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FROM: JONATHAN STEPHENS
TALKS PLANNING UNIT
9 JULY 1992

cc PS/Mr Hanley (L&B) - B
PS/PHS (L&B) - B
PS/Mr Fell - B
Mr Thomas - B
Mr Alston - B
Mr Bell - B
Mr Cooke - B
Mr Dodds - B
Mr D J R Hill - B
Mr Maccabe - B
Ms Lodge - B
Mr Caine - B
Mr Archer, RID - B
Mr Hallett - B
HMA Dublin - B

(Annex B follows by fax)

PS/SECRETARY OF STATE (L&B) - B

ARTICLES 2 AND 3: LEGAL POSITION

The Secretary of State asked two questions about Articles 2 and 3.

- Was it contrary to international law, and various international agreements, for the Republic to maintain a territorial claim over Northern Ireland?

- What had been the British Government's public view of Articles 2 and 3 in the past?

2. In brief, the answers are:

- Although the Republic's claim has no validity in UK or international law, it is nonetheless not illegal for the

a Mr Hallett
Re X in para 5 - does Jack Lynch's "we will not stand idly by" speech in ?? 1969 not amount to a threat of territorial invasion?

Full 7/7

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Republic to maintain its claim, providing it does not pursue it by force.

- While asserting that Northern Ireland was a part of the United Kingdom, the British Government appears to have said remarkably little about the Republic's claim in Articles 2 and 3, prior to Mr Brooke saying that he did "not regard it as helpful".

3. The rest of this note fills in the detail to these answers.

Status of Republic's claim

4. A detailed note on Northern Ireland's legal status, prepared by the FCO and cleared with its lawyers, is attached at Annex A. (I am sending the attachments to the FCO note to you only.) It deals with the status of the Republic's territorial claim in paragraphs 14-20.

5. The key points are these:

- The territorial claim in Articles 2 and 3 of the Irish Constitution has no basis whatever in international law.

- But the fact that the claim has no validity in international law does not mean that it is, as the unionists claim, an "illegal claim" in the sense of it being contrary to international law to even maintain the claim. It is not unlawful for a state merely to assert a claim to a part of another state's territory, nor is it contrary to the CSCE Final Act (which is not in fact a legally binding agreement), nor is it contrary to the EC Treaties which have nothing to say about territorial disputes.

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- It would be contrary to international law for the Republic to pursue its claim by the threat or use of force. But successive Irish Governments have never even attempted to assert their claim to Northern Ireland in international fora, nor to base it on international law, let alone assert it by force.

British comments on Articles 2 and 3

6. I attach a note by Mr Hallett (Annex B), of the FCO's Research Department, recording the Government statements he has been able to identify. Prior to Mr Brooke's comments, the most the Government said was in 1937, when the Irish Constitution came into effect. The Dominions Office issued a statement on behalf of the Government:

"They cannot recognise that the adoption of the name Eire or Ireland, or any other provision of those Articles, involves any right to territory or jurisdiction over territory forming part of the territory of the United Kingdom of Great Britain and Northern Ireland, or affects in any way the position of Northern Ireland as an integral part of the United Kingdom of Great Britain and Northern Ireland."

7. Of perhaps more interest are some comments Mr Hallett has found from the Head of the Irish Civil Service in 1937, J J McElligott. Commenting internally on an early draft of the Irish Constitution, he objected to Articles 2 and 3:

- "It seems rather to vitiate the Constitution, by stating at the outset what will be seen, with some justice, as a fiction and one which will give offence to neighbouring countries ..."

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- "From the point of view of international law, it is not clear whether we are on safe ground in claiming sovereignty and jurisdiction over land recognised internationally, de jure and de facto, as belonging to another country ..."

- "These Articles will not contribute anything to effecting the unity of Ireland, but rather the reverse".

8. His comments were ignored.

— The force of Heads of Civil Service everywhere.
D.

(SIGNED)

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ANNEX A

NORTHERN IRELAND'S LEGAL STATUS

The Act of Union, 1801

1. The Act of Union of 1801 established the United Kingdom of Great Britain and Ireland with a single government and parliament under the British Crown. Prior to that Ireland had been subject to the British Crown, but with its own parliament.

The Government of Ireland Act, 1920

2. Northern Ireland was established as a separate entity within the United Kingdom by the Government of Ireland Act of 23 December 1920. Its extent was defined in Section 1(2) of the Act as "the parliamentary counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone and the parliamentary boroughs of Belfast and Londonderry". The Act also applied to "Southern Ireland", but was never implemented there except for certain purely procedural purposes;

a) as the basis for the elections of 1921, and

b) for the formal transfer of power to the Irish Free State authorities in 1922 (see below).

The Anglo-Irish Treaty

3. Negotiations took place between October and December 1921 between representatives of Dail Eireann and the British government on the future relationship between Ireland and Great Britain. These were concluded on 6 December 1921 in the form

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of "Articles of Agreement for a Treaty between Great Britain and Ireland" (usually known as the Anglo-Irish Treaty). This established the "Irish Free State" as a Dominion within the Commonwealth with the same relationship to the Crown and the Imperial Parliament as the Dominion of Canada. Formally, the treaty applied to the whole of Ireland. Under Article 11, however, for a period of one month from the date of ratification of the treaty, the powers of the parliament and government of the Irish Free State would not be "exercisable as respects Northern Ireland". Article 12 provided that if, before the expiration of the said month, an address was presented to the King by both Houses of the Northern Ireland parliament to that effect, "the powers of the parliament and government of the Irish Free State shall no longer extend to Northern Ireland, and the provisions of the Government of Ireland Act 1920 (including those relating to the Council of Ireland) shall, so far as they relate to Northern Ireland, continue to be of full force and effect".

4. Article 12 also provided that, if such an address were presented, a Boundary Commission would be established to determine "the boundaries between Northern Ireland and the rest of Ireland".

5. The Anglo-Irish Treaty was approved by Dail Eireann on 7 January 1922 by 64 votes to 57. On 25 October 1922, the Irish Free State Constitution Act was passed by the Dail. On 5 December 1922, the Irish Free State Constitution Act was passed by the United Kingdom parliament, ratifying both the Anglo-Irish Treaty and the Irish Free State Constitution, as approved by the Dail. The Irish Free State (Consequential Provisions) Act, of 5 December 1922 provided that the government of Ireland Act, 1920, should "cease to apply to any part of Ireland other than Northern Ireland". On 7 December 1922, the Northern Ireland parliament duly exercised its right

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to opt out of the Irish Free State by presenting an address to the King.

The Ireland (Confirmation of Agreement) Act 1925

6. The Northern Ireland parliament having exercised its right to opt out of the Irish Free State, the Boundary Commission provisions of Article 12 of the Treaty came into force. For various reasons which do not need to be examined here, the Boundary Commission was not actually set up until November 1924, however. The Commission deliberated for more than a year. In November 1925, when it became clear, as a result of a newspaper leak, that the Commission had decided upon only relatively minor rectifications of the border, rather than the substantial transfers of territory which they were anticipating, the Irish Free State Government concluded that its interests would best be served by the suppression of the Boundary Commission report, with the boundary of Northern Ireland left unchanged. An agreement to this effect was concluded between the British, Irish Free State and Northern Ireland governments on 3 December 1925. Paragraph 1 provided that the Boundary Commission provisions of Article 12 of the Anglo-Irish Treaty be revoked and that "the extent of Northern Ireland for the purposes of the Government of Ireland Act, 1920, and of the said Articles of Agreement, shall be such as was fixed by sub-Section (2) of Section 1 of that Act." The Agreement also annulled the provisions of the Treaty relating to the Council of Ireland. The Agreement of 3 December 1925 was subsequently confirmed by legislation of the respective parliaments. In the United Kingdom, this took the form of the Ireland (Confirmation of Agreement) Act of 10 December 1925. In the Irish Free State, it took the form of the Treaty (Confirmation of Amending Agreement) Act of the same date.

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The Irish Constitution of 1937

7. De Valera, who had opposed the Treaty and the 1925 Agreement, came to power in the Irish Free State as a result of the elections of 1932. He immediately set about undoing various aspects of the Anglo-Irish Settlement of 1921-25. In 1937 he introduced a new Constitution, the overall effect of which was to make the Irish Free State a Republic in all but name. No discussions or negotiations took place with the British government prior to the adoption of the Constitution. As is well-known, Article 2 of the new Constitution defined the "national territory" as the whole island of Ireland and Article 3 proclaimed a right of jurisdiction over the whole of that territory, though this right was not to be exercised, pending the "reintegration" of the national territory.

8. These Articles of the 1937 Constitution amounted to unilateral repudiation of the Northern Ireland aspects of the Agreements of 1921 and 1925. Those Agreements were, however, entered into by the British and Irish authorities of the day and ratified by each in accordance with their respective constitutional procedures. They could not thus be validly amended or repudiated except by negotiation and agreement between the parties involved. No such negotiations or agreement took place. The provisions of the 1937 Constitution had no effect on the position of Northern Ireland either in UK domestic law or in international law. This was the view taken by the UK government at the time and subsequently.

9. That Articles 2 and 3 were intended primarily for internal consumption is suggested by the fact that successive Irish governments have never attempted to assert their claim to Northern Ireland in international fora nor to base it on international law. They no doubt recognise that they would have little prospect of success in doing so. They have not in

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practice ever challenged the UK government's right to represent Northern Ireland in international organisations of which both States are members, such as the European Community or the UN. The main, indeed the only, practical effect of Articles 2 and 3 of the Irish Constitution has been in Irish domestic law, in that they have prevented successive Irish governments from giving de jure recognition to Northern Ireland's status as part of the UK. Any attempt to do so would, on challenge, have been ruled unconstitutional by the Irish courts. In the absence of amendment of Articles 2 and 3, Irish governments have not been able to go beyond de facto recognition.

Reaffirmation of Northern Ireland's status in UK domestic law

10. Following the decision of the Irish government in 1948 to declare a Republic, the UK government and parliament enacted the Ireland Act 1949, Section 1(2) of which declared that: "Northern Ireland remains part of His Majesty's dominions and of the United Kingdom and it is hereby affirmed that in no event will Northern Ireland or any part thereof cease to be part of His Majesty's dominions and of the United Kingdom without the consent of the parliament of Northern Ireland."

11. Following the suspension of the Northern Ireland government and parliament in 1972, the Northern Ireland Constitution Act 1973 reaffirmed the status of Northern Ireland in the following form:

"It is hereby declared that Northern Ireland remains part of Her Majesty's dominions and of the United Kingdom, and it is hereby reaffirmed that in no event will Northern Ireland or any part of it cease to be part of Her Majesty's dominions and of the United Kingdom without the consent of the majority of the people of Northern Ireland voting in a poll held for the purposes

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of this Section in accordance with Schedule 1 to this Act".

The Anglo-Irish Agreement 1985

12. In November 1985, the British and Irish governments concluded the Anglo-Irish Agreement. This was a formal international agreement, binding in international law. The Agreement provided, in Article 1, that "any change in the status of Northern Ireland would only come about with the consent of a majority of the people of Northern Ireland". The Agreement could not state in terms that the present status of Northern Ireland was part of the United Kingdom because there was no accompanying amendment of Articles 2 and 3 of the Irish Constitution. The Agreement marked the first formal recognition by the Irish government in a binding agreement of the principle of consent of a majority of the people of Northern Ireland to any change in status.

The McGimpsey Judgment

13. Article 1 of the Anglo-Irish Agreement was carefully worded to ensure compatibility with the Irish Constitution as presently drafted and thus avoid the risk of a constitutional challenge in the Irish Courts. In this it was unsuccessful. A challenge was mounted against the constitutionality of the Agreement by the McGimpsey brothers, which was eventually concluded with the Irish Supreme Court's judgment of 1 March 1990. This ruled that the agreement was compatible with the Constitution, but in doing so affirmed that Article 2 of the Irish Constitution constituted a definition of the national territory of Ireland "as a claim of legal right" and that the reintegration of the national territory was a "constitutional imperative".

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The Irish Territorial Claim in International Law

14. The McGimpsey judgment had the effect of reactivating Unionist concerns about the territorial claim and prompted a campaign to persuade the UK government to challenge the claim in various international fora. The Unionists described the claim as "illegal" and asserted that it was contrary to various international agreements, notably the CSCE Final Act, the UN Charter and the EC treaties.

15. The UK Government has seen no reason to raise the territorial claim in any international forum. If it were to do so or, even worse, to suggest that the "dispute" between the UK and the Republic should be resolved by an international dispute-settlement procedure, it would lend the claim dignity by appearing to take it seriously as an issue in international law. (And since any international means of settlement would require the consent of the Republic, a proposal of this kind would in any event have no possibility of success.) As stated above, we are confident that the territorial claim in Articles 2 and 3 of the Constitution of the Republic has no basis whatever in international law. Northern Ireland's position as part of the UK is fully recognised internationally.

16. The fact that the claim has no validity in international law does not mean however that it is "illegal" in the sense of being contrary to international law. It is not unlawful for a State merely to assert a claim to a part of another State's territory. The claim to another's territory, whether it be a strong claim or - as here - a claim with no substance at all, does not in itself involve a breach of international law, unless the State concerned has undertaken not to make any such claim (as the FRG did in its treaties in the early 1970s with the USSR, Poland and Czechoslovakia).

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17. The question of how a territorial claim is pursued is a separate matter. There are very clear rules of international law, of an overriding nature, which prohibit the threat or use of force against a state's territorial integrity. The most well-known formulation of these is of course to be found in Article 2(4) of the Charter of the United Nations. It is further elaborated in the 1970 UN Declaration on Friendly Relations Among States, as follows:

"Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States."

Thus, whilst Argentina is not in breach of international law merely by virtue of its claim to the Falkland Islands, it did indeed break international law when it sought in 1982 to assert its claim by force.

18. In support of their argument that the Republic's territorial claim is contrary to international law, the Unionists frequently cite the Declaration on Principles Guiding Relations between Participating States in the CSCE Helsinki Final Act. They rely on the requirements on participating States in Principles III and IV respectively to "regard as inviolable all one another's frontiers" and to "respect the territorial integrity of each of the participating States".

19. The Declaration (which does not comprise a legally binding agreement, but in respect of the matter under discussion does reflect existing rules of international law) is attached, together with the Government's commentary on the principles which was published at the time. The wording of the Declaration itself and the Commentary make clear that all the

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Principles are of primary significance (that is, are of equal importance), and that each has to be interpreted taking into account the others. Thus, interpretation of the third Principle, with regard to the inviolability of frontiers, has to take account of that part of the first Principle which indicates that frontiers can be changed by peaceful means and by agreement. The Commentary in paragraph 90 makes clear that the third Principle, on inviolability of frontiers, is a specific application in international law of the general principle on the non-use of force. There had been proposals to use Russian words meaning "untouchability" or "immutability" of frontiers, instead of inviolability, but these were successfully resisted. The Helsinki Final Act thus reflects international law upon the unlawful threat or use of force against a State's territory, rather than ruling out the making of a claim to another State's territory or the peaceful change of frontiers.

20. The Unionists also refer to the EC Treaties (in general terms) in support of their argument. The treaties contain no provisions regarding territorial disputes between member states and the Community institutions have no competence in the matter. The active pursuit of a territorial claim may cause difficulties in negotiating or applying EC legislation (as in the case of Spain's claim to Gibraltar), but such difficulties have not arisen in the case of the Republic since it does not pursue its claim within the EC.

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ANNEX B

Mr Stephens
NIO

UK GOVERNMENT STATEMENTS ABOUT ARTICLES 2&3

1. You asked me what UK Governments had said in the past about Articles 2 and 3 of the Irish Constitution. The short answer is very little. In April 1937, when the contents of the new Constitution became known to the British Government, the Dominions Secretary, MacDonald, recorded in internal minuting that, while Articles 2 and 3 were "very objectionable", it would be a mistake to make too much of them. He noted that this was also the view of the NI Prime Minister, Craigavon. Halifax, the Foreign Secretary, expressed the view that de Valera "was really play-acting which it would be a great mistake to treat too seriously". In July 1937, again in internal minuting, the Attorney General, Somervell, recorded the view that Articles 2 and 3 were "without legal result", a view with which the NI Parliamentary Counsel, Queckett, concurred.

2. On the coming into effect of the new Constitution on 29 December 1937, the Dominions Office issued a statement on behalf of the Government, which included the following:

"His Majesty's Government in the United Kingdom take note of Articles 2, 3, and 4 of the new Constitution. They cannot recognise that the adoption of the name Eire or Ireland, or any other provision of those Articles, involves any right to territory or jurisdiction over territory forming part of the territory of the United Kingdom of GB and NI, or affects in any way the position of NI as an integral part of the UK of GB and NI. They therefore regard the use of the name Eire or Ireland in this connection as relating only to that area which has hitherto been known as the Irish Free State."

3. Thereafter, there appears to have been almost complete silence on the subject. I have looked at statements made by UK Ministers in connection with the various Anglo-Irish Agreements concluded in 1938 and at the time of the passing of the Ireland Act, 1949, following the declaration of a Republic by the Irish Government. None of these mention Articles 2 and 3.

4. The question was reactivated by the Irish Supreme Court's judgement in the McGimpsey case of 1 March 1990. Unionist concerns about the statements in the judgement on Articles 2 and 3 prompted Mr Brooke to make clear, on a number of occasions, that the Government regarded them as "unhelpful". Copies of the main statements are attached. (To you only).

5. The above is based mainly on secondary sources. In the time available I have not been able to conduct an exhaustive search of Hansards, but will endeavour to do so if you or others think this necessary.

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W&S European Section
Research & Analysis Dept
OAB 2/76 210 6752
25 June 1992

cc Mr Thomas NIO
Mr Bell NIO
Mr Cooke NIO
Mr DJR Hill NIO
Ms Lodge NIO
Mr Brooker NIO
Mr Archer RID

While the efforts of the Government to bring jobs away from the border and economy has been growing steadily over the past years or eight years and it is continuing to improve the past. Visitors to the Province will see the changes in Belfast and Londonderry—the

the Government's strategy. We have been in the past years. Visitors to the Province will see the changes in Belfast and Londonderry—the

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due to seek to find ways of returning full responsibilities to politicians who are elected by the people of Northern Ireland and who will be accountable for their stewardship of Northern Ireland affairs before I turn to the efforts that I have been making to address that issue, I wish to deal briefly with a more fundamental issue.

Although the constitutional question has often seemed central to matters in Northern Ireland, I turn to it now in the hope of putting it to one side. We regard the position as clear. Northern Ireland is part of the United Kingdom in national and international law. It is a part of the United Kingdom because that is the clear wish of the majority of the people of Northern Ireland. There will be no change in the status of Northern Ireland unless and until a majority of the people there want it. That seems unlikely for the foreseeable future. I believe that most in this House, and I number myself among them, would wish to see the Union continue, but the principles of democracy and self-determination mean that the people of Northern Ireland must themselves be the final arbiters.

By virtue of the 1927 Act, the Republic of Ireland has since 1927 also claimed sovereignty over Northern Ireland. We do not accept or recognise that claim, which has no basis in our law or, equally important, in international law. That claim is, I know, seen by some in Northern Ireland, and in other parts of this country, as a major stumbling block to the development of constructive relationships. I do not regard it as helpful. Nor, however, do I believe that it should be a major preoccupation—for this reason the Republic of Ireland has accepted, through the Anglo-Irish Agreement, that the status of Northern Ireland could be changed only with the consent of a majority of its people. In short, through that binding international treaty it has shown that it, too, supports the right of the people of Northern Ireland to self-determination. The agreement also welcomes the Irish Government's support for our policy of establishing local institutions of government on a basis that would secure widespread acceptance throughout the community.

Rev. Ian Paisley (Aldershot, North): Is not it a fact that the status of Northern Ireland is an integral part of this United Kingdom and not open to the Anglo-Irish Agreement and that it contains no definition of Northern Ireland's status?

Mr. Brooker: The hon. Gentleman makes mention of the Anglo-Irish Agreement, and I am seeking to put simply on the record what is the position.

Mr. Ian Gow (Glasgow): Will my right hon. Friend give way?

Mr. Brooker: Meanwhile, under the Anglo-Irish Agreement, I have found the framework for Anglo-Irish relations provided by the agreement valuable. Both the agreement and its working have demonstrated the desire of the two Governments to have a close and friendly relationship, and to settle the matter of Northern Ireland's different cultural, historical and religious traditions.

Mr. Gow: Will my right hon. Friend allow me to interpose now? He has just said the point in his speech at which I wanted to interpose, when he was telling the House that he did not think that the wording of article 2 and 3 of the Republic's constitution is of any great significance. Will he address his thought to this