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Memorandum for the Government

14 November 1984

Anglo-Irish Relations

1. The Taoiseach wishes to bring to the attention of the Government developments in Anglo-Irish exchanges which have taken place since the Minister for Foreign Affairs last informed the Government on this matter (31 October 1984), to set out the position of the two sides as he and the British Prime Minister prepare for the forthcoming Anglo-Irish Summit and to seek the authority of the Government to authorise the continuation of the exchanges along the lines set out herein.

Status of Exchanges

2. It must be stressed that all contacts between the two sides on the possibility of the establishment of new arrangements for the government of Northern Ireland have been conducted strictly on a hypothetical basis and "without commitment". Thus, just as it would be inaccurate to suggest that the British Government have "offered" all of or one or other element of a possible set of measures to the Irish Government, so it would be inaccurate to suggest that the Irish Government have "offered" any other possible set of measures to the British Government.

Most Recent Exchanges

3. On November 2 and 3 British and Irish officials reviewed their own and each others positions together in an effort to establish as clearly as possible where each of the two sides

stood on all important issues and, following a further round which took place on November 12, the Taoiseach is now satisfied that the exercise has been taken as far as is practically possible before his Summit meeting with the Prime Minister. The main purpose of this memorandum is to set out those issues as they now stand and to indicate the main areas of possible difficulty that remain. The following are the main elements which have now emerged.

Central Concept: Balance

4. The central concept is of that of a balance between, on the one hand: action by the British Government to implement a set of measures intended to give the Irish Government a right to contribute, on a systematic and institutionalised basis, to the formulation of policy on a defined range of issues arising in the government of Northern Ireland as well as a number of other measures intended to halt and reverse the problem of alienation among the Northern minority and on the other hand: action by the Irish Government to reassure the Northern majority by making it plain through an amendment to the Irish Constitution that the aspiration to Irish unity remains but there is no territorial claim on Northern Ireland.

Two Basic Categories of Powers

5. It is agreed between the two sides that for the purpose of the new arrangements it is convenient to divide the powers of government in Northern Ireland into two basic categories:

- the Westminster Powers
- all the Remaining Powers.

6. The Westminster Powers are essentially those that relate to external defence, foreign affairs and finance. It is common ground between the two sides that these would remain the responsibility of the British Government although the

possibility of informal consultation of the Irish Government on the exercise of these powers in Northern Ireland would on request not be excluded.

7. The Irish Government would have a right to contribute to policy-making in the case of the Remaining Powers, unless and until a Devolved Executive drawn from an elected Assembly can be established on an acceptable basis and with the support of the Irish Government, in which case a range of the Remaining Powers would be devolved to the Executive and the Assembly while a number of powers - notably those having to do with the formation of the Executive and questions of identity, human rights, justice and security - would not be devolved. This system, provisionally to be called the Joint Arrangements, would be a new institution within the existing Anglo-Irish Intergovernmental Council. The system would in practice take the form of the participation by an Irish Minister in the process of decision-making along with the Secretary of State for Northern Ireland. The Irish Minister would have an office in Belfast and a staff resident on a full-time basis in Northern Ireland.

Devolution

8. There would be an elected Assembly for Northern Ireland. It would be the stated objective of the two Governments that an Executive would be established based on the Assembly to administer powers to be devolved to it.

Security

9. A number of specific measures would be implemented. There would be, under the aegis of the Secretary of State for Northern Ireland and the Irish Minister, a Joint Security Commission with the participation, as advisers and as necessary, of the Chief Constable of Northern Ireland and the Commissioner of the Garda Síochána or other appropriate senior police officers. Operational responsibilities would remain

with the respective police forces. At the level of practical policing there would be measures designed to improve relations between the police and local communities as well as measures designed to improve the recruitment of Catholics into the police.

System of Justice and the Law

10. Persons tried in the North or in the South would be tried by a single court. Such a court might comprise three judges for each case. These might be drawn from a panel of judges half of whom would be from each jurisdiction. When sitting in the Republic, one of the three judges would, in this system, be from Northern Ireland and the Court would exercise its jurisdiction under the law of the Republic. When sitting in Northern Ireland, the converse would be the case.

11. There would be established an All-Ireland Law Commission which would seek to agree recommendations for the harmonisation of the criminal law throughout Ireland. The Commission might also be required to devise proposals for the steps to be taken to establish the following:

- a single criminal court with the possibility of a jury which could be selected on an all-Ireland basis;
- a single court both for the North and for the South which would have sole jurisdiction in relation to human rights in both jurisdictions;
- a common legal regime in the area of human rights;
- a single appellate division of the All-Ireland Court;
- a uniform criminal law for the two jurisdictions.

Anglo-Irish Parliamentary Body

13. There would be established a body based in the first instance on the Houses of the Oireachtas and the Houses of Parliament at Westminster, but not excluding participation by members of the Northern Ireland Assembly, which might make recommendations to the two Governments or the two sovereign parliaments.

The Irish Constitution

14. Articles 2 and 3 would be replaced by other Articles central to which would be the declaration that it is the wish of the Irish people that the unity of Ireland be achieved in peace and by agreement.

Legal Basis of an Agreement

15. This has not yet been discussed in detail but the British side has accepted that it can be assumed, for purposes of the discussion, that the measures agreed on would be spelt out in a formal agreement between the two Governments, which would incorporate a statement of objectives and would provide for the establishment and implementation of the measures agreed on. The agreement would have to be ratified by both Parliaments and registered with the United Nations; and it would enter into force only after Articles 2 and 3 of the Irish Constitution had been amended following a referendum. Legislation would be required in both countries.

Common Ground and Possible Differences

16. The two sides have in their recent exchanges taken careful note of each others positions. The "package" as described above (paras 4-15 inclusive) can be said to be broadly agreed at this stage between the two sides (although without commitment of either Government). The exchanges thus far have in their character been highly exploratory rather than the result of detailed negotiation. It is clear that there are differences of emphasis and possibly of substance in the

thinking of the two sides on some important issues, differences that could only be resolved by detailed negotiation between experts based on a joint political commitment given by the two Heads of Government. In essence it will be for the Taoiseach and the Prime Minister at the Summit to decide or otherwise to instruct their officials to proceed to such detailed exchanges. The Taoiseach believes, however, that it would be useful for the Government, in their consideration of this matter, to be aware at this stage of the main issues on which it is clear, from differences of approach in the exchanges, that there may be difficulty in any future exchanges between the two sides. The following paragraphs of this Memorandum set out those issues.

Devolution

17. The Minister for Foreign Affairs in his Memorandum of 31 October informed the Government of a less forthcoming approach taken by the new Secretary of State for Northern Ireland, Mr Hurd, than by his predecessor, Mr Prior, and of similar difficulties that had emerged in the exchanges between officials following the recent inclusion for the first time of officials from the Northern Ireland Office in the discussions. These difficulties are now centred on two aspects of the question of devolution. First, it recently appeared to the Irish side that there might be in the thinking of at least some of those on the British side an assumption that the implementation by the British Government of the measures for Joint Arrangements in the package might be conditional, not alone on a change in the Irish Constitution, but also on the actual establishment of devolved government in Northern Ireland. Second, it further appeared that these same British officials might be contemplating a form of majority rule as being appropriate in the new circumstances. The Irish side has in recent days formally notified the British side that the establishment of devolved government could not be a condition for the implementation of the package, that proposals for devolved government could only be on the basis of power-sharing

and that unless these principles were clearly and unconditionally established there could be no question of the Irish Government considering any amendment to the Constitution.

18. The Irish side has made some proposals for its part towards overcoming likely unionist reluctance to take part in a power-sharing administration

- first, the provision that the Joint Arrangements would involve all the functions which might be devolved unless there were an Executive in existence would be an incentive to unionists to participate, as their decision to participate would in effect remove the Irish Minister from the area of devolved government;
- second, the Irish side argued that the fear of Irish unity which inhibits unionists from contemplating participation in a power-sharing arrangement or supporting other measures of reassurance to Northern Ireland nationalists, is at heart grounded in a lack of certainty about British rather than Irish intentions; the Irish side proposed that it would help to reassure unionists in this sense if the Secretary of State or some other British Minister were to undertake for as long as necessary the role of Chief Executive or Chairman in a devolved government; the Irish side also argued that such a measure would serve to overcome the considerable practical difficulty of bringing the two sides together.

The British formally took note of these arguments and privately gave informal assurances that the two difficulties the Irish side had raised would be overcome. They were told that such assurances were not adequate.

Irish Role in Decision-Making

19. The British side said that the British Government could not accept Joint Authority but that the British side understood

that the Irish would require more than consultation. It now seems that the issue lies somewhere along a spectrum between consultation at one end to equal participation in decision-making at the other end, always subject to ultimate authority (in effect, sovereignty) remaining with the British Government. The Irish side has pressed for an arrangement (partly suggested by the British side) whereby the two Ministers would in all cases seek to achieve agreement and, where they failed, apply to the Heads of Government meeting together. The Irish side has also suggested, as a possible approach that, for the powers which might be devolved to an Executive and in the event that an Executive could not be formed on an acceptable basis from the Assembly, an Interim Executive might be formed with both the Secretary of State (as Chairman) and the Irish Minister as full participants in decision-making together with other persons nominated from outside the Assembly by agreement between the two Ministers. This, the Irish side has argued, would also constitute an added incentive to unionists in the Assembly to participate in the Executive, as the establishment of the power-sharing Executive would effectively end the involvement of the Irish Minister in that area of government.

Security

20. The Irish side has effectively called for the disbandment of the UDR and its replacement, if necessary, by some more acceptable system. The Irish side has also made a number of suggestions for changes in the Northern Ireland police for the improvement in relations between the police and the community. The Irish side has also suggested that the Joint Security Commission have an important role in the nomination of the principal officers of the police force, the laying down of guidelines for the police and the operation of a police complaints procedure. The British side has noted these proposals without rejecting them.

The Irish side has argued that the Joint Security Commission would not be the appropriate forum to discuss cross-border cooperation and has suggested that, if necessary, this could be

carried out in a separate configuration within the Anglo-Irish Intergovernmental Council. The British side has made a number of suggestions for intensifying cross-border cooperation but one suggestion of theirs, the establishment of joint North-South police squads, has been formally rejected by the Irish side and this position has been noted by the British side.

21. The above paragraphs deal with the major issues only. There are a number of other less substantial issues, originally raised by the British side, which the Irish side has insisted should be resolved e.g.

- repeal of Flags and Emblems Act;
- repeal of legislation which prevents members of the Northern Ireland Assembly being elected to and sitting in the Houses of the Oireachtas.