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FROM: S L RICKARD, SIL
25 OCTOBER 1990

cc PS/Minister of State (L&B) - B
PS/PUS (L&B) - B
PS/Sir K Bloomfield - B
Mr Ledlie - B
Mr Pilling - B
Mr Alston - B
Mr Steele - B
Mr A P Wilson - B
Mr Hamilton - B
Mr Wood (L&B) - B
Mr Bell - B
Mr Dodds - B
Mr D J R Hill - B
Mr McNeill - B
Mr Petch - B
Mrs Miller
HMA Dublin
Mr Archer
Mr Gowan, Cabinet Office

UNDER/
522/10
24 OCT 1990

26/x.

1. MR THOMAS - B (signed, QJT 25/10)
2. PS/SECRETARY OF STATE (L&B) - B

INTERGOVERNMENTAL CONFERENCE: EXTRADITION

Following yesterday's exchanges in the Commons, I imagine that the Secretary of State will wish to raise the issue of extradition at the Conference. I attach a brief at A. Further substantive work on this issue cannot take place until the attorneys have met to discuss extraterritorial prosecutions on 30 October. In the meantime our objectives, I suggest, should be:

- a) to put down a marker of our continuing serious concern;
- b) to obtain a reference in the communique to the issue.
A possible text is at B.

(signed:)
S L RICKARD
SIL Division
25 October 1990
Ext OAB 6466

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INTERGOVERNMENTAL CONFERENCE, 25 OCTOBER: EXTRADITION

Line to take

- Wish, in the light of yesterday's events, to reiterate the concern which the British side feels about extradition. (Recognise that the perpetrators of the bombing offences yesterday may well be extraditable under your current legislation. But the fact remains that yesterday's events have brought Anglo-Irish security co-operation to the forefront of attention in the UK, where extradition is universally seen as the touch stone of that cooperation.)
- We continue to believe that the uncertainty of Irish case law (evident from the interim report of WGII) is unnecessary and dangerous. The Ellis case in the High Court does nothing to change that view - indeed, we continue to think it wrong to rely on uncertain case law to do the job which we all desire to see done.
- I recognise that there have been no failed cases since we last discussed this issue. But the consequences of a failure for our bilateral relations would be very grave; and one could occur at any time.
- We remain concerned to see early Irish legislation to tighten up the 1987 Extradition (ECST) Act.
- Would wish our concern to be recorded in the post-Conference statement.

Background

The perpetrators of the yesterday's attack on the Buncrana Road and Cloghoge PVCs and on the military base at Omagh would very probably, in principle, be extradited under present Irish law. Their crimes appear to involve both "use of explosives where such use endangers persons" (Section 3 of the Irish Extradition (ECST) Act 1987) and "cruel and vicious means" causing a "collective danger" (Section 4 of the same act). That said, extradition remains in the public mind a touch stone of the effectiveness of Anglo-Irish security co-operation, which yesterday's attacks have thrust to the fore.

2. The present state of play in relation to extradition is that WGII's interim report on arrangements for dealing with fugitive offenders, attached, was discussed at the Conference on 14 September. The Joint Statement "noted the work accomplished so far and agreed to return to this issue at a further meeting." In fact the British side has already, in the interim report, identified the issues of concern to it, mainly the uncertainty and unpredictability of current law on the political offence exception, and the difficulty of obtaining the return of escapers from HMP Maze. Further work is likely to focus on the question of greater use of the extraterritorial jurisdiction. On the latter front, the next step is a meeting between the British and Irish Attorneys, due on 30 October.

3. In the meantime it is suggested that the Secretary of State might reiterate the concerns expressed at the 14 September Conference.

Current Cases

4. The case of Ellis, wanted in GB for possession of explosives, successfully passed the High Court in July; the Court

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found that Ellis' offences, which relate to the manufacture of, inter alia, nail bombs subsequently used in public places, involved the use of "cruel and vicious" means creating a "collective danger" under the Irish Extradition (ECST) Act (although it added, less helpfully, that his offences did not meet the criteria for exemption from the political offence exception found elsewhere in the Act). Ellis commenced a hunger strike against his extradition on 10 October. It seems politically prudent to distance ourselves so far as possible from Irish management of his hunger strike and Ministers are advised not to raise the issue with the Irish; although we would, naturally, listen carefully to any information they wish to give us. All other things being equal we would expect Ellis' case to come to the Supreme Court in November/December, although the course of his hunger strike may yet influence the date.

5. The case of A G Sloan, a Crumlin Road escaper, was heard in the High Court on 9 October. A judgement is expected shortly. Sloan may be expected to appeal to the Supreme Court should his case fail in the High Court.

6. Two further Crumlin escapers, Magee and McKee, are listed for hearing in the High Court on 4 December.

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FLAG B

POSSIBLE TEXTS FOR CONFERENCE STATEMENT

"The Conference discussed arrangements for dealing with fugitive offenders. The British side expressed continuing concern about the practical operation of the political offence exception in Irish extradition law, [and other matters]. The work undertaken so far by officials was noted and it was agreed to return to the subject at a future meeting."

Possible Variations

- A. The Irish may wish to insert some riposte to the second sentence; if so, we could insert as a new third sentence:

"The Irish side drew attention to the possibilities for prosecuting terrorist offenders through the extraterritorial legislation."

- B. A blander formula (but one that said very little more than the 14 September statement) would be to use only the first and final sentences.

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

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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.

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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

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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.