedings, which occur under seal, avoid public scrutiny entirely and no consideration is given as to the privacy or due process rights of the foreign national under investigation.

This has created a situation whereby the PPS in Northern Ireland may obtain information from a private party in a foreign jurisdiction without any consideration of the subject's privacy rights under domestic or international law.

Further, the investigated individual is without standing to challenge the release of their private information, unless a third party notifies them of the U.S. proceedings, and they have the resources to engage in international litigation.

“The release of the Boston College tapes has already had a destabilizing effect on the peace process in Northern Ireland.”

In re Request from the UK, 685 F.3d 1, the U.S. District Court denied the researchers, Moloney and McIntyre, standing to intervene to challenge the release of the Boston College tapes.

In its decision the court only considered whether or not the material provided from the college was relevant to the subpoena request.

McIntyre has challenged the release of the materials in the Northern Irish court system on the grounds that the PSNI and PPS disregarded his Art. 8

ECHR rights in the issuance of the ILOR request.

In Northern Ireland, the release of an individual's personal testimony raises a conflict between individual rights and state responsibilities under the ECHR.

While individuals have a right to privacy under Article 8 of the Convention, the state has a responsibility to protect life and investigate crime under Article 2 of the ECHR, if indeed such rights are triggered.

The standard of privacy protection afforded to individuals under Art. 8 ECHR finds some resonance with Fourth Amendment protection against unreasonable searches and seizures.

While the Fourth Amendment jurisprudence has limited privacy rights to those where a reasonable expectation of privacy has been violated, the ECHR right to privacy is significantly more expansive.

The ECHR prohibits interference by a public authority into an individual's rights to privacy except when an intrusion is deemed necessary for public safety, national security or protection of the rights and freedoms of others.

This conflict of rights surfaced in a recent case related to the Boston College tapes where the court found that the state's duty to investigate murder overcame the applicant's suppression claim under Article 8.

In perfect parity, the PPS has charged one former loyalist and one former republican based on evidence acquired from the Boston College tapes to date.

In Rea's case, the court found that the ILOR issued by the PPS was fully within the powers conferred by the CICA act of 2003.

This decision was based on the PPS meeting three requirements posed by Section 7(5) of the CICA: that the request came from the designated authority; that there were reasonable grounds to suspect that an offence had been committed; and that the offence was under investigation.

The offenses under investigation in Rea included murder, membership of a proscribed organization, directing terrorism and robbery.

Understandably, the court considers the severity of the offense charged when determining whether private information may be released.

Where the suppression of evidence relates to an active murder inquiry, the government's Article 2 ECHR duty to investigate conflicts with the applicant's objections on privacy grounds. Nevertheless, the three-part test outlined in the Section 7(5) CICA must always be met to justify intervention by

the UK's prosecutorial authorities wishing to seek information from abroad.

If Art.8 ECHR considerations do not prohibit prosecutorial authorities in Northern Ireland from receiving the documents, the PPS may well obtain a trove of potentially incriminating material from ex-paramilitaries from the Troubles.

Many Belfast Project interviewees agreed to take part for future generations to study and understand what happened in Northern Ireland.

McIntyre seeks to hold the prosecuting authorities accountable to international standards of showing that an investigation is in fact “ongoing” into a specific matter, and that the ILOR in his case has not been issued for a “fishing expedition.”

The international mutual legal assistance scheme is designed to apprehend individuals who pose a current threat to the public or to obtain key evidence that may be beyond the jurisdiction of a domestic court.

Law enforcement authorities in Northern Ireland appear to be intent on using the American court system to fish for evidence that would otherwise be protected under both domestic and international law.

Had McIntyre not sought assistance from the courts in Northern Ireland to prevent the tapes from being turned over, law enforcement would have been provided access to the tapes without any court considering his privacy rights under domestic or international law.

The release of the Boston College tapes has already had a destabilizing effect on the peace process in Northern Ireland.

Further release of materials held by Boston College should be considered within broader diplomatic efforts to encourage consensus between parties to the Good Friday Agreement.

Disclosure of personal accounts of former combatants privately held by a third party is not merely a legal question when those alleged acts are the result of a political conflict.

Even if these materials are relevant to solving crimes abroad, these recordings implicate broader international relations and foreign policy questions. To ensure the integrity of the peace process going forward, the U.S. should seek resolution of these issues through diplomacy.

It is time for Northern Ireland to finally move forward on legacy issues and the U.S. should maintain its role as a key supporter of peace.

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