



**International covenant
on civil and political
rights**

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HUMAN RIGHTS COMMITTEE
Ninety-first session
15 October- 2 November 2007

VIEWS

Communication No. 1474/2006

<u>Submitted by:</u>	Mr. Gareth Anver Prince (represented by counsel, Prof. Frans Viljoen)
<u>Alleged victim:</u>	The author
<u>State Party:</u>	South Africa
<u>Date of communication:</u>	20 October 2005 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 24 May 2006 (not issued in document form)
<u>Date of adoption of Views:</u>	31 October 2007

* Made public by decision of the Human Rights Committee.

Subject matter: religious use of cannabis

Procedural issues: Exhaustion of domestic remedies, other international instance of investigation or settlement; admissibility *ratione temporis*; continuing effects

Substantive issues: freedom of religion; manifestation of one's religion; indirect discrimination; right of minorities to practice their own religion

Articles of the Covenant: 18, 26 and 27

Articles of the Optional Protocol: 1 and 5, paragraphs (a) and (b)

On 31 October 2007, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1474/2006.

[ANNEX]

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of
the Optional Protocol to the International Covenant on Civil and Political rights

Ninety-first session

concerning

Communication No. 1474/2006*

<u>Submitted by:</u>	Mr. Gareth Anver Prince (represented by counsel, Prof. Frans Viljoen)
<u>Alleged victim:</u>	The author
<u>State Party:</u>	South Africa
<u>Date of communication:</u>	20 October 2005 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2007,

Having concluded its consideration of communication No. 1474/2006, submitted to the Human Rights Committee by Gareth Anver Prince under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Gareth Anver Prince, a South African national born on 6 December 1969. He claims to be the victim of violations by South Africa of his rights under article 18, paragraph 1; article 26; and article 27 of the International Covenant on Civil and Political Rights. The Covenant and its Optional Protocol entered into force for South Africa

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glélé Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sánchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

respectively on 10 March 1999 and 28 November 2002. The author is represented by counsel, Prof. Frans Viljoen.

Facts as presented by the author

2.1 The author is a follower of the Rastafari religion, which originated in Jamaica and later in Ethiopia, as a black consciousness movement seeking to overthrow colonialism, oppression and domination. There are about 12 000 Rastafarians in South Africa. The use of *cannabis sativa* (cannabis) is central to the Rastafari religion. It is used at religious gatherings and in the privacy of one's home where it does not offend others. At religious ceremonies, it is smoked through a chalice (water-pipe) as part of Holy Communion, and burnt as incense. In private, cannabis is also used as incense, to bathe in, for smoking, drinking and eating. Although not all Rastafarians in South Africa belong to formal organizations, there are four Rastafari houses and a Rastafari National Council.

2.2 The author fulfilled all academic requirements for becoming an attorney. Before being allowed to practice, prospective attorneys in South Africa must, in addition to these academic requirements, perform a period of community service, as required by the Attorneys Act.¹ The author applied to the relevant body (the Law Society of Cape of Good Hope) to register his contract of community service. In its determination of this issue, the Law Society must assess whether the candidate is a "fit and proper person". A criminal record, or a propensity to commit crime, will jeopardize such a finding.

2.3 Under the Drugs and Drugs Trafficking Act and the Medicines and Related Substances Control Act,² it is, among others, an offence to possess or use cannabis. These laws allow for exemptions under specified conditions for patients, medical practitioners, dentists, pharmacists, other professionals, or anyone that has "otherwise come into possession" of a prohibited substance in a lawful manner.³

2.4 When applying to the Law Society, the author disclosed that he had two previous convictions for possessing cannabis, and expressed his intention, in light of his religious dictates, to continue using cannabis. On this basis, his application for registration for community service was refused. He was thus placed in a position where he must choose between his faith and his legal career.

2.5 The author claimed before the South African courts that the failure of the relevant legislation to make provision for an exemption allowing bona fide Rastafarians to possess and use cannabis for religious purposes constitutes a violation of his constitutional rights under the South African Bill of Rights.⁴ On 23 March 1998, the Cape High Court dismissed the author's application for review of the Law Society's decision⁵. On 25 May 2000, the Supreme Court

¹ Act 53 of 1979.

² Act 108 of 1996.

³ See eg section 4(b) (i), (ii), (iii), (iv) and (v) of the Drugs and Drugs Trafficking Act.

⁴ See the Sections of the Constitution referred to in paragraph 4.11 below.

⁵ *Prince v. President of the Law Society, Cape of Good Hope and Others* 1998 8 BCLR 976 (C), decided on 23 March 1998.

dismissed his appeal⁶. The Constitutional Court delivered two judgements, on 12 December 2000 and 25 January 2002⁷. In the latter, it decided, by a majority of 5 to 4, that although the Drugs Act did limit the author's constitutional rights, such limitations were reasonable and justifiable under section 36⁸ of the Constitution. The minority found unconstitutional the prohibition on the use and possession of cannabis in religious practices which does not pose an unacceptable risk to society and the individual, and considered that the government should allow an exemption.

2.6 In 2002, the author applied to the African Commission on Human and Peoples' Rights. The issue was whether the failure to exempt bona fide Rastafarians from using and possessing cannabis for religious purposes violated the African Charter. In December 2004, the African Commission found no violation of the complainant's rights as alleged.

The complaint

3.1 The author claims a violation of article 18, paragraph 1, of the Covenant, and refers to General Comment No. 22, which states that the concept of worship "extends to ritual and ceremonial acts giving direct expression to belief". The author is a bona fide adherent to Rastafarianism. The use of cannabis is accepted to be an integral part of that religion and fundamental to its practice. The author claims that the State party has a positive obligation to take measures to ensure the de facto protection of his right to freedom of religion.

3.2 He argues that his case differs from the case of *Bhinder v Canada*⁹, because the justification of the limitation in the present case is much less concrete, and the failure to exempt Rastafarians is based on pragmatic concerns such as the cost and difficulties to apply and enforce an exemption. The author is fully informed and prepared to accept any risk, if any, to him personally. He submits that the legitimate aim of preventing the harm associated with the use of dangerous dependence producing substances does not necessitate a blanket ban on the use and

⁶ *Prince v. President, Cape Law Society and Others* 2000 3 SA 845 (SCA), decided on 25 May 2000.

⁷ *Prince v President, Cape Law Society and Others* 2001 2 SA 388 (CC), delivered on 12 December 2000 (*Prince I*) and *Prince v President, Cape Law Society and Others* 2002 2 SA 794 (CC), decided on 25 January 2002 (*Prince II*).

⁸ Section 36 of the Constitution: Limitations of rights

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

⁹ Communication 208/1986, Views adopted on 9 November 1989.

possession of cannabis for religious purposes. The limitation is excessive in that it affects all uses of cannabis by Rastafarians, no matter what the form of use, the amount involved, or the circumstances, while the use of cannabis for religious purposes takes many forms. A tailor-made exemption would not open the floodgates of illicit use; and there is no evidence that an exemption would pose substantial health or safety risks to society at large. The denial of his right to freedom of religion is greater than the necessary to achieve any legitimate aim.

3.3 The author claims to be the victim of a violation of article 26, as the failure to differentiate the Rastafari religion from other religions constitutes discrimination. He is coerced into a choice between adherence to his religion and respect for the laws of the land.

3.4 The author claims that the failure to explore and find an effective exemption for Rastafari constitutes a violation of article 27. Rastafarianism is essentially collective in nature, as it is a particular way of life, in community with others. This way of life has deep African roots.

3.5 The author contends that his complaint is admissible. His communication is not being examined under another procedure of international investigation or settlement, as the African Commission has already made a finding on the merits. He has exhausted domestic remedies, as his case was examined by the Supreme Court of Appeal and the Constitutional Court.

3.6 The author argues that his claim is admissible *ratione temporis*. Although the judgments of the national courts were issued before the entry into force of the Optional Protocol for the State party in 2002, the alleged violations constitute “continuous violations” with “continuing effects”, which persist into the period after the entry into force and into the present. The Attorneys Act 53 of 1979 and the Drugs and Drug Trafficking Act 140 of 1992 remaining in force, the legislative framework still presents an obstacle to the author’s free expression of his right to religion. He refers to the case of *Lovelace v. Canada*¹⁰ and argues that his communication concerns the continuing effect of the Attorney’s Act and the Drugs Traffic Act, as a result of which he cannot register for community service with the Law Society.

The State party’s submission on admissibility and merits

4.1 On 24 July 2006, the State party commented on the admissibility of the communication. It argues that domestic remedies have not been exhausted, as the author did not, in his applications to the domestic courts, seek to have the prohibition of cannabis declared unconstitutional and invalid, and to have such prohibitions removed from the respective act for the benefit of the whole population, as is the usual way in challenging legislative provisions which are believed to be inconsistent with the Constitution. He only challenged the constitutionality of the laws prohibiting the use of cannabis in as far as they did not make an exception in the favour of a minority of 10,000 people, permitting the use of cannabis for religious purposes. The State party submits that the reason why the prohibition of possession and use of cannabis remains in force is the result of the author’s misguided approach in the domestic courts.

4.2 The State party contends that the communication is inadmissible *ratione temporis*. The Optional Protocol entered into force for the State party on 28 November 2002. The facts and applications in domestic courts were completed before the entry into force of the Optional

¹⁰ Communication No. 24/1977, Views adopted on 30 July 1981, paragraph 13.1.

Protocol, with the Constitutional Court delivering its final judgment on 25 January 2002. On the author's argument that the violation has continuous effects because the laws still prohibit the possession and use of cannabis, the State party considers that it to be invalid, because the author did not seek to have the prohibition laws declared unconstitutional and invalid. He cannot therefore claim that the fact that these laws still apply amounts to a continuous violation. The State party refers to the Committee's jurisprudence¹¹ according to which continuous effects can be seen as an affirmation of previous alleged violations. It submits that it has not affirmed the concerned provisions of the relevant laws, as they remain unchanged.

4.3 The State party recalls that the same facts were already examined by the African Commission, which found no violation of the African Charter on Human and People's Rights. The State party suggests that the Committee should broaden its literal interpretation of the concept of "being examined" to address policy issues such as the phenomenon of "appeal" from one body to another, as the risk of "human rights forum shopping"¹² is considerable. It considers that the Committee, in dealing with the present case, has the opportunity to give clear guidance, in an innovative and creative manner, on how it intends to contribute to the maintenance of a credible and respected unified international human rights system.

4.4 On 24 November 2006, the State party commented on the merits. It argues that while its legislation indeed results in a limitation of the right to freedom of religion of Rastafarians, such limitation is reasonable and justifiable in terms of the limitation clause contained in article 18, paragraph 3. Furthermore, it is proportionate to and necessary for the achievement of the legitimate aims provided for in that article, namely the protection of public safety, order, health, morals or the fundamental rights and freedoms of others. The Cape High Court, the Supreme Court and the Constitutional Court all found that while the legislation the author complained about limited his constitutional rights, such limitation was reasonable and justifiable under Section 36 of the State party's Constitution.

4.5 For the State party, the essential question before the Committee is not whether a limitation on the rights of Rastafarians has taken place, but whether such limitation will be encompassed by the limitation clause contained in article 18, paragraph 3. It emphasises that at the national level, the author did not challenge the constitutionality of the prohibition on the possession and use of cannabis, accepting that it serves a legitimate purpose, but alleged that this prohibition is overbroad and that exemption should be made for the religious use by Rastafarians. In the case before the Cape High Court, it was requested that the possession and use of cannabis for religious purposes by Rastafarians be legalised. On appeal, it was requested that an exemption also be granted for transporting and cultivating cannabis, while the requested exemption became far wider before the Constitutional Court, where importation and transportation to centres of use and distribution to Rastafarians were requested. It follows that the practical relief sought by the author is an exemption to legalise a whole chain of cultivation, import, transport, supply and sale

¹¹ Communication No. 520/1992, *Könye and Könye v. Hungary*, Decision on Admissibility of 7 April 1994, paragraph 6.4; Communication No 422/1990, *Aduayoum et al v. Togo*, Views adopted on 12 July 1996, paragraph 6.2.

¹² The State party refers to an article by J.S. Davidson, "The Procedure and Practice of the Human Rights Committee under the First OP to the ICCPR" (1991), 4 *Canterbury Law Review* p. 337 at 342, which is annexed to its submissions.

of cannabis to Rastafarians. In practice, the only workable solution would be the creation and implementation of a “legal” chain of supply of cannabis, as an exception and parallel to the illegal trade in cannabis. The majority in the 2002 Constitutional Court judgment found, after thoroughly considering the limitations clause in Section 36 of the Constitution and applicable foreign law, that the relief sought could not be implemented in practice¹³.

4.6 In finding that the “blanket” ban on the use of cannabis was proportional to the legitimate aim of protecting the public against the harm caused by the use of drugs, the Constitutional Court evaluated the importance of the limitation, the relationship between the limitation and its purpose, and the impact that an exemption for religious reasons would have on the overall purpose of the limitation, against the author’s right to freedom of religion. It took into account the nature and importance of that right in a democratic society based on human dignity, equality and freedom, the importance of the use of cannabis in the Rastafari religion and the impact of the limitation on the right to practice the religion.

4.7 On counsel’s reference to the *Bhinder* case and his contention that allowing a permitted exemption for the benefit of Rastafarians would present little danger to public safety or health, the State party reiterates that implementing such a permit system would present practical difficulties, and that it is impossible to prevent a dangerous substance from escaping from the system and threatening the public at large. Medical evidence on the harmful effects of cannabis was considered and accepted by the Constitutional Court as such¹⁴.

4.8 The State party invokes the Committee’s inadmissibility decision in *M.A.B., W.A.T. and J.-A.Y.T. v Canada*¹⁵, where it considered that the use of cannabis for religious purposes cannot be brought within the scope of article 18. The State party concludes that there was no violation of article 18.

4.9 With respect to the author’s claim under article 26, the State party recalls that distinctions are justified, provided they are based on reasonable and objective criteria, which in turn depends on the specific circumstances and general situation in the country concerned. It refers to Views

¹³ “There is no objective way in which a law enforcement official could distinguish between the use of *cannabis* for religious purpose and the use of *cannabis* for recreation purposes. It would be even more difficult, if not impossible, to distinguish objectively between the possession of *cannabis* for one or the other of the above purposes” (paragraph 130).

“There would be practical difficulties in enforcing a permit system They include the financial and administrative problems associated with setting up and implementing such a system, and the difficulties in policing that would follow if permits were issued sanctioning the possession and use of *cannabis* for religious purposes” (paragraph 134).

“The use made of *cannabis* by Rastafari cannot in the circumstances be sanctioned without impairing the State’s ability to enforce its legislation in the interests of the public at large and to honour its international obligation to do so. The failure to make provision for an exemption in respect of the possession and use of cannabis by Rastafari is thus reasonable and justifiable under our Constitution” (paragraph 139).

¹⁴ See paragraph 13 of the 2002 judgement.

¹⁵ Communication No. 570 / 1993, Admissibility decision of 8 April 1994.

in *Broeks*¹⁶, where the Committee held that “the right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26”.

4.10 The State party’s legislation and the limitation relating to cannabis apply equally to all, Rastafarians and others. The limitation therefore does not violate the right to equal treatment and equality before the law. The author claims the right to see positive measures adopted, at great financial and administrative cost, in favour of Rastafarians to ensure equality for this group with any other religious groups. However, such special treatment in favour of Rastafarians may be interpreted as a form of discrimination against other groups in society who also feel that they have special needs and legitimate claims to be exempted from certain provisions of domestic legislation. The obligations contained in article 26 relate to equality, non-discrimination and equal protection before the law, norms also enshrined in and protected in terms of the State party’s Constitution. Equal protection in this context does not include an obligation to make exemptions for certain classes of people.

4.11 On the author’s claim under article 27, the State party points out that its Constitution contains the same right framed in almost identical language¹⁷. It is common cause that the Rastafarians form a religious minority group in South African society. When it decided the issue, the Constitutional Court took into account the protection afforded to minority religious groups, like the Rastafarians, in terms of Section 15, paragraph 1¹⁸, and Section 31¹⁹ of the Constitution, and the constitutional protection required by a small, vulnerable and marginalised group like the Rastafarians²⁰. The Court concluded that the relief sought by the author was impractical and found that the legislation in question set reasonable and justifiable limitations to the right to freedom of religion, including within its association context provided for in Section 31 of the Constitution.

¹⁶ Communication 172 / 1984, Views adopted on 9 April 1987, paragraph 13.

¹⁷ Section 31 of the South African Constitution: “(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
(a) to enjoy their culture, practice their religion and use their language; and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

¹⁸ Section 15, paragraph 1: “Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”

¹⁹ Section 31: “Cultural, religious and linguistic communities

1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community

a. to enjoy their culture, practise their religion and use their language; and

b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

2. The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

²⁰ see para. 122 of the 2002 Constitutional Court decision.

4.12 The State party emphasizes that the author did not act on behalf of Rastafarians as a group before domestic courts or the Committee. In addition, he failed to advance facts before the Committee on which to base his view that Rastafarians as a minority group are being singled out for discrimination. If a right to use cannabis during religious ceremonies does not accrue to a member of a minority group because of reasonable and justifiable limitations, such a right cannot be construed in a collective form, as the same limitations will apply.

Authors' comments to the State party's observations

5.1 On 31 January 2007, the author commented on the State party's submissions, reaffirming that his communication is admissible. On the State party's argument of inadmissibility *ratione temporis*, he argues that if the violation or its effects continue after the entry into force of the Optional Protocol, then, notwithstanding that it entered into force after the violation itself occurred, a continuing violation should be found and the communication declared admissible.²¹ The Constitutional Court expressed its opinion that the legislation in question in the case is constitutional. This legislation remains in force. It can hardly be expected of the author to 'affirm' the *same* arguments before the *same* courts related to the *same* legislation – in fact, such an attempt would be met with judicial *res judicata* reply, or that it is moot. In any event, the author remains unable to be registered for his contract of community service, required for practice as an attorney, and thus cannot engage in his chosen profession as a result of his religious convictions.

5.2 On the issue of exhaustion of domestic remedies, the author acknowledges that his case before the South African courts was not to contest the constitutionality of the general prohibition against the possession and use of cannabis, but to contest the constitutionality of the relevant legislation only in so far as it does not provide for a circumscribed exemption allowing a particular group, on established religious grounds, to possess and use cannabis. Under South African law, the complainant is entitled to contest the constitutionality of legislation for being excessive and is not required to contest the constitutional validity of a 'general provision' *in toto*, as the State party argues. In fact, the Constitutional Court itself characterised the author's constitutional complaint as one contesting that the 'impugned provisions are overbroad',²² and dealt with it on these terms.

5.3 On the merits, the author accepts that the right to freedom of religion may reasonably and justifiably be limited. He does not argue that article 18, paragraph 3, of the Covenant is not applicable to this case. While the State party emphasizes the 'thorough consideration' of the relevant factors by the Constitutional Court, the author points out that the Court's finding was

²¹ See Communication 422/1990, *Aduayom et al v Togo*; and Communication 42/1997, *Lovelace v Canada*, para 13.1: 'The Committee considers that the essence of the present communication concerns the continuing effect of the Indian Act, in denying Sandra Lovelace legal status as an Indian ... This fact persists after the entry into force of the Covenant, and its effects have to be examined, without regard to their original cause.'

²² *Prince v President, Cape Law Society and Others* 2002 2 SA 794 (CC), decided on 25 January 2002, Constitutional Court judgment, para. 31.

narrow, with the Court split 5-4.²³ He contends that the government did not properly consider all the possible forms that an appropriate statutory amendment and administrative infrastructure allowing for a circumscribed exemption could take. Ngcobo J, for the Court minority, noted that the State's representatives did not suggest 'that it would be impossible to address these problems by appropriate legislation and administrative infrastructure'. There is no need to raise the spectre of a 'whole chain of cultivation, import, transport, supply and sale' of cannabis, as all that the complainant requests is that his religious use of cannabis be accommodated within the legislative and administrative scheme of existing legislation. The government did not engage in a consultative process to establish how the author's rights may be accommodated within a workable scheme that does not pose the risks outlined in evidence.

5.4 The author refers to the Committee's General Comment No. 22 on article 18, according to which limitations imposed on the right to practise or manifest one's religion must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. He argues that the laws in question²⁴ are applied in a way that negates the author's right to practice and manifest his religion in as much as the freedom to use cannabis for religious purposes is denied to him.

5.5 The author submits that if exceptions to the prohibition of the use of cannabis could be made for medical and professional purposes and effectively enforced by the State party, exceptions to the prohibition of the use of cannabis could also be made and effectively enforced on religious grounds with no additional burden on the State party. Its failure and unwillingness to exempt the religious use of cannabis from the prohibition of the law negates the author's freedom to manifest his religion guaranteed by article 18, and cannot be not justified under article 18, paragraph 3.

5.6 With respect to article 26, the author reiterates that the current legal position constitutes a *de facto* violation of his right to equality, and the government has a duty to correct that situation. He argues that the law outlawing the possession and use of cannabis applies to 'everyone', and does not single out Rastafarians by name, but in its effect it discriminates against them, because it affects *them* and their religion, not everyone else and their religion²⁵.

5.7 The author argues that it is for the Committee to decide if his rights were reasonably accommodated. If not, a workable exemption clause has to be found – not by the Committee, but by the State party's Executive. In determining the most workable solution, Parliament will have regard to factors such as financial and administrative cost. These considerations may affect the course it chooses, but cannot justify a violation of the Covenant.

²³ The majority judgment is by Chaskalson CJ; with Ackermann J, Kriegler J, Goldstone J and Yacoob J concurring. The minority is that of Ncobo J; with Mokgoro J, Sachs J and Madlanga AJ concurring. Only 9 of the 11 Constitutional Court judges participated in this case.

²⁴ The Drugs and Drug Trafficking Act 140 of 1992 and the Medicines and Related Substances Act 101 of 1965.

²⁵ The author refers to Communication No. 666/1995, *Foin v France*, Views adopted on 3 November 1999, paras 8.3 – 8.8.

5.8 The author contends that as a member of a religious minority, he can invoke article 27, which requires that someone invoking this provision must be a ‘person belonging’ to such a minority. Although the author may not have acted explicitly ‘on behalf of’ all Rastafarians, both the majority and minority judgments of the Constitutional Court indicate that the author is a member of the Rastafarian community, and that the exercise of his religion has strong communal elements.

5.9 Finally, the author submits that the onus is on the State party to prove that the interest of the State outweighs his own. Its mere assertions that a permit system in the author’s favour would be burdensome to enforce is no proof, all the more so since there are already exceptions to the general prohibition of use of cannabis under the State party’s laws. The restriction on the practice of the Rastafari religion occasioned by the State party’s legislation is not reasonable, justifiable or proportionate to the aim of protecting the public in the State party.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

6.2 The Committee notes the State party’s contention that a similar claim filed by the author in the African Commission on Human and Peoples’ Rights was dismissed on the merits in December 2004. However, article 5, paragraph 2 (a), of the Optional Protocol does not constitute an obstacle to the admissibility of the present communication, since the matter is no longer pending before another procedure of international investigation or settlement, and South Africa has not entered a reservation to article 5, paragraph 2, (a), of the Optional Protocol. The clear wording of the provisions of article 5, paragraph 2 (a) militates against the State party’s interpretation in paragraph 4.3 above.

6.3 As to the State party’s argument that the author has failed to exhaust domestic remedies because he has not brought a general challenge of the law before national courts, the Committee notes that the author brought the claim that Rastafarians should be granted a workable exemption from the general prohibition of the possession and use of cannabis up to the Constitutional Court, the highest court in the State party. As this is precisely the claim argued before the Committee, it concludes that the author has exhausted domestic remedies for the purpose of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 The State party has challenged the admissibility *ratione temporis* of the communication, because the facts and applications in domestic courts were completed before the entry into force of the Optional Protocol on 28 November 2002, and because it has not affirmed the relevant provisions in the legislation in question. The Committee recalls that it is precluded from examining alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless these violations continue after that date or continue

to have effects which in themselves constitute a violation of the Covenant²⁶. While the author's complaint was finally decided by the domestic courts before the entry into force of the Optional Protocol, the Committee notes that the author's claims relate to the application of the Drugs and Drug Trafficking Act 140 of 1992 and the Attorneys Act 53 of 1979, which remain in force. The Committee considers that the issue of whether the effects of the challenged legislation, which continue after the entry into force of the Optional Protocol, constitute a violation is an issue closely interwoven with the merits of the case. It is therefore more appropriately examined at the same time as the substance of the author's claims under articles 18, 26 and 27.

6.5 Regarding the State party's reference to the Committee's inadmissibility decision in *M.A.B., W.A.T. and J.A.Y.T. v. Canada*²⁷, the Committee considers that the factual and legal position in the present case can and should be distinguished from that in the Canadian case which, it understood, concerned the activities of a religious organization whose belief consisted primarily or exclusively in the worship and distribution of a narcotic drug. Rastafarianism as a religion within the meaning of article 18 is not an issue in the present case. The Committee concluded that such a belief could not be brought within the scope of article 18 of the Covenant.

6.6 For the above reasons, the Committee concludes that the communication is admissible.

Consideration of merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The author has claimed a violation of his right to freedom of religion, because the impugned law does not make an exemption to allow him to use cannabis for religious purposes. The Committee recalls that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of worship extends to ritual and ceremonial acts giving expression to belief, as well as various acts integral to such acts²⁸. The Committee notes that the material before it is to the effect that the use of cannabis is inherent to the manifestation of the Rastafari religion. In this regard, it recalls that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.

7.3 The Committee observes that the prohibition of the possession and use of cannabis, which constitutes the limitation on the author's freedom to manifest his religion, is prescribed by the law (the Drugs and Drug Trafficking Act 140 of 1992). It further notes the State party's conclusion that the law in question was designed to protect public safety, order, health, morals or

²⁶ See Communication No.24/1977, *Lovelace v. Canada*, Views adopted on 30 July 1981, para.7.3; Communication No. 1367/2005, *Anderson v. Australia*, Decision on Admissibility of 31 October 2006, para. 7.3; and Communication no. 1424/2005, *Anton v. Algeria*, Decision on Admissibility of 1 November 2006, para. 8.3.

²⁷ See para. 4.8 above.

²⁸ See Communication No. 721/1996, *Clement Boodoo v. Trinidad and Tobago*, Views adopted on 2 April 2002, para. 6.6.

the fundamental rights and freedoms of others, based on the harmful effects of cannabis, and that an exemption allowing a system of importation, transportation and distribution to Rastafarians may constitute a threat to the public at large, were any of the cannabis enter into general circulation. Under these circumstances the Committee cannot conclude that the prohibition of the possession and use of drugs, without any exemption for specific religious groups, is not proportionate and necessary to achieve this purpose. The Committee finds that the failure of the State party to grant Rastafarians an exemption to its general prohibition of possession and use of cannabis is, in the circumstances of the present case, justified under article 18, paragraph 3, and accordingly finds that the facts of the case do not disclose a violation of article 18, paragraph 1.

7.4 On the author's claim that the failure to provide an exemption for Rastafarians violates his rights under article 27, the Committee notes that it is undisputed that the author is a member of a religious minority and that the use of cannabis is an essential part of the practice of his religion. The State party's legislation therefore constitutes interference with the author's right, as a member of a religious minority, to practice his own religion, in community with the other members of his group. However, the Committee recalls that not every interference can be regarded as a denial of rights within the meaning of article 27²⁹. Certain limitations on the right to practice one's religion through the use of drugs are compatible with the exercise of the right under article 27 of the Covenant. The Committee cannot conclude that a general prohibition of possession and use of cannabis constitutes an unreasonable justification for the interference with the author's rights under this article and concludes that the facts do not disclose a violation of article 27.

7.5 The author argues that he is the victim of a *de facto* discrimination because unlike others, he has to choose between adherence to his religion and respect for the laws of the land. The Committee recalls that a violation of article 26 may result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds set out in article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds³⁰. In the circumstances of the present case, the Committee notes that the prohibition of the possession and use of cannabis affects all individuals equally, including members of other religious movements who may also believe in the beneficial nature of drugs. Accordingly, it considers that the prohibition is based on objective and reasonable grounds. It concludes that the failure of the State party to provide an exemption for Rastafarians does not constitute differential treatment contrary to article 26.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any articles of the Covenant.

²⁹ See Communication No.24/1977, *Lovelace v. Canada*, Views adopted on 30 July 1981, para. 15.

³⁰ See the Committee's General Comment No. 18 on non-discrimination and Communication No. 998/2001, *Rupert Althammer et al. v. Austria*, Views adopted on 8 August 2003, para. 10.2.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
