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From: The Private Secretary

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John Coles Esq
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13 March 1984

Prime Minister.

A.J.C. 23/3.

A.J.C 26/3.

Dear John

... I attach the submission to the Forum for a New Ireland which was submitted by Dr Tom Hadden and Professor Kevin Boyle. Dr Hadden is a lecturer in law at Queen's University Belfast and Professor Boyle is a professor of Law at Galway. The Secretary of State thought that the Prime Minister and Sir Robert Armstrong might wish to see this document, whose analysis of the problems in Northern Ireland and the proposals for action are of interest.

I am copying this letter with attachment to Richard Hatfield.

Yours ever

Derek

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SUBMISSION TO

THE FORUM FOR A NEW IRELAND

by

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and

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Forum Submission

A. THE CONTEXT OF THE FORUM

1. The Objectives of the Forum.

The stated purpose of the Forum is to seek a way in which lasting peace and stability can be achieved in a new Ireland through the democratic process. It is uncontestable that the current constitutional arrangements have not produced lasting peace and stability in Northern Ireland. In that sense, partition has failed. It does not follow that partition in itself was wrong or that it could have been avoided. Few people in the Republic now take the view that peace and stability can be achieved by the simple incorporation of Northern Ireland in the Republic, and the Forum has been considering various approaches which accept that Northern Ireland, however its boundaries are to be defined, must continue to be a separate unit for constitutional and governmental purposes. The purpose of this submission is to discuss some of the possibilities for constructive change in the current constitutional arrangements based upon an analysis of the realities of twentieth century Ireland without prior commitment either to a united Ireland or to the continued incorporation of Northern Ireland in the United Kingdom.

2. Partition.

Since it has long been a fundamental tenet of Irish nationalism that partition was and remains the fundamental problem, it is appropriate to begin by stating what actually happened and why it happened in the period from 1911 until 1921. The reality in crude terms is that both Northern Ireland and the Republic of Ireland were created by a combination of military force and popular will. The idea of partition was first seriously raised when it became clear that very large numbers of people in Ulster were prepared to fight in Carson's UVF against the imposition of Home Rule on an all-Ireland basis. The idea that the rest of Ireland must be granted a measure of independence was similarly accepted when it became clear that the IRA could not be defeated and that the vast majority of voters in the twenty-six counties supported the objectives of Sinn Fein. It is true that the British government made no attempt to coerce the Unionists and that it did its best to suppress the IRA. It is also true that the adoption of partition as a solution, however temporary, may be

directly related to other British political and defence concerns. Whatever view is taken of the merits of British policy in this period and of the way in which the border was drawn, it is essential to remember that the underlying reasons for partition were that the vast majority of the inhabitants in the two parts of Ireland had expressed incompatible loyalties and commitments and that very large numbers were prepared to fight for those commitments.

3. The Current Realities

(a) Population Balance: It is clear from the results of the 1981 census in Northern Ireland that not only has there been very little change in the proportions of the majority and minority communities in Northern Ireland but that despite the continuing higher birth rate among Catholics, it would be unrealistic to predict any rapid change in the balance of voting power within Northern Ireland. The work of Dr. Paul Compton on the demography of the two communities shows that differential emigration rates have continued to counterblaance the higher Catholic birth rate: his latest estimates indicate that Catholics represented only 37.5% of the total population in 1981 and that the net intercensal emigration of Catholics (about 14%) was more than double that of Protestants (about 6%):

	Catholics		Protestants & Others	
1971 estimate	562,000	36.8%	965,000	63.2%
natural increase	78,000		30,000	
net migration	76,500		53,500	
1981 estimate	563,000	37.5%	941,500	62,5%

(Source: Fortnight, Issue 192 Mar. 1983)

On the assumption that 'Catholic fertility and family size will continue to fall during the 1980s', Dr. Comptom concludes that 'there can be no automatic assumption that present trends will remain unchanged and that Catholics will eventually become the majority population in the province'. It is noted that the Forum has received evidence which might, if accepted, change these figures but does not enhance greatly the likelihood of an ultimate Catholic majority.

(b) The Commitment of the Majority: It is equally clear that the commitment of the Protestant majority to the maintenance of the union with Britain is unchanged. In the last formal vote on the matter in March 1973, 58% of the voting population in Northern Ireland voted for the maintenance of the union, less than 1% voted for a united Ireland and 41% abstained. Allowing for the usual 20% to 25% of non-voters, it is clear that almost the whole of the Protestant community turned out to vote for the union. There is no evidence from recent opinion polls to suggest that a new Border Poll would produce a different result. Furthermore, very large numbers within the Protestant community are still prepared to use force to defend their position. There are currently more than 7,500 members of the Ulster Defence Regiment, more than 8,000 members of the Royal Ulster Constabulary and more than 4,500 members of the RUC Reserve. While these forces are officially non-sectarian, it is well-known that there are very few Catholic members of the UDR and that the proportion of Catholics in the RUC is well below 10%. All these forces are armed and at least in the case of the UDR have been constituted for the express purpose of the defence of the Northern Ireland state. There can be little doubt that in the event of a threatened British withdrawal, many more members of the majority community would be ready to join official or semi-official military or para-military organisations, as they did in the early 1920s, and that it if were not possible to defend the union, the defence of an independent Northern Ireland would be adopted as an alternative. It may also be relevant to note that the capacity and readiness of members of the majority community to defend Northern Ireland and resist its absorption in an all-Ireland state is almost certainly distinct from the question of the size and even the existence of a voting majority within the current boundaries of Northern Ireland, and that if at some time in the future there was a prospect of a Catholic voting majority within the six counties, it would be unwise to expect a peaceful resolution of the Northern Ireland problem on that ground alone. On the contrary, it seems likely that communal tensions and the risk of civil war would increase rather than decrease as the balance of the population became more equal. That has certainly been the experience in Lebanon.

(c) The Position of the Minority: The balance of the population within Northern Ireland and the strong commitment of the majority to maintaining their separate identity are not unrelated to the corresponding commitment of the minority. The commitment of the minority community to its Irish identity and culture is at least as strong as that of the majority to its British or non-Irish identity and culture. It has been sustained over the past sixty years notwithstanding efforts, formal and informal, to suppress it, both by continuing support from the Republic and by the existence of a highly segregated educational system within Northern Ireland. The resulting identification of communal and political identities, however imprecise, has exacerbated the social and economic differentiation between the communities. There is no doubt that under the Unionist regime, members of the minority community suffered a measure of political discrimination, notably in the drawing of local government constituency boundaries and in the delay in implementing British reforms in voting qualifications. Nor is there any doubt that the minority community has experienced consistently higher rates of unemployment and socio-economic deprivation than the majority community, and that emigration has been consistently higher as a result. It has been estimated that in 1971, the unemployment rate among Catholics was more than double that among Protestants (Fair Employment Agency, Research Paper 1, 1978) and there is clear evidence that the position had not changed in any significant degree by 1981 (T. Hadden, Fortnight, Issue 194). Whether this is due primarily to deliberate discrimination by members of the majority with a view to maintaining the balance of the population in spite of the higher Catholic birthrate or to underlying patterns of employment and education is an arguable point. But the belief within the minority community in the widespread practice of political and economic discrimination was sufficient to support a sustained civil rights campaign in the late 1960s. The refusal of most Unionists to accept any form of political 'power-sharing', the failure of the British Government under direct rule since 1972 to achieve any major change in the differential rates of unemployment and economic disadvantage and the fact that the worst effects of the troubles and of abuses by the security forces have been experienced by the minority have re-inforced their feelings of alienation from Britain and the majority community alike.

The resulting despair among political leaders of the minority community at the prospect of resolving their problems within a purely Northern Ireland or British context was the primary motivating force behind the establishment of the Forum.

4. Legitimacy and Consent

These unpleasant facts about the situation in Northern Ireland raise difficult issues about legitimacy and consent. It is undeniable that Northern Ireland can claim legitimacy in two important and internationally recognised senses: first, that a substantial majority of its citizens have consistently expressed their support for its current constitutional status; and second, that in the event of an armed conflict within its boundaries, it is almost certain that the majority community would be in a position to maintain an effective system of government. The first of these may be expressed as the international principle of self-determination. The second is tacitly accepted in international law in that the victors of an internal conflict or of a revolutionary coup d'etat are entitled to or are generally granted de facto and ultimately de jure recognition. On a broader conception of legitimacy, on the other hand, which requires the general acceptance of the state by substantially all of its citizens, Northern Ireland is not a legitimate state. Nor can it claim to have met the highest internationally accepted standards of civil and human rights in the treatment of its communal minority, though the same might be said of large numbers of other states whose legitimacy is not generally contested. The immediate difficulty which faces the Forum in pursuing this line of argument, however, is that there appears to be little realistic prospect of establishing a new all-Ireland state which would meet the first of these more demanding tests of legitimacy. This has generally been expressed in an Irish context by the concept of unity by consent. But the ambivalence of many who use that phrase is illustrated by the frequent reference to the need to eliminate, or at least to the desire to be able to ignore, the so-called Unionist veto. Whether or not a British Government at some time sees fit to repeal the provision of the Ireland Act, 1949 as amended, which states that Northern Ireland shall not cease to be part of the United Kingdom without the consent of the majority of its voters, the Protestant community in Northern Ireland has a continuing veto on any all-Ireland state which purports to be based on their consent.

The traditional Republican position rejects unity by consent as a policy in its full implications. The position taken is that the achievement of a majority vote for independence in 1919 by Sinn Fein was a mandate for both independence and unity. Independence was frustrated by the British although the reduced measure of Dominion status was endorsed by the majority. Unity was frustrated by both the British and the Northern Unionists, and, on the traditional view, neither had the right to do so. Had unity been defeated entirely by the British state, and the island partitioned against the wishes of both the Nationalist majority on the island and the Northern Unionist minority, the traditional republican view would clearly have full validity in international law. But those were not the facts as is well known. It is necessary for those who accept the consent principle to reject the traditional thesis which grants no legitimacy to the position taken by the Northern Ireland majority in the 1920s against being part of the original Republic or the Free State. Not to do so is to be distinguishable only from Provisional Sinn Fein and others through the rejection of violence, which such groups justify by reference to the traditional view of the origins of both states. The implications of the principle of consent for both the minority community in the North, the majority community and the Irish constitution is developed under Section C below.

A Blueprint or a Process?

The fact that the Protestant community in Northern Ireland is almost certain for the foreseeable future to reject any proposal for a change in its fundamental constitutional status creates a difficult dilemna for the Forum. It is tempting for those who seek a radical solution to prepare a blueprint for a new Ireland under which Northern Protestants might for instance be offered special guarantees and a measure of self-government in a federal all-Ireland state. The argument in favour of such an approach is that there is no hope of persuading Northern Protestants to join in a new Ireland unless the terms on which their consent is to be sought are spelled out in detail. The drawback is that there is no evidence whatsoever that Northern Protestants will give their consent to any such plan, and that any attempt to coerce them into doing so by economic or other sanctions would destroy the ideal of unity by consent. The alternative is for the Forum to contemplate a process of constitutional and legislative change which would help to produce peace and stability without threatening the constitutional position of Northern Ireland

as part of the United Kingdom. The arguments in favour of a gradual approach of this kind in which changes are introduced or recommended in their own right as likely to lead to peace and stability are essentially pragmatic.

B. PROBLEMS WITHIN THE CURRENT CONSTITUTIONAL FRAMEWORK

6. Why Partition Failed.

If any progress is to be made in moving towards peace and stability within the current constitutional framework, it is essential to identify what has gone wrong since partition was imposed in 1921. The problems may be analysed at a number of different levels. First, there is a need for a clear understanding both north and south of the border as to why the policies which were adopted in the Republic and in Northern Ireland alike did not produce peace and stability. Secondly, there is a need for a greater understanding of some of the more general constitutional principles of commitments, notably those of national sovereignty and majority rule, which have contributed to those policies. Finally, there is a need to understand why some of the solutions, notably those of power-sharing and federalism, which have been tried or proposed in recent years have not proved workable or acceptable.

7. The Mutuality of Unionism and Republicanism.

It is a commonplace that in the years following partition, Northern Ireland and the Republic were turned into sectarian states in which the interests of the respective minorities were largely ignored. In Northern Ireland, all effective power was reserved for members of the majority community. The justification or excuse for this was the reluctance of members of the minority to become involved in the institutions of a state which they rejected. But no efforts were made to encourage the participation of the minority. With hindsight, it can be seen that the exclusive attitude of the Unionists was shortsighted, even from their own narrow viewpoint, in that the continued existence of a disaffected minority of one-third almost certainly posed a greater danger to the stability of Northern Ireland than the slow growth in the proportion of Catholics which many of the discriminatory policies and practices which flourished under the Unionist regime were designed to avoid. The approach adopted in the Republic was not essentially different.

Though the minority of Protestants within the Republic was so small as not to pose any possible threat to the Catholic majority, no opportunity was missed to confirm the fears and prejudices of Protestants and to deter those in Northern Ireland from contemplating any form of unity or even mutual respect. The exclusive nature of the Republic was expressed in cultural terms by the emphasis on Gaelic and Catholic language and symbols in social terms by the laws on mixed marriages, divorce and contraception, and in political terms by the refusal to recognise the legitimacy of Northern Ireland. These attitudes and actions on both sides of the border are understandable. It was natural for a newly formed state like the Republic which had a highly homogeneous population to assert its non-British language and culture. It was equally natural for the Protestant community in Northern Ireland to fear the erosion of its majority by the natural increase in the Catholic population or by infiltration across the border from a state which since 1937 had laid formal constitutional claim to Northern Ireland and regularly asserted its desire to incorporate Northern Ireland, without taking any account of the views of the majority community. But the effect in both cases was to reinforce the alienation of their respective minorities. In so doing, the Unionists succeeded in underlining the instability of their state and the proponents of a united Ireland reinforced the determination of the Unionists to have nothing to do with the Republic. It is true that there were (and are) non-sectarian advocates of Unionism and Republicanism, but their voices have had little practical impact on how both states have developed, or on their relationships to date.

8. The Problem of Majority Rule.

Many of these problems are directly related to an identification of democracy with majority rule and the inadequacies of the British legal and constitutional tradition, from which both Northern Ireland and the Republic evolved. The notion of democracy as rule by the majority may function in a homogeneous society in which there are no fundamental differences in political objectives and in which there is a reasonable prospect of different political parties winning sufficient electoral support to form or participate in a majority government. It is wholly inappropriate in a communal society in which one group is in a position to exercise more or less permanent dominance over another and in which the political objectives of different communal groups are fundamentally oppositional. The

problems which this creates within Northern Ireland are well recognised. But they are likely to be equally serious within a new all-Ireland state in which about a quarter of the population shares a communal identity and an entirely different set of commitments and loyalties.

9. The Problems of Power-Sharing.

The solution to this problem which has been most widely advocated for Northern Ireland is generally known as 'power-sharing'. It is an attractive concept. But it is not usually very clearly defined. The short-lived Executive of 1974 was constituted under a formal provision which permitted the Secretary of State to choose an Executive from parties which appeared to him to command widespread support in the community (Northern Ireland Constitution Act, 1975, s. 2). The current provisions for 'rolling devolution' are essentially the same, in that powers may not be devolved to the Northern Ireland Assembly unless Parliament is satisfied that an order for the devolution of particular powers is likely to command widespread acceptance throughout the community (Northern Ireland Act, 1982, s. 2(2)). Provisions of this kind reserve the final decision on what is acceptable by way of power-sharing to the Government or Parliament in Westminster, and in so doing, create an obvious risk that parties in Northern Ireland will seek to hold out for the maximum advantage which they think they may be able to persuade the authorities in Westminster to concede. The alternative approach favoured by Fine Gael and the SDLP is rather more precise in that it would guarantee a place as of right in any Executive or Cabinet to representatives of all major parties on the basis of proportional representation. Those who refused to participate would thus forfeit the opportunity to participate in the government. The essential weakness of both these forms of power-sharing, however, is that neither provides a mechanism for the resolution of disputes within the Executive or Cabinet. If the principle of majority rule within the Executive or Cabinet is to be applied, then the representatives of the majority community will be able to maintain their domination by forming an internal cabal. If, on the other hand, there is a requirement of unanimity, it is not at all clear how differences of policy are to be resolved. Nor is there any provision under either system which makes it clear what is supposed to happen when a large section of the Executive or Cabinet resigns or when it otherwise becomes apparent or might be thought that it no longer commands

widespread acceptance throughout the community. Under the British statutes of 1973 and 1982, there was, and is, an obvious implication that the alternative to agreement is continued Direct Rule. But this, or its alternative under a new all-Ireland state or joint sovereignty cannot be regarded as a satisfactory method of resolving the kind of differences which regularly lead to the formation of new governments in other jurisdictions. In more general terms, it is hard to accept that a system of government which in effect requires everyone to agree all the time is suitable for a province in which there are very deep divisions on very many issues. Those in Britain and the Republic who favour such a system need only consider what their reaction would be to the imposition of a similar principle in their own jurisdictions or in a new all-Ireland state to realise that there are serious objections to a system under which a relatively small minority holds a permanent veto on every issue in the sense that their refusal to co-operate can bring down the government.

The Problems of Federalism.

It is perhaps significant that power-sharing has not been proposed as a means of meeting the assumed desire of Northern Protestants for a share in government in a new all-Ireland state. The alternative which has been most widely canvassed is a form of federalism under which a measure of self-government would be granted to a new provisional government in Northern Ireland, whether for the existing six counties or some larger or smaller unit. This might help to resolve some of the differences on matters of social legislation between the predominantly Protestant community in the North and the predominantly Catholic community in the rest of Ireland. But there are substantial difficulties. Federal systems of government depend on a basic level of agreement as to national objectives between the various units, which cannot be assumed to exist in the case of Northern Ireland. There would in addition be a fundamental imbalance in the constituent units of the federation, unless a new set of provincial governments were also established within the Republic. This difficulty has proved a major obstacle to proposals for a federation within the United Kingdom, given the hugh disparity between the populations in England, Scotland and Wales and

the lack of any general desire for the creation of regional governments in England. Nor is it clear how the interests of the minority within a federal Northern Ireland are to be protected. This creates another difficult dilemma: the larger the proposed powers of a federal all-Ireland government, the less likely it is - though it is in any event highly unlikely - that Northern Protestants would agree to join; if the powers of the central federal government are severely restricted, on the other hand, the more necessary it is to create effective protections for the minority within Northern Ireland, thus raising the same problems which have proved so difficult to resolve within the current constitutional framework.

11. The Problems of Sovereignty.

For the Republic, the constitutional principle of national sovereignty is likely to prove almost as troublesome as that of majority rule. The notion of absolute sovereignty which developed with the creation of nation states seems increasingly inappropriate as a model for political and constitutional structures in a world in which the reality has become one of increasing economic, political and military interdependence. Both Britain and Ireland have already ceded a large measure of their internal sovereignty by joining the European Community, by their commitments to such regional international organisations as the Council of Europe and through participation in the United Nations Organisation. But there is still a considerable degree of commitment in both countries to the ideal of sovereignty. The assertion by the Republic of exclusive sovereignty over the whole island of Ireland in its constitution has long been a stumbling block to better relations with, let alone recognition of, the legitimacy of Northern Ireland. The corresponding assertion by the United Kingdom of its own sovereignty over Northern Ireland while it remains part of the United Kingdom has caused similar frustrations within the Republic, notably over lack of consultation on political and other initiatives in Northern Ireland. The very substantial differences between Britain and the Republic over communal defence policies and neutrality, most recently expressed over the Falklands, have made matters worse. It has even been argued that the commitment in the Republic to neutrality is as strong if not stronger than the commitment to the unification of Ireland. The assertion of absolute claims of this kind makes very little sense in relation to Northern Ireland in which both Britain and the Republic have an obvious interest and in which the two sections of the population can be assumed to share

the conflicting commitments of Britain and the Republic. Nor, if there were to be a federal Ireland, would it be easy to envisage a constituent part of the federation asserting a different stance from the rest of the country on matters of defence or neutrality. These considerations point strongly in the direction of some form of joint sovereignty over Northern Ireland. But that in itself is likely to prove a highly controversial conception which would involve a breach of the oft-repeated commitment of the British government over the status of Northern Ireland and might serve to exacerbate the relations between the two communities in Northern Ireland. Nor would it in any way help to resolve the long-standing problem of achieving some form of government within Northern Ireland which would secure the consent of both sections of the community. If similar <u>results</u> can be achieved in practical terms by making less fundamental constitutional changes, there are strong arguments for adopting the less radical approach. The complex inter-relationships between the two parts of Ireland, Britain and the rest of the E.E.C. can be better reflected by making ad hoc adjustments than by attempting to start with a clean slate on which new arrangements are to be spelled out in terms of an essentially outdated and wholly inappropriate concept like sovereignty. The goal should be to examine the need for constitutional, legal and other changes through the concept of interdependence of the peoples and states on these islands, rather than through the traditional assumptions of independence and the symbols or rhetoric of sovereignty. Change based on this concept permits co-operation at the level of policy and administration much more readily than demands for exclusive legal sovereignty with its inevitable claim for exclusive loyalty to one state or the other from the two Northern Ireland communities.

C. A FRAMEWORK FOR ACTION

12. The Reflection of Realities.

The basis of an approach to the Northern Ireland problem which rejects the practicality of any new blueprint for unity, whether on an all-Ireland or federal basis, or joint sovereignty, but accepts the need for significant changes in the current legal, administrative and constitutional framework is that new arrangements should reflect the realities of the relationships between the communities within Northern Ireland and between the peoples of Britain and Ireland as a whole. This will require a carefully prepared programme of action on a number of different levels:

first, the acceptance and recognition by all parties of the differing identities and loyalties of the two communities within Northern Ireland;

second, the extension of this acceptance and recognition in the context of relationships between the United Kingdom and the Republic;

third, the protection of majority and minority rights on a political level within Northern Ireland;

fourth, the protection of communal and cultural rights through law for both communities within Northern Ireland and the Republic;

finally, the development of a formal and practical arrangement to deal with the problems of security before, during and after the implementation of any new set of arrangements.

13. The Recognition of Identities and Loyalties within Northern Ireland.

The right of members of the minority in Northern Ireland to aspire to and assert their political support for a united Ireland has come to be accepted in British policy only in the last decade. This process can be dated from the Sunningdale Agreed Communique, (December, 1973) and is strongly expressed in the White Paper 'Framework for Devolution', (1982) which preceded the present Northern Ireland Assembly. The minority's nationalist aspirations had been recognised and supported by the Republic, but the refusal of Unionists to wholeheartedly accept and respect these ideals was mirrored by the Republic's resistance to acknowledging any legitimacy in the majority Unionist tradition in Northern Ireland. The Unionist attitude to the minority's aspiration was in a large measure the basis for popular support for the Republic's policy towards the Unionists over the years.

The Sunningdale Communique was the last formal government declaration of the position on Northern Ireland by the Republic and Britain. The two states made formal declarations in the following terms:

5. The Irish Government 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.

The British Government solemnly declared that it was, and would remain, their policy to support the wishes of the majority of the people of Northern Ireland. The present status of Northern Ireland is that it is part of the United Kingdom. If in the future the majority of the people of Northern Ireland should indicate a wish to become part of a united Ireland, the British Government would support that wish.

6. The Conference agreed that a formal agreement incorporating the declarations of the British and Irish Governments would be signed at the formal stage of the Conference and registered at the United Nations.

The meaning and effect of these clauses was examined by the Supreme Court in Boland v. An Taoiseach (1974) I.R. This decision concluded that the clauses did not constitute an agreement "on fact or principle", and at most was a 'de facto' recognition of Northern Ireland's position within the United Kingdom, and not a de jure one. The Court appeared to take the view that the formal agreement referred to in Paragraph 6 above might offend the Constitution and particularly Articles 2 and 3. No formal agreement was ever concluded or lodged with the United Nations, because of subsequent developments.

What follows from this is that both states have failed to grapple at the level of binding agreements, or internal legislation with the rights to self-determination of the peoples of Northern Ireland. It has never been conceded by Unionist or British governments that the Nationalist minority were inadequately consulted as to the arrangements leading to partition and as to their incorporation within Northern Ireland as part of the partition settlement. If the principle of constitutional change by consent is properly to be provided for in new arrangements, it must extend not only to the majority community, but also to the minority in Northern Ireland. In international law, conflicts between peoples claiming

conflicting rights to self-determination are not unusual. The resolution of such conflicts distinguishing rights to internal and external self-determination are compatible with international law if they are based on the consent and agreement of the peoples and states involved. In particular, the formal concession of the right of the majority to self-determination cannot be absolute if the minority's right to self-determination is to be conceded also. It follows also that the minority's right to self-determination must be constrained and attention must focus on the combination of elements of internal and external self-determination which would offer a framework for the maximum flexible satisfaction of the entitlements of both communities. One dimension of internal self-determination for example relates to culture and identity. The right of the minority to assert Irish identity and culture has been denied or ignored in Northern Ireland. Attention should be focused on facilitating the tangible expression of identity short of incorporation of Northern Ireland into an all-Ireland state. In addition, at the constitutional level, the right of citizens of Northern Ireland to claim and exercise the rights of Irish citizenship which is already accorded them under the Irish Constitution and the Irish Nationality Act, 1956 without losing any rights within Northern Ireland should be recognised.

This would also involve the immediate repeal of the provision of the Electoral Law Act (Northern Ireland) 1962 which disqualified from voting in local elections in Northern Ireland all citizens of the Irish Republic not already on the register in 1949. Other surviving disabilities identified in the Anglo Irish Joint Discussion Documents should be removed. The current bar on joint membership of the British Parliament or Northern Ireland Assembly and the Parliament of the Republic, which caused such problems in the Mallon case, should be removed. The question whether any more formal arrangements should be made for the representation in the Oireachtas of those in Northern Ireland who assert their Irish identity would be a matter for the Republic. But the right of the Republic to make such arrangements and to hold any necessary elections within Northern Ireland should be formally recognised. On a more practical level, provision should be made for the

establishment of consular offices for Irish citizens in Belfast and other centres as thought appropriate. These arrangements by Britain would reflect acceptance that the original partition and the 1949 Act declaration of majority right had not taken account of the minority's position and its right to national identity.

In return for the acceptance of these tangible expressions of the right of members of the minority community to be Irish, the Government of the Republic would be required to grant full and explicit recognition of the constitutional status of Northern Ireland as part of the United Kingdom and thus to remove the ambiguous and controversial provisions of the Irish Constitution which appear to, but do not in practice, claim jurisdiction over Northern Ireland. These constitutional changes in the Republic would reflect acceptance that concern for the minority's rights in Northern Ireland and the aspiration of the Nation for unity had not adequately taken account of the Northern Unionists' right to national identity. The principle behind these various measures is that both the Republic and Britain should recognise the respective rights of the majority to determine the constitutional status of Northern Ireland and of the minority to express their Irish identity in ways which do not conflict with that status.

14. Relationships within these Islands.

A similar approach should be adopted within the wider framework of these islands as a whole. With the exception of the provisions of the Prevention of Terrorism Act, freedom of movement and settlement, and full voting rights are already granted within Britain to citizens of the Irish Republic, and legislation to grant equivalent rights to British citizens in the Republic are before the Dáil. Though these rights are anomalous, they give tangible recognition to the long historical association between the peoples of Great Britain and Ireland and the established patterns of movement and settlement. On a political level, the close relationships between the two countries have already been recognised by the establishment of the inter-governmental Anglo-Irish Council and its cultural counterpart, Anglo-Irish Encounter. It would clearly be appropriate for a representative parliamentary tier

to be added to give public expression to matters of joint concern between the two countries. Ideally, it would be desirable for such an inter-parliamentary council to include separate representation of both the minority and majority communities in Northern Ireland, based on their proportional strength in whatever parliamentary body is established there. The function of the parliamentary tier would be primarily that of debating and scrutinising the plans and performance of the various governments, though it might also be granted some executive, including appointing or funding, powers in respect of agreed joint agencies, such as the established Foyle Fisheries Commission and other bodies with cross-border functions, such as the Joint Commission for the Promotion of Human Rights, proposed below. A security function could also be envisaged for this tier. Objections to direct representation of this kind in the parliamentary tier from Unionists on constitutional grounds, notwithstanding the formal recognition of their status, should not be admissible. It bears repetition and should be a parallel axiom to that of the principle of consent for the Forum, that the peculiar circumstances of Northern Ireland do not permit of either population to exercise absolute rights to self-determination. Unionist objection, however, may for a period result in representation of that community being indirect.

15. Minority Participation in Government within Northern Ireland.

Arrangements for internal government within Northern Ireland are crucial to any settlement which is to produce peace and stability. As has been explained, it is all too readily assumed by those in London and Dublin that all that is required is agreement on some form of power-sharing in which all or most leading parties will participate in executive government without serious consideration of the mechanisms by which the disputes which will inevitably arise within any such structure are to be resolved. While a voluntary broad-based coalition of all parties for an initial period of reconstruction would be both desirable and perhaps attainable, neither the highly discretionary criteria adopted by successive British governments to assess whether there is widespread acceptance within the community of a particular

administration nor the more precise system of proportional representation proposed by Fine Gael and the SDLP is likely to prove workable in the longer term. A more practical approach would be to provide that both legislation and other governmental decisions requiring a formal administrative order (delegated legislation) should require a weighted majority of votes in respect of matters over which there are obvious communal interests, notably education, major industrial development and planning decisions, local government, policing and security, and all matters of a constitutional or electoral nature. It is not necessary that a similar weighted majority should be set for all these matters. A sixty per cent majority might reasonably be thought sufficient protection for certain matters and a seventy-five per cent majority for more fundamental matters. For all such matters where action is pursued by delegated legislation or statutory instrument, the affirmative vote procedure would be required. The concept that different decisions require different majorities is well established in constitutional law in other jurisdictions and in company law as the primary mechanism for the protection of minorities. In the Northern Ireland context, a structure of this kind linked with the generally agreed system for the appointment of scrutiny committees with wide powers and with chairmen and members drawn from all parties on a proportional basis would provide the best means of involving all parties in the process of government without requiring the unrealistic degree of consensus required in the power-sharing model. This structure would work best also without the establishment of formal structures for communal voting and communal representation, such as the provision for a President and Vice-President to be drawn from the majority and minority communities, which would be likely to entrench rather than help resolve inter-communal conflict.

16. The Protection of Individual and Communal Rights.

Apart from the right to participate in political processes, it also follows from the argument so far that further provision for the protection of both individual rights and freedoms and communal or group rights will need to be made. The recognition of collective or group rights particularly of minorities has been a relatively recent development at either the national or international level.

The protections available through law at present in both Northern Ireland and the Republic for minority rights are indirect and inadequate as compared with individual rights. Serious attention should, therefore, be paid to their direct expression and protection, notably those of language, religion and culture. In Northern Ireland, there is an obvious need for some direct protection of minority rights in such matters as communications, street names and the use of the Irish language where it can be established that there is a genuine communal desire within a defined area for such expressions of communal identity. There may also be a need for some direct expression of the right of parents to have their children educated in schools of an integrated as well as of a Protestant or Catholic character.

In the Republic of Ireland, it is appropriate to remark that minorities are not necessarily exhausted by reference to religious affiliation, and that apart from the issues of women's rights, there are sexual, racial and other minorities that require consideration. If protection of minorities is to be a central theme in the arrangements for a new Ireland, it is right that standards already common and in principle binding on both states derived from international law should be the basis for protection. These standards have evolved at the universal level under the aegis of the United Nations and at the regional international level through the Council of Europe. An initial step towards effective action should be the signing and ratification by the Republic of all of the major international instruments on human rights in addition to the European Convention on Human Rights, which it has already ratified. These instruments are:

The International Covenant on Economic Social and Cultural Rights,

The International Covenant on Civil and Political Rights,

Optional Protocol to the International Covenant on Civil and Political Rights,

Declaration regarding Article 41 of the International Covenant on Civil and Political Rights (concerning the competence of the Human Rights Committee to receive communications by one State Party against another),

International Convention on the Elimination of all Forms of Racial Discrimination,

× Convention on the Elimination of all Forms of Discrimination Against Women,

× Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief.

The bulk of these instruments have been ratified by the United Kingdom, and would, therefore, constitute positive obligations in international law with respect to their observance in Northern Ireland. The acceptance by both states of the various Declarations and Conventions and, in particular, the right of individuals or groups to complain to the agencies established to implement the Covenants on Civil and Political Rights, and Racial Discrimination would signal the wish and interest of both to uphold the highest international standards as well as their preparedness to submit human rights policies to international supervision. As will be known, the precedent already exists for this through the European Convention on Human Rights and the right of individual petition, which is increasingly having an impact on both Northern Ireland and the Republic.

It may be argued that the European Convention represents an adequate international supervision, without further action by the two States. But the duty to ratify these instruments arises from the United Nations Charter, and the obligation undertaken by both states through membership of the United Nations. It is relevant too that Ireland is among the last members of the European Community yet to ratify the major instruments cited - the United Nations "Bill of Rights", the Covenants on Civil and Political Rights and the Covenant on Economic Social and Cultural Rights. It is anomalous also that these instruments constitute standards of protection for Britain in relation to Northern Ireland at the international level, but do not constitute obligations for the Republic's government for the people on the rest of the island because of failure to ratify them. Given the Republic's concern about human rights issues in Northern Ireland, in its own right, without reference to new arrangements for the future, it seems odd that it has been excluded from the consideration of reports on Northern Ireland, made by the United Kingdom in international fora because of failure to participate in the relevant machinery. It is necessary to emphasise that the participation in such international structures for human rights protection does not supercede national legal protection. In all cases, these instruments are secondary to the national legal systems. Their functions are to provide 'outer' protection should no remedy be available at home, and to fuse with the national constitutional and legal protections,

so as to provide as much as can be achieved through law to secure the enjoyment of human rights by individuals and minorities. On the other hand, international supervision which will result from ratification of the U.N. instruments does represent a commitment. It is not an empty gesture. It entails obligations to bring domestic law into line with the international requirements, and it obligates the state party to submit comprehensive periodic reports as to how it is fulfilling obligations undertaken. Such periodic reports are all the more important if the entitlement of individuals or groups to petition is conceded.

There is one further recommendation to be made on this topic; the incorporation into the domestic law of both Northern Ireland and the Republic of the European Convention on Human Rights. The case for a Bill of Rights for Northern Ireland has been much discussed. To those arguments can be added the case for the Republic. In Northern Ireland, without devaluing the importance of the work of particular agencies, such as the Fair Employment Agency, or the increased scope for judicial review under the Constitution Act, 1973, the arguments for an enforceable and comprehensive Bill of Rights is persuasive. The Standing Advisory Commission on Human Rights in Northern Ireland advocated one, albeit on a United Kingdom wide basis. The Republic has a written constitution which includes fundamental rights clauses that have been effectively extended by the judiciary to offer to the Irish citizen the full panoply of rights expected in a democratic state. Nevertheless, the incorporation of the Convention (by parallel legislation for both parts of Ireland) would for the Republic achieve a number of important effects. In the first place, it would supply a convenient codification of the implied rights developed through constitutional interpretation of Bunreacht na hEireann, which by virtue of being implied, do not appear on the face of the document. Secondly, it would supply an additional source for human rights protection and interpretation of the constitution's guarantees. Thirdly, it would link the processes of protection of human rights by the courts in Ireland more closely to the organs of the European Convention in Strasbourg, the European Commission and European Court of Human Rights, which have shown worrying signs of disharmony in recent times. Without elaborating on the technical dimension of incorporation, it would be desirable that the Convention be incorporated by statute rather than constitutional amendement so as to achieve equal status in both parts of the island.

The incorporating statutes could include presumptions that the rights formulated should take precedence over subsequent legislation unless the respect legislatures intended clearly the contrary purpose. Further, the legislation could direct that courts in Northern Ireland and the Republic should take into consideration decisions on the interpretation of the parallel Act in the other jurisdiction as well as the jurisprudence of the Convention at Strasbourg, with a view to harmonisation of result. Joint legislation could allow for the Attorneys-General of both Northern Ireland and the Republic to appear in any litigation before the courts in either jurisdiction where general questions of importance on the interpretation of the incorporated Convention arose in litigation, again with the objective of harmonisation of interpretation and maximising the potential of the legislation for securing remedies for human rights violation.

To some, the step of incorporating the European Convention may appear either radical or inefficacious. It is worth noting, therefore, that the Convention has the status of domestic law in seven out of the ten European Community states and fourteen out of the twenty-one Council of Europe states. In some states, it has effective equality with the Constitution. The European Court of Human Rights now permits by its Rules, the intervention in a case involving one particular state party and an individual complainant, not only another state that may have an interest in the outcome, but non-governmental organisations.

The achievement of respect for human rights of individuals or groups is not alone a function of remedies and litigation. It requires education to instil values and to dispel prejudice. What little has been achieved to ensure understanding and respect for the traditions, identity and rights of others on this island is to the credit of non-governmental agencies including the Churches. It cannot be claimed that education in the field has been a central issue for governments over the years in either Northern Ireland or the Republic.

The Forum must recognise that apart from the clearly structual basis of the conflict, there is a direct connection between violence and the stereotypes rampant on the island through which the different communities view each other. By extension, similar points can be made about Great Britain. It is proposed that the parliamentary tier of the Anglo-Irish institutions should appoint a joint commission for the promotion of respect for human rights, with a mandate to develop programmes of education and information in co-operation with existing agencies, governmental and non-governmental, in both Northern Ireland and the Republic. The Commission might be established under the joint legislation to incorporate the Convention on Human Rights and that legislation might outline its functions. Apart from an educational function, it might have power to refer issues to the courts in the appropriate jurisdiction, as does the Fair Employment Agency in Northern Ireland, or the Consumer Affairs Office in the Republic. The legislation establishing the Commission ought to provide that the Commission's views are to be sought by both governments before submitting periodic reports to the relevant international agencies under the international instruments when these are ratified. The parliamentary tier envisaged should as a regular feature table and debate such reports submitted by the two governments. The proposal here is again hardly radical, since both states have in the last few years committed themselves by resolutions of the Committee of Ministers of the Council of Europe to promote human rights education and research. In looking for models for such a Commission, the Forum might consider the recently established Australian Human Rights Commission established at the federal level, and which is recognised to have been particularly successful and effective in its activities.

17. Security.

By its nature the topic of security is not one that can be comprehensively reviewed through the Forum. Rightly, discussions on day to day security policy and co-operation is confidential. However, it is necessary for the Forum to consider security at a more general level given that special security arrangements will continue to be necessary before and after the implementation of any new settlement of the kind which has been outlined. There is in the first place a link with the subject of human rights protection, in the preceeding section. The use of exceptional powers in Northern Ireland and the Republic because of the emergency in public security requires to be considered against the international standards governing the use of such powers. All of the international instruments permit a temporary resort to emergency measures which involve derogation from certain rights, provided the derogations are strictly required by the exigencies of the situation. The common assumption that during an emergency, all rights can be set aside in the interests of security is incorrect, as has been emphasised by the Irish Supreme Court, as well as the European Court of Human Rights. In this connection, it may be noted that the emergency clause of the Irish Constitution, Article 28, is in principle incompatible with international standards, because it permits the Oireachtas and the Executive too wide powers to suspend all constitutional rights. Under the European Convention, and the U.N. international instruments, certain rights, for example, freedom from torture, and the prohibition on retrospective laws, may never be suspended. Since the standards governing the use of emergency measures are common North and South, and if in particular the European Convention's protections were to become part of the internal law in each jurisdiction, the proposed Human Rights Commission would be concerned centrally with the question of emergency powers and safeguards on their use. There is obvious scope in this context for the provision of mechanisms for the scrutiny and supervision of security policies

and performance by inter-governmental and inter-parliamentary bodies of the kind discussed above. The logic for this development derives not only from the fact of security co-operation across the Border, but from the obligations which devolve on both states under international law to ensure that emergency powers are subject to scrutiny and control.

In institutional terms, the machinery created by joint legislation for interjurisdictional trials in 1975 and 1976 has considerable potential for extension. The interaction between the Criminal Law Jurisdiction legislation and the Irish Extradition Act, 1965, particularly the provisions granting a privilege against being returned to Northern Ireland from the Republic where the arrestee claims that the offence is politically motivated is currently the subject of proceedings before the Supreme Court in the Republic. It would, therefore, be inappropriate to comment on the topic, beyond noting that the effect of the laws under discussion is that there is no immunity for anyone on the island who commits offences of violence anywhere on the island. Also, whatever may be done to prevent the abuse of the concept of the political offence by paramilitaries, the internationally recognised principle of the right to seek asylum from persecution should not be abandoned in the process.

The problems in coping with violent crime common to both jurisdictions relate to enforcement including detection and production of acceptable proof for courts of the involvement of persons in violence. These problems will decrease in the context of acceptable political changes but cannot be eradicated in the short or medium terms. The Forum should set its face against panaceas for security in the context of political resolution. Draconian measures and wide discretionary powers to the security forces have the potential of reversing all political achievements as the Northern Ireland example itself demonstrates. A better course would be to seek to harmonise criminal procedure laws in Northern Ireland and the Republic, including police powers. It is regrettable in that regard that the current Criminal Justice Bill before Dail Eireann did not take over the proposal of the 1967 Criminal Justice Bill to adopt the Northern Ireland classifications of offences and police powers. Any concept of joint policing that might develop cannot proceed without the

respective forces functioning on identical powers. The adoption of common power enables the adoption of common safeguards governing the arrest and questioning of suspects and would clearly be essential if there is to be an effective common monitoring of the use of such powers in Northern Ireland and the Republic. It cannot be ignored that the rights of suspects are better protected under United Kingdom law presently than in the Republic, and that the current Criminal Justice Bill in the Republic will give the Garda more extensive powers than are available to the R.U.C. in certain respects.

The technical and sensitive nature of many of these issued would prompt the suggestion that they require separate review. It is proposed that a further Law Enforcement Commission be established to review experiences since the first report in 1974, and to examine in the context of the aims of achieving acceptable policing systems and controlling violence, how the inter-jurisdictional machinery already established might be built upon. In the meantime, the Forum might consider recommending a review of the Offences Against the State Act, 1939, which has never been undertaken in its history and which as emergency legislation is much less economical in scope, and subject to fewer controls, legal and parliamentary, on its use than the Northern Ireland Emergency Provisions Act, 1978, its equivalent in Northern Ireland. The task of harmonising criminal law and procedure would not be a major task, since the essentials are already common, and could await the advice of the proposed Law Enforcement Commission.

18. Mode of Enactment.

The mode of enactment for the various measures which would form part of a general settlement along the lines outlined requires careful consideration. To achieve peace and stability, it is important that the highest degree of legitimacy be conferred in major elements in an initial settlement. In the Republic, some constitutional change is clearly required to remove the ambiguity of Articles 2 and 3 of the current Constitution and to amend Article 28 as noted. It would also be desirable to gain general popular consent to the creation of new inter-governmental and inter-parliamentary bodies. In Britain, there

is no obvious means of entrenching constitutional legislation which refers to an integral part of the United Kingdom as presently constituted. But a new comprehensive constitution for Northern Ireland, incorporating a Bill of Individual and Communal Rights, could eventually be enacted. Within Northern Ireland further legitimacy to any measures may be achieved by way of one or more referendums, for which there is already statutory provision. Consideration should be given on the inter-state level to the utility of adopting the changes proposed and establishing the structures recommended through a fresh Treaty.

19. Conclusion.

The European Court of Human Rights has defined the hallmark of a democratic society as requiring "pluralism, tolerance and broadmindedness". (Handyside, 1976). We believe in those values and seek to see them effective in both parts of Ireland. We believe that a package of measures along the lines set out in this submission offers the most realistic chance of moving towards peace and stability on the island based on those values.

25 November, 1983

Ireland Relays