THE COMMONWEALTH AND SOUTH AFRICA

I

If lawyers were nothing but lawyers, a law review would be a singularly inappropriate medium for the publication of a study of South Africa's withdrawal from the Commonwealth. For the legal aspects of the course of events are dwarfed in magnitude by the political, and although no one can yet be certain what the ultimate legal implications will be, it is clear that in the context of Commonwealth relations they will be only of subsidiary and peripheral importance.

This overwhelming primacy of the political factor is now the dominant feature of constitutional developments in the Commonwealth. Gone are the good old days when Canadian, Afrikaner and Irish lawyers, pre-occupied with the incidents of status, used to set the pace; when the Statute of Westminster stood as the centre-piece of the emergent British Commonwealth of Nations; when learned commentators could enmesh themselves in infinitely subtle argument in pursuit of the Commonwealth's *Grundnorm.* Seldom have matters of legal nicety or constitutional orthodoxy troubled the thoughts of Commonwealth Prime Ministers in recent years. It is true that the vital passage in the Declaration of Commonwealth Prime Ministers setting out the terms on which India was enabled to retain her membership of the Commonwealth as a republic was drafted by a distinguished lawyer, Sir Stafford Cripps; but for this purpose he acted *qua* statesman rather than *qua* lawyer, and the Declaration itself has never been enshrined in any formal legal instrument. It is true, also, that occasions still arise when legal expertise becomes indispensable — for example, in the devising of new forms for the royal style and titles. [1] But in the evolving structure of the new Commonwealth the role of the constitutional lawyer has diminished and is diminishing; and the politicians show no inclination to proclaim that it ought to be increased. What are the basic rules governing admission to, continuance of, and termination of full membership of the Commonwealth? And where are they to be found? What obligations are attached to membership; do they necessarily extend to all Members alike; and in what sense are they binding? In what sense, indeed, is the Commonwealth an entity? The Commonwealth exists; but what is it? The

1. de Smith, *The Vocabulary of Commonwealth Relations* (1954), 21-27.

political scientist, the historian and the economist all have their contributions to make in answering these questions, and so too has the lawyer; but the lawyer who approaches them with a grim determination to analyse extra-legal situations in terms of familiar juristic concepts will experience only bafflement and frustration.

II

A historian might begin his tale with the Great Trek, proceeding through the Boer War and its aftermath down to the Nationalist electoral victory of 1948, and tracing the seemingly inexorable course of events that followed. It is sufficient for us to place our starting point in 1960, though we shall need to make a few backward and sidelong glances.

On January 20, 1960, Dr. Verwoerd informed the Union Parliament that legislation was to be introduced to enable a referendum to be held on the question whether South Africa should become a republic.[2] The Bill providing for a referendum was given a first reading on March 11 and received the royal assent on May 25. In the meantime Mr. Macmillan had made his "wind of change" speech to the two houses of the Union Parliament, in which he had openly expressed his disagreement with the Union Government's policy of *apartheid*; and a Meeting of Commonwealth Prime Ministers[3] had been held in London from May 3-13. At this meeting the Federation of Malaya was represented for the first time, and Tengku Abdul Rahman at once sent a flutter through the dovecotes by raising the problem of racial discrimination in South Africa and its effects on Commonwealth relations. Mr. Louw, representing the Union Government, objected to any discussion of the domestic policies of the Union, and the meeting proceeded formally to re-affirm the traditional practice "that Commonwealth conferences did not discuss the internal affairs of member countries." However, Mr. Louw agreed to participate in informal talks on the South African racial situation. Contemporary reports indicated that these talks did not prove helpful.

The meeting agreed to the continuance of Ghana's membership of the Commonwealth when it became a republic[4] and "noted" Mr. Louw's statement regarding the projected referendum in the Union. "In the event of South Africa deciding to become a republic, and if the desire was

2. Detailed references for the facts here stated have not been supplied. The main sources are the *Commonwealth Survey* and parliamentary debates and newspapers in the countries concerned. I have been assisted in the compilation of the factual material by Mrs. M. A. Waters.

3. Commonwealth Prime Ministers' Conferences are still styled "Meetings" in official communiques to emphasise their peculiarly informal character. And the term "Prime Minister" is still used although Pakistan and Ghana have presidential regimes.

4. Ghana became a republic on July 1, 1960.

subsequently expressed to remain a member of the Commonwealth, the meeting suggested that the South African Government should then ask for the consent of the other Commonwealth Governments . . . ." [5] The Union Government officially interpreted the sense of the meeting as being favourable to the continuance of South African membership. But by August 3, when a further Union Government statement announced the date of the referendum and the intention to make a formal application for continuance of Commonwealth membership, doubts appear to have mounted. "If South Africa is refused continued membership of the Commonwealth," so read the statement, "it will not be on account of becoming a republic but because it does not agree to demands which amount to interference in domestic policy."

At the referendum, held on October 5, 1960, 850,724 voters were in favour of a republic and 774,607 were against. Over 90% of the electorate voted; some three-quarters of the adult population were denied the franchise because they were not of European race. A Bill for a republican Constitution was published on December 9. It received the royal assent as the Republic of South Africa Constitution Act, 1961, and Republic Day was fixed for May 31, 1961.

The tenth meeting of Commonwealth Prime Ministers opened in London on March 8, 1961. Five days later there began the discussion of South Africa's application for the continuance of her Commonwealth membership after May 31. The discussion lasted for two further days, and the outcome may be expressed in the words of the official communique: [6]

> On March 13 the Prime Minister of South Africa informed the meeting that, following the plebiscite in October 1960, the appropriate constitutional steps were being taken to introduce a republican form of constitution in the Union, and that it was the desire of the Union Government that South Africa should remain within the Commonwealth as a republic.
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> In connexion with this application the meeting also discussed, with the consent of the Prime Minister of South Africa, the racial policy followed by the Union Government.
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> The Prime Minister of South Africa informed the other Prime Ministers this evening [March 15] that in the light of the views expressed on behalf of other member-Governments and the indications of their future intentions regarding the racial policy of the Union Government, he had decided to withdraw his application for South Africa's continuing membership of the Commonwealth as a republic.

On March 14 the Commonwealth Prime Ministers had unanimously approved the admission of the Republic of Cyprus, an independent state

5. *Commonwealth. Survey,* 1960.

6. *Commonwealth Survey,* 1961.

outside the Commonwealth, to membership of the Commonwealth forthwith,[7] and on March 16 they unanimously approved the admission of Sierra Leone to full membership of the Commonwealth upon its attainment of independence on April 27, 1961. On May 31, 1961, South Africa duly became a republic and ceased to be a Member of the Commonwealth.

Why was it necessary for South Africa to obtain the agreement of the other Members of the Commonwealth if she was to retain her membership as a republic? The answer lies in a convention which had grown up since 1949 and had established itself as part of the constitutional structure of the Commonwealth. This convention is that a Member of the Commonwealth which decides to adopt a republican form of government may continue its membership provided that it recognises the Queen (or King) as Head of the Commonwealth[8] and the other full members agree to accept its continued membership on those terms. A convention may be expressly laid down as a rule of general application for the future, or it may become established by usage or an identifiable precedent or a series of precedents which comes to be regarded as normative and binding. On no occasion have rules of general application been authoritatively laid down on the subject of acquisition or continuance of Commonwealth membership. But there are precedents; and it is thought that the precedents on continuance of membership conclusively establish the convention stated above. When India's continued membership as a republic was agreed to in April 1949, official spokesmen were at pains to insist that this was a special case which was not intended to afford a precedent; yet it was hardly conceivable that what had been accorded to India could be denied to Pakistan or Ceylon. And, indeed, in 1955 the Commonwealth Prime Ministers agreed to the continuance of Pakistan's membership as a republic, and in 1956 they agreed to the continuance of Ceylon's membership if that country chose to follow the same road.[9] What happened in the case of India must now be conceded to have established a precedent.

The statement of this convention leaves several questions unanswered. At what stage may an application for continuance of membership by a prospective republic properly be made? Have the existing Members a discretion to refuse an application properly made? If so, by

7. Cyprus, formerly a colony, had become a republic outside the Commonwealth on August 16, 1960 (Cyprus Act, 1960; S.I. 1960, No. 1368 (U.K.)).

8. It may be assumed that the same convention applies where a Member decides to adopt a monarchical form of government in which the head of state will be a person other than the Queen of the United Kingdom, because this will involve an abandonment of the concept of common allegiance to a common Crown as far as that Member is concerned (see below). Hitherto the question has arisen only on an application for admission to membership (the case of the Federation of Malaya) and not on an application for continuance of membership.

9. Pakistan became a republic in 1956; Ceylon has not yet become a republic.

what principles ought they to be guided in the exercise of their discretion ? What would be the constitutional position if some Members were in favour of granting the application and others favoured rejection ? And what are the consequences of rejection ?

The last question can be disposed of first. If such an application is rejected the Government of the applicant Member may follow any one of three courses. It may abandon its republican aspirations and remain a Member of the Commonwealth on the then existing basis; it may secede from the Commonwealth there and then; or it may proceed with the introduction of a republican regime, in which case its Commonwealth membership will automatically terminate when the republic is born. Full membership of the Commonwealth carries with it the right to secede on any grounds and at any time without the prior concurrence of the other Members. This proposition has been unquestioned since 1942, when Sir Stafford Cripps, on behalf of the United Kingdom Government spelt out the implications of the offer of Dominion status to India;[10] and its validity was demonstrated by the secession of Eire in 1949.[11] Refusal by other Members of the Commonwealth to recognise the efficacy of a fellow-member's secession would doubtless pose some diverting legal and political conundrums, but the possibility is too remote to merit discussion, and in any event such a refusal would appear to be inconsistent with the accepted principles governing Commonwealth membership.[12]

At the time of South Africa's application for continuance of membership, it was universally assumed that if the Union had merely proclaimed itself a republic without having consulted the other Commonwealth governments at all, or if a republic were to be introduced after the application had been rejected, South Africa would cease to be a Member of the Commonwealth. Although there had been no authoritative pronouncement on the constitutional effect of such conduct, there is no reason to doubt the soundness of these assumptions, given the premise that prior consent was requisite. In the event South Africa's application

10. See Cmd. 6350 (1942); Mansergh, *Documents and Speeches on British Commonwealth Affairs, 1931-1952* (1953), ii, 616-617, 626; *ibid*., *The Commonwealth and the Nations* (1948).

11. And in substance by the earlier secession of Burma in 1948, though since Burma had not acquired the formal attributes of Dominion status the secession could only be effected in law by an Act of the United Kingdom Parliament (Burma Independence Act, 1947).

12. The refusal by the United Kingdom and the Dominions to give constitutional recognition to Eire's "external association" with the Commonwealth between 1937 and 1949 (see Mansergh, *The Commonwealth and the Nations,* Chap. 8) is distinguishable, for Eire had purported unilaterally to adopt for itself a unique status the existence of which other Commonwealth countries were not disposed to acknowledge, whereas the right of secession is now undisputed.

was not rejected but withdrawn by Dr. Verwoerd before the Commonwealth Prime Ministers had reached their decision. The situation was indistinguishable in constitutional terms from one in which the application had never been made at all; and the proclamation of the Republic of South Africa was equally indistinguishable from a voluntary act of secession.

The case of South Africa answers, or suggests possible answers to, the other questions that we have asked. In the first place, the communique issued by the 1960 Meeting of Prime Ministers points to the circumstances in which an application for continuance of membership may be premature. Although there is no direct indication in the communique that the Union Government asked for advance approval of continued membership as a republic and was rebuffed, there is little doubt that this was what did in fact happen.[13] But in effect the communique said nothing more than that the time was not yet ripe; the matter should be raised after the referendum. This was not an unreasonable position to adopt, and it could be supported by the precedents: [14] the applications of India and Pakistan had been preceded by resolutions of their Constituent Assemblies, the application of Ceylon by resolutions in both houses of Parliament to set up a select committee to report on a republican form of government, and the application of Ghana by a plebiscite and a General Election. Although the case of Ceylon is perhaps marginal, in all these instances a sufficiently clear expression of intention had been afforded by the procedures deemed to be appropriate for that purpose under the constitutional system of the applicant Member. In South Africa the procedure had not been completed, and a Commonwealth decision given at that stage might, moreover, have unduly influenced the result of the referendum. If, however, there had been no Referendum Bill and no projected referendum, it is difficult to see how any application made by the Government in office could have been held to be inadmissible merely on the ground that it was premature.

But in 1960 it was already apparent that some Members of the Commonwealth were not going to treat South Africa's application as one to which formal, almost automatic, approval should be given. At the very least it could be expected that at the next Prime Ministers' Meeting there would be denunciations of the South African Government's racial policies and attempts to secure modifications of those policies before the application was approved. Criticism of a Member's internal affairs in formal session would be a departure from usage, and some would say a breach of convention. If, on the other hand, the Union Government were again to insist adamantly on its rights in this matter, there was a strong possibility that some Members would summarily refuse their consent to

13. See, *e.g.*, Mr. Macmillan's statement at 637 H.C. Deb. col. 441 (March 22, 1961).

14. See Sir Ivor Jennings, "Constitutional Problems in Admitting Republics" (1960) Optima 117.

the application or even move that the Union be expelled from the Commonwealth. This might bring about an open split in the Commonwealth. The only real hope of averting these misfortunes was to allow *apartheid* to be discussed at the conference table. Mr. Macmillan, who supported the South African application throughout, succeeded in persuading Dr. Verwoerd of the force of this argument,[15] and accordingly the theory and practice of *apartheid* were debated at the 1961 meeting with the (albeit reluctant) consent of the Union Government.

The motion was that South Africa's application for continuance of Commonwealth membership be agreed to; the debate was about the morality of the Union's domestic policies and their compatibility with the Union's membership of the Commonwealth. To the Union Government these proceedings were a *détournement de pouvoir,* the use of a power for a purpose other than that for which it had been granted. The impropriety remained notwithstanding Dr. Verwoerd's enforced acquiescence in what was taking place.

The South African Government's racial policies may be indefensible; its refusal to receive High Commissioners from the new African Members of the Commonwealth was manifestly inconsistent with the spirit animating a multi-racial association; nevertheless, there was something to be said in favour of its standpoint on the question of constitutional propriety. In defining the content and scope of a conventional rule, regard must be paid to the purposes that the rule was originally designed to serve and the relevance of those purposes to present conditions. It is no doubt correct to say that a Member wishing to retain its place in the Commonwealth as a republic must seek the consent of the other Members because India, Pakistan, Ceylon and Ghana sought that consent; but in considering the attitude that the other Members ought to adopt towards such an application one must go on to ask *why* the obtaining of their consent has been treated as an indispensable prerequisite. The answer lies in traditional attitudes towards the place of the Crown in the Commonwealth. Before 1949 common allegiance to a common Crown was generally regarded as a fundamental rule of Commonwealth membership. When Eire adopted a republican Constitution in 1937 the United Kingdom and the other Dominions affected not to notice what had happened. As far as they were concerned Eire was still a Dominion. If a country insisted on severing all its links with the Crown — and Eire had retained a vestigial nexus — it would have to leave the Commonwealth. Accordingly Burma departed in 1948 and Eire finally cut the painter shortly afterwards. These events provoked heart-searching in Whitehall — a process that was immediately to receive a powerful stimulus from the prospect of India's reluctant secession and

15. As Dr. Verwoerd was to put it later: "By giving the Prime Ministers a chance to blow off steam we could at least have a chance of retaining our membership" (House of Assembly Debates, March 28, 1961, col. 3841).

the collapse of the Commonwealth in Asia. But the formula reconciling Indian republicanism with continuing membership of the Commonwealth was not easily arrived at. There were misgivings not only among ardent monarchists in Britain and the older Dominions but also among statesmen in Pakistan and Ceylon.[16] The text of the Declaration of April 1949 took account of these misgivings, first by designating the King as the symbol of India's free association with the other independent member nations of the Commonwealth and as such "Head of the Commonwealth," secondly, by explicitly recording the acceptance and recognition of India's continuing membership on the new basis by the other Members, and thirdly, by re-iterating that the common allegiance to the Crown owed by the other Members still remained at the root of their membership of the Commonwealth.

From this it followed that republicanism was not necessarily incompatible with membership of the Commonwealth. It did not follow that a decision to become a republic would thenceforth be purely a matter of domestic concern for a Member which wished to retain its membership. On the contrary, it was matter of common concern, because in the eyes of several Members of the Commonwealth a renunciation of allegiance to the Crown was a very serious matter which might tend to diminish the status of the monarchy and weaken the bonds that held the Commonwealth together. Any future application of a similar nature[17] would therefore have to be carefully scrutinised by the other Members in the light of this factor. Before long, however, it became evident that aspirations towards republicanism were more than a regrettable Indian aberration, and that the multi-racial Commonwealth would soon disintegrate unless the circle of republican Members was widened. The impact on the status of the Crown in the Commonwealth ceased to be the criterion by reference to which an application to continue membership as a republic was judged, and no other criterion took its place. There is nothing to show that the applications submitted by Pakistan, Ceylon and Ghana provoked the slightest discussion; they were agreed to as a matter of course. And it would have been very difficult for any of the other Members to justify the substitution of a wholly different criterion *ad hoc* in passing judgment on such an application. In fact, if the case of South Africa had never arisen they would almost certainly have agreed by 1960 that it would be wrong for them not to grant any application which had been properly made. An application would be properly made if the people of the country concerned had expressed an intention, either directly by means of a referendum (if one had been prescribed by local legislation) or indirectly by means of a Constituent Assembly, a Parliament or a Government in office, to adopt a republican system. The mere

16. A fact recently revealed by Sir Ivor Jennings: see (1960) Optima at 118-119.

17. The initial reluctance to envisage the possibility that other applications of a similar nature might be made was never convincing.

fact that he South African Government was heartily detested by a number of Commonwealth governments was an insufficient reason for treating the application on a different footing from any other.

Nevertheless, South Africa's application did differ from those previously made insofar as neither the composition of the Union Government nor the results of the referendum were a genuine reflection of the views of the people of the Union; they reflected only the views of a majority of the electorate, which was all-white. This point was seized upon by other Commonwealth leaders at the 1961 Meeting, but only for the purpose of developing a general assault upon the Union's racial policies.

The outcome may well prove to have been more advantageous to the Commonwealth than any other course of action. But when one views the constitutional implications of what occurred, it is difficult to escape the conclusion that when a Member applies for continuance of its membership as a republic the other Members will be entitled to refuse their consent if they consider the applicant unfit to retain its membership. [18] This is an unsatisfactory state of affairs. The question of excluding an existing Member from the Commonwealth may arise unpredictably at a future date; but if it does arise, an application for continuance of membership because of a prospective abandonment of allegiance to the Crown [19] is likely to be a singularly inappropriate occasion for dealing with the matter. It is surely better to face up to the situation squarely, dissociating the individual merits of the case from an essentially domestic issue such as a change of constitutional status. And one may go further. What useful purpose is now served by the rule requiring the consent of the other Commonwealth Members ? The original reason behind the rule has dissolved into emptiness, and no new reason has supplanted it. The present writer at least would welcome the replacement of the existing rule by one which merely requires a Member proposing to abandon its allegiance to *inform* the other Members of its intentions. The rule has had its day. Having once subsided into quiescence and then transmogrified itself with startling results, let it now be allowed a place of repose in the museum of Commonwealth antiquities.

18. It does not follow, however, that they are entitled to discuss the applicant Member's internal affairs at a Prime Ministers' Meeting without that Member's consent.

19. Under the existing rule a Member which (like the Federation of Malaya) had already abandoned its allegiance to the Crown by adopting a separate monarchy will probably not require the consent of the other Members for its continued membership if it decides to become a republic.

IV

Other aspects of Commonwealth membership, and the broad implications of membership, are thrown into sharper relief by an analysis of what took place (or is alleged to have taken place)[20] at the 1961 Conference. The pattern of events at the 1960 Conference, and the words and deeds that had followed, ensured that the meeting would be a difficult one. Dr. Verwoerd had agreed, *faute de mieux,* to a discussion of his Government's racial policy in formal session, but he had affirmed that he would tolerate neither humiliation nor interference in the Union's domestic affairs. By this it could be understood that he would withdraw the Union's application if he thought the Union Government was being insulted or if conditions were attached to the granting of the application in an attempt to enforce changes of policy on the Union, and probably that he would withdraw the application rather than see it turned down. But the leaders of the Asian and African Commonwealth countries had long felt themselves to be insulted by the Union's racial policy. Even in the absence of South Africa it would not always have been easy for them to justify Commonwealth membership to their more radical supporters. While South Africa remained a Member they sometimes found it hard to justify their position to themselves. In May 1960 Dr. Nkrumah had given notice that Ghana would find it "embarrassing" to remain in the Commonwealth unless South Africa brought its racial policy into conformity with the principles of the United Nations.[21] Ghana and Malaya had imposed embargoes on South African imports; Nigeria and Ghana had taken action to prevent the entry and public employment of white South Africans; India had withdrawn its High Commissioner from the Union as long ago as the 1940's in protest against the treatment of South African citizens of Indian origin. At the United Nations the annual resolutions condemning *apartheid,* the treatment of Indians in the Union and the abuse of the mandate in South-West Africa had been supported by the Asian and African Members notwithstanding the domestic jurisdiction clause of the Charter.[22] If the senior Members of the Commonwealth had decided to oppose South Africa's application not a voice would have been raised in dissent.

In this situation the United Kingdom's attitude was crucial. New Zealand would have followed Britain's lead; the Australian Government

20. The fullest accounts have been given in parliamentary speeches by Mr. Menzies and Dr. Verwoerd. Other Commonwealth leaders who made public statements after the Meeting were more reticent. In compiling the record use has been made of contemporary newspaper reports which were inherently credible and have not been contradicted by statements made by the participants. Unfortunately, some of the parliamentary debates were unavailable at the time of writing.

21. Nkrumah, *I Speak of Freedom* (1961), 229.

22. Art. 2(7), which precludes the United Nations from intervening in matters which are "essentially within the domestic jurisdiction of any state".

was known to support the Union's application strongly, but it could hardly have maintained that position in the face of united opposition; in Canada Mr. Diefenbaker had let it be known that his Government was not committed to giving unconditional support to the application. For a number of reasons, however, the United Kingdom Government decided to support the application. There were the memories of Botha and Smuts, great Commonwealth statesmen, and of wartime comradeship (from which the members of Dr. Verwoerd's Government were admittedly excluded). There were the ties of kinship with more than a million white South Africans of British stock, the overwhelming majority of whom were vehemently opposed to the establishment of a republic. Alongside these sentimental considerations went others of a more practical nature. In the first place, while South Africa remained within the Commonwealth its Government (or a future Government) might conceivably become susceptible to moderating influences. A South African Government which had been dismissed from the Commonwealth could be expected to be entirely inflexible. Secondly, the Commonwealth was not only an association of states and governments; it was also an association of peoples. To exclude the Union Government would be to exclude the non-European majority of South African citizens from the multiracial Commonwealth. What useful purpose would this serve? Thirdly, if relations with the South African Government were to become embittered, Britain would experience great difficulty in discharging its responsibilities for the three High Commission Territories in Southern Africa. Basutoland was an enclave in Union territory; Bechuanaland and Swaziland were contiguous with the Union; all were heavily dependent on the Union economically. Fourthly, the availability of the Simonstown base in wartime might be endangered. Fifthly, British trade with and investments in the Union might suffer indirectly.

In addition there were broad constitutional and political considerations which indicated that the application should be supported. To refuse an application because of distaste for the applicant's political behaviour would not only be a departure from precedent and a possible misuse of power; it would introduce into the Commonwealth for the first time a standard of moral eligibility for membership. Once the principle of an eligibility test had been introduced the character of the Commonwealth could hardly remain the same, and disruption would result from the application of such tests in the future.[23] In any event, why should one standard of moral eligibility be singled out from all others? Discrimination on grounds of colour by Europeans against non-Europeans was thoroughly reprehensible, and the House of Commons itself had broken with precedent to condemn both the practice of *apartheid* and the

23. *Cf.*, Miller, *The Commonwealth in the World* (2nd ed., 1960), 64-65.

South African Government's record as a Mandatory;[24] but was it the uniquely damnable political sin ? What of the suppression of parliamentary institutions and the denial of basic civil liberties ? What of religious or linguistic discrimination ? Few who have not experienced racial discrimination in the capacity of victims can share to the full the passionate reactions of those who have experienced it, but in judging which way the balance of advantage lies in a given situation a measure of detachment is usually helpful.

These arguments had not convinced the African nationalist movement in the Union or a number of white liberals there, or the British Labour Party, or the bulk of articulate opinion in non-white Commonwealth countries. If Dr. Verwoerd wanted South Africa to remain within the Commonwealth it was because he thought it was politically advantageous for his party. What was good for Dr. Verwoerd was bad for non-Europeans in South Africa and should therefore be resisted. There was no evidence that the atmosphere of the Commonwealth club had yet influenced the South African Government for the better or was ever likely to do so. Exclusion from the Commonwealth would increase South Africa's isolation by removing a shield that offered shelter and refuge from the chill blast of world opinion. Outside pressure on the Union Government could then more easily be stripped of its remaining inhibitions. And the Commonwealth, having been purged of South African racialism, would then stand for something positive, or, put at its lowest, could survive as a going concern.

That no Commonwealth Government had publicly committed itself to opposing South Africa's application before the 1961 Meeting began is perhaps a tribute to the deference still paid to the views of the United Kingdom as the senior Member of the Commonwealth. There was a strong hint of opposition in Tengku Abdul Rahman's warning against the dangers of deciding vital questions by an ostensibly unanimous vote which might not reflect the genuine views of the majority,[25] but his comments on arrival in London were ambiguous. President Nkrumah also indicated his own Government's reservations, but said that he would accept a "collective decision" and that he personally wished for no showdown on South Africa.[26] The other Commonwealth statesmen confined themselves to guarded generalities, coupled with some tart remarks on Dr. Verwoerd's definition of *apartheid* as "good neighbourliness."

On March 11 most informed observers in London expected South Africa's application to be agreed to, though the official communique

24. 621 H.C. Deb. cols. 774-843 (April 8th, 1960); 632 H.C. Deb. cols. 671-729 (December 15, 1960).

25. *Straits Times,* March 5, 1961, p. 1.

26. *The Times, March* 10, 1961, p. 14.

would doubtless record the strong criticism to which the Union Government had been subjected. On March 12 opinions swung round sharply. In an article published in a Sunday newspaper,[27] Mr. Julius Nyerere, the Chief Minister (as he then was) of Tanganyika, affirmed, soberly and reluctantly, that when his country became independent at the end of the year it would feel unable to belong to a Commonwealth of which South Africa was still a Member: "to vote South Africa in is to vote us out." Mr. Nyerere is highly regarded by all sections of political opinion in Britain, and his public image is that of a moderate. By this declaration he had committed himself irrevocably to taking Tanganyika out of the Commonwealth[28] if the decision on South Africa went the way that the United Kingdom Government had hoped it would go. And few British politicians given an unfettered choice between Mr. Nyerere and Dr. Verwoerd would have unhesitatingly plumped for Dr. Verwoerd in 1961. Moreover, the irresistible force of me-tooism would have driven other African Commonwealth Members, not to speak of prospective Members, in the same direction. For South Africa Mr. Nyerere's article was the writing on the wall. Thereafter the Meeting had an invisible participant.

The first discussion of South Africa's application included a broadside against *apartheid* delivered by Tengku Abdul Rahman, reading (it was said) from a 15-page typescript. The Tengku was supported by Mr. Diefenbaker, who is believed to have commended the idea of a "Commonwealth Bill of Rights" to which all Members would be obliged to subscribe. No reliable information is available either about what Mr. Diefenbaker said or about its bearing on the issue immediately under discussion, but two points may be noted. First, after the Meeting was over Mr. Menzies publicly expressed his opposition to the whole idea of a Commonwealth Bill of Rights.[29] Secondly, since it would certainly have included a condemnation of racial discrimination as an instrument of policy, the Union Government could not have subscribed to it. The proposal could therefore have been designed or used as a device for forcing South Africa out of the Commonwealth, though one cannot assert that this was its purpose.

Other Commonwealth leaders then weighed in with their criticisms, and Dr. Verwoerd made a reasoned reply. On the following day, March 14, a draft communique recording the acceptance of South Africa's application and the condemnation by other Prime Ministers of the Union's

27. *The Observer,* March 12, 1961, p. 10.

28. It is understood that he had previously given private notice of his intentions to some Commonwealth governments; but this would not necessarily have precluded him from resiling from his position on the matter.

29. Commonwealth of Australia House of Representatives Debates, April 11, 1961, p. 653.

racial policy was debated. To most of the Afro-Asian representatives, so it appears, the wording was not strong enough, and it is reported that they had the backing of the Canadian Prime Minister. The technical difficulty, according to *The Times,* was "to find words not so harsh as to make South Africa's withdrawal inevitable and therefore virtually expel her — which no one wished to do — and yet stiff enough to show that a real stand was being taken by the Commonwealth against racial discrimination." [30] But as the debate continued attitudes hardened, and the longer it continued the more unsatisfactory the attempt to paper over a fundamental cleavage of principle must have seemed. Mr. Nehru is said to have taken a strong line and to have prepared a counter-resolution (or possibly an amendment to the original draft) declaring the practice of racial discrimination to be incompatible with Commonwealth membership. By the afternoon of March 15 the Meeting appeared to have moved closer to ostensible agreement on a verbal formula, but Dr. Nkrumah is then reported to have threatened that he might have to move South Africa's expulsion or withdraw Ghana from the Commonwealth, and there were sharp attacks by the Prime Ministers of India and Nigeria.[31] After a short adjournment, Dr. Verwoerd, without prior notice but reading from a document which Mr. Diefenbaker noticed was "somewhat dog-eared," [32] formally withdrew the application. The formula lay dead in the draftsman's hands.

V

Was South Africa "pushed out" of the Commonwealth, as Mr. Menzies was to assert,[33] or is it correct to say that no one wished to force the Union's withdrawal? Could Dr. Verwoerd have kept South Africa in the Commonwealth by swallowing a few harsh words in the draft communiqué ? One may accept Mr. Diefenbaker's affirmation that none of the non-European Members had pressed for South Africa's expulsion,[34] but it may be necessary for this purpose to draw a distinction between form and substance. Too many participants have been too reticent for the historian's liking. Perhaps the best evidence of what occurred is supplied by Dr. Verwoerd himself. At the Prime Ministers' Meeting on March 15, he said that he was withdrawing the application because the spirit of hostility shown towards South Africa had "made it clear that in the view of the majority of the Commonwealth Prime Ministers, after the lead given by a group of Afro-Asian nations, South Africa will no

30. *The Times,* March 16, 1961, p. 14.

31. See statement issued by Dr. Verwoerd, reported in *The Times,* March 17, 1961, p. 000.

32. 105 House of Commons Debates (Can.), col. 3082 (March 17, 1961).

33. *The Times*, March 21, 1961, p. 12.

34. *Loc. cit*., note 32, *ante*, at col. 3083.

longer be welcomed in the Commonwealth after May 31 when she becomes a republic."[35] In a later statement he said that his decision had also been taken in the interests of South Africa's friends in the Commonwealth, particularly in the United Kingdom. He could not have "placed them in the invidious position of having to choose between South Africa and a group of Afro-Asian nations."[36] But on his return to the Union Dr. Verwoerd, in replying to a parliamentary debate, used significantly different language. If, he said, South Africa had stayed in the Commonwealth India, Nigeria, Ceylon, Ghana and possibly Malaya would have seceded; to prevent this catastrophe the United Kingdom would have sided with the others against the Union; and a vote for the expulsion of the Union would have been carried *nem. con.*[37] These remarks suggest that the main reason for the withdrawal may well have been Dr. Verwoerd's determination to forestall the ultimate humiliation of exclusion. Whether he had in mind expulsion at a later date or a rejection of the application that was under discussion is not clear.

If Dr. Verwoerd's assessment of the situation may be taken to be broadly accurate, several conclusions can be drawn. In the first place, the practice of racial discrimination in its most blatant forms must now be regarded as a disqualification for membership of the Commonwealth. Despite the pessimistic apprehensions of Mr. Menzies, discriminatory immigration laws still stand on a different footing. Secondly, the possibility of a Member's being expelled from the Commonwealth can no longer be discountenanced merely because there is neither precedent nor a recognised procedure for expulsion.[38] Thirdly, light is thrown on what may happen when there is a division of opinion among Members on a matter requiring a collective decision. In the past the problem has been considered in the context of an application for *admission* to full membership, but the case of an application for continuance of membership is indistinguishable. At one time it had seemed that South Africa might purport to "veto" the Gold Coast's application for admission to full membership. In the event it approved the application and approved all subsequent applications.[39] But there was never any substance in the suggestion of a *liberum veto.* Because decisions have always been unanimous it does not follow that they must always be unanimous. A dissentient might acquiesce in a majority decision, or it might prefer to secede from the Commonwealth.[40] If it had proved necessary for the

35. *The Times*, March 16, 1961, p. 14.

36. *Ibid.*

37. House of Assembly Debates, March 28, 1961, cols. 3842, 3850.

38. *Cf.*, Wheare, *The Constitution Structure of the Commonwealth* (1960), 127.

39. A point to which Dr. Verwoerd was not slow to draw attention. And on March 16, 1961, South Africa approved Sierra Leone's application.

40. Wheare, *op. cit.*, 124-6. See also *Halsbury's Laws of England* (3rd ed.), v. 457.

Meeting to come to a decision in March 1961 it would probably have been unanimous. But if it had been in favour of granting the application the Commonwealth might soon have disintegrated by virtue of the secession of several existing Members and the refusal by potential Members to apply for admission, unless the decision was soon nullified by a decision to expel the Union. It is by no means unlikely, therefore, particularly in view of Dr. Verwoerd's absolute refusal to make even the slightest concession in the face of criticism,[40a] that the decision (unanimous or otherwise) would have been to refuse the application. And whatever the outcome might have been, it could hardly have been that which the United Kingdom Government had desired. This in itself would have suffered to make the 1961 Meeting a landmark in the history of the Commonwealth.

VI

The crisis having been survived, one does not expect the character of the Commonwealth to be fundamentally changed. Its capacity to serve as a bridge between the West and the new non-European nations has been strengthened by South Africa's withdrawal. But it remains the loosest and most informal of international associations, a concert of convenience,[41] in which sovereign states co-operate and consult with one another on matters of common concern because it is in their interests to do so. And since in very large measure Commonwealth relations mean relations between Britain and other individual Members, Britain's entry into the European Common Market could well have a more profound influence on the future of the Commonwealth than the departure of South Africa.

For South Africa, on the other hand, the consequences of the crisis are likely to be of great importance. To the extent that some of those consequences follow inevitably upon withdrawal from the Commonwealth one is able, in reviewing them, to discern more clearly what Commonwealth membership implies. Considerations of expediency will determine what the other consequences will be, and it would be an elementary blunder to invest with universal validity the solutions offered to meet the special circumstances of a particular case.

1. *Commonwealth Relations*

When a country leaves the Commonwealth its Prime Minister ceases to be eligible to attend meetings of Commonwealth Prime Ministers; it is no longer represented at the financial, economic, scientific, technological,

40a. Both Mr. Macmillan and Mr. Sandys afterwards expressed their conviction that the atmosphere of the Meeting would have been quite different if Dr. Verwoerd had shown signs of flexibility.

41. The phrase is Professor J. D. B. Miller's *(The Commonwealth and the World,* 2nd ed., 275).

military and educational conferences to which Commonwealth governments send their delegates; its membership of the numerous official and unofficial Commonwealth commissions, institutes, associations and committees [42] terminates unless special arrangements to the contrary are made. Its representatives in Commonwealth capitals, and the representatives of Commonwealth governments in its capital, will become Ambassadors instead of High Commissioners; its relations with the United Kingdom Government will be conducted through the Foreign Office instead of the Commonwealth Relations Office;[43] it will lose some of the advantages of informality and intimacy in those relationships and it will be deprived of the flow of diplomatic information that issues from the Commonwealth Relations Office. If its citizens cease to be Commonwealth citizens their interests will become *prima facie* ineligible for the protection afforded by the United Kingdom Government in those foreign countries where Commonwealth countries are not represented.

Some of these disadvantages are substantial. Where they cause serious general inconvenience (as might be the case in the fields of postal services and telecommunications, for example) South Africa may perhaps be treated *ad hoc* as if it were a country member of the Commonwealth club. But it would be politically impossible for the United Kingdom or any other sympathetically inclined Commonwealth country to allow the exceptions to grow into a new rule. It would be surprising if specialised facilities for the military training of South African troops continued to be offered by the United Kingdom.[44] And the suspension of South Africa's membership of the Imperial *[sic]* Cricket Conference is a straw in the wind for other unofficial Commonwealth organisations.

2. *General Legal Aspects*

A country which becomes a republic within the Commonwealth is no longer in fact part of "Her Majesty's dominions" or a "Dominion" or a "British possession," and it would seem that where those terms appear in statutes in force in other Commonwealth countries they ought to be so construed as to exclude the new republic from their ambit. But in practice it would be inconvenient and undesirable either to leave the matter at large or expressly to discontinue the operation of the relevant legislation in relation to the country concerned. The invariable practice, therefore, has been for the United Kingdom and other Commonwealth

42. For further particulars, see Harvey, *Consultation and Co-operation in the Commonwealth* (1952); Miller, *op. cit.*; Wheare, op. *cit.* ; and the annual *Commonwealth Relations Office List.*

43. The Republic of Ireland has been treated as an exceptional case, and its relations with the United Kingdom Government are conducted by its Ambassador through the Commonwealth Relations Office.

44. The availability of the Simonstown base depends on a bilateral agreement which is not related to membership of the Commonwealth (Cmd. 9520 (1955)).

countries to pass Consequential Provision Acts which continue in force all the existing rules of municipal law in relation to that country, leaving any necessary modifications to be made by subordinate legislation.[45]

If a country becomes a republic outside the Commonwealth it is no longer covered by the statutory expression "Commonwealth country"; its doctors cease to be "Commonwealth practitioners"; and so forth. And if it was one of Her Majesty's realms immediately before secession, it will probably cease to be included within the scope of the other statutory expressions already mentioned. It may, of course, be considered to be in the general interest, for political and practical reasons, to arrange matters so that most of the existing laws will continue to apply to that country as if it had never seceded. This was the approach adopted by the United Kingdom and other Commonwealth countries when Eire decided to sever its last formal links with the Crown and the Commonwealth. [46] But Eire was a very special case. After Burma had seceded it was treated as a foreign country for nearly all purposes in English law;[47] and it would be imprudent to assume that the provision made for South Africa will follow the Irish rather than the Burmese pattern. The Republic of South Africa (Temporary Provisions) Act, 1961, has frozen the existing state of affairs in English law for a period that is not to extend beyond May 31, 1962, and a similar enactment has been passed in South Africa.[48] In settling the long-term basis of legal relationships with South Africa, the United Kingdom Government will no doubt have in mind the principle stated by Lord Hailsham: "It is impossible for all respects to have the best of both worlds, all the advantages of Commonwealth membership without any of the reality." [49] South Africa is outside the Commonwealth, and it must be manifestly and undoubtedly seem to be outside the Commonwealth.

Unless Parliament otherwise provides, a miscellany of United Kingdom Acts will either cease to apply to South Africa and its citizens, or cease to differentiate them from foreign countries or foreigners, when the Temporary Provisions Act expires or is repealed. For example, the provisions of the Merchant Shipping Act, 1894, whereby certificates of competency issued in South Africa to masters, mates and engineers of ships are interchangeable with those issued in the United Kingdom, will

45. See, *e.g.*, India (Consequential Provision) Act, 1949 (U.K.).

46. For the United Kingdom, see the Ireland Act, 1949.

47. See generally the Burma Independence Act, 1947.

48. Commonwealth Relations (Temporary Provisions) Act, 1961 (No. 41 of 1961). Ghana has merely removed South Africa from the definition of "Commonwealth country" in the Interpretation Act (Republic of South Africa Act, 1961 (Act 61 of 1961)).

49. 229 H.L. Deb. col. 1231 (March 23, 1961); see also Mr. Duncan Sandys, 637 H.C. Deb. 527 (March 22, 1961).

no longer have effect, and ships owned by a company incorporated in South Africa will lose their British status. Again, the special rules relating to the reciprocal enforcement of maintenance orders obtained in the two countries and the recognition of grants of probate and letters of administration made in South Africa will cease to be part of English law; the arrangement facilitating the enrolment of practising South African solicitors on the roll of solicitors in England will be discontinued; for the purposes of registration in England South African doctors and dentists will be classed with foreign practitioners instead of with Commonwealth practitioners; the provisions governing the registration and winding up of Commonwealth companies will not extend to South African companies. Some of these special provisions are likely to be retained in one form or another. The present rules relating to financial matters and to the status of South African citizens in the United Kingdom raise more contentious issues, and they will be considered separately. One further problem may, however, be mentioned at this point. The extradition of fugitive criminals from one Commonwealth country to another is regulated not by extradition treaties but by the Fugitive Offenders Act, 1881. The procedure is simple and convenient,[50] but there is nothing in the Act which explicitly forbids the rendition of a political offender, though an English court might possibly be prepared to apply by analogy the principle applicable to requests for extradition made by foreign countries.[51] It would seem preferable, in the face of this uncertainty, not to continue the 1881 Act in force but to conclude an extradition treaty with South Africa which, in accordance with the Extradition Acts, would make it clear that political offenders could not be extradited.

3. *Citizens of South Africa*

By virtue of section 1 of the British Nationality Act, 1948, South African citizens are British subjects and Commonwealth citizens in English law. Section 6(1) of that Act entitles them to be registered as citizens of the United Kingdom and Colonies after a short period of residence in the United Kingdom or if they are in Crown service under the United Kingdom Government.[52] These provisions would have continued in force even if there had been no Temporary Provisions Act, for nowhere in the 1948 Act is South Africa designated as a Commonwealth

50. Clure, "Law and Practice in Commonwealth Extradition", (1959) 8 Am. Jl. Comp. Law 15.

51. See *Re Government of India and Mubarak Ali Ahmed* [1952] 1 All E.R. 1060 at 1063, *per* Lord Goddard C.J. (dictum).

52. See also section 3(2) of the British Nationality Act, 1958, extending the qualifications for entitlement to registration.

country and the Act must therefore be deemed to be operative notwithstanding South Africa's change of status and departure from the Commonwealth. As British subjects in English law,[53] South African citizens enjoy all the rights, privileges and immunities and are subject to all the duties and liabilities of citizens of the United Kingdom and Colonies. They can vote, sit in Parliament and serve on juries; they cannot be refused admission to the country, nor can they be deported unless they have committed an extraditable offence.

That few expect this state of affairs to continue much longer is indicated by the sharp increase in the number of South African residents in Britain who have applied for registration as citizens of the United Kingdom and Colonies, despite the fact that by taking this step they are deprived by South African law of their South African citizenship. One possible answer to the problem would be to adopt a provision based on section 2 of the 1948 Act (referring to citizens of Eire, now the Republic of Ireland) and enabling a South African citizen who had particular associations with the United Kingdom to claim back or continue his British nationality; other South African citizens would cease to be British subjects. But it would be surprising if the new legislation were to go all the way with the Irish precedent. By the combined effect of the 1948 Act and the Ireland Act, 1949, the Republic of Ireland is not a foreign country and its citizens, although not British subjects, are not aliens and are immune from all the liabilities and disabilities attaching to aliens in Great Britain. On the other hand, it is relevant to point out that of those South Africans who will wish to enter and remain in Britain a large proportion will be strongly antagonistic to the policies being pursued by their Government. If it were thought right to classify them legally as aliens it would still be wrong for their path to be needlessly obstructed by administrative action.

4. *Financial and Economic Problems*

The Sterling Area is not co-extensive with the Commonwealth. Canada is not a member of the Sterling Area; the Republic of Ireland, Burma, Ireland, Jordan and Libya are members. South Africa has in fact retained its membership of the Area despite its departure from the Commonwealth. It has, however, lost the advantage of participation in the effective management of the Area now that it has become ineligible for representation at meetings of Commonwealth Prime Ministers and Finance Ministers or for continued membership of the Commonwealth Liaison Committee.[54]

Trustees in Great Britain are empowered to invest trust funds in "fixed-interest securities issued in the United Kingdom by the govern-

53. Though they are not British subjects in South African law.

54. See further Miller, *op. cit.*, 77-79, 265-72.

ment of any overseas territory within the Commonwealth." [55] South African Government securities will clearly be excluded from this definition, and unless it is changed trustees will not be entitled to make further purchases of such securities, nor will new issues be acceptable as trustees securities, after the Temporary Provisions Act has ceased to operate. In view of the wider powers of investment now available to trustees the practical effect of the exclusion of South African Government stock may not be important. Far more serious, from the standpoint of the South African Government, are such developments as the outflow of capital and the difficulty of attracting any significant investment from abroad in the presence of political unrest and uncertainty.

South Africa's place in the scheme of Commonwealth preference presents special problems. The United Kingdom is South Africa's best customer, and at least a half of its exports (other than precious metals) to the United Kingdom are admitted free of duty or at reduced rates of duty in accordance with bilateral agreements. South Africa accords preferences to some United Kingdom imports, but it gets more than it gives under the scheme.[56] Legal authority to grant the agreed preferences is conferred upon the United Kingdom Government by section 2(4) of the Import Duties Act, 1958, in which South Africa is listed among "Commonwealth countries." If it were thought proper to continue the preferences the section would have to be amended by removing South Africa into the company of Burma and the Republic of Ireland, which are listed separately as potential beneficiaries. An amendment to the General Agreement on Trade and Tariffs would also be required, but it would seem that GATT would not oppose in principle the continuance of Commonwealth preference in respect of South Africa.[57] However, the question has to be asked whether the political disadvantages of continuing the existing arrangements would not outweigh the possible economic advantages, when all the African and most of the Asian Members of the Commonwealth are carrying out a total boycott of trade with South Africa on grounds of principle.

South Africa's absence from the conclaves of the Commonwealth must surely weaken its capacity to exert influence over the negotiations now in progress as a result of the United Kingdom's application to join the Common Market. If no concession is obtained for the benefit of South Africa in the negotiations, if the United Kingdom and the Six decide to adopt a common tariff, and if Commonwealth preference is also lost, the prospects for South Africa's fruit, wine and sugar exports will indeed be bleak.[58]

55. Trustee Investments Act, 1961, First Schedule, Part II, para. 4.
56. See *The Commonwealth and Europe* (Economist Intelligence Unit, 1960), 332.
57. Under the Agreement Commonwealth preference at the then existing rates was accepted as an exception to the general principle of conceding most-favoured nation treatment to all the signatories.
58. *The Commonwealth and Europe,* 334.

It has already been announced that South Africa's participation in the Commonwealth Sugar Agreement will be terminated at the end of 1961. Under this Agreement South Africa has been assured of a guaranteed market and a preferential price for a fixed quota of its sugar exports.

5. *The High Commission Territories*

Bad relations between the United Kingdom and South Africa would leave the three High Commission territories in an extremely precarious position. None of them would be directly defensible against armed assault; all of them are highly vulnerable to economic pressure. Basutoland, for example, derives £1 million of its meagre annual income from the earnings of Basutos employed as mineworkers in South Africa, and it saves perhaps a further £1 million because of its customs union with South Africa. Bechuanaland's capital, Mafeking, is within South Africa and can hardly remain there. Swaziland has obtained a substantial indirect advantage from South Africa's participation in the Commonwealth Sugar Agreement; separate arrangements will now have to be made for the territory.

Constitutionally the status of the territories remains unaffected by South Africa's withdrawal from the Commonwealth. Section 151 of the South Africa Act, 1909, and the Schedule to that Act, made provision for the eventual transfer of the territories to the Union by the King in Council upon addresses from the Union Parliament; but it has been obvious for some years that the United Kingdom Government would not agree to such a transfer without the consent of the inhabitants, and Dr. Verwoerd has recently made it clear that he will never adopt the role of a petitioner. Nevertheless, South Africa's new republican Constitution preserves these obsolete provisions in the statute book.

Now that the United Kingdom High Commissioner in South Africa has become an Ambassador there is much to be said for the view that he should be relieved of his second hat, which he has worn in his capacity as the officer responsible to the Secretary of State for Commonwealth Relations for the administration of the High Commission territories, and that this should be given to a different wearer who would be solely responsible (under the appropriate United Kingdom Minister) for the three territories. The task will certainly be a delicate one. The establishment of multi-racial Legislative Councils in Basutoland and Bechuanaland during the last two years is based on principles different from those which are to inspire Dr. Verwoerd's idyllic Bantustans, and the journey towards responsible government will assuredly be adventurous. An awareness of the perils that lie ahead explain the United Kingdom Government's

much-criticised refusal to allow the Union Nations Committee on South-West Africa entry into Bechuanaland on the grounds that the members of the committee had declined to give an undertaking not to attempt to enter South-West Africa illegally.[59]

6. *International Law and Relations*

South Africa's decision will have little effect on the operation of rules of international law. The Commonwealth has long since ceased to act as an international person; and of the *inter se* doctrine, according to which relationships between Commonwealth countries were not governed by the ordinary rules of international law, only a few tattered remnants survive.[60] To the international community it makes hardly any difference at all whether a country is within or without the Commonwealth.

One consequence (albeit of little practical importance) of South Africa's withdrawal is that the exclusion of intra-Commonwealth disputes from the acceptance by most Commonwealth countries of the Optional Clause conferring compulsory jurisdiction on the International Court of Justice will no longer include disputes between those signatories and South Africa. It has also been suggested that South Africa ceased to be entitled to administer the mandated territory of South-West Africa upon the establishment of the republic, or that alternatively South Africa will cease to be so entitled when it becomes a foreign country in relation to the other Members of the Commonwealth. The argument is based on the fact that the mandate was conferred upon "His Britannic Majesty." But it was conferred upon him "for and on behalf of the Government of the Union of South Africa," and there is no real doubt that South Africa was intended to be, has been and still remains the mandatory power.[61] At the time of writing the question whether South Africa was in breach of its existing obligations imposed by the mandate was under consideration by the International Court.[62]

International pressure on South Africa has mounted since the March decision, and Members of the Commonwealth have been among the leaders of the onslaught. Ghana has refused to recognise the South

59. The Committee had been authorised to go to South-West Africa, without the co-operation of the South African Government if necessary, to make recommendations for self-government leading to independence. The South African Government refused to admit the Committee to the mandated territory.

60. Fawcett, *The Inter se Doctrine of Commonwealth Relations* (1958); R. Y. Jennings, "The Commonwealth and International Law" (1953 B.Y.I.L. 420; *Halsbury's Laws of England* (3rd ed., 1953), v, 463-464.

61. Blom-Cooper, "Republic and Mandate" (1961) 24 Mod. L. Rev. 256.

62. The proceedings were instituted by Ethiopia and Liberia. For an earlier Advisory Opinion on the status of South-West Africa, see I.C.J. Reports, 1950, p. 128.

African Republic; Nigeria and Sierra Leone have banned all trade with South Africa; the International Labour Organisation has adopted a Nigerian-sponsored resolution calling for South Africa's withdrawal; United Nations resolutions on South-West Africa, *apartheid* and the treatment of Asian citizens have become still more peremptory. South African newspapers have complained of persecution by UNO. Dr. Verwoerd had withdrawn South Africa from the Commonwealth because to him it was becoming, in effect, the United Nations in microcosm; now UNO must sometimes seem like the new Commonwealth writ large and stripped of its old-fashioned courtesies.

Most of these happenings would have been predictable even if the March decision had gone the other way. But one new development, potentially serious in its implications for South Africa, is almost certainly attributable to the change in Commonwealth membership. There was a time when the United Kingdom delegates, unimpressed by the allegations of "threats to international peace," had regularly voted against the condemnatory United Nations resolutions on South Africa on the grounds that the resolutions were incompatible with the domestic jurisdiction clause of the Charter.[63] In view of the political difficulties to which this standpoint gave rise, a movement from opposition to abstention on the less opprobrious resolutions took place.

Reappraisal was carried a stage further after the March decision, and on April 5, 1961, the United Kingdom voted in favour of a resolution condemning the South African Government's racial policies in strong terms, though it abstained from voting on two paragraphs calling upon members to take positive action to bring about the abandonment of those policies and declaring them to be a threat to international peace. The resolution had been sponsored by India, Pakistan and Ceylon; Australia followed the same course as the United Kingdom; Portugal alone voted against the resolution.

In so far as the maintenance of good relations with Commonwealth countries was a significant factor in the shaping of British foreign policy, it could now operate only to South Africa's disadvantage. Embattled Afrikanerdom would soon stand in isolation, with its back to a promontory still incongruously called the Cape of Good Hope.

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63. For an account of the British interpretation of this clause, see Goodwin, *Britain and the United Nations* (1957), Chap. 9.

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