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Ref. A084/2701

PRIME MINISTER

Anglo-Irish Relations: Northern Ireland

Mr Goodall and I are due to have a further round of talks with Mr Nally and Mr Lillis in London on 15 and 16 October. Mr Goodall and I shall be accompanied on this occasion by Mr Bourn and Mr Brennan of the Northern Ireland Office, as experts on certain of the matters to be discussed, and by Mr Alan Goodison, the British Ambassador in Dublin; Mr Nally and Mr Lillis will be accompanied by two corresponding experts, by the Irish Ambassador in London, and probably by Mr Sean Donlon, the Irish Acland.

2. As a basis for discussion at these meetings we have prepared a series of speaking notes, setting out a British position on the topics to be discussed. These speaking notes are submitted herewith for the approval of you and the two Secretaries of State. If they are approved, our representatives will speak to them in the discussions. We shall also be prepared to leave with the Irish copies of those notes which I have marked with an * in the following list. Those copies will have no status except as copies of our speaking notes. The notes not marked with an * will be the basis on which we speak, but we shall not hand copies over.

3. The Irish representatives will, we understand, be following a similar procedure.

4. The list of speaking notes is as follows -

1. Mixed Law courts

*2. All-Ireland Law Commission

*3. Joint Security Commission

4. Practical policing measures

5. Arrangements for institutional consultation

6. Devolved Government

*7. Anglo-Irish Parliamentary Body

[8. Amendment of Irish Constitution: no British note]

*9. Legislative basis for an agreed package

*10. Draft of joint declaration from Ashford Summit

11. A Northern Ireland Bill of Rights

5. We have reason to believe that the Irish Government's notes will make greater demands than we can contemplate meeting or will otherwise fall short of what is practicable, but that further moves in later discussion are not ruled out. We have therefore kept our notes cautious. In various aspects they will fall short of what the Irish Government would like and will think that they need. At the end of our meeting, therefore, a number of gaps will remain. I shall report progress to you after the meeting, and seek instructions as to whether there should be a further round of official discussions before the Ashford Summit, and if so what our positions should be. Even if there is a further official round, there is likely to remain a number of gaps which will have to be considered and discussed by you and the Taoiseach at Ashford.

6. Paper No 10 is a first British draft of a possible communique or declaration from the Ashford Summit, if you and the Taoiseach decide that it is politically worth while to proceed to a further stage of official discussions and an agreed package of proposals. It is a five-point declaration. The points are for the most part self-explanatory; the second is taken nearly verbatim from Mr Prior's speech in the House of Commons on 2 July.

7. The note on a Northern Ireland Bill of Rights (Paper 11) is much less advanced than the others, because there is much more work still to do. It is for the Irish Government to lead on this: they did not raise it at our last meeting but have given

notice that they will raise it at this. At this stage British reactions can and will be preliminary and non-committal, as indicated in the note.

8. I am sending copies of this minute and of the speaking notes to the Foreign and Commonwealth Secretary, the Secretary of State for Northern Ireland, Sir Antony Acland, Mr Robert Andrew, Mr David Goodall and Sir Philip Woodfield.

RtA

ROBERT ARMSTRONG

10 October 1984

SECRET

PAPER NO 1

SPEAKING NOTE

MIXED LAW COURTS

1. As a possible measure to reduce the alienation of the minority in Northern Ireland the Government of the Republic of Ireland have suggested that persons tried in Northern Ireland for terrorist crimes could be tried by a panel of three judges, one of whom would be from the Republic of Ireland; and that persons tried for such crimes in the Republic of Ireland would be tried by a similar panel of three judges including one from Northern Ireland.

2. It is assumed that any such arrangements would be without prejudice to the arrangements created by the Criminal Jurisdiction Act 1975 (and the matching Irish legislation) whereby crimes committed in one jurisdiction can, in certain circumstances, be tried in the other jurisdiction.

3. The Judicature (Northern Ireland) Act 1978 requires that High Court Judges in Northern Ireland shall be persons who have practised for at least 10 years at the Northern Ireland Bar, and there are similar provisions for the rest of the judiciary. It would be necessary to amend these provisions if judges from a foreign jurisdiction were to sit in Northern Ireland. The legislation also provides that judges shall be appointed by Her Majesty the Queen; and that on appointment they should take both the oath of allegiance and the judicial oath.

Some dispensation from these requirements would be necessary in order to accommodate the arrangements suggested. Such a dispensation could itself become a matter of controversy.

4. Although judges from the Northern Ireland and Republic of Ireland jurisdictions spring from different legal backgrounds, it is not considered that a judge from one jurisdiction would experience undue difficulty in mastering the criminal law and procedure of the other.

5. There is, however, a problem of numbers. For the trial of scheduled offences in the Northern Ireland Crown Court, a single

judge sits alone. To create a court of three judges - (one of whom would be from the Republic of Ireland) would mean doubling the number of Northern Ireland judges sitting on each case. This would require the appointment of three more judges in Northern Ireland. Between one and three further judges would be required to provide the necessary Northern Ireland judge at sittings of the Republic's Special Criminal Court. It would be exceedingly difficult to find these extra four to six judges - irrespective of whether the extra judges were to be High Court or County Court judges. Even if sufficient members of the Bar could be identified who would be suitable for appointment to the Bench, their appointment would deplete the number of Queen's Counsel by 20% (and those active in court work by 50%). This would add quite disproportionately, and cumulatively, to the delays in bringing criminal cases to trial.

6. There are other practical problems to which a solution would have to be found. If a bench comprised three judges of equal status, one would have to preside; how would the presiding judge be chosen? Would it be acceptable that the presiding judge should always be from the 'home' country? It seems probable that allowing the 'visiting' judge to preside would be controversial - in each country.

7. It would also be necessary to consider what the specific role of the three judges is to be. In Northern Ireland a judge trying scheduled offences sits without a jury; it is therefore for him to make findings of fact, as well as to rule on matters for law. Would each of the three judges be empowered to state his own findings of fact? If they did, this would make the conduct of any subsequent appeal very complicated. But if they did not, doubt might be cast on the extent to which three judges were any better than a single judge. Serious problems might arise where there were conflicting opinions on questions of law, or whether there was a case to answer, and on the admissibility of a confession. It would be intensely divisive if, as must happen sooner or later, a case arose where the majority consisted of the two Northern Ireland judges, and the minority of the single judge from the Republic of Ireland. When passing sentence, the judges would have to confer, and

and announce a single decision.

8. These difficulties are considerable but, given the co-operation of the judiciary, may be surmountable. But the logistical problem of finding sufficient judges to operate a three-judge system could prove insurmountable. It therefore seems worth considering alternative courses, which might require the appointment of fewer extra judges.

9. The first possibility, which seems politically unrealistic, would be to constitute a single panel of High Court judges to serve in both jurisdictions, only a single one of them taking the Bench at sittings in Northern Ireland. This would mean that a proportion of the relevant cases heard in Northern Ireland would be heard by a single judge from the Republic of Ireland, sitting alone. This seems politically unrealistic - and could be constitutionally unacceptable unless that judge could and would take the same oaths of office as the existing Northern Ireland judges.

10. A second possibility would be to adhere to the original three-judge suggestion, but to reduce the range of cases to which it applies. This would involve some selection of cases from within the existing scheduled offence cases. Such selection might be on a case-by-case basis by the Lord Chief Justice (who might be reluctant to have the responsibility of identifying those cases which he considered more serious than others, since all cases would involve human liberty), or some re-definition of the scheduled offences, seeking to separate some more serious offences from those which are less serious. But as all scheduled offences are currently contained in the list because they are likely to relate to terrorist-involved cases, the distinction between more and less

serious offences might not be reflected in the relative seriousness of the cases actually coming before the Courts.

11. A third possibility would be to retain the original proposal, but to provide that the two additional judges at sittings of the Northern Ireland Crown Court should be of a rank junior to the presiding judge. Thus he would be assisted by, say, a recorder

or resident magistrate and by a similarly ranked judicial figure from the Republic of Ireland. This could solve the numbers problem, but it is questionable whether the more junior status of the two additional judges would ultimately enhance the acceptability of the Court to the minority.

12. A fourth possibility would be for the judge from the Republic of Ireland to sit not in the High Court, but in the Northern Ireland Court of Appeal. This court already sits with three judges and there would therefore be no additional manpower requirement for the Northern Ireland Bench. On the other hand it could be argued that the presence of a judge from the Republic of Ireland in the Court of Appeal might not have the same immediate impact as the presence of such a judge in the court of first instance.

PAPER NO 2

SPEAKING NOTE

AN ALL-IRELAND LAW COMMISSION

1. This proposal starts from the proposition that the United Kingdom and the Republic of Ireland should examine together whether there are areas of the criminal law, applying, respectively, in Northern Ireland and the Republic, which could, with advantage to both countries, be harmonised.

2. The United Kingdom would stress the importance of setting realistic objectives for such an exercise. It would not be realistic to envisage the total harmonisation of the criminal law, substantive and procedural, operating in two sovereign states. Leaving aside the doubtful utility of such an undertaking, the breadth of the modern criminal law, with all its regulatory accretions, would make comprehensive harmonisation impracticable. So would the susceptibility of the criminal law to differing judicial interpretations in the two systems; and the reality that two independent sovereign parliaments would not always see eye to eye on what the substance of the statutory criminal law should be. These factors are enhanced to the extent that the Republic's Courts and Parliament are constrained by the requirements of a written constitution. Accordingly, the United Kingdom would identify the aim as being to achieve a measure of harmonisation, where this is perceived as being to the mutual benefit of the two countries, in selected areas of the criminal law.

3. On this approach, the first task would be to identify such areas; the second to establish joint machinery for studying them in depth and producing proposals for reform. The arrangement under which the Law Commission for England and Wales and the Scottish Law Commission undertake programmes of work approved by the responsible Ministers (Law Commissions Act 1965, Section 3) provides a model which might be followed. In the first instance, the governments of the United Kingdom and the Republic would set up, under the auspices of the AIIC, a joint commission charged to report on the scope for harmonisation measures within the whole field of the criminal law (including procedural

law) and to recommend an initial programme of work with, say a five year time-span. Provided that this study confirmed the utility of proceeding, and that agreement on a programme was reached, the commission might then be converted into a standing body to carry out the approved programme and, in due course, make recommendations for further work.

4. The commission, even at the intial stage, would need a full-time joint secretariat. If the model of the Great Britain Law Commissions were followed it might ultimately need full-time commissioners; but, with adequate secretarial backing, the task of establishing a viable programme of work could be given to a part-time body of, say, six nominees from each side, working under joint chairmen. The commission would need to be representative of a wide range of legal experience - academic, forensic, governmental - and some lay input into the development of the programme might be desirable. Once the commission embarked on a programme, it might be expected to set up working parties or study groups on particular topics, and would need power to co-opt appropriate experts to these. There would, accordingly, be financial and manpower implications for both governments, and shared funding arrangements would have to be made.

5. The United Kingdom has, at this stage, an open mind about the range of studies that might be undertaken by a commission, and would see much advantage in the suggested initial joint study to seek to establish what would be realistic. At the same time, it would suppose that a probable priority area would be that of terrorism and related offences; and the commission's initial remit might specifically enjoin it to examine what further scope exists for harmonisation studies in this area.

6. Law reform reports run a perennial danger of being pigeon-holed. If the two governments were to establish a joint commission to produce such reports it would be desirable to complement it by

machinery (perhaps within the auspices of the AIIC) to examine the reports, and seek to co-ordinate action on them. It must also be borne in mind that harmonisation proposals would normally require fresh statutory provision in the two jurisdictions, and could be brought to fruition only if the two Parliaments assented.

7. The United Kingdom would wish to place on record that much Northern Ireland criminal law is identical with, or closely modelled on, the law in England and Wales. Of course, that law also has common roots with, and close similarities to, much of the corresponding law in the Republic. But, for the United Kingdom a constraint on the harmonisation of law within the island of Ireland, is that any benefits that might result from such work should not be outweighed by the introduction of unacceptable discrepancies between the laws operating in different parts of the United Kingdom.

8. This paper has been written in terms of the criminal law. It is not meant to preclude the possibility of extending harmonisation arrangements in due course, to other areas of law where they would be beneficial.

SPEAKING NOTE

A JOINT SECURITY COMMISSION

Institutionalised consultation in the field of law enforcement could be introduced within the AIIC framework by the establishment of an inter-governmental Security Commission for Northern Ireland and the Republic.

2. The Secretary of State for Northern Ireland and the Minister of Justice of the Republic would be the Joint Chairmen of the Commission. The Commission would be small in number; half would be nominated by the Secretary of State and half by the Minister of Justice. The members would include the Chief Constable of the RUC, the Commissioner of the Garda and the Permanent Secretaries of the Northern Ireland Office and the Department of Justice. Indeed these might be the only members in the first instance, but others might be invited to attend as necessary; and the membership might be increased at a later stage by mutual agreement to include such members as the Chairman of the Northern Ireland Police Authority and the Chairman of the Northern Ireland Complaints Board, to be paralleled by their opposite numbers if such institutions are established in the Republic. The Council would have a small joint Secretariat provided by the Northern Ireland Office and the Department of Justice.

3. The Commission would have regular meetings every three months and special meetings would be convened when necessary; for example, in the aftermath of a particularly serious incident with implications for both countries. The Commission would receive regular reports from the two Chief Police Officers. In addition

it would be supported by a structure of Joint Committees at official level, with members drawn in equal numbers from both countries and with joint chairmen, to carry out a comprehensive programme of work of mutual interest and value.

4. This programme of work would cover such matters as -

a. the exchange of intelligence;

b. technical co-operation, e.g. in training, forensic matters and control of explosives;

c. exchange of personnel;

d. joint inspection arrangements;

e. the planning of joint operations;

f. the establishment and operation of joint units;

g. the development of a programme of action designed to affirm the position of the police as an accepted part of the whole community.

5. The programme of action referred to in paragraph 4.g might include the establishment of local consultative machinery; training in community relations; the introduction of lay visitors to police stations; crime prevention schemes involving the community; and improvements in arrangements for dealing with complaints against the police. Although these measures would be directed primarily towards Northern Ireland, with the particular object of making the police more readily accepted by the nationalist community, some of them might be developed by the Security Commission in ways which were acceptable in the Republic as well.

6. An Inter-Governmental Security Commission would focus continuing attention at the highest level on the improvement of security co-operation throughout Northern Ireland and

the Republic. Yet there would be no derogation of sovereignty on the part of the United Kingdom or the Republic. The RUC and the Garda would remain independent forces; the Chief Constable would maintain his links with the Secretary of State and the Commissioner his accountability to the Minister of Justice.

These arrangements would ensure full consultation at the highest level in the security field. The activities of the security forces in dealing with crime, particularly terrorist crime, would consequently be more easily seen as legitimate by all sides. In this way, the terrorist might be truly distanced from the community. At the same time, the development of improved links with the community would reduce any divisions between the police and the people, particularly in the nationalist areas of the North, but also in other areas where there is some evidence of the development of the same tension between the police and the community that is found in most countries in the Western world.

SECRET PAPER NO 4

SPEAKING NOTE

PRACTICAL POLICING MEASURES

1. There are several ways in which practical police co-operation could be improved so as to promote greater general acceptance and support for the work of the police in Northern Ireland, particularly in nationalist areas. Examples are given in the list of possible subjects for study in the paper on a Joint Security Commission. This paper deals with two particular subjects; increasing the recruitment of members of the nationalist community to the police in Northern Ireland, and the establishment of joint co-operation between the police forces in Northern Ireland and the Republic of Ireland on the general model of the Regional Crime Squads in Great Britain.

Recruitment

2. There has been an increase in the recruitment from the nationalist community to the police in Northern Ireland. Over 12% of the recruits to the RUC from the start of 1984 until August 1984 have come from the Catholic community; this is over 50% more than the figure for the comparable period in 1983 and compares favourably with the current Catholic strength of the RUC which is about 9% of the total force. In the view of the Northern Ireland Office it would be more realistic to take action to increase the number of Catholics in the RUC as a whole (including those in supervisory ranks) rather than to attempt to create a separate Catholic force, which would give rise to serious problems of organisation and command and of the safety of the officers concerned.

3. Further steps to increase the recruitment of officers from the nationalist community might be studied by a Committee of the proposed Joint Security Commission. Possibilities include;

a. in areas with a high nationalist population, efforts might be made to explain to individuals or small groups of potential recruits the work of the police service and its career prospects;

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b. minority candidates who narrowly fail the educational test might be given advice to help them to succeed if they reapply;

c. short courses might be held for police officers in charge of recruitment in minority areas;

d. selection procedures could be reviewed to ensure that there are no hidden inhibitions to success by members of the minority community;

e. help might be given where necessary to recruits from the minority community and their families to find new housing if they lived in particularly dangerous and exposed areas.

The Regional Crime Squad Model

4. The detection and apprehension of terrorists involves four connected activities;

a. the acquisition of intelligence;

b. the surveillance of suspected terrorists and their accomplices;

c. the protection of surveillance teams;

d. operations to apprehend suspected terrorists and their accomplices in circumstances that will facilitate their being charged and successfully prosecuted in the courts.

5. In the RUC these activities are undertaken by a number of specialised groups of staff, including Headquarters Mobile Support Units. In the Republic, the Garda Siochana's Special Task Force has broadly paralleled the activities of the corresponding RUC Units.

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It would therefore be possible to combine some of the RUC and Garda resources working in this field on the general model of the Regional Crime Squads which have been formed in Great Britain, from officers of neighbouring police forces. The precise functions covered, the force's size, and other practical questions would need to be jointly examined and agreed. The commander would be jointly responsible to the Chief Constable and the Commissioner of the Garda Siochana - command might alternate between the two forces, say every two years. Arrangements for liaison with other RUC and Garda formations and formations of the two Armies would have to be worked out carefully.

6. This force would be deployed in both jurisdictions - it need not be confined to a border strip. It would operate under the law of the relevant jurisdiction; in the Republic, it would primarily be for members of the Garda to make arrests and be responsible for other acts of legal significance; in Northern Ireland, it would be for members of the RUC. In emergency, it might be necessary for a Garda officer to arrest a person in Northern Ireland (or for an RUC officer to so do in the Republic). Details would have to be worked out, but the legal position of citizens of the Republic in the United Kingdom, and citizens of the UK (particularly Northern Ireland) in the Republic, should facilitate this type of arrangement.

7. The fact that the collaborative group specialised in terrorist crime, where the law is not too different in the two jurisdictions, would facilitate its operation. However, as discussed in other papers, it might be helpful to work towards the establishment of a common code for terrorist crime in both jurisdictions, and also towards some harmonisation of police powers.

Conclusion

8. These suggestions for the development of recruitment, and for collaboration on the model of Regional Crime Squads would need to

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be investigated further and in detail. They could be examined by committees tasked by the Joint Security Commission and containing members drawn from the police forces of the two countries, and other experts. The Garda Siochana would have a most useful contribution to make to this work from their own experience in dealing, for example, with terrorist crime and difficult community relations problems in urban areas. The RUC could contribute their own experience and expertise. Both police forces would gain. In this way, the work of the Joint Security Commission could make a useful contribution to the fight against terrorism and to the development of improved relations between the police and the community, to the benefit of the people in both countries.

SECRET AND PERSONAL

SPEAKING NOTE

INSTITUTIONALISED CONSULTATION

This note considers possible arrangements for "institutionalised consultation" within the framework of the AIIC, and operating against the background of a devolved government in Northern Ireland which commands the widespread acceptance required by the Northern Ireland Act 1982.

Purpose

2. To ensure that the interests and views of the nationalist community in Northern Ireland are adequately taken into account in decisions taken by government, and to provide "institutionalised consultation" with the government of the Republic of Ireland to that end.

Scope

3. The British Government would accept an obligation to consult the Irish Government and the Irish Government would have the right to be consulted on matters for which the Secretary of State for Northern Ireland is responsible. Consultations on law and order matters would be the subject of separate arrangements from those suggested in this note.

4. The following matters are outside the responsibility of the Secretary of State for Northern Ireland (or in some cases are not matters for him alone) and would thus be outside the scope of consultation:

- the constitutional status of Northern Ireland;
- international relations, including the handling of European Community matters;
- taxation, and the fixing of overall public expenditure limits and policies;
- defence, including military deployments in Northern Ireland;
- courts (except so far as these would be covered by any arrangements relating to law and order);
- matters transferred to a devolved Northern Ireland administration;
- matters which fall within the responsibility of local

authorities and other independent bodies.

5. The government of the Republic of Ireland would establish in Northern Ireland a representative, whom the Secretary of State, and any officials acting on his behalf or subject to his direction would consult on relevant matters.

6. The representative would be free to contact Ministers or Departments on his own initiative.

7. A liaison unit would be established, probably in Stormont Castle, to monitor, co-ordinate and encourage contacts with the representative; and to act as a channel or communication with the representative whenever this appeared desirable.

8. The liaison unit would be expected to have regular meetings with the representative.

9. Any representations made by the representative of the government of the Republic of Ireland would be considered and taken into account by the Secretary of State for Northern Ireland (or any Minister or official acting on his behalf or under his direction) before taking the relevant decision.

10. The ultimate decision would nevertheless remain that of the Secretary of State (or other person acting on his behalf), whose action would continue to be subject to any constraints or requirements imposed by law, and to any requirements in relation to Parliament or to wider United Kingdom government policy.

11. Contacts between the representative and the Northern Ireland authorities would be in addition to, not a substitute for, direct contact at the political and diplomatic levels between the United Kingdom and Republic of Ireland governments. In particular, the Secretary of State for Northern Ireland would continue, within the framework of the AIIC, the present pattern of discussions with Irish Ministers on matters of mutual concern.

12. Similarly, the representative's role in relation to the nationalist community in Northern Ireland would be in addition to, not in substitution for, improved direct relationships between the authorities in Northern Ireland and the minority community.

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PAPER NO. 6

SPEAKING NOTE

DEVOLVED GOVERNMENT

1. The best prospect for the stable Government of Northern Ireland lies in a devolved administration that commands widespread acceptance throughout the Northern Ireland community.

2. That acceptance must be genuine, not enforced. Enforced acceptance will only result in further instability.

3. The Northern Ireland Act 1982 provides a basic framework from which such devolved government could be developed. Under that Act, the Northern Ireland Assembly is empowered to submit proposals for it to resume some or all of its former legislative powers, and for the formation of a Northern Ireland Executive; if the Assembly's proposals have the support of 70% of its members, or if the Secretary of State is satisfied they are likely to command widespread acceptance throughout the community (and have the support of 50% of Assembly members), then those proposals must be laid before Parliament. The proposals can only be acted on, however, if both Houses of Parliament approve them and consider that they are likely to command widespread acceptance throughout the community.

4. Devolution proposals which did not stem from this Assembly, or which did not meet the tests of the 1982 Act, could not be implemented without fresh legislation.

5. Although the three parties currently attending the Northern Ireland Assembly (Alliance, DUP, UUP) are examining their own respective proposals for devolved government there is no evidence at present that they will reach agreement on a form of devolved government that is likely to command widespread acceptance throughout the Northern Ireland community.

6. The current views of the major constitutional Northern Ireland political parties appear to be;

The SDLP have declined to offer views on devolution within Northern Ireland.

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The DUP in the advocate a majority system whereby the majority party in the Assembly would form a Cabinet responsible for legislation and the execution of policy. Departmental Committees would have an advisory role in relation to legislation and finance. Minority representatives might have a greater role in the Committees than their numbers would warrant. There could be additional safeguards for the minority including a Bill of Rights and a blocking mechanism in the Assembly.

The UUP - Devolution of administrative and functional powers enjoyed at local government level in other parts of the UK, possible incorporation of the ECHR, as well as arrangements for the cultural expression of Irishness.

The Alliance - Devolution of legislative and executive powers to an Assembly, election of Ministers on a proportional basis - power sharing. A right of appeal to the Secretary of State. A Bill of Rights for Northern Ireland. A "sensible, practical expression of the Irish dimension" in social and economic fields.

7. It is not clear that the unionist parties will be willing to agree to a sufficient role for the minority to meet the test of widespread acceptance. Nor is it clear that the SDLP is willing to join in the search for a form of devolved government that might meet this test.

8. HMG is seeking ways of bridging this gap and of encouraging the parties to explore together possible ways of constructing a devolved government that would command widespread acceptance.

9. We believe that the deletion of amendment to Articles 2 and 3 of the Constitution of the Republic of Ireland would not, in unionist eyes, be sufficient to offset the introduction of institutionalised consultation and sharing of power with the

minority in a devolved government. In addition to the proposed action by the Irish Government to amend the Irish Constitution, unionists will need a significant inducement from the British Government if they are to be brought to acquiesce in any arrangements involving institutionalised consultation with the Irish Government on Northern Ireland affairs. A devolved government run on majority lines, with safeguards for the minority, might meet this requirement, provided that (as we envisage) there was no provision for consulting the Irish Government on matters for which the devolved government would be responsible. But there would be difficulties if the SDLP insisted on consulting the Irish Government direct about devolved matters, as they did during the period of the power-sharing executive after Sunningdale.

10. The creation of a devolved government could take many of the present responsibilities of the Secretary of State (except for law and order) out of the scheme of institutionalised consultation. This would diminish the value of institutionalised consultation to the Irish Government. Applying institutionalised consultation to the devolved powers would attract fierce unionist opposition. At a minimum the Irish Government would expect consultation procedures to apply to whatever public appointments remained in the Secretary of State's gift, as well as to any checks and balances on majority rule which might form part of his responsibilities: for instance, if the Secretary of State's formal endorsement was required for certain acts by the devolved government, the Irish Government would no doubt argue that it should have a right to be consulted before that endorsement was given.

SECRET AND PERSONAL

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SPEAKING NOTE

ANGLO-IRISH PARLIAMENTARY BODY

Background

The establishment of an Anglo-Irish Parliamentary body was first proposed in 1981 and recorded in the White Paper on Anglo-Irish Joint Studies in the context of ideas to enhance the relationship between the two countries by giving it closer institutional expression. There has since been little further discussion of the detail of the proposal between the two sides, and comparatively little Parliamentary pressure for the creation of such a body although some support for it was expressed in the House of Commons debate on Northern Ireland on 2 July. As was to be expected Unionist spokesmen have from time to time opposed its creation and have declared that if it were to be set up despite their opposition they would not take part in it.

Functions

2. It will be difficult to create a Parliamentary body which appears to have sufficient useful purpose to be taken seriously without it trespassing unacceptably on the role of the sovereign Parliaments, or on the process of government. We believe it would be best to proceed by building on the existing Anglo-Irish Parliamentary Groups at Westminster and the Dail. The Groups' role could be enhanced by making provision for more regular meetings, and by giving the new organisation a higher profile as a consultative body. It could receive an annual report from each government on the progress of Anglo-Irish relations, and itself make recommendations to the two governments or the two sovereign Parliaments, which together with the Northern Ireland Assembly would be free to debate them, or let them lie.

Structure

3. Given the declared opposition by the Unionists and the uncertain availability of Northern Ireland Assembly representatives, it might be best to establish a new Parliamentary body in two phases. It could begin with an equal number of representatives from Westminster and Dublin, chosen roughly in proportion to party representation in the lower Houses of those two Parliaments. Provision could then be made for them to add further members drawn from the Northern Ireland Assembly if and when the time seemed appropriate. It would need to be decided whether only elected members of the respective Parliaments should be included or whether members of the Lords and the Irish Senate would be eligible. We presume that the members of the body would be appointed by the contributing assemblies. The size of the proposed body and the proportion eventually to be drawn from the Northern Ireland Assembly would need to be decided: the membership would not have to be so large as to be unmanageable, or so small as to be unrepresentative.

The Unionists would resist this

4. There are a number of other practical questions which would need resolution. The body would need to be given a place or places to meet; a secretariat and a budget; and a chairman, perhaps selected in rotation from among the representatives of the two sovereign Parliaments by all its members. It would be necessary to be clear whether the body was empowered to appoint committees and how frequently it was able to meet.

Implementation

5. The simplest way of establishing the new body would probably be by a resolution in the Parliaments of Westminster and Dublin, perhaps on the lines of those which established the Commons departmental committees.

It would be necessary to ensure that the terms of the resolution could be carried unamended both in the Commons and in the Dail; there would therefore be need for agreement among both government supporters on the broad structure and functions of the body and in practice a fair measure of agreement on the Opposition benches too.

SPEAKING NOTE

LEGAL BASIS

It is envisaged that the arrangements under discussion would be embodied in an agreement between the British and Irish Governments. Although for historical reasons it would not be called or referred to as a treaty, it would be a formal international agreement which would be registered at the United Nations and would require ratification.

2. The form of the agreement would turn in part on the substance. But it might consist of:

(i) a Preamble setting out political statements not intended to constitute legal obligations; some of these might be drawn from the proposed Joint Declaration of objectives or principles;

(ii) Articles on each of the areas discussed in other papers on which action was to be taken by each of the sides or consultation established, the detail on each point being set out in Annexes:

(iii) formal Articles providing for ratification, entry into force and registration with the United Nations.

3. It is envisaged that domestic legislation would need to be enacted in both Westminster and Dublin to give effect to the provisions of the Agreement, including the holding of a referendum in the Republic. The procedure and sequence for finalising the agreement might therefore be: initialling of a text resulting from negotiations, followed by publication; then formal signature of the agreement, followed by constitutional and legislative action in both countries. After this was complete in both countries, instruments of ratification would be exchanged.

PAPER No 10

SECRET AND PERSONAL

I could not possibly agree to this. It would shock Jan into the Unionists.

DRAFT JOINT DECLARATION ON NORTHERN IRELAND

The Prime Minister and the Taoiseach discussed the situation in Northern Ireland. They agreed that the promotion of peace and stability in the province was dependent upon acceptance that :

Not strong enough. The Paramount is part of the U.K. and will remain so unless the majority etc.

i. There can be no change in the constitutional status of Northern Ireland as part of the United Kingdom without the consent of the majority of its people.

ii. Geography, and the sense of loyalty which many people in Northern Ireland feel to the Irish state, call for a close relationship between the Governments of the United Kingdom and of the Republic of Ireland.

iii. The identities of both the majority and the minority communities in Northern Ireland should be respected, and both communities should be entitled to give those identities appropriate public, political and social expression.

?? What is this meant to mean?

iv. The institutions of government in Northern Ireland should be such as to provide both communities with the confidence that their rights will be safeguarded and their aspirations respected.

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v. Any attempt to promote political objectives by means of violence or the threat of violence must be rejected, as must those who adopt or support such methods.

SECRET AND PERSONAL

BILL OF RIGHTS

The main political parties in Northern Ireland have each, at some time or other, expressed support for the concept of a Bill of Rights in Northern Ireland. This unusual unanimity may indicate that no party expects a Bill of Rights to have a substantial effect on circumstances in Northern Ireland, or alternatively that each party holds a rather different view of what a Bill of Rights would set out to achieve.

2. Most definitions of a Bill of Rights include a list of fundamental human rights and freedoms which are to be entrenched in the law in such a way that action which appears to be incompatible with them (including legislative action) can be challenged in a court.

3. The possibility of such a Bill of Rights in Northern Ireland has been examined, and publicly debated, on many occasions, revealing a considerable range of difficulties.

4. First there is a question of the rights and freedoms which should be incorporated in the Bill of Rights. In recent years discussion has tended to focus on the provisions of the European Convention on Human Rights, which is still probably the most convenient list for the present purpose. It would, however, be necessary to confirm that this list is precisely appropriate for the circumstances of Northern Ireland.

5. Second, there is the way in which the relevant rights and freedoms are to be described. The language of the European Convention on Human Rights is, of necessity, the language of a Treaty, rather than the language of a statutory provision within the United Kingdom. There is a case for seeking to redraft the rights and freedoms in the more watertight language of a United Kingdom statute; but to do so could raise formidable drafting problems, and could sever the important presentational value of having domestic provisions which are identical in form to the

European Convention. But before accepting that the language of the European Convention should be that used in relation to Northern Ireland, it would be important to establish that this would not give rise to unmanageable problems for the courts, or for others.

6. Third, there is the problem of how to incorporate the Bill of Rights provisions in the law of Northern Ireland. The most direct approach would be to enact provisions (as provisions were enacted in the Government of Ireland Act 1920 and the Northern Ireland Constitution Act 1973) which govern all legislative and executive action undertaken in Northern Ireland. By such means it would be possible to ensure that all future actions of a Northern Ireland Executive and a Northern Ireland Assembly would be subject to the Bill of Rights provisions - as would be any similar activities undertaken during direct rule.

7. Such a provision would not, and could not, bind the United Kingdom parliament, and would thus not affect any future statute of that parliament.

8. The 1920 and 1973 precedents also have the limitation that they only confer protection against actions by Ministers and other governmental organisations; they do not, for instance, bite on the actions of the police, the army, or of organisations and people who are outside government. Yet it might be argued that a Bill of Rights should confer rights and freedoms upon the citizen irrespective of the nature of the authority, organisation or individual who might threaten those rights; and that the Bill of Rights should therefore confer protection against the actions of a much wider range of organisations and individuals than those covered by the 1920 and 1973 Acts.

9. Such a widening would, however, provoke complicated new problems as to the judicial mechanism for enforcing the rights and freedoms. The 1973 Act provides that the judicial committee

of the Privy Council may rule on legislation whose vires are disputed; and that an aggrieved person may complain to the courts in the usual way if any of his rights protected under the 1973 Act are violated. If the police (and the Army) were to be brought within the ambit of the Bill of Rights, a more complicated machinery would be needed (and it would have to be constructed so as to be compatible with the other mechanisms for controlling the police and dealing with complaints against them).

10. The enforcement of human rights and freedoms could in any case be a much more complicated problem than that faced in the 1973 Act (where discrimination is the only point at issue); the European Convention on Human Rights protects a wide range of human rights, human rights which do not have many characteristics in common, and which might therefore be difficult to protect by means of a single juridical device.

11. These problems are relatively well known, and have been well ventilated over the years. No satisfactory means has yet been found of overcoming them all, particularly in the context of a country such as the United Kingdom which has no written constitution. To the extent that Northern Ireland has a written constitution, it is possible to overcome some of these difficulties, though only by limiting the scope of the Bill of Rights to matters which fall within the scope of those constitutional and governmental arrangements. Any proposal to create a Bill of Rights provision for Northern Ireland would inevitably have implications both for the rest of the United Kingdom and, presumably, for the Republic of Ireland. It is not easy to see how a satisfactory dividing line can be drawn between what is needed in Northern Ireland and what is needed in the rest of the United Kingdom, or in the Republic of Ireland. If the Republic of Ireland were to introduce a Bill of Rights there, it would make the case for such action in Northern Ireland

correspondingly stronger - while a decision in the Republic of Ireland not to introduce a Bill of Rights for that country would be seen as weakening the arguments for a Bill of Rights in Northern Ireland.

12. These arguments lead to one final problem; what is the purpose that enactment of a Bill of Rights is expected to serve? If it is believed that a wide range of rights and freedoms is not protected by the law in Northern Ireland, then it is arguable that the only way to protect all of them would be to enact a Bill of Rights; if, on the other hand, it is believed that individual rights or freedoms are inadequately protected by the law then it may be simpler and more effective to concentrate (as did the 1973 Act) on examining provisions which might remedy those particular deficiencies. This last point links with the first point identified in this paper - namely the need to establish at an early stage just what rights and freedoms it is intended to protect.