

Prime Minister.

9

Thankyou Mr,

A.I.C. - 2/2

Ref.A084/436

PRIME MINISTER

Northern Ireland

Mr Goodall visited Dublin on 3 February on the business of the Anglo-Irish Intergovernmental Council. In the margins of that meeting he had a private talk with Mr Lillis, the Taoiseach's adviser on Anglo-Irish and Northern Ireland affairs. Before your meeting on 10 February you should see Mr Goodall's note of his talk, which I attach.

2. I have not sent copies of this minute to the Foreign and Commonwealth Secretary or the Secretary of State for Northern Ireland.

CONQUEROR

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ROBERT ARMSTRONG

8.2.84.

SECRET AND PERSONAL

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SIR ROBERT ARMSTRONG

Northern Ireland: The Forum

1. As you know, I visited Dublin on 3 February to discuss AIIC business with the Irish co-Chairman of the Co-ordinating Committee, Mr Michael Lillis. Before the official meeting (of which HM Embassy at Dublin will be supplying a record) Mr Lillis took me aside for a private talk. He said that affairs in the Forum had taken a turn for the better and that it was now virtually certain that its final report would be on the lines he had described to me in London last month (my minute to you of 16 January, copied only to Mr Coles): i.e. there would be three parts, the first analysing the attitudes of the various parties to the problem; the second identifying a number of principles or criteria which any settlement must satisfy; and the third examining an illustrative list of possible models for a solution. In the view of the Irish Government the crucial section would be the second. On this there had been an important development two days earlier. Mr Haughey had withdrawn his objection to the inclusion of a section on principles/criteria and the draft of this section had been agreed between the leaders of the four parties (Fine Gael, Fianna Fail, Labour and SDLP). Mr Lillis said that the Taoiseach had instructed him to give me a copy of the text for the Prime Minister's eyes only. (This is attached.) He said that no record would be taken on the Irish side of this transaction and the Taoiseach was particularly anxious that the text should at this stage be shown to no one on the British side except the Prime Minister. The Irish Ambassador, who was seeing the Northern Ireland Secretary that day, had however been instructed to give him the gist of its contents without

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showing him the document itself. (At my request Mr Lillis agreed that I might show the document to Mr Goodison on a strictly personal basis and on the understanding that he would make no reference to it in his reporting. This I subsequently did.)

2. Mr Lillis asked if I had any immediate comments on the text. I said we would obviously need to study and reflect on it. My only immediate comment related to Principle No 6, which states that "a fundamental criterion of any proposed arrangement must be that it will provide immediate stability for the people of Northern Ireland....". It seemed to me that there was no action which any one could take which could provide "immediate" stability and that this criterion was therefore unrealistic. It would be a pity if the inclusion of one unrealistic provision cast doubt on the value of the whole text. Mr Lillis conceded this but said that the word "immediate" was a political imperative for the SDLP as conveying the requirement for early movement towards security arrangements designed to counter the alienation of the minority community. This should not be taken literally.

3. Mr Lillis went on to say that the Taoiseach was particularly anxious to get across to the Prime Minister that he was looking forward to a serious dialogue with the British side when the British Government was ready for it; that he had no wish to put the Prime Minister under any time pressure for this; and that he wanted her to recognise that he (the Taoiseach) would "play no funny games" either with such a dialogue or with the Forum report. He would welcome advice on how best to handle the report from the British point of view. I said that I was entirely without instructions about this. But my strictly personal reaction was that the Irish Government should refrain from any form of public exploitation of the report, either at home or

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overseas, until the Prime Minister herself had seen it. I wondered if consideration was being given to the possibility of the Taoiseach sending her an advance copy under cover of a personal message explaining what he (Dr Fitzgerald) thought was important in it and what should be disregarded; how he proposed to handle it; and what he hoped it might lead to. Once the report got into the public domain there would be all sorts of interpretations and misinterpretations of the Irish Government's intentions and I thought it would be helpful if the Prime Minister had received an authoritative account in advance from the Taoiseach himself of how the Irish Government wanted to play it. Mr Lillis said that it was already the intention that we should be given an advance copy of the report through HM Ambassador at Dublin; but the idea of a personal message was a helpful one which the Taoiseach might well want to act on.

4. I asked Mr Lillis how Mr Haughey had come to change his mind about the structure and content of the report. Mr Lillis said that this had largely been the result of Mr John Hume's advocacy. The decisive consideration appeared to have been the appearance of the draft of the final section (on illustrative models). This spelt out the pros and cons of each of the models examined. In particular, it showed that the economic disadvantages of the "unitary state" solution were so overwhelming that it would be difficult for Fianna Fail to endorse it without qualification. It was also relevant that Mr Haughey was experiencing difficulties (unspecified) within his own party which might have the effect of once again calling his leadership into question.

5. On timing, Mr Lillis said that he was still hopeful that the report would appear by the end of February. The oral submission now to be made by the Irish hierarchy was unlikely to involve amendments of substance or to lead to

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delay. The Taoiseach would be in Washington for St Patrick's Day when he would be seeing President Reagan; and there had been earlier indications that Mr Haughey would like to deny him the advantage of having the Forum's report available by then. But it now seemed less likely that Mr Haughey would press his point on this. I said that I hoped the Taoiseach would not be tempted to use his interview with President Reagan to enlist the latter's support for the Forum report as a means of putting pressure on the British or of creating the impression that the United States Government were being given the first opportunity of any foreign government to be informed of the Forum's conclusions. Mr Lillis said that this point was well taken: the Taoiseach was determined to avoid creating any such impression. His primary concern was to ensure a sympathetic response from the Prime Minister.

6. In conclusion, Mr Lillis said there was one aspect of the handling of the report on which the Irish would welcome our specific advice. Consideration was being given to the possibility of sending a copy of the report, under a covering letter (although he did not say by whom the covering letter would be signed), to every person on the voters' list in Northern Ireland. The report would not be a long document and it would be desirable to try to ensure that as many people as possible in Northern Ireland were given the opportunity of reading it in full rather than having to rely on the inevitably distorted or simplified reports which would appear in the press. I said that I could understand the thinking behind this idea. But it was one of evident sensitivity from our point of view. I would therefore like to consult about it on my return to London and let him have a considered reaction later. I am pursuing this point separately with the Northern Ireland Office and the Foreign and Commonwealth Office.

David Goodall

6 February 1984

A D S Goodall

REALITIES

The Forum has identified the following realities that must be accommodated in a new Ireland.

1. Existing or past policies have failed to provide either peace or stability in Northern Ireland.
2. The nationalist identity and ethos comprise a sense of a separate national Irish identity and a democratically founded desire to have that identity fully institutionalised in a sovereign united Ireland.
3. The Loyalist identity and ethos comprise a sense of British identity allied to a unique sense of Irishness (itself different from the nationalist sense of Irishness) and a sense of the Protestant ethos being under threat from a Catholic ethos which is perceived as comprising different and irreconcilable values.
4. Acceptance of the equal validity of the two traditions: both of these traditions must each have secure, adequate and durable political and administrative expression and protection of their identities.
5. Clear rejection of the principle and practice of domination or threat of domination of one tradition by an other.
6. Stability and Security: A fundamental criterion of any proposed arrangement must be that it will provide immediate stability for the people of Northern Ireland through a system of security which, in particular, takes account of the deep and growing alienation of the nationalist section of the community and which will enhance the stability of the island as a whole.

7. Urgency: Britain owes a moral duty to the people of Northern Ireland to act now by joining in a process that will lead to the accommodation of these realities in order to ensure that these people are not condemned to yet another generation of violence and sterility. The parties in the Forum commit themselves to join in a process directed towards that end.

Articles 2 and 3 of the Irish Constitution

In an address to the Irish Senate on 9 October 1981, Dr Fitzgerald as Taoiseach said that repeal of Articles 2 and 3 would "reduce pressures that give rise to their [Unionist] siege mentality and open up the possibility of easier dialogue between them and the Nationalists in Northern Ireland."

In 1966 an informal All-Party Committee set up by the then Taoiseach, Mr Lemass, to review the Constitution agreed that Article 3 should be amended and replaced with the following:

"The Irish nation hereby proclaims its firm will that its national territories are re-united in harmony and brotherly affection between all Irishmen."



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ANNEX A

Joint Policing of a Border Zone

Definition

1. The border between Northern Ireland and the Republic curls about for 300 miles. Although most of the border area is sparsely populated, especially on the Irish side, there are significant towns (including Londonderry, Strabane, Armagh and Newry in Northern Ireland, and Dundalk and Monaghan in the Republic) which would be within a five miles strip on either side of the border.

2. Defining the boundaries of the new border zone in terms of a specified distance (5, 10 or 20 miles) each side of the existing border would not take account of any natural geographical boundaries or features or of population units. It would replicate twice over the arbitrary twists and turns of the existing border. It would be a major exercise to mark it or for those concerned to be sure which side of the line they were. A long narrow strip would make a difficult policing unit.

3. For Northern Ireland a better approach might be to define the border zone as comprising the police sub-divisions contiguous to the border. Police sub-divisions have recently been re-drawn to follow local government boundaries fairly closely: defining the Northern Ireland part of the border zone in terms of local government units would therefore produce a similar result. The map (annexed) shows that the Northern Ireland border zone thus defined would range up to 20 miles wide. It would include a substantial area.

Manpower

4. The 7 RUC sub-divisions whose areas are on the border have a total strength (including full-time RUC reserve) of around 1,200. In addition there are approximately 15 Divisional Mobile Support Units of 30 men each which operate


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in these areas. The police total of 1,650 takes no account of back-up in terms of police common services which would need to be supplied in some way. The UDR strength in these areas is approximately 1,000 permanent cadre and 1,300 part-timers. The army strength includes the South Armagh roulement battalion (over 600 men) and companies (each of 120 men) allocated to East Fermanagh and Londonderry. Though not allocated on a permanent basis, a high proportion of the army contribution to Northern Ireland security is directed to the border areas and the bulk of army effort (9,500 in all) to border areas and West Belfast.

5. The Republic is divided, for policing purposes, into Divisions and sub-districts. The sub-districts are the equivalent of RUC sub-divisions, and sub-districts adjacent to the border might form the Irish part of the joint zone. We have not risked arousing suspicion by making enquiries about the number and numerical strength of Garda sub-districts adjoining the border. The numbers are likely to be less than RUC manpower (the total strength of the Garda is 10,000) and the total manpower of our security force commitment on the UK side of the border strip is likely to be very substantially more than that on the Irish side.

6. If much the greater part of the manpower of a joint force came from Northern Ireland that would have implications for the nationality of the chief and senior officers and the public perception of the force.

Functions

7. The new joint border force could be solely responsible for all policing functions in the border zone. It might in addition be expected to undertake the operations in support of the police now performed by the army, including the UDR. An alternative approach would be for the new force to



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concentrate on counter-terrorist functions with the RUC and Garda continuing to perform other police duties (traffic, ordinary crime).

8. British, and Irish, policing has been on the principle of one police force in one area. The Continental practice of functional rather than geographica division is seen as leading to confusion, rivalry and even policemen shooting each other by mistake. Counter-terrorism is much the most important policing function in the border area. To split it off would leave only a rump function for the RUC and Garda. There is no precise dividing line between terrorism and ordinary crime either in fact or in law (e.g. a robbery may be ordinary crime or to raise funds for the IRA). Effectiveness against terrorism should grow from local knowledge gained from ordinary police work. Those in the Republic who argue that joint policing would help win public acceptance among the minority for the security forces would want maximum direct public access to the joint force and a minimal requirement for the minority in the border zone to have dealings with the RUC.

9. Nevertheless, several European countries and the United States have several police forces in any area. Leaving the existing forces to cope with routine functions would reduce the range of law and police practice which would have to be harmonised for the international joint force to operate.

Command and Control

10. If the new joint force were to be effectively independent of the Garda and RUC, it would have its own chief officer, presumably appointed jointly by the UK and Republic; its own recruitment and career structure with, at least, a core of permanent police personnel; its own finance, presumably made available by the two Governments,



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and administered by a joint police authority, equal numbers of which would be nominated by each government. The police authority could also make the senior appointments to the force. Full independence would follow from such direct control of resources. Arrangements providing a measure of operational independence without setting up a separate force are discussed in paragraph 20 below.

11. Difficult questions arise as to the new force's answerability to Ministers and Parliament. Although the chief officer of a UK police force has direct responsibility for operational decisions, the Secretary of State is answerable to Parliament for broader policy. The Secretary of State may also have to account to Parliament for police action or inaction in incidents causing exceptional public interest. One could make the chief officer of the new force report to Ministers in two governments and Parliaments. If, for example, a Southern member of the joint force shot a Protestant in Northern Ireland questions might be asked in Parliament by the Unionist MP for the area and in the Dail by the TD from whose constituency the policeman came. The chief officer might well be subject to different and conflicting pressures from the two Ministers and the accounts given in the two Parliaments might differ. Ministerial answerability is important as the expression of the public responsibility of the police force to the people. Joint arrangements which compromised the answerability of Ministers in the UK Parliament for the policing of part of Northern Ireland would be represented, with some justice, as compromising the sovereignty of that Parliament over that part of Northern Ireland. The objection will be that local people would find themselves policed by foreigners whom they do not trust, under arrangements they did not want, and with their elected representatives unable to exercise the degree of influence on their behalf which applies elsewhere in the UK. These objections would be expressed as strongly in the



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Republic as in Northern Ireland. One could avoid the criticism that a chief officer cannot answer to two Parliaments by giving responsibilities to a joint parliamentary body established to complement the AIIC. Such a structure would make the proposals much more attractive to the Irish. It would however expose more clearly the implications of joint policing for sovereignty and increase criticism among Unionist opinion. One might try to minimise the Parliamentary and Ministerial overlap by agreeing that the joint force should answer to the Minister and Parliament of the police officers concerned in each incident or of the area in which an incident occurred. Such demarcation would be difficult to operate in practice; it would go against the "jointness" concept; and those aggrieved would complain about force policy.

Organisation of Joint Forces

12. One would need to attract experienced officers to the new force. Those already serving in the RUC and Garda in the areas to be covered might be transferred to it. But many might prefer to stay with the Garda or RUC. The prospect of indefinite service in border areas would be unlikely to attract many current members of the RUC. And the Garda, who are now mostly unarmed and operate in the Republic without being targets for the IRA, might need strong inducements to exchange relaxed rural policing for the new joint force. Special pay inducements might be necessary to attract volunteers elsewhere in the Garda, RUC and perhaps British police officers. There might be advantage in having policing serving in the joint force for a few years and then going back to the Garda and RUC. One might even question whether all recruits must have a professional police background, especially if the range of functions included work now done in border areas by the



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army and UDR. If the new police force replaced the UDR in border areas there would be political attractions for the South. The new force would then be further removed from police traditions and more of a para-military organisation. The question would arise of whether to present it as a police force or as a police/army hybrid frontier guard.

13. The senior officers would come from the Garda and RUC: presumably the chief officer from one force and deputy from the other, though British or other nationalities could be considered.

14. Appointments, pay, conditions of service would have to be established, probably by the new police authority. The compromises between RUC and Garda practice would probably lean substantially to the higher and more expensive RUC standards. The new force would presumably take over the equipment and buildings possessed by the police now operating in its area. If it took over army functions it would need much extra equipment, including helicopters. It would need resources for command structure and common services. It would need training facilities of its own or arrangements as a common service with the RUC and Garda: the RUC training centre at Inniskillen would be within the area of the joint force. It would be likely to need its own special branch rather than rely on the Garda and RUC and this raises questions concerning availability of intelligence.

15. The delicate question of uniform design might be passed to the police authority. The establishment of a police Federation for the new force could be entrusted to the police representative bodies in the Garda and RUC. Inspection would be tricky since the Republic has no equivalent to the UK system of inspection and might not take happily to inspection of the joint force by HM Inspectorate of Constabulary.



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16. The arrangements for complaints and discipline would be particularly sensitive. Unionists will be quick to complain about the conduct of "foreign" members of the joint force, as would Republicans about ex-RUC officers in the South. The Republic has no formal police complaints arrangements and no Police Complaints Board. We should need a special Police Complaints Board for the joint force or perhaps a single Board to cover all three forces in the island of Ireland. Any serious complaint against a police officer is likely to involve allegation of a criminal offence. Hence the Director of Public Prosecutions is inevitably involved in complaints procedures. A joint force would require a single Director of Public Prosecutions or the closest harmony between the two Directors and their offices.

Relations between the 3 forces

17. The practical test for the new force will be whether it would reduce the scope for terrorists to exploit the border. The danger is that the problems would be compounded: three forces instead of two and three border lines instead of one. Liaison arrangements between separate forces rarely work as effectively as a single command structure. Flexibility of movement could be some compensation. Even if members of the joint force tended to operate mostly among their own nationals, any member would be entitled to act as a police officer throughout the joint force area. There would need also to be flexibility to cross the zone boundaries, certainly in hot pursuit and desirably to make enquiries. Similarly, Garda and RUC officers would need to be able to go into the zone without difficulty. The legislation establishing the joint force would therefore need to give its members the powers of a constable throughout the zone and also outside the zone when pursuing operations or enquiries from the zone. It would be difficult to define in the legislation constabulary powers outside the zone in limited terms; one might have to provide powers at large with understandings about the circumstances in which

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zone constables would act outside the zone. Similarly, members of the Garda and RUC would need constabulary powers in the foreign half of the zone when pursuing operations or enquiries from their own territory. The Irish might have reservations about former RUC members of the joint force appearing in Dublin or well away from the border. At the last election Mr Haughey made much of his allegations that Dr Fitzgerald's ideas could lead to the RUC operating in the South.

Belfast

18. Including part of Belfast in the joint police area would make it clear that the objective was political rather than cross-border co-operation. Questions of sovereignty would be more obvious. The several, separate Catholic areas in Belfast could not be brought together into a single zone without including some strongly Protestant areas. A Belfast segment of some of the Catholic population, together with a border zone would not form a natural unit and boundary problems with the RUC would be increased.

Army

19. The RUC are unable by themselves to police much of the border area and West Belfast effectively. They depend on army support. The argument that a new joint force would not accord with ordinary police practice is therefore weaker in that ordinary police practice is demonstrably of very limited effectiveness in the prevailing special conditions. If the new force were to attempt to dispense with that army support, it would need a wide range of equipment, training and double or triple the manpower requirement. If it proved possible for the joint force to win acceptability not available to the RUC, the army role could be reduced.

Border Crime Squads

20. Instead of an entirely separate force for the border zone, one might establish special co-operative arrangements between the two forces within an area either side of the border.


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The analogy of regional crime squads operating across force boundaries within Britain could justify international border crime squads. The Divisional Mobile Support Units of the RUC and the Garda special task forces could be reconstituted as joint units operating under a single command structure but accountable to the two chief officers of police. The legal, constitutional, and financial implications would be more manageable as would boundary problems. The practical benefits could be as great or greater. Though it would be natural for a joint crime squad to concentrate its attention on cross-border activity and the border area, its zone of operation need not be precisely defined and could be varied without elaborate formality. For example, involvement in Belfast might be slender and occasional at the outset, but develop substantially if the cross-border work went well. A wider Belfast involvement might then be defended on operational rather than political grounds: making use of the squads' wider experience and, perhaps, greater acceptability wherever such qualities were most likely to be of value and where the problem of terrorism was greatest. The Republic might, however, find informal arrangements with the joint crime squad answerable in Northern Ireland to the Chief Constable of the RUC politically unattractive, even if they were supported by special liaison arrangements at Ministerial level.

Anglo-Irish Joint Security Council

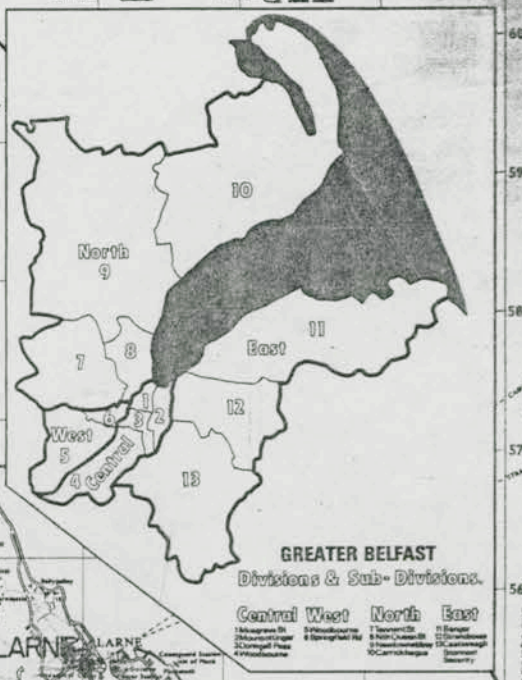
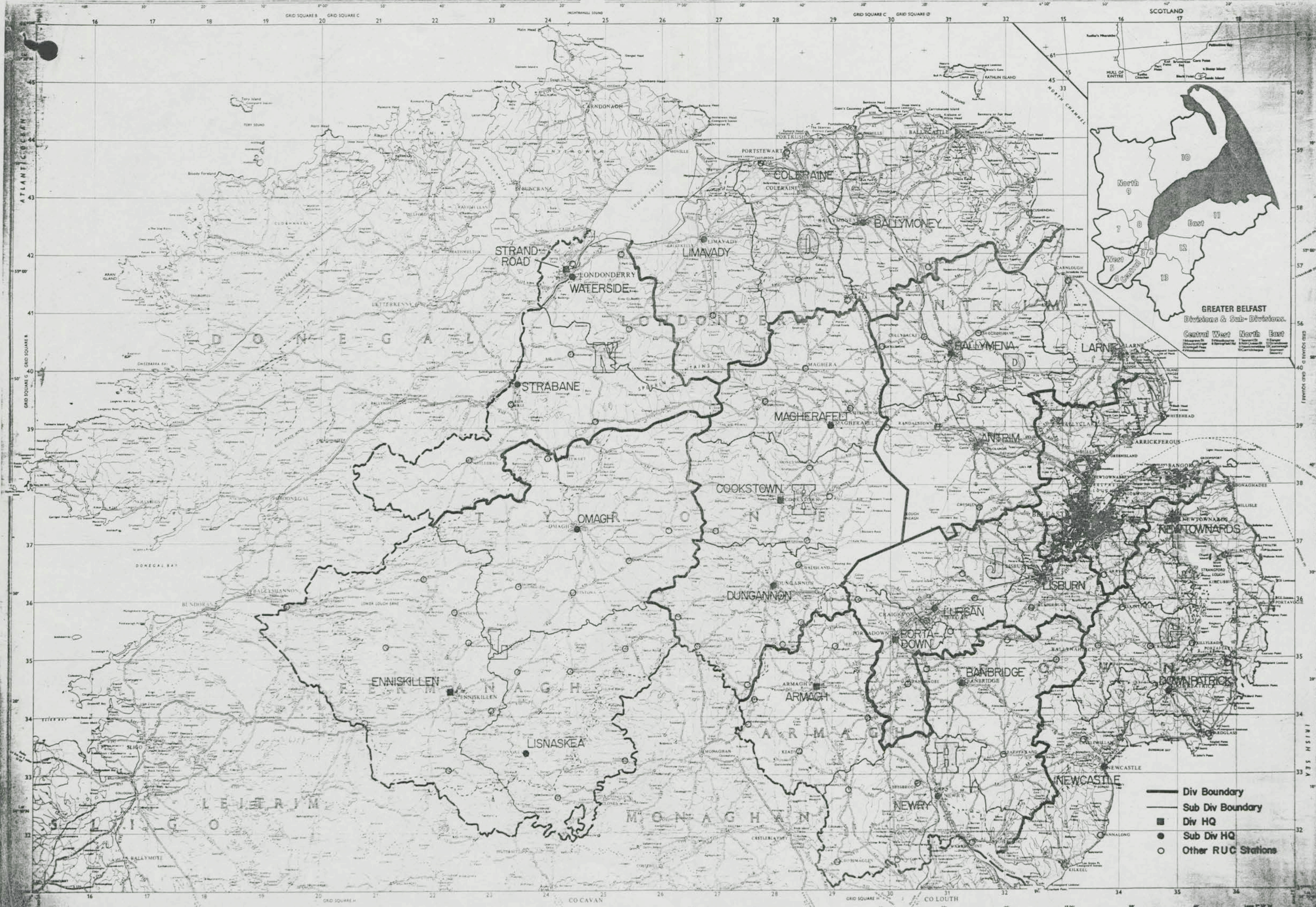
21. Arrangements for joint policing of a border zone would require substantial intensification of co-operation between the two governments on security matters - beyond as well as within the border area. The joint policing zone could be seen as one form of that intensified co-operation. The precise arrangements for policing the border area would require detailed discussion between the two governments as well as with national interests (RUC, D of PP, UDR) having a direct concern. The attitudes of the Republic are not easy to forecast. The way forward may be for the



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two governments to agree first on their objective of strengthening security co-operation and winning the widest possible acceptance and public support throughout the island of Ireland for the security forces and to establish a joint security council to work out practical arrangements to achieve that objective; the Secretary of State and the Irish Minister of Justice could be joint Chairmen; the Council's first task could be to work out arrangements for joint policing of a border zone.

CONQUEROR



- Div Boundary
- Sub Div Boundary
- Div HQ
- Sub Div HQ
- Other RUC Stations

ELEVATIONS IN METRES
(CONTOUR INTERVAL 80 METRES)

Joint Criminal Jurisdiction in a Border Zone

This note examines the proposition that, in a jointly policed area straddling the Border between Northern Ireland and the Republic of Ireland, there should be unified arrangements for the administration of criminal justice.

2. The enforcement of the criminal law requires the performance of four inter-dependent functions. It is necessary to consider the proposition in relation to each of them. The functions are:

1. Investigation
2. Prosecution
3. Trial
4. Enforcement of Sanctions.

Investigation

3. The principal investigative agency, for the purposes of criminal law enforcement, is the police. The proposition assumes that satisfactory joint policing arrangements would have been made. It is, however, worth noting that the police are not the sole relevant investigating agency. Of particular relevance, in relation to a border zone, are Customs and Excise and the DHSS (for example in relation to social security frauds by those who "moonlight" over the border). In addition, a wide range of agencies, including local authorities, are concerned in the investigation of regulatory offences of the kind mentioned in Annex C. There is no clear advantage to be gained from unifying the activities of non-police investigative agencies within the border zone, and it might be best to leave them undisturbed. But, in that event, it would be necessary to decide how far their activities should be brought within the ambit of, for example, any joint arrangements for prosecution and trial. These are matters of detail which might best be resolved, in consultation with the agencies concerned, if and when the outline of a police related scheme was in place.

Prosecution

4. It would be necessary to establish whether, within the border zone, there was to be a single prosecution authority or whether, according to some criteria, cases should be allocated between the existing authorities in, respectively, the Republic and Northern Ireland. If there were a unified criminal law, the case for a single prosecution authority would be strong; presumably it would be formed of officers allocated by the existing prosecutors in the two countries. The disadvantage, if there were a unified criminal law, of preserving two separate prosecution systems would be that they might operate different prosecution policies so that inequities and anomalies resulted. However, if there were no unified criminal law (and the difficulties of achieving it are discussed in Annex C), a possible arrangement would be for cases to be referred to the appropriate prosecuting authority (ie that of the Republic or of Northern Ireland) according to the territory in which the alleged offence had been committed. The distribution of cases on such a basis seems plainly preferable to an allocation according to the nationality of the suspect which would offend the principle of territoriality. There might, of course, be cases involving multiple suspects in which some of the offences had been committed on one side of the Border and some on the other. A unified prosecution system would simplify the handling of these; but, in essence, they would be no different from cases of the kind which may already arise and would require the two countries to take independent action.

Trial

5. The idea for examination is that there should be a zonal court or courts, staffed jointly by the Republic and the United Kingdom, and exercising jurisdiction over all or some of the alleged offences committed in the zone.

6. Perhaps among the more simple matters would be to determine the jurisdiction, and physical arrangements for the sitting, of the zonal court(s). Presumably the court would at a minimum, have jurisdiction over offences (in the agreed categories)

committed in the zonal area. In addition, it might be desirable to make arrangements for the court, perhaps with the agreement of the appropriate court outside the zone, to try offences committed outside its jurisdiction where this was desirable to achieve a coherent trial either of a principal or of a principal and accomplices. As to the physical arrangements, these would inevitably depend on the width of the border zone, and the extent to which it included centres of population. At this stage, it is possible to do no more than suggest that there might, notionally, be a single court for the zone with a capacity to sit either in different locations within the zone or outside of it. A possible model (which might avoid problems of providing additional court buildings and staff) might be for selected existing courts, whether in the Republic or Northern Ireland, to sit as "zonal courts" as appropriate with the judges or assessor from the other jurisdiction being brought in as necessary. It should however be noted that, whatever political attractions mixed courts might have in the South, they are not a necessary adjunct of the concept of a border zone with a criminal jurisdiction. It would be theoretically possible for trials within the zone to be shared between exclusively Republican and Northern Irish courts each exercising the zonal jurisdiction. Whether or not the courts were "mixed", criteria for allocating cases among courts centres would have to be worked out; but it is assumed that, in principle, any zonal court would have jurisdiction over any "zonal" case, so that, for example, an offence committed in Crossmaglen (if that were within the border zone) would be triable by a zonal court sitting in the Republic. (It is worth noting that the Criminal Jurisdiction Act 1975 and the corresponding legislation in the Republic already provide for the extra-territorial enforcement of terrorist offences, which have been broadly reconciled, without a common criminal jurisdiction being necessary.) It should also be noted that some difficult legal and technical questions would arise about the surrender for trial within the zone of offenders found outside its jurisdiction.

7. The notion that there might be "mixed" courts raises problems of its own. The working assumption must be that, for the

foreseeable future, all or most of the cases tried by the zonal courts would be cases tried without a jury. This argues, so that deadlocked courts should be avoided, for mixed courts of three judges. Leaving aside the scope for argument about the balance between court members from the North and South, if they were all professional judges, this would be expansive in terms of scarce judicial manpower. On the other hand (given, in particular, the absence in Ireland of a lay magistracy) there are manifest difficulties in involving lay assessors in the judicial process; and, in the circumstances of a border zone, it would give rise to a substantial security problem. The best approach may be to envisage a panel of professional zonal judges, drawn from both countries, who would sit singly, and might be allocated to any zonal court irrespective of the Border.

8. A modern system of criminal trial is underpinned by a number of branches of procedural/administrative criminal law which, like the criminal law relating to specific offences, differ between the Republic and Northern Ireland. (Although it should be noted that no serious study of the extent of these differences has yet been made.) Before a common system of trial could be operated, it would be necessary to determine the law that was to be applied zonally in the following areas. The list may well not be exhaustive:

1. Arrest and charge
2. Preliminary hearings; committal for trial
3. Remand and bail
4. Legal aid; costs
5. Forms of process; indictments
6. Trial procedure
7. Law of evidence
8. Sentencing powers
9. Criminal appeal.

9. It is arguable that what was nominally a zonal court could accommodate differences in the substantive criminal laws of the two countries (particularly if they were more of form than substance), eg by enforcing the substantive law of the country

in which it happened to be sitting or which matched that of the accused person. Anomalies of various kinds would have to be accepted; indeed, would be unavoidable if it were desired to establish a zonal court before the long process of establishing a unified substantive criminal law had been completed. But a unified "zonal" police force could hardly apply two different sets of powers relating to arrest, search, detention, lawful use of force, etc; and for a unified court to attempt to conduct trials according to two different systems of law, perhaps with divergent treatment of co-defendants, would expose the concept as flawed. Before zonal courts could be launched, it would be necessary to agree upon a unified body of law that was to be applied by them. To the extent that the courts were given jurisdiction over only a limited range of offences, the task of settling agreed provisions of substantive law might not prove too formidable, although the Parliamentary hurdles noted in paragraph 9 of Annex C would remain. But it would still be necessary to find a way through the other difficulties mentioned in that Annex (for example, reconciling differences in judge-made law in the two countries); and reaching agreement on the procedural/administrative areas listed above would be a lengthy task.

Enforcement of Sanctions

10. This links with the question of sentencing powers mentioned above. The maximum sentences for particular offences which are provided in Irish law may not coincide with those for Northern Ireland and the countries may not have identical provisions relating to the imposition of fines, use of probation, use of absolute and conditional discharge, suspended sentence, etc. It would seem essential that a common code of penal sanctions should be agreed. It would then remain to ensure that there were satisfactory mutual arrangements for enforcing the penalties imposed. For example, would a prison sentence imposed anywhere in the zone be servable either in the North or in the Republic; would a fine imposed in the zone be enforceable in either jurisdiction; similarly, with probation orders? Of particular relevance would be the question of where jurisdiction would lie to release prisoners subject to life sentences. Should a release

require the agreement of the responsible authorities in both countries, or should the decision lie with the country in whose jurisdiction the sentence is being served? The latter approach might encourage the view that each country should take its "zonal" offenders. These are details to which answers need not be found at this stage; but the questions would have to answered before any scheme which transcended national jurisdiction took effect.

General

11. Finally, it should be remembered that in considering any arrangements for the joint administration of criminal justice, the Republic is constrained by the provisions of its Constitution and by the extent to which it is able to deliver any constitutional amendments that it is willing to make. The constitutional constraints would not only limit the scope for making unified laws, they would also mean that, in relation to arrests, trials, etc., in the Republic's part of the border zone, questions of constitutionality would be liable to arise.

Comments and Conclusions

12. This Annex deals with the problems of creating a unified criminal jurisdiction in a limited area. Since they are complementary to the idea of a joint policing zone discussed in Annex A, it might be possible to link developments to the progress made on joint policing. But we could not get far without the need for legislation which is likely to be controversial.

A Common Criminal Law for Ireland

1. There is already a large measure of commonality in the criminal law of both jurisdictions, and both have the same tradition of the common law. This Annex examines the proposition that we should aim to establish a unified criminal law for the island of Ireland.
2. Criminal law may be substantive or "general" and procedural. The substantive criminal law covers an enormous range of conduct. Much of it is now statutory but the common law still plays an important role: neither jurisdiction has a "criminal code" which could serve as a starting point for a harmonisation exercise. The law has expanded, and is still expanding, whether through the creation of new statutory offences or judicial interpretation of the common law, to meet the conditions of modern society and modern expectations of government. It is not only that the so-called "regulatory" offences have proliferated: the law has had to adapt to opportunities for serious criminal activity which were not available to previous generations. A total harmonisation of all the criminal offences which have evolved in the two independent jurisdictions would not be practicable.
3. Turning therefore to selective harmonisation, one approach would be to attempt to tackle the "classical" criminal law, i.e. the body of offences substantially founded on the common law: offences against the person; sexual offences; theft; criminal damage and so on. Further selectivity could concentrate on the criminal laws most relevant to terrorist activity, or most likely to come before any Anglo-Irish joint court. This approach would avoid the difficult task of harmonising laws such as those relating to homosexuality or abortion. It would however be necessary to go beyond offences arising from the common law in order to cover e.g. offences relating to the control of explosives. One could start by drawing up with the Irish a list of offences relevant to terrorism, on which there seemed to be a realistic prospect of harmonisation and practical gains. There are various "guides" which would provide the British side with a starting point: for example, the "scheduled offences"

in the Criminal Jurisdiction Act 1975 or in the Northern Ireland (Emergency Provisions) Act 1978, or, more broadly, offences of the nature identified in Article 1 of the European Convention on the Suppression of Terrorism. It is worth noting that some harmonisation of the relevant substantive laws was a concomitant to the Criminal Jurisdiction Act 1975 which followed Sunningdale. The Appendix to this Annex offers some illustrative comparisons of the two bodies of criminal law as they now stand. Because much criminal law is case law, an initial harmonisation of statutory laws would be subject to divergencies if the judicial systems of the two countries remained separate, and they did not share a common jurisprudence. The extent to which this matters would depend on how ambitious the project was.

4. The so-called "general part" of the criminal law covers such matters as the mental element in crime; burden and onus of proof; inchoate offences (attempts, conspiracy, etc.) and general defences. A comprehensive harmonisation project would have to embrace all of this, and a wide range of procedural matters such as the law relating to juries, legal aid, the conduct of a trial and appeals. But in these areas harmonisation could be concentrated on such aspects of general and procedural law as seemed capable of reconciliation, and had major relevance to the trial of terrorists. But, as indicated in Annex B, any proposal for the joint administration of the criminal law in, for example, a border zone would inevitably raise the question of harmonisation across the whole range of general and procedural matters.

5. However ambitious or restricted the project, questions arise about the manner of bringing it to fruition with two sovereign Parliaments. Machinery could, no doubt, be devised for producing legislative proposals that had been agreed between the two governments; but there could be no guarantee that the products emerging from the two Parliaments would be identical. Experience of criminal law reform in England and Wales has demonstrated how extensively

criminal law reform measures may be amended in both Houses of Parliament. It would be for consideration whether the risk of "disharmonisation" at the parliamentary stage could be minimised by the establishment of some form of joint parliamentary procedure to consider the projects in question.

6. Machinery would be needed to determine how differences between the laws of the two countries should be resolved. In the general field of codification and modernisation, we are further advanced than the Irish are, but they would not necessarily be willing to resolve differences by bringing their laws into line with ours. Moreover, the terms of the Irish Constitution might in some circumstances circumscribe that Government's freedom of action. It would be necessary to consider on each topic how far a concession to Irish views would involve a departure from what we have regarded as the desirable state of the criminal law in the United Kingdom, and how far it would be acceptable to pay a price of disharmonisation of laws between Northern Ireland and Great Britain, recognising that Northern Ireland law already departs from that of Great Britain in a number of ways.

7. The machinery for achieving harmonisation would no doubt depend on the scale of the project. If it was desired to embark initially on harmonisation of the greater part of the substantive criminal law, some Irish standing joint commission would probably be needed and would be occupied for a period of many years. It would be for consideration whether such a body could sensibly ignore the work of the Great Britain Law Commissions. But if the undertaking were confined initially to comparatively specialised areas of criminal law, it might be possible to confine it to relevant groups of officials at least until the stage when proposals that might form a basis for public consultation had been formulated.

Comparison of Law of the Republic with Law of Northern Ireland

Much of the old statute law is similar - see list of extra-territorial offences in Sch 1 to 1975 Act and CL (J) Act 1976 in the Republic.

2. The Republic has common law - so offences such as murder, manslaughter, kidnapping are offences there.

3. The reciprocal legislation in 1975-76 achieved a certain amount of assimilation, eg -

- (a) Explosives - ss 2 and 3 of the Explosive Substances Act 1883 were amended in identical ways in both jurisdictions so as to extend them extra-territorially with respect to both the United Kingdom and the Republic.
- (b) Firearms - ss 8 and 9 of the 1976 Act (R) inserted two new offences of having firearms in suspicious circumstances and with intent to commit indictable offence. This brought law of the Republic into line with that of Northern Ireland in these respects. S 8 of the 1975 Act increased penalty for having a firearm in suspicious circumstances to five years so that the penalty was the same in both jurisdictions.
- (c) Hijacking of vehicles and ships - s 2 of 1975 Act and s 10 of 1975 Act created new, identical, offences of hijacking vehicles or ships punishable with 15 years.
- (d) Escaping from custody - the broad effect of s 3 of 1975 Act and s 3 of 1976 Act is that it is an offence under the law of both jurisdictions to escape from custody in either the Republic or Northern Ireland if the escaper has been charged or convicted of one of the listed offences, on whichever side of the border the offence was committed.
- (e) Theft - ss 5, 6 and 7 of the Republic's Act amended the Larceny Act 1916 so as to create new offences of robbery, burglary and aggravated burglary and brought the law (in these respects) exactly into line with that of England and Wales in the Theft Act 1968 and Northern Ireland in the Theft Act (NI) 1969.

4. Superficially, one might conclude that the substantive law in both jurisdictions, in the area of terrorist activity, is much the same since much of the statute law pre-dates 1922, both jurisdictions apply the common law and (as mentioned above), in some respects, the law of both jurisdictions was assimilated by the reciprocal legislation of 1975-76. But there must be a number of qualifications -

- (a) It is doubtful whether criminal law reform in the Republic has proceeded at the same pace as in the United Kingdom although Northern Ireland itself is usually behind England - examples, replacement of Malicious Damage Act 1861 by Criminal Damage legislation, codification of law on conspiracy and attempts.
- (b) Much of the criminal law depends heavily on case law, which may diverge substantially in the two jurisdictions, particularly where case law has developed since 1922.
- (c) The Republic has a written constitution. In relation to this, note -
 - (i) Art 39 defines treason (seems much the same as our offence.
 - (ii) Art 40(4) enshrines habeas corpus.
 - (iii) Art 40(5) declares every citizen's dwelling to be inviolable and prohibits forcible entry save in accordance with law.
 - (iv) Art 40(6) contains rights of free expression, free assembly, free association, subject to wide qualifications.

5. What is said above relates to the substantive law. There may be substantial differences in evidential law and procedure.

Possible Forms of Devolved Local Government in Northern Ireland

The Appendices to this Annex describe a range of possible local government units of various sizes, beginning with a single council for the whole province, with the boundaries and the likely political balance in each unit. A single regional council could be based on the existing Assembly. It would either be unionist controlled or could have a committee system with chairmanships shared between the parties. Other possible groupings of areas which could either be in substitution for or in addition to a single council area as follows.

2. A four-unit model would follow the boundaries of existing Health and Social Services Board; a five-unit model would follow the boundaries of the Education and Library Boards. If more units are required one could revert to the old six counties plus Belfast, though the population in some of the counties would be very small. Splitting Belfast could certainly produce a nationalist and a unionist area, though dividing a single natural unit in two would seem odd.

3. However one varies the size of the units, boundaries and political balance, the following difficulties remain:

(a) Sinn Fein

The council or councils with a nationalist majority would not provide a majority for the SDLP alone. Even if Sinn Fein were not the largest party, the SDLP would have to come to terms with it, if the natural nationalist majority in population were to be reflected in control of the council. The price Sinn Fein would exact from its pivotal position would be unpleasant for the SDLP and the United Kingdom Government. A possible outcome would be the SDLP and Sinn Fein co-operating to prevent the Unionists running the council but not to run it themselves. If Sinn Fein's political advance continued so that it became the dominant group it might use the council to try to introduce measures coming close to de facto secession.

(b) Functions

It is easier to state in general terms the desirability of fuller local government powers in Northern Ireland than to identify functions which could appropriately and safely be transferred to local government units of the kind discussed. Education and housing are the more important functions in Britain. In Northern Ireland both have a history of sectarianism. The Housing Executive has painfully established confidence among the population that allocation of houses is fair and has markedly improved the housing stock in the province. Roads, water, sewerage, fire, planning and social services offer less obvious scope for sectarianism but could all be administered, or be perceived as being administered, unfairly.

(c) Disruption

Despite the troubles and divisions, local services are recognised as being run in Northern Ireland to a standard of efficiency and fairness which bears comparison with the rest of the United Kingdom. There has been much reorganisation in recent years, following the MacCrory report reforms and introduction of direct rule. Splitting up again amalgamated structures which have only recently settled down to smooth working would be costly in terms of finance, morale, and efficiency.

4. Such objections would be outweighed if the arrangements satisfied the aspirations of the two sides of the Northern Ireland community in any substantial degree. But the probability is that the SDLP and the Irish Government would be hostile. Unionist opinion may be more sympathetic; but the unionists will be concerned at the large areas of Northern Ireland which would become liable to nationalist control. The structures seem more likely to encourage unionists and nationalists to exploit their majority positions to the full in the councils they control than to move towards co-operation.

Upper Tier of Local Government comprising 1 Regional Council

i)	<u>Area</u>	Whole of Northern Ireland	
ii)	<u>Population</u>		
	Total population	: 1,555,000	
	Catholics	: 592,000	(38.1%)
	Non-Catholics	: 963,000	(61.9%)
iii)	<u>Political control</u>	: Unionist. (UUP and DUP have over 60% of Assembly seats.)	

Note:

In view of the high level of non-response (18.5%) to the religious question in the 1981 Census, the figures at (ii) above (which are used throughout this paper) rest on two assumptions. First, the estimated total of non-enumerated persons (74,000) is all assigned to the Catholic group. (This seems reasonable since the anti-Census movement formed part of the Republican pro-hunger strike campaign.) Second, the 275,000 who did not answer the religious question are allocated pro rata between the Catholic and non-Catholic groups. (Source: PPRU)

Upper Tier of Local Government comprising 3 Regional CouncilsI Border Council

- i) Area : Local government areas of:
Limavady, Londonderry, Strabane,
Omagh, Fermanagh, Cookstown, Dungannon,
Armagh, Banbridge, Newry and Mourne,
Down.
- ii) Population
- | | | | |
|------------------|---|---------|---|
| Total population | : | 533,000 | (34.3% of Province total) |
| Catholics | : | 295,830 | (55.5% of Border Council
population; 50% of
Catholics in Province). |
| Non-Catholics | : | 237,170 | (44.5% of Border Council
population). |
- iii) Political control : Probably nationalist.

II North Eastern Council

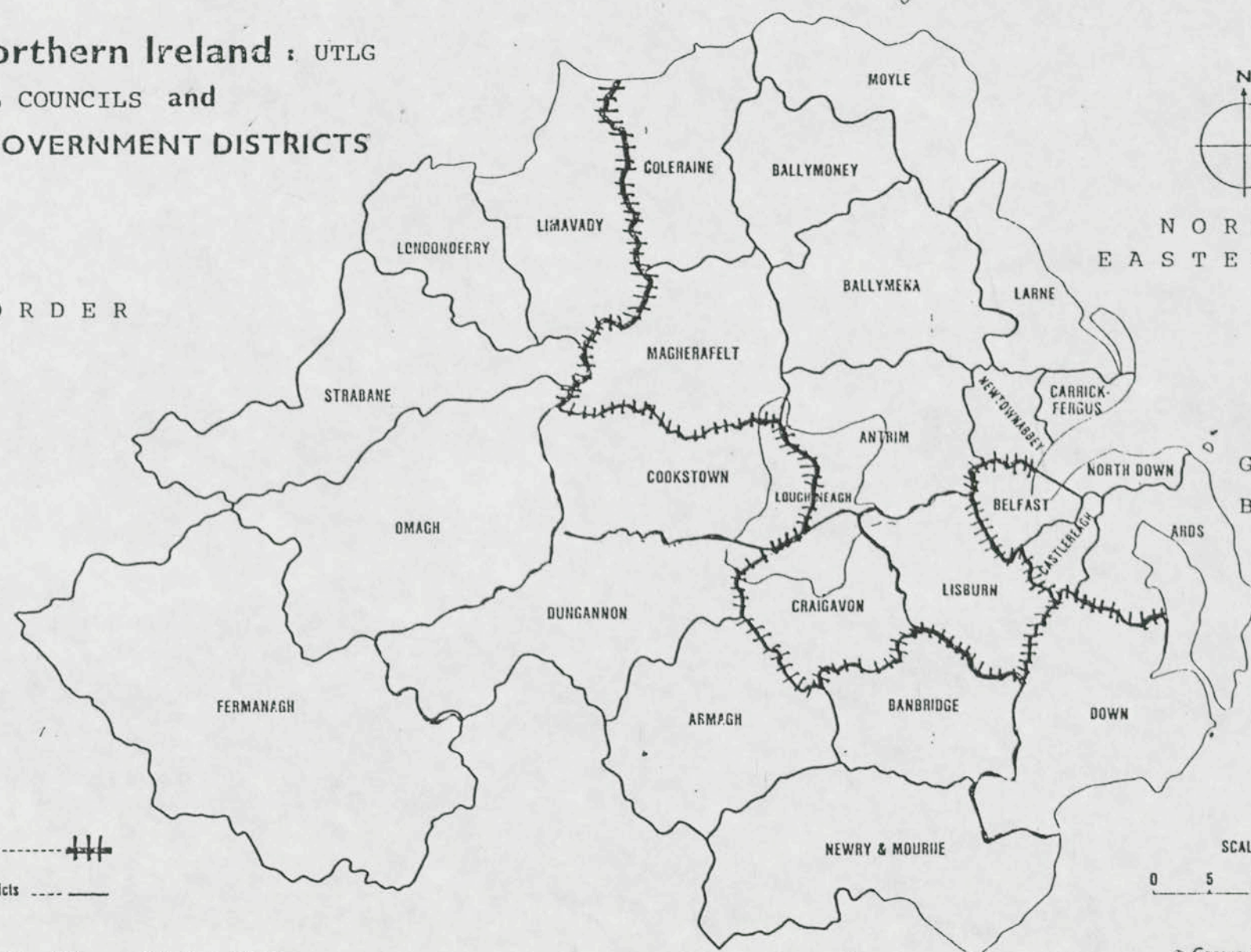
- i) Area : Local government areas of:
Magherafelt, Coleraine, Ballymoney,
Moyle, Ballymena, Larne, Carrickfergus,
Newtownabbey, Antrim, Lisburn, Craigavon.
- ii) Population
- | | | | |
|------------------|---|---------|---|
| Total population | : | 519,740 | (33.42% of Province
total) |
| Catholics | : | 153,920 | (29.6% of NE Council
population;
26% Catholics in Province) |
| Non-Catholics | : | 365,820 | (70.4% of NE Council
population) |
- iii) Political control : Unionist

III Greater Belfast Council

- i) Area : Local government areas of:
Belfast, Castlereagh, North Down,
Ards.
- ii) Population
- | | | | |
|------------------|---|---------|--|
| Total population | : | 502,260 | (32.28% of Province
total). |
| Catholics | : | 142,250 | (28.3% of GB Council
total; 24% of Catholics
in Province). |
| Non-Catholics | : | 360,010 | (71.7% of GB Council
population). |
- iii) Political control : Unionist



Northern Ireland : UTLG
REGIONAL COUNCILS and
LOCAL GOVERNMENT DISTRICTS

BORDER



NORTH
EASTERN

GREAT
BELFAST

KEY
Regions - - - - - 
Local Government Districts - - - - - 

SCALE
0 5 10 15 miles

Produced by the Ordnance Survey of Northern Ireland.

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Upper Tier of Local Government comprising 4 Regional CouncilsI Eastern

- i) Area : Eastern HSSB area - i.e. local government areas of Ards, Belfast, Castlereagh, Down, Lisburn, North Down.
- ii) Population
- | | | | |
|------------------|---|---------|--|
| Total population | : | 632,650 | (40.7% of Province total) |
| Catholics | : | 182,580 | (28.9% of Eastern population;
30.8% of Catholics in Province) |
| Non-Catholics | : | 450,070 | (71.1% of Eastern population). |
- iii) Political control : Unionist

II Northern

- i) Area : Northern HSSB area - i.e. local government areas of Antrim, Ballymena, Ballymoney, Carrickfergus, Coleraine, Cookstown, Larne, Magherafelt, Moyle, Newtownabbey.
- ii) Population
- | | | | |
|------------------|---|---------|--|
| Total population | : | 386,900 | (24.9% of Province total) |
| Catholics | : | 114,890 | (29.7% of Northern population;
19.4% of Catholics in Province.) |
| Non-Catholics | : | 272,010 | (70.3% of Northern population). |
- iii) Political control : Unionist

III Southern

i) Area : Southern HSSB area - i.e. local government areas of Armagh, Banbridge, Craigavon, Dungannon, Newry and Mourne.

ii) Population

Total population	:	280,270	(18% of Province total)
Catholics	:	142,500	(50.8% of Southern population; 24.1% of Catholics in Province.)
Non-Catholics	:	137,770	(49.2% of Southern population).

iii) Political control : Finely balanced.

More efficient transfer of votes between parties in the unionist bloc, together with the fact that the proportion of Catholics in the voting (18+) age group is lower than in the population as a whole, could give the unionists control.

IV Western

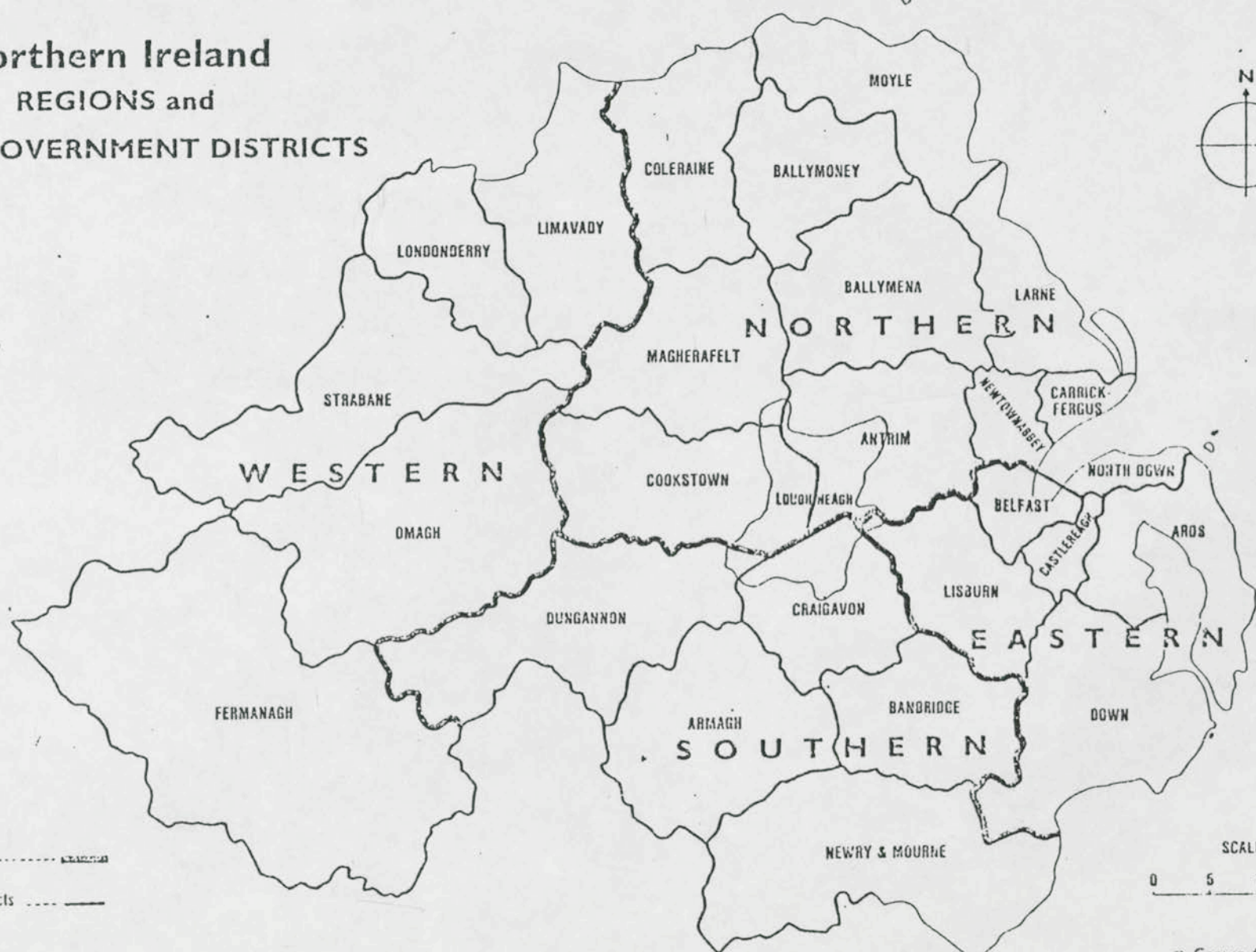
i) Area : Western HSSB area - i.e. local government areas of Fermanagh, Limavady, Londonderry, Omagh, Strabane.

ii) Population

Total population	:	255,180	(16.4% of Province total)
Catholics	:	152,030	(59.6% of Western population; 25.7% of Catholics in Province).
Non-Catholics	:	103,150	(40.4% of Western population)

iii) Political control : Nationalist

Northern Ireland REGIONS and LOCAL GOVERNMENT DISTRICTS



KEY
Regions - - - - -
Local Government Districts - - - - -

SCALE
0 5 10 15 miles

Upper Tier of Local Government comprising 5 Regional CouncilsI Belfast

- i) Area : Belfast E & LB area - i.e. Belfast City Council area.
- ii) Population
- | | | | |
|------------------|---|---------|---|
| Total population | : | 309,750 | (19.9% of Province total) |
| Catholics | : | 112,100 | (36.2% of Belfast population;
18.9% of Catholics in Province.) |
| Non-Catholics | : | 197,650 | (63.8% of Belfast population) |
- iii) Political control : Unionist

Note:

It has been suggested that Belfast might be divided into two Councils. Since published Census results on religious affiliation are not broken down below the Council area as a whole (although the material necessary to produce a breakdown by religion to ward level is available to PPRU) it is not possible to calculate the religious profile of a dual Council model from the Census. However a broad assessment can be made from the results of the June 1983 General Election (the Parliamentary boundaries largely coincide with the City Council boundary). The following totals of votes were cast in Belfast West and North (Gerry Fitt's votes are divided equally between nationalist and unionist, since there is evidence that, exceptionally, he received significant support from loyalist voters):

Sinn Fein	21830
SDLP	16878
WP	4305
Fitt (50%)	5163
<u>Nationalist total</u>	<u>48176</u>
UUP	17774
DUP	10659
Fitt (50%)	5163
Miscellaneous	1134
<u>Unionist total</u>	<u>34730</u>
Alliance	3879

A West/North Council would therefore clearly be under nationalist control, with Sinn Fein dominant. Correspondingly an East/South Council would have an overwhelming unionist majority.

II South-Eastern

- i) Area : South Eastern E & LB area - i.e. local government areas of Ards, Castle-reagh, Down, Lisburn, North Down.
- ii) Population
- | | | | |
|------------------|---|---------|---|
| Total population | : | 322,900 | (20.8% of Province total) |
| Catholics | : | 70,480 | (21.8% of South-Eastern population;
11.9% of Catholics in Province.) |
| Non-Catholics | : | 252,420 | (78.2% of South-Eastern population) |
- iii) Political control : Unionist

III Southern

- i) Area : Southern E & LB - i.e. local government areas of Armagh, Banbridge, Cookstown, Craigavon, Dungannon, Newry and Mourne.
- ii) Population
- | | | | |
|------------------|---|---------|--|
| Total population | : | 308,210 | (19.8% of Province total) |
| Catholics | : | 156,980 | (50.9% of Southern population;
26.5% of Catholics in Province.) |
| Non-Catholics | : | 151,230 | (49.1% of Southern population). |
- iii) Political control : Finely balanced.

This area is identical with the Southern area in the 4 Council model (annex CIII) save that Cookstown is added, which slightly increases nationalist chances.

IV Western

Identical with Western Council in 4-unit model (annex CIV)

V. North-Eastern

- i) Area : North Eastern E & LB area - i.e. local government areas of Antrim, Ballymena, Ballymoney, Carrickfergus, Coleraine, Larne, Magherafelt, Moyle, Newtownabbey.
- ii) Population
- | | | | |
|------------------|---|---------|---|
| Total population | : | 358,960 | (23.1% of Province total) |
| Catholics | : | 100,410 | (28% of North-Eastern population;
17% of Catholics in Province.) |
| Non-Catholics | : | 258,550 | (72% of North-Eastern population) |
- iii) Political control : Unionist.

Upper Tier of Local Government comprising 6 County Councils and Belfast

The boundaries of the 26 local government areas (on which the Census information is based) deviate significantly from the boundaries of the six counties, and it is therefore not possible to derive a meaningful population profile for the counties from the published Census material. However, the 1971 Census figures (which were collected on a county basis) are an indication of the sort of result which might be obtained from a detailed study of the results at ward level: there are unlikely to have been major changes in balance since 1971.

1971 Census	Total	Catholic	Non-Catholic	Not stated
Antrim	352,599	83,345	238,658	30,596
Armagh	132,678	57,710	62,967	12,001
Down	308,910	74,298	208,997	25,615
Fermanagh	49,935	23,738	21,864	4,336
Londonderry (inc. city of Londonderry)	180,530	82,040	79,969	18,521
Tyrone	138,158	65,370	57,836	14,952

Belfast is not included in these figures; for present estimates, see annex DI.

DIVIDING BELFAST

1. A wedge-shaped area running from Twinbrook (just outside the city's south-west boundary) to the Divis Flats in the centre - incorporating Poleglass, Lenadoon, Suffolk, Ladybrook, Riverdale, Andersonstown, Turf Lodge, New Barnsley, Ballymurphy, Whiterock, Beechmount, Springfield, Clonard, Distillery and the Lower Falls - would have a population profile roughly as follows:

Total	<u>70,000</u>	(22.6% of total population of 310,000)
Catholics	<u>63,000</u>	(56.2% of 112,000 Catholics in Belfast)
Non-Catholics	7,000	(3.5% of 198,000 non-Catholics in Belfast)

There would only be one significant concentration of non-Catholic population: the Blacks Road enclave south of the Stewartstown Road. This is unavoidable.

2. Significant Catholic ghetto areas excluded from this wedge would be:

<u>North Belfast</u>	<u>Catholic population</u>
Ardoyne	4,500 approx
Ligoniel	1,500 approx
New Lodge	4,000 approx
Cliftonville	4,000 approx
 <u>South Belfast</u>	
Markets	1,500 approx
 <u>East Belfast</u>	
Short Strand	2,000 approx
<u>Total</u>	<u>17,500 approx</u>

The residue of the Catholic population in the city (ie something between 30 and 35,000) live in mixed or predominantly Protestant (and generally more middle-class) areas.

3. Such a division would have no basis in existing constituency or ward boundaries. Any larger area (eg based on Westminster constituencies) would bring in strong Protestant areas (eg Shankhill is in West Belfast)
4. Giving local government powers to two separate Belfast Councils, one of which had a population of less than a quarter of the total, would be criticised both for dividing a city which forms a natural unit and for giving powers to a unit which has too small a population base to operate them effectively.
5. The limited powers now available to the Belfast Council might be divided without great pain (at present Catholic and Protestant dustmen tend to work from depots in the areas where they live, rarely switching to other parts of the city). Planning, transport, roads, water, sewerage and fire are classic wide area services requiring a substantial base, resources and staff. Personal social services (health, social work, education, libraries) do not need such a broad base. Housing allocation and management need not require large resources, though building and policy may be more demanding.
6. Whatever the arithmetic and theory, one must be apprehensive at the political reaction if the effect were to hand over control of part of Belfast to Sinn Fein. The heartlands of Protestant paramilitarism adjoin the Catholic area.

Recognition of the Sense of Irish Identity in Northern Ireland

The SDLP and the Republic have advocated formal opportunities for the minority to express their Irish identity in the institutions of Northern Ireland. The idea is vague. On citizenship, the Republic gives an entitlement to its citizenship to anyone born in Northern Ireland or whose parent or grandparent was born in Northern Ireland. Many nationalists in Northern Ireland use Irish passports. The United Kingdom makes no difficulty about dual nationality. There is already elaborate legislation in Northern Ireland against discrimination. It is more difficult for the state to provide express scope for the political expression of Irish identity in terms of loyalty to a foreign state. The issues discussed below are regarded by the minority in terms of "discrimination" and by unionists in terms of "loyalty". None are of more than symbolic importance but changes could contribute to the "green" part of any package.

Repeal the Flags and Emblems (Display) Act (Northern Ireland) 1954

2. The Act makes it a criminal offence to display the tricolour in circumstances likely to lead to a breach of the peace. The Act has little, if any, practical value to the police. They do not use it now. Even if the 1954 Act provision were repealed, flying the Irish flag would still be an offence if it were done in circumstances likely to lead to a breach of the peace. The specific provision is a cause of resentment and misunderstanding on both sides of the community. The minority object to a specific provision referring to the Irish flag. Although the 1954 Act does not prohibit flying the Irish flag - only prohibits its display in circumstances likely to lead to a breach of the peace - the provision is resented as if it were a total ban and is sometimes defied accordingly. Unionists sometimes chose to interpret it as if it were a total ban and complain that the RUC are not enforcing it with sufficient vigour.



3. The only reason the provision has not been repealed earlier has been that such a move would provoke a row amongst the unionist community which might well be greater than any feelings of satisfaction on the part of the minority. It has therefore been saved up as an ingredient offering minor satisfaction to the minority in any general package. The change can be made by Order in Council without primary legislation at Westminster.

Votes for Irish Citizens in Northern Ireland Local Government Elections

4. Irish citizens resident in Britain can vote in local government as well as Parliamentary elections. Irish citizens resident in Northern Ireland can vote in Parliamentary elections but, unless they were born in Northern Ireland, not in local government or Assembly elections unless they have been continuously resident in the United Kingdom for seven years. A change bringing the Northern Ireland practice into line with that in the rest of the United Kingdom would mean that between five and six thousand people would be enfranchised at local government elections. The change would be unlikely to make any great difference to councils as at present constituted, though any increase in the probable nationalist vote is naturally unwelcome to unionists. They would counter the argument that United Kingdom electoral practice should be uniform with the argument that there is no logical reason why Irish citizens should vote in our country and that the anomaly matters more in Northern Ireland than in Britain. A possible compromise might be for Irish citizens to get the vote in local elections if they had been resident for say three years in Northern Ireland. One does not want Sinn Fein to organise their people to cross over, or claim to have crossed over, in order to be present on registration day.

5. Until recently the Irish Government were in no position to complain since their legislation allowed British citizens in Ireland no vote at all. They have recently introduced legislation giving United Kingdom citizens resident in the Republic the vote there in all elections. They have accordingly raised in the AIIC



the question of whether we will bring Northern Ireland practice into line with British and their practice. A change would require legislation at Westminster.

Recruitment to the Northern Ireland Civil Service

6. Irish citizens are eligible for recruitment to the United Kingdom Civil Service but not to the Northern Ireland Civil Service. It is arguable that the entitlement of Irish citizens to join our Civil Service is an anomaly, particularly in current employment conditions. Nevertheless, there is presentable argument for bringing the Northern Ireland Civil Service into line with the United Kingdom Civil Service. The practical difference is unlikely to be substantial. The change could be made without primary legislation. It would require regulations made by the Northern Ireland Civil Service Commissioners.

Simultaneous Membership of British and Irish Parliaments or Assembly

7. Mr Mallon's disqualification from membership of the Northern Ireland Assembly on account of his membership of the Irish Senate created a furor. The nationalists saw that disqualification as "discriminatory" and indicating a reluctance to accept the "Irish identity" of the Northern Ireland minority. The counter argument is that membership of a foreign legislature is not compatible with membership of the British House of Commons or even the Assembly. The objections to simultaneous membership of two sovereign Parliaments are rather stronger than to membership of both the Northern Ireland Assembly and the Irish Parliament.

Primary legislation would however be required to make any change. Legislation to allow simultaneous membership of the Assembly and an Irish Parliament would raise the question of simultaneous membership of both Parliaments.



SECRET

Action by the Republic to accept the Union

1. A key element in the ideas which the Irish floated with us informally prior to the November 1983 Summit is the thought that, in return for appropriate concessions from HMG, the Irish Government might be prepared formally to recognise that Northern Ireland was, and would remain, part of the United Kingdom. For this purpose it has been suggested that the Irish Government might be willing to seek to amend the territorial provisions (Articles 2 and 3) of the Irish Constitution so as to remove the territorial claim and substitute a long-term "aspiration" to Irish unity (a copy of Articles 2 and 3 is attached). Alternatively, it has been suggested that, rather than amending the Constitution, it might be possible to build on Article 3 by means of a "declaratory statement".

2. The removal or dilution of the territorial claim contained in Article 2 of the Irish Constitution would represent for the Irish a concession of the greatest symbolic significance and one which could be crucial in securing the acquiescence of the Unionist community in any package of measures which had the effect of strengthening the links between Northern Ireland and the Republic. But it is important to recognise how difficult the Irish Government would find it to deliver such a concession. Although the idea of amending the territorial provisions of the Constitution has from time to time been actively canvassed in the Republic in recent years, it has always been rejected and any Irish Government which advocated it would face a head-on confrontation with nationalist sentiment throughout the country.

3. It may be helpful to consider the steps which the Irish Government would have to take if they were to give a formal and binding commitment to accept the union for



SECRET

the foreseeable future. They would presumably need to enter into some form of formal agreement with HMG providing recognition of the union and might also need to secure the acceptance of an Act to the same effect in the Irish Parliament. But either an agreement or an Act of Parliament giving effect to recognition of the union would be likely to be challenged as being unconstitutional and might well be rejected by the Supreme Court. The most certain way of avoiding this risk would be for the Irish Government to amend or delete Articles 2 and 3 of the Constitution. This would require two steps:

- (i) the passage of a Bill proposing the amendment(s);
- (ii) the holding of a referendum.

Provided the proposed amendment(s) secured a simple majority of votes cast in the referendum the amendment(s) would be adopted.

4. It can be assumed that any attempt by the Irish Government to amend substantially (or simply delete) Articles 2 and 3 of the Constitution would arouse fierce opposition. Quite possibly this opposition would extend beyond the ranks of Fianna Fail (the single largest party in the Dail with 75 seats) to some of the more traditional elements within the coalition parties, including Dr Fitzgerald's own party, Fine Gael. It is therefore possible that even if the Irish Government decided to press for constitutional amendment, they might fail to pass the first test: passage of a Bill through Parliament. The effect of such a failure could well be to bring down Dr Fitzgerald's Government.

5. It is very difficult to predict the outcome of a referendum. Much would depend on the precise form of the amendment, the nature of the agreement with HMG of which it would form part, the size of turn-out, the attitudes of



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the political parties and so on. But failure to secure adoption of any amendment would again seriously threaten the existence of the Government.

6. We have therefore examined the possibility of the Irish Government recognising the union in a less formal and binding fashion, for example, by means of a "declaratory statement" building on the qualifications already contained in Article 3. (In December 1973 the then Irish Government agreed to the inclusion in the Sunningdale communique of a statement that it "fully accepted and solemnly declared that there could be no change in the status of Northern Ireland until a majority of the people of Northern Ireland desired a change in that status". This statement was subsequently challenged in the Supreme Court, and the challenge failed on the grounds that a de facto statement of policy by the Government of the day could not put it in breach of its constitutional obligations. But the President of the Court added that "an acknowledgement by the Government that the state does not claim to be entitled as of right to jurisdiction over Northern Ireland would.... clearly not be within the competence of the Government having regard to the terms of the Constitution".) Even leaving aside the constitutional difficulty, a declaratory statement would clearly be less satisfactory than a formal and binding commitment reflected in an amended Constitution. The Unionists would be bound to argue that it would not tie the hands of any future Irish Government and might even be withdrawn by Dr Fitzgerald himself if he were dissatisfied with the implementation of any agreement reached with HMG. But, depending on its terms, it could nevertheless be a valuable element in any package if the constitutional difficulty could be overcome.

7. It is unlikely that the Irish Government would be prepared to run the risk of seeking amendments to the Constitution or even the lesser risk of making a declaratory

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statement (which would itself be highly controversial in Irish political terms) unless the other measures agreed with the British Government could be presented in Ireland as giving the Republic a new and significant role in Northern Irish affairs and hence as a British acknowledgment of the "all-Ireland dimension". Without exploratory discussion with the Irish, it is impossible to judge how much the British Government would need to offer and in what areas for the Irish Government to think it worth running all the risks which even a declaratory statement would involve. The right course would seem to be to invite the Irish to explain their own ideas for a "formal and binding commitment"; to press them hard to accept the need for constitutional amendment; but as a fall-back position to be ready to discuss with them the terms of a possible declaratory statement on certain clear understandings. These would be that (a) such a statement would have to go significantly beyond the terms of the Sunningdale communique; (b) the statement could be sure of majority backing in the Dail; and (c) the Irish Government would take steps to pre-empt or defeat any attempt to have the statement invalidated on constitutional grounds. It would be for the Irish to decide how best to achieve this.

8. If these conditions could be met - and it would have to be made clear to the Irish from the outset that implementation of the rest of the package would be dependent on the Irish Government's ability to meet them - it might be possible for the British Government to accept a solemn declaration by the Irish Government to the effect that Articles 2 and 3 of the Irish Constitution reflected an aspiration and not a territorial claim; that although the Republic remained committed to realising that aspiration, it recognised that it could not be realised without the full and free consent of a majority of the people of



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Northern Ireland; and that the Republic accepted that, until such time as that consent might be forthcoming, Northern Ireland was and would remain a part of the United Kingdom.

CONQUEROR

THE IRISH CONSTITUTION (EXTRACT)

4

THE NATION.

Article 1.

The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions.

Article 2.

The national territory consists of the whole island of Ireland, its islands and the territorial seas.

Article 3.

Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstát Éireann and the like extra-territorial effect.

THE STATE.

Article 4.

The name of the State is Éire, or in the English language, *Ireland*.

5

AN NÁISIÚN.

Airteagal 1.

Deimhníonn náisiún na hÉireann leis seo a gceart doshannta, dochloíte, ceannasach chun cibé cineál Rialtais is rogha leo féin a bhunú, chun a gcaidreamh le náisiúin eile a chinneadh, agus chun a saol polaitíochta is gilleagair is saíochta a chur ar aghaidh de réir dhúchais is gnás a sinsear.

Airteagal 2.

Is é oileán na hÉireann go hiomlán, maille lena oileáin agus a fharraigí teorann, na críocha náisiúnta.

Airteagal 3.

Go dtí go ndéantar athchomhlánú ar na críocha náisiúnta, agus gan dochar do cheart na Parlaiminte is an Rialtais a bhunaítear leis an mBunreacht seo chun dlínse a oibriú sna críocha náisiúnta uile, bainfidh na dlíthe a achtófar ag an bParlaimint sin leis an limistéar céanna lena bhain dlíthe Shaorstát Éireann, agus beidh an éifeacht chéanna acu taobh amuigh den limistéar sin a bhí ag dlíthe Shaorstát Éireann.

AN STÁT.

Airteagal 4.

Éire is ainm don Stát nó, sa Sacs-Bhéarla, *Ireland*.