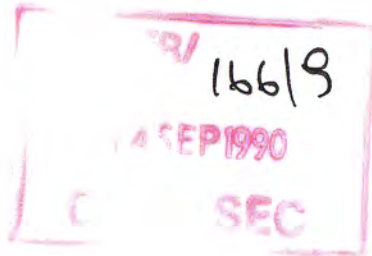


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FROM: S L RICKARD, SIL
23 September 1990



cc: PS/Secretary of State (B) - B
PS/Minister of State (L) - B
PS/Mr Needham (L&B) - B
PS/PUS (L&B) - B
PS/Sir K Bloomfield - B
Mr Chilcot - B
Mr Ledlie - B
Mr Alston - B
Mr Thomas - B
Mr A Wilson - B
Mr Hamilton 14/9 - B
Mr Wood (L&B) - B
Mr Bell - B
Mr Dodds - B
Mr Hill - B
Mr F G McConnell - B
Mr J McConnell - B
Mr Daniell - B
Mrs Miller - B
HMA Dublin - M
Mr Archer, FCO - B
Members of the UK side of WGII

PS/SECRETARY OF STATE (L) - B

EXTRADITION : INTERIM REPORT FROM WORKING GROUP II

As you will have noticed, the WGII report submitted with the Conference folders was in fact the British draft, the Irish not having, at the time of submission, come back to us with their final comments.

2. We received last night an Irish version, which I attach; changes are underlined, and note also a change in the order of paragraphs.

3. The Irish have indicated that they wish tomorrow's discussion to take place on the basis of an agreed text (or not at all). Whilst the Irish changes are faintly irritating, they do not affect the substance of the points which the interim report

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attempts to draw out - in particular, from the British point of view, the points about uncertainty, risk, and the need for new legislation brought out in paragraphs 3 and 8 of the attached version of the report (and in the Secretary of State's brief). In these circumstances, we have told the Irish side that we believe that the attached report provides an adequate basis for discussion tomorrow. We have reserved the right to make further textual amendments "for the record" in consultation with the other UK members of WGII (who have not yet seen the Irish text).

4. Could you, therefore, substitute the attached interim report for the one in Ministers' folders?

(Signed)

S L RICKARD
SIL DIVISION
13 SEPTEMBER 1990
EXT OAB 6466

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WORKING GROUP II : INTERIM REPORT TO THE INTERGOVERNMENTAL
CONFERENCE

Introduction

1. At its meeting on 19 April 1990, the Intergovernmental Conference instructed officials to undertake a review of arrangements for dealing with fugitive offenders and to report back to a future meeting of the Conference. The Intergovernmental Conference subsequently decided, at its meeting on 17 July, that an interim report from officials in the matter would be discussed at the next Conference meeting. In accordance with this mandate Working Group II met on 24 May and 30 August.

2. The Working Group reviewed arrangements for extradition in the light of the decisions of the Irish Supreme Court in the cases of Dermot Finucane, James Pius Clarke and Owen Carron and also noted the decision of the High Court in the case of Desmond Ellis, the written judgment in which was not yet available. The Group discussed a number of other issues arising from the extradition arrangements. The Group are also continuing to review the arrangements for the bringing of extraterritorial prosecutions under the Criminal Law (Jurisdiction) Act 1976 and the Criminal Jurisdiction Act 1975 with a view to ensuring full use of those procedures.

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Extradition

3. The British side presented a note setting out their views on the implications of the judgments in the cases of Finucane, Clarke and Carron immediately in advance of the Working Group's meeting on 24 May. That paper provided the basis for the Group's initial exchange of views. In it the British side expressed concern about the potential scope of the political offence exception in respect of extradition applications. The British side believed that offences would be held to fall within the political offence exception unless (a) there was clear evidence that the alleged offender intended to subvert the Irish Constitution, or (b) the case fell within the terms of the McGlinchey judgment, or (c) the offence was covered by the provisions of the Extradition (European Convention on the Suppression of Terrorism) Act 1987. The British side were of the view that the precise scope and effect of the 1987 Act were uncertain and that it was not possible to make any reliable forecast of the outcome of future cases in relation to a number of offences - eg murder, manslaughter or other offences against the person not committed by means of explosives or an automatic firearm; conspiracy to murder; conspiracy to cause explosions; possession of explosives or firearms with intent. They believed that there was accordingly a risk of a series of unsuccessful applications for the extradition of alleged terrorists, with serious consequences, and asked the Irish side to consider very carefully the option of immediate legislation.

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4. The Irish side outlined the legal, constitutional and political background to the enactment of the 1987 Act and the approach adopted in giving effect to the European Convention on the Suppression of Terrorism. It also stressed that the 1987 Act not only gave effect to the Convention but went even further than was required of a contracting State by the Convention. The Irish side emphasized the fact that the provisions of the 1987 Act had yet to be applied in the courts and that forthcoming cases would provide an opportunity to see how those provisions operated in regard to particular offences. It would be premature to seek to anticipate how the Act might work in practice in advance of cases where it had actually been operated. The Irish side also stated that in addition to the 1987 Act there were other grounds on which the plea of the political offence exception could be argued relying on lines of authority such as the McGlinchey, Quinn and other cases. It further stated that the intention of the Irish authorities was to seek the broadest possible interpretation of the law in each case. In this regard the Irish side subsequently pointed out that the political offence exception had been held by the High Court in the Ellis case not to apply to certain types of offence about which the British side had expressed reservations in regard to the efficacy of the 1987 Act (possession of explosives with intent and conspiracy to cause explosions) by virtue of both Section 4 of the Act and the decision in the McGlinchey case. The Irish side confirmed that the case is now under appeal to the Supreme Court.

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5. The British side also feared that reliance could not be placed on extradition being obtained of persons involved in the 1983 Maze escape, by reason of the application of Article 40 of the Irish Constitution to the facts of those cases, irrespective of the political offence exception. The Irish side suggested that the British side should examine the extent to which it might be possible for them to address in any future case the particular concerns which the Supreme Court had expressed concerning events in the Maze after the escape. The British side foresaw little scope for fresh evidence which would meet these concerns. The Irish side urged further consideration of the issues raised by the Supreme Court judgement.

6. The Irish side also mentioned the alternative possibility of proceedings being taken under the Criminal Law (Jurisdiction) Act 1976 in respect of Maze escaper cases where extradition applications had already failed or where the persons sought were in custody or were otherwise located in the South.

7. A number of other issues relating to the extradition arrangements were also considered. The Irish side reiterated the concern, which they had raised a number of times since the enactment of the Extradition (Amendment) Act 1987, that the rule of speciality, already applied in practice, should be provided for by statute in British law and pointed out again that, if the provision on speciality in that Act were brought into operation

unilaterally, the extradition arrangements would break down. The British side said there was difficulty in finding a suitable statutory vehicle for this purpose, and that they would find it difficult to propose legislation on this subject in isolation in present circumstances. The British side attached continued importance to movement on the issues of jurisdiction in extradition cases, detention pending appeal, evidential provisions, point of departure and provisional arrest, as well as the future of the 1987 Extradition (Amendment) Act. The Irish side indicated that they would consider the British side's proposals in this regard again, but that difficulties attached to some of them, at least, eg constitutional difficulties in relation to the proposal for detention pending appeal. They stressed that there could be no question of an alteration to the procedure for the vetting of applications provided for by the 1987 Amendment Act.

8. On the main extradition issue, the British side's view at this stage remains that there is a degree of uncertainty in the law regarding the political offence exception which is unacceptable and unnecessary and that the risk of cases thereby failing could be avoided by new Irish legislation to bring certain offences explicitly within the ambit of the 1987 Act. The Irish Side reiterated its view that such a course would be premature, a view which they said had been reinforced by the decision in the Ellis case.

Extraterritorial Prosecutions

9. The Irish side stressed the advantages attaching to greater use of the legal provisions allowing for extraterritorial prosecutions in appropriate cases. Out of a total of 16 persons tried under the Irish Criminal Law (Jurisdiction) Act, 12 have been convicted. It urged the British side not to operate a presumption in favour of extradition and suggested that the practical difficulties to which they pointed as attaching to the extra-territorial prosecution process had to be weighed against the practical difficulties which arose in relation to extradition.

10. The British side agreed that full use should be made of the extra-territorial prosecution route in appropriate cases but indicated that there would in its view continue to be cases where that route, although available, would be for a variety of reasons unsuitable. It also pointed to circumstances where no extraterritorial jurisdiction existed (eg for many types of offences committed in Great Britain) and to the scope for differing views being taken by the prosecuting authorities in each jurisdiction about the merits of individual cases.

11. The Working Group noted that the two Attorneys were to meet shortly to consider extraterritorial prosecution, concentrating on individual cases. It was agreed that there would be further

Discussion in the Group on general issues concerning extraterritorial jurisdiction.

Final Remarks

12. At the present stage of discussions in the Working Group the two sides hold different perspectives on the appropriate response to recent developments in the extradition area. The British side continue to favour immediate amending legislation while the Irish side regard such a course as premature. Both sides agree that further discussion in the area of extra-territorial jurisdiction should focus on general issues concerning the possibilities afforded by the reciprocal legislation in this area.