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COUNCIL OF IRELAND

Taoiseach,

Mr. Faulkner's statement of yesterday on the future of discussions on a Council of Ireland came without warning. According to the Press he is reported to have "reaffirmed that no discussions between North and South could be contemplated in the absence of such an agreement".

This statement is based on Mr. Faulkner's interpretation of the Supreme Court judgement in the Boland case.

The relevant parts of this judgement appear to be at page 12 which states -

> "In my opinion, Clause 5 of the Communiqué is not capable of being construed as an agreement. It is not so expressed. It is, consequently, clearly distinguishable from Clauses 6, 7, 10, 11 and 20 of the communique in each of which agreement is stated to have been reached..... The "Status of Northern Ireland" and the acceptance of it is to my mind a reference to the "de facto" position of Northern Ireland, and nothing else and the respective declarations are no more than assertions of the policies of the respective Governments, matters clearly within their respective executive functions. Consequently, Clause 5 in my opinion, is not capable of being construed as any action by the Government which would bring it within the jurisdiction of the Courts to supervise or restrain."

This finding is no more, in fact, than a finding in accordance with the pleadings in the Defence. This, in turn, is on all fours with the Defence in the High Court case which was the subject of appeal to the Supreme Court. Paragraph 2(iii) of the High Court Defence stated -

> "Neither Paragraph 5 of any other part of the agreed Communiqué recited or recorded any agreement between the British and Irish Governments which..... (b) acknowledged or stated that the portion of Ireland therein described as "Northern Ireland" cannot be re-integrated into the National territory until or unless a majority of the people of an area described as "Northern Ireland" indicate a wish to become part of a united Ireland".

As you know, Mr. Faulkner has the text of the Defence in the High Court Case. He and Mr. McLachlan at least, are aware that the relevant parts of the Sunningdale Comminuqué were never intended to be an agreement in the sense in which uses the term. What they are is, in fact, an agreement to make an agreement. When this later agreement is made it would, under Paragraph 6 of the Communiqué, be lodged with the United Nations.

What may be worrying Mr. Faulkner, in particular, is the passage in the judgement by Justice Griffin which states -

> "The extreme likelihood is that a Bill would be introduced in Dáil Éireann for the approval of such agreement, as I find it difficult to see how such an agreement would not involve a

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charge on public funds. When the Bill has been passed by both Houses, the President may, under the provisions of Article 26, after consultation with the Council of State, refer the Bill to this Court for a decision on the question as to whether such Bill is repugnant to the Constitution or any provision thereof. But even if that procedure was not adopted, and the Bill was enacted by the Oireachtas, it would still be open to the High Court and to this Court, pursuant to Article 34(3)2 to consider the validity thereof having regard to the provisions of the Constitution were the question to arise in a justiciable matter."

Probably the fullest interpretation of Mr. Faulkner's mind at present is that now recorded in the attached transcript from a radio interview given by Mr. Peter McLachlan after the 1.30p.m. news yesterday.

At 10.30 p.m. last night I received a message from Mr. Whelan, Department of Foreign Affairs who had been contacted by Mr. Donlon following a phone message from the S.D.L.P. Chief Whip Mr. Devlin. The effect of the message was to ask us to make no comment, either indirectly or directly, on the Faulkner statement. Mr. Devlin said that it was the considered view of the S.D.L.P. Party that this was a panic statement inspired particularly by Messrs. Bradford and McLachlan. There was a grave danger that one to three of Mr. Faulkner's supporters were on the brink of leaving his Party, following the recent election. Further, Mr. Faulkner was more than usually nervous of Mr. Wilson, as Prime Minister, and what he might do. Mr. Devlin said that the whole matter would be discussed this morning at the meeting of the Executive. You will have heard the news that, according to wireless messages they have stated that they will have to consider their whole position in the Executive if Mr. Faulkner persists in his present line. [Mr Faulkner had mentioned some time ago 60% support for his policies. The 42% poll for the Assembly parties has been a blow to him.]
You wrote to Mr. Faulkner on 13 February saying, inter alia, that

"It is my intention that, as soon as the Boland case is finally disposed of, a statement will be made on the lines we indicated."

You also said -

"In the light of the progress we are making, I believe we should now be thinking in terms of fixing a date for the formal signing of the package."

Mr. Faulkner has not so far replied to this letter.

I have ~~however~~ also received a verbal request from Mr. Bloomfield, at the instance of Mr. Faulkner, that he be allowed to see the statement on Status before it is made.

It is difficult to say exactly what the best course is in the present rapidly changing position. It might do no harm if, following this mornings meeting of the Executive, and subject to whatever message the S.D.L.P. convey, you were to contact Mr. Faulkner and discuss with him the terms of a statement on the attached lines.

* See however the transcript (attached) of his statement 14/3/74 GF

(7166)T61167. 5,000. 9-71. F.P.—G28.

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The statement is based largely on that submitted to you some time ago by the Minister for Posts and Telegraphs and incorporates changes to accord with the Attorney General's views i.e. that we should say "within the United Kingdom" rather than refer to Northern Ireland as being "part of the United Kingdom".

The question of whether there should be consultation with the Leader of the Opposition also arises, ~~or will or must the~~ SDLP.

5th March, 1974.

(7166)T61167. 5,000. 9-71. F.P.—G28.