

FROM : AUSTEN MORGAN

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## NOTE FOR DAVID TRIMBLE ON IRISH CONSTITUTIONAL OFFER

1. As you know, we - Austen Morgan, & Jeremy Carver of Clifford Chance - tabled proposed amendments to get rid of the territorial claim on 12 March, and have made some changes for the next meeting with Irish lawyers in London on 30 March. I attach the latest Irish offer - the fourth since 4 March - , what they are calling their 28th draft!
  2. This has been written by Martin Mansergh (MM) in communion with the ancestral voices of Irish republicanism. We have now succeeded in getting directly to the lawyers, and hope to get our suggestions into play. However, MM is the real government of Ireland (as they call it), and there can only be in my judgment meaningful agreement if Bertie Ahern accepts the idea of a historic compromise, by getting rid of all provocative symbolism in an agreement where there is practical north-south cooperation.
  3. There are two problems with the text - political and legal.
  4. MM's mindset is appeasing Sinn Fein. He is a nationalist ideologue. And he has bought the idea of the constitution as a catechism; it must not be touched. The Irish government is moving. We have consent in the north, consent in the south (very useful), and peaceful means. However, MM is seeking (1) to restrict amendments to articles 2 & 3 and (2) to pack lots of other stuff into the spaces.
  5. We as lawyers have more respect for Bunreacht na hEireann (the only name of their fundamental law text), and are of course advising in a political context. But MM - who seems to have no difficulty running rings round UK officials (I refer to the 2 governments leaked document of 24 March) - is engaged mainly in presentation to say everything will stay the same.
  6. For this reason, as well as the fact that he is not a lawyer, he has produced a dog's dinner of a draft, which gets worse as he, for example, takes out territory and then puts it back in again following a meeting with a government backbencher or someone.
  7. We have the following comments on the 23 March (with manuscript addition) draft:
    - (i) as you know, articles 1 to 3 on 'The Nation' (a title we can accept) do the following: article 1 establishes the nation (not the people who enacted the constitution on 1 July 1937) as the source of political legitimacy; article 2 defines the national territory (only states have territory) as all Ireland; and article 3 - in its ordinary & natural meaning - restricts jurisdiction to 26 counties without prejudice to the right to exercise it whenever (like the threatened invasions in 1969/70);
    - (ii) two Irish cases are crucial: *The Criminal Law (Jurisdiction) Bill 1975* [1977] IR 129, where O'Higgins CJ held that (re)unification was aspirational; *McGimpsey* [1990] IR 110, where Finlay CJ stated there was a constitutional imperative, article 2 being a claim of legal right and article 3 a - sort of - denial of UK title (Finlay CJ went on to effectively remove the 'without prejudice' phrase, a helpful contribution which I had to draw to the attention of Dublin's senior legal advisor last week!);
    - (iii) there is no precedent in Irish constitutional law, and, since we want O'Higgins back and Finlay killed off, the test we have advised is: the territorial claim must be removed in all its aspects, so no future Irish Supreme Court can read republicanism into Eamon de Valera's text establishing a new state, and it must be seen to have been removed - otherwise you will not succeed in selling it with McCartney/Paisley, and some of your own MPs, believing Irish nationalists are on the offensive to undermine the union;
- their draft 2
- concession making to Sinn Fein. We want dual nationality with real reciprocity, and accept that northern nationalists can continue to have Irish passports. Dublin now wants to make that a constitutional guarantee, when the citizens of the 26 counties will



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be less favourably treated! That's their problem, not yours. But we have drafted an article 9.1.3 which says that in language fitting a constitution;

(v) 'entitlement' (used twice) is legally uncertain as used here; 'birthright' has been taken from the presentation of their 1956 citizenship act, where citizenship by birth did not apply to NI; 'the island of Ireland, ... its islands and seas' is more a definition of a state, with 'islands' shoved in for reasons of apparent nervousness about the Aran Islands in Galway Bay! 'Nation' survives as a territorial, all-Ireland entity. We cannot accept that nations have members by virtue of birth. Nations - in Ben Anderson's definition - are 'imagined communities', something for the (utopian) future. We can accept nationalism as a historical tradition, and Irish nationality as the identity of most in the 26 counties and a minority in the 6 counties. But we must seek to have O'Higgins CJ's aspirational idea inserted as an article 2.1 (as we have drafted); the first sentence confuses membership of the nation with citizenship (which is not a problem between us); the second sentence is the diaspora, or the Irish race of the late C19/early C20 - distinguishing Ireland as a territory and Irish people overseas; it should not be in a new article 2 - dealing with the democratic route to a united Ireland - and would not even be suitable for a secular, non-controversial preamble, such as we are also seeking.

#### their draft 3.1

(vi) This combines desirable articles 2 and 3 in each of the two sentences.

(vii) First sentence: 'will' (with or without 'firm') is acceptable for people - people of the 26 counties maybe, even the people who are Irish citizens, but not the people of the 32 counties, who are divided on whether there is an Irish nation and whether there should be unification; we cannot have an Irish nation which is a - Hegelian - subject of history (even if nationalists believe it); territory was brought back in on the third draft; 'diversity of identities and traditions' is MM in FF's 1995 aims and values document - yet Ahern says the constitution should not be a party document; the next phrase gives us two consents and peaceful means, which is what we want; but this has to be clear legally and politically; it is neither at the moment; also, the use of jurisdiction in what should be article 2 reinforces the fears sparked by the Dublin-drafted 1995 Framework Documents (which, as you know, I believe - on one interpretation - contain a leaseback: Irish sovereignty would remain, and the so-called British claim would be undermined, UK jurisdiction lasting only until present consent was lost).

(viii) Second sentence: 'pending' is hanging on to old article 3; the rest is acceptable as a statement of 26 counties jurisdiction; though we want to drop Saorstát Éireann and simply refer to the previous constitution, following the 1967 Irish precedent of J.M. Kelly, who first tackled 2 and 3; as you know, we have sought to ground all our proposals in terms of Irish constitutional reformers, precisely to avoid accusations of British/unionist interference.

#### their article 3.2

(ix) This is a north-south bodies provision; 'executive power' may be ok, but 'shared' is very woolly; two jurisdictions again, without a clear transcendence of the territorial claim, is worrying; they do need a constitutional amendment, but it is in article 29 (international relations) and we have drafted a 29.4.7 (modelled on their 29.4.5 which allows them to discharge their European obligations); MM doesn't want to mention north-south as international relations, and may fall back to article 28 (the government) which is legally absurd.



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**their article 29.4.4**

(x) We accept, though it might be better placed in article 29; they have to be watched on timing of implementation - who fulfils what conditions precedent (I have no faith that NIO will get this right).

**their extra-territoriality provision**

(xi) This is extraordinary: we want to take extra-territoriality out of existing article 3, because it is not in Dublin's interests and would be difficult for you to explain: note they talk about extra-territorial jurisdiction!; extra-territoriality is tolerated in international law, but not talked about; we can live with Dublin's extra-territoriality on citizenship and criminal justice; there is in international law territorial sovereignty, jurisdiction (an aspect of the former) and extra-territoriality (which allows interference in another state's affairs for express limited reasons); you cannot live with even an amended extra-territoriality provision given McCartney/Paisley are waiting to say you have not got rid of the territorial claim (which, of course, they do not want, because it would remove the devil they know - and secretly love to hate!).

**Summary**

We can get an agreed draft on a new article 3 (26-county jurisdiction); we need a clear new 2 on 2 consents and peaceful means; we have drafted cover for them on nation and nationality, which will not cause you legal difficulty; but we still have other problems: the preamble; article 1 on the nation; Ireland as the name in article 4 (which the UK objected to immediately in 1937); and the national language in article 8 (which allows discrimination against English speakers, and will make it difficult for you to recognize a linguistic minority in NT).

My strategy remains to combine negotiations with the Irish government and (if you instruct) privately encouraging the constitutional reformers in the south to see the historic compromise as their opportunity also.

Austen Morgan,

27 March 1998