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MESSAGE FROM THE RT HON MARGARET THATCHER MP
TO DR GARRET FITZGERALD TD DATED 28 OCTOBER 1986

Thank you for your message which your Ambassador delivered on 21 October.

I am grateful for the re-statement of your commitment to the early introduction of legislation to ratify, without reservations, the European Convention on the Suppression of Terrorism. You know the importance we have all along attached to this.

I appreciate your concern to ensure public confidence in the administration of justice in Northern Ireland. It was for this reason that when I had to tell you in my letter of 4 October that we could not agree to the introduction of three-judge courts I set out the other things that we were doing or proposing to do in this field. I accept that individually these are lesser measures, but I believe that cumulatively their impact is significant.

Of course we will listen to any further representations to see whether anything more can be done: but I am bound to say that the ground has already been gone over pretty thoroughly in the Intergovernmental Conference and Ministers here examined the possibilities once again before I sent my message of 4 October. In agreeing to further consultation I would not wish to raise hopes that there are likely to be any major new measures which could be announced.

cc A-I Section
A-I Secretariat

CONFIDENTIAL

Message from the Taoiseach, Dr. Garret FitzGerald to the Prime Minister, Mrs. Margaret Thatcher

Dear Margaret,

Thank you for your message of 4 October. I am sorry not to have replied sooner, but you will appreciate that your reply has posed serious problems for us, and I have also had the preoccupation of preparation for our Party Conference - where, incidentally, I was very heartened by the enthusiastic support for the Agreement.

I want first of all to assure you of my own personal commitment, and the Government's concern, to introduce legislation that will enable us to ratify the Convention on the Suppression of Terrorism, without reservations. We want to move on this as rapidly as possible, under conditions that would secure the passage of this legislation by the Dail and Seanad.

You will be aware from my message of 1 October that in our judgement the legislation would not pass in present circumstances. It is <u>not</u> just a question of 'maximising' the chances of the Bill's passage.

You have not felt it possible at present to agree to either the Mixed Court contemplated in the Agreement, or to a move towards 3-judge courts, as we had proposed as an alternative.

Against this background, we are faced with the question of what other steps might be taken, as agreed at Hillsborough to give 'substantial expression' to the aim of underlining public confidence in the administration of justice in Northern Ireland. The 'lesser changes' which you mention in your letter could not be seen by themselves as constituting substantial change in this area. And it is against the background of early progress with such substantial changes affecting public confidence in the administration of justice in Northern Ireland together with similar progress with measures in the security area within Northern Ireland and between North and South that our Parliament will see our commitment in the Hillsborough Communique to proceed with the ratification of the Convention.

I feel that there should now be urgent consultations with a view to seeing what other steps might now be taken, and presented to the public, that would create the conditions that would enable us to be sufficiently confident about the passage of the Bill to make it possible to proceed with it.

There is a considerable element of urgency about this, as it is hard to see the Bill passing through the Dail in less than four weeks - even that may be difficult - and the Opposition will naturally want ten days' notice of it through its publication. This timetable is still not impossible of achievement this side of Christmas, but it would require the necessary progress to be made between us within the next ten days or so at the outside in relation to matters referred to in the second last paragraph.

I have asked my Ministers and officials to be available for whatever consultations may be necessary to resolve this issue positively.

CONFIDENTIAL

THREE-JUDGE COURTS/EXTRADITION BILL : MRS THATCHER'S MESSAGE

Nothing new/No concessions

1. The message indicates that the British Government have concluded that the introduction of three-judge courts is not "the right change to make". Mrs. Thatcher goes on to say that "there are other - though admittedly lesser - changes that we can make, some of which are already in hand". There is nothing new in the changes mentioned. The range of scheduled offences where the Attorney General can direct a jury trial has already been increased (as Mrs. Thatcher indicates). This occurred by an amendment order as far back as January. The changes * proposed in the Emergency Provisions Act (EPA) have all been indicated to us months ago and all but one (judge's discretion to admit confessions) were announced by Mr King in Parliament as long ago as 18 June.

2. The steps which have been taken to reduce the length of time of absence between first remand and trial are fair enough, although they could hardly be described as "major steps". We can presume from Mrs. Thatcher's message that the hint in Lowry's judgement that the number of defendants in supergrass trials should be reduced has been accepted. There are other points in Lowry's judgement however which tend to support the supergrass system (notably on the issue of corroboration) as well as the credibility of one-judge Diplock courts. These points were dealt with in the briefing note prepared for the Conference of 6 October.

* The changes will bring the EPA (a Northern Ireland act) closer to UK-wide law, for example, by restoring the common-law test of "reasonable grounds of suspicion" for the exercise of most powers, including arrest (exerciseable in Northern Ireland "on suspicion" only since 1922).

3. All of these changes are long overdue. As the joint report of the internal discussions of Working Group I starkly shows, the British side have not yet made a single concession on any point raised by the Irish side, whether in regard to mixed courts, three-judge courts, additional minority appointments to the Bench, a second senior judicial office, emergency legislation, problems relating to "Supergrass" trials, or the administration of criminal trials and appeals. Every change made or about to be made, including the oppointment of Michael Nicholson, was in the works before the Agreement; was determined exclusively within the British system; and was presented in public as the result of purely internal processes. The only development which may have been put down to our credit by nationalists was the speeding up of the Supergrass appeals which ended a hunger strike early this year. The only other advance we can point to is one element in the Attorney General's statement in March, i.e., that the DPP would be very unlikely to prosecute without corroborating or supporting evidence. (In general, however, this statement was supportive of the existing system and the British themselves did not interpret it as presaging a change).

4. In contrast, we moved a considerable way in the second Working Group towards British desiderata in respect of an extradition bill. Our movement was of course predicated on agreement on reforms in the administration of justice.

[One could add that the present balance on the other two elements in Paragraph 7 of the Hillsborough Communique - security co-operation and relations between the security forces and the community - shows the same pattern: intense presssure for security co-operation but no significant concession on Police Complaints procedures, no move on the Code of Conduct or on any other element of Article 7(c). In summary, the British attitude has been: You have the Agreement, we must have the results; our side of the bargain must be implemented slowly, your side of it must be done quickly.]

Anglo Irish Section
October 1986.

CONFIDENTIAL

Mrs Thatcher's reference to the appeal judgement R. v. Donnelly and to delays in the Court system

In her message of 4 October to the Taoiseach, Mrs Thatcher says that "in considering the bringing of proceedings which may involve multiple defendants", the Attorney General and the DPP will "pay the greatest attention to the observations of the Lord Chief Justice in the recent case of R. v. Donnelly and others" (the Black supergrass appeal judgement of 17/7/86).

The following points may be made about this aspect of Lord Lowry's judgement, and about two other aspects, corroboration and assessment of the supergrass's credibility, to which the Prime Minister does not refer.

Multiple Defendants

Lord Lowry praises the "enormous care and the remarkable and scrupulous mastery of detail" which the trial judge (Kelly J.) brought to his task, and says that a jury, however carefully directed, could never have coped. He goes on to say however that that things were "overlooked" by the judge and lawyers in the case and concludes "it is less likely that these mishaps would have occurred if there had been fewer defendants and fewer issues to consider" (p 19).

Lord Lowry reviews the points for and against joint trials but makes a very limited conclusion : "Whatever may be the pros and cons of large-scale joint trial, we feel that there is little to commend the practice of joining in the main indictment smaller fry, who often admit their relatively minor guilt initially but frequently (for reasons not easily ascertainable) plead not guilty and whose confessions are not admissible against anyone but the maker and yet, of necessity, they are put in evidence." (p 25)

Lord Lowry tends to excuse the trial judge from the ordering of separate trials on his own initiative : "A judge . . . is bound to hesitate before suggesting - much less ordering - the separate trial of charges or defendants, unless he receives an application for that purpose, since he runs the risk of acting contrary to the will and the interests of the defendants."(p 24)

Lord Lowry's treatment of the issue, although he makes no clear-cut conclusion, amounts to a hint to the law officers to reduce the number of defendants in multiple trials, or at any rate, to be more selective in the choice of defendants. Mrs Thatcher's reference to Lord Lowry's observations presumably means that the hint has been taken.

Corroboration/Credibility of the Witness

The Prime Minister does not refer to the main criticism made

of the supergrass trials, ie, conviction without corroborating evidence (which occurred in the Black case). Lord Lowry finds the trial judge's treatment of background evidence to be "unobjectionable in principle" (p 35). He did not accept the defence argument that Black was so unreliable that convictions should not have been handed down without corroboration. Lord Lowry makes the case (pp 25-35, quoting Lord Hailsham in support on p 35) that corroboration arises only when the evidence is otherewise reliable and that the first task is to determine if the evidence of the (supergrass) witness is credible. It is on this latter point that he criticises the trial judge, finding that his "firm and favourable assessment of Black seems . . to have been reached at an unusually early stage, after which the learned trial judge . . found it very difficult to attach credence to any evidence which conflicted with Black's or to any interpretation of the evidence which cast doubt on Black's corrrectness . . the truth is that those (defence) counsel succeeded often enough and to a sufficient extent to bring Black much lower in the scale of credibility than the high point at which the judge placed him. " (pp 57-58). Lord Lowry added that the trial judge "greatly overestimated the honesty (of Black) as a witness" and that "we just do not know what conclusions would have been reached on the different cases (save where the charges were borne out through the medium of confessions or otherwise) by a judge who had assessed Black's evidence less favourably . . . The trouble is we cannot put ourselves in the learned trial judge's place, and form a new assessment". (pp 59-60)

It should be noted therefore that there is no hint to the DPP in the Lowry judgement not to prosecute in accomplice informer cases without corroboration. In fact, the judgement could be described as a carefully argued legal defence of the supergrass system at least so far as the issue of corroboration is concerned.

There is advantage to us nonetheless in Lord Lowry's criticism of the error of the trial judge in coming to a much too favourable assessment of Black as a credible witness at an unusually early stage (ie before he had heard all the evidence). Supergrass judgess have been criticised for assessing witness intuitively rather than on a full and objective review of the evidence, and it is part of the case for three judges that the Court would be less likely to arrive at a much too favourable assessment of the witness's evidence (to a standard of proof beyond reasonable doubt) and still less to do so before they had heard all the evidence.

Furthermore, the British side have argued that the automatic process before three judges is a reasonable safeguard. In this case, Lord Lowry points out as quoted above that the appeal judges could not put themselves in the trial judge's place and form a new assessment, and so felt obliged to reverse certain convictions. The British side may argue that the Appeal Court was so scrupulous as to actually release people they were sure in the colloquial sense were members of the IRA (Lord Lowry, p 60). However, it has never been part of our argument

that there should be more acquittals, but rather that three judges at the trial stage would provide a better safeguard against wrong decisions than the present appeal process. As we have already argued in the official working group, Lord Lowry's judgement reinforces our case in this repect.

Delays in the Court System

There has been much criticism of delays in the courts (defendants have spent as long as four years or more in prison between first remand and start of appeal proceedings). This issue precipitated the hunger strike among the Kirkpatrick defendants late last year. We are aware that delays have been even worse in the civil area.

The Prime Minister refers in her message to major steps already taken to reduce delays between first remand and trial, and to possible changes in procedures in civil cases which might release more judge-time for criminal cases. We could acknowledge this. We have been given statistics by the British side on delays between first remand and trial which on the their face show progress and stand comparison with figures for Britain. Delay in bringing on appeals is another matter (we have not received figures we requested in that area) but it is fair to say that the appeal process in supergrass cases has been speeded up. All the major supergrass appeals pending at the start of this year (Black, McGrady, Quigley and Kirkpatrick) should be concluded by the end of the year - a point which has received little publicity.

Anglo-Irish Section
5 October 1986

ANNEX

Points noted for and against multiple-defendant trials in Lord Lowry's judgement in the Black supergrass appeal (pp 24-25)

For

- the case of one defendant is not postponed to that of another

- one tribunal assesses the witness by the same yardstick in relation to a broadly connected group of persons;

- inconsistencies and discrepancies in that witness's evidence will enure (ie come into operation) for the benefit of all the accused.

Against

- the length and complexity of the trial is increased because of the number of separate cases heard together and the mutiplication of cross-examinations on the same issue;

- the joinder of charges and accused on a large-scale introduces much inadmissible and potentially prejudicial evidence;

- the traditional hazards to to the defence of any joint trial are increased to an extent which would probably be very dangerous if the case were tried with a jury.

BRITISH EMBASSY,
DUBLIN.

4 October 1986

Dear Taoiseach,

I have been instructed to pass to you the attached message from the Prime Minister.

Yours sincerely

Duty Officer

Copy to: Mr Eamonn O'Tuathail

DEAR GARRETT,

THANK YOU FOR YOUR MESSAGE OF 1 OCTOBER. ROBERT ARMSTRONG HAS ALSO GIVEN ME A FULL REPORT OF YOUR TELEPHONE CONVERSATION WITH HIM.

I WAS VERY GLAD TO HEAR THAT YOU AND YOUR COLLEAGUES ARE INTENDING TO INTRODUCE AN EARLY BILL TO PERMIT IRISH RATIFICATION OF THE EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM WITHOUT RESERVATIONS. AS YOU KNOW, WE ATTACH THE GREATEST IMPORTANCE TO THIS. SUCH A BILL IS WIDELY EXPECTED IN NORTHERN IRELAND AND WILL BE AN ESSENTIAL ELEMENT IN OUR PUBLIC PRESENTTION OF THE TANGIBLE BENEFITS THAT THE ANGLO-IRISH AGREEMENT CAN BRING.

I KNOW THAT YOU IN TURN ATTACH GREAT IMPORTANCE TO ENSURING PUBLIC CONFIDENCE IN THE ADMINISTRATION OF JUSTICE IN NORTHERN IRELAND. I ALSO TAKE VERY SERIOUSLY THE OBLIGATIONS WHICH BOTH GOVERNMENTS ACCEPTED IN ARTICLE 8 OF THE AGREEMENT. I HAVE REFLECTED ON WHAT YOU SAID ABOUT THE IMPORTANCE OF A CHANGE IN THIS AREA TO MAXIMISE THE CHANCES OF YOUR BILL'S SUCCESSFUL PASSAGE. I AM WELL AWARE OF THE DIFFICULTIES THAT YOU FACE. MY COLLEAGUES AND I HAVE CONSIDERED IN DETAIL WHETHER THE INTRODUCTION OF THREE-JUDGE COURTS IS THE RIGHT CHANGE TO MAKE. I HAVE TO TELL YOU THAT WE HAVE COME TO THE CONCLUSION THAT IT WOULD NOT. THE DIFFICULTIES WE HAVE FOUND WITH THE PROPOSITION WILL BE FAMILIAR TO YOU BECAUSE THEY HAVE BEEN FULLY EXPOUNDED IN THE INTERGOVERNMENTAL CONFERENCE WORKING GROUP.

THERE ARE OTHER - THOUGH ADMITTEDLY LESSER - CHANGES THAT WE CAN MAKE, SOME OF WHICH ARE ALREADY IN HAND. WE HAVE ALREADY INCREASED THE RANGE OF SCHEDULED OFFENCES WHERE THE ATTORNEY GENERAL CAN DIRECT A JURY TRIAL. WE SHALL SOON BE:

- INTRODUCING A TEST OF REASONABLE GROUNDS OF SUSPICION FOR THE EXERCISE OF MOST POWERS, INCLUDING ARREST POWERS, UNDER THE EMERGENCY PROVISIONS ACT:

- STRENGTHENING THE CIVIL LIBERTIES OF DEFENDANTS BY SHIFTING THE ONUS IN BAIL CASES TOWARDS THE PROSECUTION:

- FURTHER PROTECTING THE ACCUSED BY CLARIFYING AND RESTATING THE JUDGE'S DISCRETION TO REJECT EVIDENCE OBTAINED FROM ADMISSIONS AND CONFESSIONS:

- ENSURING THAT CONTINUATION OF THE EMERGENCY PROVISIONS ACT BEYOND FIVE YEARS WOULD REQUIRE A NEW ACT OF PARLIAMENT: AND

- ENACTING NEW PROVISIONS TO PROTECT THE RIGHTS OF THOSE DETAINED UNDER EMERGENCY LEGISLATION AND HELD IN POLICE CUSTODY.

WE HAVE ALREADY TAKEN MAJOR STEPS TO REDUCE THE LENGTH OF TIME ELAPSING BETWEEN FIRST REMAND AND TRIAL, AND I HAVE ASKED FOR A FRESH LOOK TO BE TAKEN, TO SEE WHETHER THERE ARE CHANGES IN PROCEDURES IN CIVIL CASES WHICH MIGHT EASE THE PROBLEM BY RELEASING MORE JUDGE-TIME FOR CRIMINAL CASES.

THE ATTORNEY GENERAL HAS ALSO INFORMED ME THAT, IN CONSIDERING THE BRINGING OF PROCEEDINGS WHICH MAY INVOLVE MULTIPLE DEFENDANTS, HE AND THE DIRECTOR OF PUBLIC PROSECUTIONS WILL OF COURSE PAY THE GREATEST ATTENTION TO THE OBSERVATIONS OF THE LORD CHIEF JUSTICE IN THE RECENT CASE OF R V. DONNELLY AND OTHERS.

I KNOW THAT OUR DECISION ON THREE-JUDGE COURTS WILL BE A DISAPPOINTMENT TO YOU. I CAN ASSURE YOU THAT WE HAVE NOT REACHED THIS CONCLUSION LIGHTLY. I CAN ALSO ASSURE YOU THAT MY COLLEAGUES AND I REMAIN WHOLLY COMMITTED TO THE ANGLO-IRISH AGREEMENT, AND WE WILL CONTINUE IN OUR EFFORTS TO MAKE PROGRESS, WITH THE HELP OF THE IRISH GOVERNMENT, ON ALL THE ISSUES COVERED IN ARTICLE 8 OF THE AGREEMENT.

FINALLY, I APPRECIATE THE DIRECT PERSONAL INTEREST THAT YOU ARE TAKING IN THE IMPROVEMENT OF CROSS-BORDER SECURITY CO-OPERATION. THIS IS ANOTHER AREA WHERE IT IS VITAL THAT WE SHOULD SHOW PROGRESS IN TANGIBLE FORM. APART FROM BEING ESSENTIAL IN THE STRUGGLE AGAINST TERRORISM, PROGRESS IN THIS FIELD CAN HELP US TO COUNTER UNIONIST OPPOSITION TO THE ANGLO-IRISH AGREEMENT. I KNOW THAT PETER BARRY AND TOM KING HAVE SPOKEN IN THE PAST FEW DAYS ABOUT HOW TO TAKE MATTERS FORWARD. IT REQUIRES CAREFUL HANDLING AND I UNDERSTAND THAT IT WILL BE DISCUSSED FURTHER AT THE MEETING OF THE INTERGOVERNMENTAL CONFERENCE NEXT WEEK.

YOURS SINCERELY

MARGARET.