

Text of Message of 1 October, 1986 from
the Taoiseach, Dr Garret FitzGerald TD to
the Prime Minister and Minister for the Civil Service,
the Rt Hon Margaret Thatcher MP

You will be aware of the information I have conveyed to Robert Armstrong in relation to our position with regard to 3 Judge courts in Northern Ireland, another matter which I asked him to speak to you about, cross border security cooperation (which I am at present examining personally with the Minister for Justice) and the Extradition Bill now in preparation here. This Bill will enable us to Ratify the Convention without reservation and will also secure the most effective possible system of extradition of terrorists.

You and I share a deep concern about these latter issues. I believe we are now close to being able to secure these objectives before the end of the year. I would hope that early progress can be made in clearing the way politically for this. If in your view obstacles remain I very much hope that we will have an opportunity of discussing them together before final decisions are made on either side.

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Ref. A086/2750

PRIME MINISTER

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I have sent to you separately a note of a message which the Taoiseach asked me to convey to you when he spoke to me on the telephone this morning.

2. There was a second part of the message, which the Taoiseach specifically asked should be for your eyes only. I am not therefore sending copies of this minute to anyone else.

3. The Taoiseach said that he believed that his Government would be able to continue in office until after Christmas, and that (subject to a move on three-man courts by us) legislation for the ratification of the European Convention on the Suppression of Terrorism (ECST) would pass through the Irish Parliament by Christmas. He had reason to think that he could count on the support of "a small political party" - by which I presume he meant the Progressive Democrats - on that legislation. But he expected that he might well be driven to a general election shortly after Christmas; that would be on economic issues, and particularly on the budget.

4. The Taoiseach went on to say that he did not believe that Fianna Fail would win an overall majority in an election, but it was possible that Fine Gael would not be able to put together a government that could command a majority in the Dail, even in coalition with another party.

5. There had recently been an important change in the position of Fianna Fail, and of Mr Haughey in particular, on the Anglo-Irish Agreement. Mr Haughey had made it clear in public



speeches that, if he came back into office, he would regard himself as bound by the Anglo-Irish Agreement and would continue to work it, though he would look at the possibility of renegotiating it. Dr FitzGerald believed that, once Mr Haughey was back in office, he would probably not in practice try to renegotiate the agreement when he took stock of the difficulties in trying to do so. Dr FitzGerald therefore believed that the Agreement was secure, particularly in view of the things which opposition spokesmen on Northern Ireland affairs had been saying in the United Kingdom.

6. But it would be politically impossible for Mr Haughey to introduce legislation to ratify Irish accession to the ECST. If such legislation were in place by the time Mr Haughey became Taoiseach, he would not seek to repeal it or to come out of the ECST; but he could not introduce it.

7. There was thus a political opportunity to introduce and pass legislation for the ratification of the ECST, which would be very unlikely to recur if Mr Haughey returned as Taoiseach after a general election.

8. The Taoiseach said that it would be "a tragedy" if the opportunity was lost. The ratification of Irish accession to the ECST would "put the coping stone" on the Anglo-Irish Agreement. Failure to ratify would be a serious setback for the process which you and he had started and carried forward.

9. The Taoiseach stressed once again that it was politically essential for him to have some progress on three-man courts in Northern Ireland, if the ratification legislation were to pass in the Irish Parliament. He reminded me that it had been made clear in the discussions leading up to the Hillsborough Agreement that the ratification of Irish accession to the ECST would depend upon significant progress in improving the administration of justice in Northern Ireland. He was very



anxious that there should be no recriminations as between him and you, if in the event ratification legislation failed because we had not been able to make even a limited move in the direction of three-man courts.

10. The Taoiseach said that he was putting the ratification legislation top of his priorities, despite the effect that he recognised that that could have on his own political situation. He was clearly very anxious that you should be in no doubt about that.

11. Because of the great political importance, to both Governments, of sustaining the Anglo-Irish Agreement and the improvement in Anglo-Irish relations which it represented, the Taoiseach very much hoped that you would take no final decision on the introduction of three-man courts without first having had an opportunity for a further exchange of views with him. He would very much want to talk to you himself, if it seemed likely that an adverse decision was going to be taken.

12. The Taoiseach has now sent you a personal message which --- underlines this last point. I attach a copy of that message herewith.

RA

ROBERT ARMSTRONG

1 October 1986

Prime Minister
CDD

Ref. A086/2749

MR POWELL

Anglo-Irish Relations

The Government Secretary in Dublin, Mr Dermot Nally, rang this morning. He said that the Taoiseach was anxious that a message should be conveyed from him to the Prime Minister. The Taoiseach would like to tell me himself what he wanted to say to the Prime Minister, so that I could convey it to the Prime Minister directly. The Taoiseach then took up the conversation.

2. The Taoiseach said that a decision had been taken in Cabinet Committee in Dublin, and would be confirmed by the Cabinet tomorrow, to proceed (subject to one condition, to which I will return later) to the introduction in the Dail of legislation to ratify Irish accession to the European Convention on the Suppression of Terrorism (ECST). There would be no reservations under Article 13 of the Convention.

3. The Taoiseach went on to say that the offences to which the Convention applied were specified in Article 1 of the Convention. In addition, Article 2 of the Convention enabled a signatory to add to the range of offences to which the provisions of the Convention would apply. The Irish Government would want to add certain offences under those arrangements in their legislation, but they would need to accompany that with wording in the legislation on the lines of Article 13 of the Convention, applicable to the additional "unspecified" offences only, so as to avoid a constitutional challenge to the Bill as a whole. The depoliticisation of the offences specified under Article 1 was fully accepted, and the Supreme Court would accept that adherence to the Convention in respect of those offences



was not unconstitutional in Ireland. In relation to the additional offences, however, the Supreme Court might take the view (on a challenge) that the legislation fettered the discretion of the Supreme Court, unless the legislation included wording on the lines of Article 13; and, if it did not include such wording, there would be a risk that the Supreme Court would declare the whole Bill unconstitutional because of this provision. It would be in order to avoid that danger that wording like that of Article 13 would be included in the Bill in relation to the additional offences to be included.

4. The Taoiseach said that the legislation would not include any requirement of prima facie evidence for extradition. What he described as "a small political party" had been committed to requiring prima facie evidence, but he was reasonably satisfied that the party concerned would drop that request. It would be necessary for it to be known that extradition papers would be vetted by the office of the Director of Public Prosecutions.

5. The Taoiseach said that the Irish Government was thus seeking to act in complete good faith in relation to ratification of the ECST. But he went on to say that he was in no doubt that the legislation would not pass unless there were changes in the system of the administration of justice in Northern Ireland to improve the confidence of the minority community in that system, and specifically a move towards the introduction of three-man courts.

6. The Irish Government were willing to accept that three-man courts should be confined to extraditable offences and certain other very serious offences: that would reduce the number of additional judges that would be needed. The Taoiseach said that he understood that Lord Lowry had told the Secretary of State that the Northern Ireland judiciary were unanimously opposed to the introduction of three-man courts. He had reason to believe that this was not the case. His understanding was that there



had been no formal consultation of the Northern Ireland judiciary, and that three of the High Court judges were in favour of three-man courts for non-jury trials and two were neutral on the subject. He suggested that the Government should take steps to ascertain for certain what was the position of the Northern Ireland judges on the matter.

7. If there was a decision to move in the direction of three-man courts, the Irish Government would be very willing to be as helpful as possible in relation to its presentation. They would certainly wish to avoid any reflection on the conduct of the courts in the past or on the courage and integrity of the Northern Ireland judiciary.

8. Turning to cross-border co-operation, the Taoiseach said that agreement had already been reached on a number of things. He instanced:

- Regular meetings between the Chief Constable of the Royal Ulster Constabulary (RUC) and the Commissioner of the Garda.
- The need for improved surveillance south of the border.
- Strengthening of the relevant group of the Garda (I think he said Unit 143).
- Improvements in communications between the two police forces and in computerisation.

9. On two matters that had been in abeyance, the Irish side were now able to make a move:

- It was agreed that there should be regular monthly meetings between divisional Commanders and Superintendants on the border.



- It was recognised that detectives in the Garda lacked training in surveillance work. It had been suggested that they should have five months of training. That would take them off the job for too long. But it was now agreed that they should undertake training for a period to be determined, and that the staff concerned should be those who had already had some preliminary training of which the RUC were aware.

10. The Taoiseach said that they had not until this morning received in Dublin, via the Secretariat of the Intergovernmental Conference, from the Secretary of State a list of a number of matters on cross-border security co-operation which had not been dealt with. There had previously been suggestions that there were such matters, but attempts by the Irish Government to obtain a clear statement of what those matters were had not hitherto been successful. This was the first time that they had had a clear statement at political level of the matters not dealt with. The list would now be strenuously and seriously considered, and the Taoiseach said that he would be personally supervising that consideration. He suggested that the matter should be discussed at next week's meeting of the Intergovernmental Conference. It could well also be useful that there should be a separate meeting between the Secretary of State and the Chief Constable on one side and the Minister of Justice and the Commissioner of the Garda on the other.

11. In conclusion the Taoiseach stressed the political importance for him of a move on three-man courts by us, if he was to be able to get through his Parliament the proposed legislation to ratify Irish accession to the ECST.



12. The Irish Ambassador subsequently called upon me, at his request, to leave with me a copy of the notes from which the --- Taoiseach was speaking. I attach a copy herewith.

13. I am sending copies of this minute to the Private Secretaries to the Lord Chancellor, the Foreign and Commonwealth Secretary, the Home Secretary, the Secretary of State for Northern Ireland and the Attorney General.

RTA

ROBERT ARMSTRONG

1 October 1986

Notes on which the Taoiseach based his telephone
conversation with Sir Robert Armstrong - 1 October 1986

A. I can confirm to you our willingness to accept that three-man courts could be confined to extraditable offences and other very serious offences, possibly to be defined in terms of length of maximum sentences. The details are open for discussion. This could significantly reduce the number of judges needed.

B. Leaving aside the fact that the judges resolved unanimously in June 1985 that they would abide by the will of Parliament and so notified the Prime Minister, we believe that information in London that there is a 'monolithic' objection by the northern judiciary to three-man courts is not a correct representation of the position and that no formal collective consultation with the judges has taken place. We believe that three judges are positively in favour and that two others are neutral. Surely the actual position should be verified before a decision is taken on what could be a false assumption of monolithic opposition?

C. We would wish to be helpful with the presentation of this matter. We recognise that it would be most undesirable that a change in the number of judges be represented as reflecting in any way on the court in the past, especially in view of the appalling risks judges face, and the fact that a number have in fact been murdered or been the subject of murder attempts. We would ourselves present this whole matter positively, and would be willing to reflect with your government as to how best this can be done.

D. There are a number of misunderstandings about our position on extradition legislation, at civil service and lawyer levels. We want to make the following points clear - they have been cleared by our Cabinet Committee and will be cleared by our full Cabinet on Thursday -

1. We shall make no reservation under Article 13.
2. In relation to Article 2, we wish this to be applied, as the range of offences under Article 1 is too narrow, but its inclusion must be accompanied by wording paralleling wording of Article 13, because, apart from the possibility of constitutional challenge in specific cases, it is on the cards that in light of the debate in the Dail and constitutional queries by the Opposition, and possibly by academics in parallel public debate, the President may feel obliged constitutionally to refer the whole Bill to the Supreme Court. Under this procedure, (as distinct from a reference of a particular section, or a challenge in a specific case), any defect in the Bill would lead to the disaster of the whole Bill being found unconstitutional. In view of the wording of some past judgements of the Supreme Court, a real possibility exists that while de-politicisation of Article 1 offences would be upheld, as they are specified in the International Convention, an attempt to remove the Supreme Court's discretion in relation to unspecified offences under the Article 2 general category might fail - and in a general reference bring down the whole Bill. Neither of us can afford this risk. But no reservation will be entered on ratification.
3. We shall not include in the Bill any requirement for certification that a prima facie case exists and we will accept arrangements under which in terrorist cases, papers will be cleared by the DPP's office. This will cause problems in the Dail because of the perception that in a number of cases extradition has been sought

where a prima facie case did not exist. I am satisfied that one political party which is publicly committed to the view that this Bill should require a prima facie case to be shown will now drop this requirement, and also the idea of a requirement for a certificate. It would of course be necessary for it to be known that, in these cases, papers would be vetted by the DPP's office, but as there has been criticism in Britain of five cases, such a statement would be seen as an assurance of efficient extradition in future, rather than as part of a 'deal' with us.

4. A rule of speciality requirement (ie that no other charges could be preferred) would not be in the Bill, but could be substituted by a public statement of a formal understanding that such charges would be preferred only after consultation with the Irish authorities.
5. There would be no provision in the Bill about questioning after extradition.

It will be seen from these five points that we are not holding back on any of these issues on which we can facilitate extradition without introducing a real danger that the whole Act would be found unconstitutional on reference of it by the President to the Supreme Court. In the common interest we could not go further, and we are proposing to act in complete good faith in all respects. But all this is possible only if the proposed changes in the court system in Northern Ireland are made in respect of extraditable and other serious offences carrying heavy sentences. The legislation simply would not pass here without this.

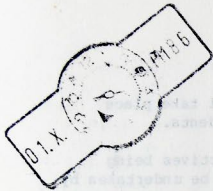
E. There appear to be misunderstandings - or in some cases persisting disagreements at police level - about cross-border police cooperation.

Among the matters that have been agreed, according to our records are the following:

1. Regular meetings between Assistant Commissioner/Assistant Chief Constable and Border Supts/District Superintendents.
2. Heads of intelligence to meet regularly.
3. The level of strengthening of special detective units and surveillance unit.
4. Substitution by either side for temporary depletion of forces on the other.
5. Strengthening of Dublin Special Detective Unit dealing with terrorism to 143.
6. Arranging for compatible and secure telephone, radio and fax equipment.
7. Harmonisation of computerisation.

There are also other matters which have hitherto been in abeyance but which we are now in a position to agree:

1. It is now agreed that regular monthly meetings will take place between Divisional Commanders and Chief Superintendents.
 2. A training programme is being established for detectives being allocated to surveillance work. The training will be undertaken by staff who have themselves received the type of training that has been referred to by the RUC. We are now studying very seriously further matters, including issues brought to my attention only this morning after the meeting between Secretary of State King and Lillis yesterday evening and I am examining these matters personally with the Minister for Justice.
- F. Finally, in view of the overwhelming importance of these issues, I would hope that no negative decision would be arrived at tomorrow on your side on the question of three-man courts. I have in mind writing briefly to the Prime Minister on this point.



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Finally, in view of the overwhelming importance of these issues, I would hope that no negative decision would be arrived at tomorrow on your side on the question of three-man courts. I have in mind writing briefly to the Prime Minister on this point.

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Ref. A086/2554

NOTE FOR RECORD

Mr Dermot Nally, Secretary to the Irish Government, was in London on 10 September 1986 and came to see me, to resume contact after the summer holiday.

2. We compared notes about the situation in Northern Ireland. I said that the marching season had passed off more quietly than we had feared. But we did not now foresee an improvement in the political climate for Northern Ireland. Unionist opposition to the Anglo-Irish Agreement was undiminished. The unionists remained united in that; but in little else. Mr Molyneaux was refusing to talk to the press. There were still "integrationist" voices to be heard, but "integration" was not seen as a feasible way forward in London. Deputy leaders of the Official Unionist Party and the Democratic Unionist Party had both made public speeches in which they suggested that, if the Anglo-Irish Agreement could not be suspended or abrogated, then unionists would have to consider independence. We did not think that that was much more than talk: we doubted whether the idea of independence had been at all thought through. On the other hand, though there were other people who appeared to favour devolution, there seemed to be no prospect of success for an early initiative in that direction. It seemed likely that on the constitutional front matters would go on for the time being very much as they were, while unionist opinion thrashed around and sorted itself out.

3. Mr Nally said that that was very much the judgment in Dublin too. They thought that the unionists were unhappy about the Agreement but confused and without direction so far as the future was concerned, and had to be given more time in which to do some serious thinking, so that they could sort themselves

out. The difficulty was to see where the serious thought was going to come from.

4. Mr Nally said that, in the Republic, the Dail would resume on 26 October. At some stage Fianna Fail would put down a motion of no confidence: this might happen quite early, but it might be postponed for a time, since Mr Haughey would want to be able to muster his full strength for the vote, and his party was at present one seat short, with by-election pending. The Labour Party conference was due to be held towards the end of October, and continued membership of the Government coalition would be an issue at that conference. Mr Nally thought, however, that, even if the Labour Party voted against continued membership of the coalition, the present Labour Party members of the Government would remain in office until the General Election, as they were committed to do: the withdrawal from the coalition would take effect when the Election was called, and the Labour Party would fight the election independently of Fine Gael. Nothing was certain in Irish politics, but on the whole Mr Nally thought that the Taoiseach would be able to last out the course and continue in office until April or June 1987. He agreed, however, that pre-electoral considerations would loom increasingly large from now on.

5. On the Anglo-Irish Agreement, I said that the British Government's commitment to it remained firm, and we were still thinking in terms of further developments in the intergovernmental conference in the coming weeks: Ministers would want to demonstrate that unionist claims that they had succeeded in frustrating the implementation of the Agreement were not well-founded. But the unionist reaction would be a factor which would enter into the British Government's calculations: the Government was likely to want so far as possible to avoid exacerbating the problems of Northern Ireland between now and the General Election in the United Kingdom, whenever that might be.

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6. Mr Nally said that the legislation for the ratification of Irish accession to the European Convention on the Suppression of Terrorism had now been drafted and was ready for introduction when the Dail resumed. The Taoiseach remained personally committed to ratification, and wanted to ratify without derogations or reservations. But this would be a measure which would not be easy to get through the Irish Parliament. It would be opposed by Fianna Fail, and there could even be a few supporters of the Government coalition who would be reluctant to vote for it. The Taoiseach had made it clear in the discussion leading up to the Anglo-Irish Agreement, - and this was reflected in the Communiqué issued on 15 November 1985 at Hillsborough - that, though there was no formal conditionality, progress in improving confidence in the administration of justice in Northern Ireland was the background against which Irish Government proposal for the Ratification of the European Convention would be considered and discussed in the Republic. The Taoiseach's political position was even more sensitive now than at the time of Hillsborough. He was convinced that it would not be possible to get the Ratification legislation through the Irish Parliament unless there was significant progress on improving the administration of justice in Northern Ireland. It had reached the point at which, unless he knew by 10 October that there would be some such progress, the Taoiseach could well conclude that the ratification measure would stand no chance and that it would be better not to introduce it and court defeat. It remained the Taoiseach's position that effectively the only measure which he saw as constituting sufficient progress was a commitment to the introduction of three-man courts in Northern Ireland for at least some offences for which trial by jury was now excluded.

7. Mr Nally said that the Taoiseach understood the difficulties for British Ministers over agreeing to a measure which might appear to reflect lack of confidence in the Northern Ireland judiciary. He suggested, however, that the strength of

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that argument had been somewhat weakened by the recent decision of the Northern Ireland Court of Appeal in the Black case. Black was a supergrass. In the court at first instance the prosecution had relied almost entirely on Black's evidence, and the assessment of Mr Justice Kelly (who tried the case) of Black's evidence was crucial to the outcome. Mr Justice Kelly had stated in his judgment that in his account of the incidents and their participants, Black was one of the best witnesses he had ever heard. The Court of Appeal, however, with Lord Lowry in the lead, found that Mr Justice Kelly had failed to make a proper assessment of Black. In their judgment they said that the trial judge, despite his undoubted manner, his great experience and the enormous care which he took over the case, had greatly overestimated the honesty as a witness of the accomplice Black.

8. In other words, Mr Justice Kelly had been led astray by the supergrass, and as he had been sitting alone and without a jury there had been no counter-balance to his opinion. It was reasonable to assume that, if he had been sitting with two other judges, that would have been less likely to occur.

9. This supported the Irish Government's general view that, in cases where by definition there could be no jury, to have more than one judge on the bench would improve the chances of fair and balanced assessment of the evidence.

10. In political terms, the Irish Government thought that the difficulties of introducing three-man courts into the judicial system in Northern Ireland could be exaggerated. It was after all the case that Mr Paisley himself had more than once spoken in favour of three-man courts.

11. I said that I would report what Mr Nally had said to me about the Taoiseach's position on this matter. I understood and would make it clear that the Taoiseach's decision whether to go

ahead with the introduction of the Ratification Bill could be crucially affected by whether or not the British Government indicated by 10 October readiness to move to three-man courts for at least some offences in Northern Ireland. But I stressed the considerable difficulties which I foresaw. I knew that the Taoiseach was aware of the strength of feeling against three-man courts in the Northern Ireland judiciary (and especially Lord Lowry); and I thought he was right in believing that British Ministers would be reluctant to take a measure which implied that they lacked confidence in the courage and impartiality of the Northern Ireland judiciary.

12. Mr Nally asked what we were thinking about future meetings between the Prime Minister and the Taoiseach. He said that the Taoiseach was not pressing for a meeting, and recognised that a meeting might create difficulties for the Prime Minister in relation to the unionists. As against that, it was nearly a year since they had had a formal bilateral meeting, and it would be undesirable for the impression to be created that they were reluctant to meet.

13. I said that I had not had the opportunity of discussing this with the Prime Minister recently. She had a very busy schedule in the coming weeks, and I did not think that she would want to press for a meeting, unless there was some positive purpose in having one. She and the Taoiseach had, after all, met a number of times since Hillsborough in the margins of the European Council. But I knew that Dr FitzGerald came to London from time to time on private business or to undertake speaking engagements, and I thought that the Prime Minister would be very ready to see him for a short call during the course of such a visit. Indeed, a short and informal meeting of that kind might reduce speculation about unwillingness to meet and pressure from the media or elsewhere for a full bilateral meeting.