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HUMAN RIGHTS COMMITTEE
Fifty-seventh session
8 - 26 July 1996

VIEWS

Communication No. 571/1994

Submitted by:	Eustace Henry and Everald Douglas (represented by counsel)
Alleged victims:	The authors
State party:	Jamaica
Date of communication:	18 May 1993 (initial submission)
Date of adoption of Views:	25 July 1996

On 25 July 1996, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 571/1994. The text of the Views is appended to the present document.

[ANNEX]

*/ Made public by decision of the Human Rights Committee.

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
- FIFTY-SEVENTH SESSION -

concerning

Communication No. 571/1994

Submitted by:	Eustace Henry and Everald Douglas (represented by counsel)
Alleged victims:	The authors
State party:	Jamaica
Date of communication:	18 May 1993 (initial submission)
Date of decision on admissibility:	16 March 1995

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

Meeting on 25 July 1996,

Having concluded its consideration of communication No. 571/1994 submitted to the Human Rights Committee by Messrs. Eustace Henry and Everald Douglas 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, their counsel and the State party,

Adopts the following:

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

1. The authors of the communication are Eustace Henry and Everald Douglas, Jamaican citizens who, at the time of submission of their communication, were awaiting execution at St. Catherine's District Prison, Spanish Town, Jamaica. The authors claim to be victims of violations by Jamaica of articles 6; 7; 9; 10 and 14, of the International Covenant on Civil and Political Rights. They are represented by counsel. Mr Henry died at St. Catherine's District Prison on 12 December 1993.

The facts as submitted by the authors:

2.1 In January 1981, the authors were arrested and charged with the murder of Maria Douglas on 31 July 1980. They remained in custody for two and a half years awaiting trial. On 7 June 1983, the trial against the accused started in the Home Circuit Court, Kingston. On 13 June 1983, the authors were found guilty as charged and sentenced to death. The Court of Appeal of Jamaica dismissed their appeal against conviction on 31 October 1986. Their petition for special leave to appeal to the Judicial Committee of the Privy Council was refused on 26 March 1992. On 18 December 1992, the authors' offence was classified as a capital murder under the Offences against the Person (Amendment) Act 1992. The authors appealed this decision and in April 1995 Mr. Douglas was reclassified as non-capital and sentenced to 15 years of imprisonment.

**/ Pursuant to rule 85 of the rules of procedure, Committee member Laurel Francis did not take part in the adoption of the Views.

2.2 The case for the prosecution was based on the evidence of one eyewitness, the deceased's sister, Elsie Douglas. She testified that she was lying on her bed in the early morning of 31 July 1980, when she saw six men burst in through a door leading to an adjacent room where her mother slept. She recognized the authors among the men. She heard shots from the room and then saw Mr. Douglas going outside, while Mr. Henry entered her room. While she pretended to sleep, she saw Henry holding a gun over her sister and heard the sound of shots. He then went out of sight for about twenty minutes. When he returned, he shot the witness through the face.

2.3 The witness stated that she had known Henry for eighteen years and that she had been able to see him that night for about twenty-five minutes. She had known Douglas for five years and had been able to see him for about ten minutes that night. The illumination came from an electric light bulb in an adjacent room and from a street light which was positioned some 60 or 70 feet from the house but partially obscured by the presence of fruit trees in the yard between the light and the house. The trial transcript reveals that the witness was deeply shocked by the incident and did not recall giving an account of it to a police officer shortly after it occurred.

2.4 The case for the defence was based on alibi. A defence witness, Esmine Witter, testified during the trial that Henry had been with her and her family during the whole of the night of the 31 July 1980. Douglas' common-law wife, Velmina Beckford, testified that her husband had been seriously injured because of gunshot wounds from an incident in June 1980, and that he had not left the house during the night of 31 July 1980. The surgeon who had treated Douglas for the gunshot wounds testified that he had carried out a major operation on him on 20 June 1980, and that he assessed that it would have taken the author four to six weeks to start walking again. A hospital attendant testified that Douglas was discharged from hospital on 1 July 1980, but that he continued to visit for treatment until October 1980 and that he still had difficulties walking then.

The complaint:

3.1 The authors submit that they were being threatened by the police upon their arrest; the police allegedly told them that they would be sent to prison because of their association with the P. N. P., the main political opposition party in Jamaica then. Henry states that during his pre-trial detention of two and a half years, he shared a cell with two other persons, Douglas with four others; they were locked up 20 hours per day. According to Henry, the police, in particular one inspector whom he identifies, subjected him to beatings and electric shocks. Douglas states that he was unable to obtain medication or treatment for the wounds that he suffered in June 1980.

3.2 The authors claim that the trial against them was unfair. They submit that the judge misdirected the jury on the issue of identification, in that he did not deal properly with the question of the quantity and quality of the illumination of the scene of the crime. They further allege denial of justice in that the judge failed to address an unspecified difficulty put to him by the jury. The authors claim that the judge made comments which were unnecessary and highly prejudicial to them. In this context, they note that the judge wrongly directed the jury that the defence's case was based on suggestion of fabrication, which it was not. The judge further allegedly made prejudicial comments on the alibi evidence presented for Henry, challenging the defence witness' memory, and, in his summing-up, wrongly interpreted the surgeon's testimony on Douglas' ability to walk properly. It is also submitted that the judge failed to address the possibility that the prosecution witness' evidence was flawed because of post-traumatic amnesia; in this connection, it is stated that the prosecution witness had made a statement to the police shortly after the incident, of which she has no recollection.

3.3 During the preliminary hearing, Henry was unrepresented, whereas Douglas was represented by a privately retained lawyer, whom he only saw in court. During the trial, the authors were represented by privately retained lawyers. It is alleged that counsel did not consult with them prior to the trial, that they did not discuss the conduct of the case with them during the trial, that they did not show them the written prosecution statements or take instructions from them. Instructions from the authors to call certain witnesses as well as to produce medical evidence were not complied with by counsel. Furthermore, an application to call a certain witness on the issue of the lighting at the crime scene was refused by the judge, who did not wish to adjourn for the purpose of securing the attendance of that witness. A request to the judge for an inspection of the locus in quo was similarly denied. With regard to the appeal, the authors claim that counsel who represented them before the Court of Appeal failed to consult with them before the appeal hearing, at which the authors were not present.

3.4 The authors state that they have been imprisoned on death row for more than 10 years. The long delay and resulting uncertainty caused them severe mental distress. Although Henry has been diagnosed as having cancer, he was being kept alone in an extremely cold cell without adequate food. Douglas still suffers from medical problems caused by the gunshot wounds sustained in 1980. It is alleged that the authors' access to a doctor and medical treatment is being obstructed by the prison authorities.

3.5 The authors claim that their prolonged pre-trial detention violated articles 9, paragraph 3, and 14, paragraph 3(c), of the Covenant. They further claim that the ill-treatment they were subjected to in pre-trial detention, as well as their present conditions of detention, amount to violations of articles 7 and 10 of the Covenant. Finally, the cumulative effect of the delay in carrying out the execution, exacerbated by the classification under the 1992 Act, is said to constitute a breach of article 7.

3.6 The authors allege that the irregularities which occurred during the trial amount to a violation of article 14, paragraph 1, and that the failure of the judge to grant an adjournment for the purpose of obtaining the attendance of a defence witness and to permit an inspection of the locus in quo, constitutes a violation of article 14, paragraph 3(e). They contend that counsels' failure to consult with them and to respect their instructions resulted in a violation of article 14, paragraphs 3(b) and (d). The failure of counsel for the appeal to consult with them, taken together with the fact that the authors were not present during the appeal hearing, is said to constitute a violation of article 14, paragraph 5.

3.7 Finally, the authors invoke a violation of article 6, since they were sentenced to death after a trial during which the provisions of article 14 were not complied with.

3.8 It is submitted that all domestic remedies have been exhausted. The authors observe that they have not filed a constitutional motion, since no legal aid is available in Jamaica for the purpose.

State party's observations on admissibility and counsel's comments thereon:

4.1 By submission of 18 April 1994, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies. It submits that the rights which the authors invoke in their communication are coterminous with rights protected by the Jamaican Constitution and that it is therefore open to the authors to seek redress from the Supreme Court under article 25 of the Constitution. The State party further notes, in respect of the authors' claim that they are victims of a violation of article 6 of the Covenant, that the authors' appeal against the reclassification of their

sentences under the Offences against the Person (Amendment) Act is still pending.

4.2 The State party indicates that it has ordered an investigation into the authors' complaints that they were denied medical attention.

4.3 As to the authors' claim under article 14, paragraph 3(b), of the Covenant, the State party argues that, in the absence of evidence that the State authorities hindered counsel in the preparation of the defence, it cannot be held responsible for the alleged failure of privately retained counsel to consult with their clients.

4.4 As regards the authors' claim that they did not receive a fair trial, the State party notes that the substance of these allegations concern matters of evidence and the instructions given by the judge in relation to the evidence. Invoking the Committee's jurisprudence that matters of evidence are best considered by a State party's appellate tribunals, the State party argues that this allegation concerns issues outside the Committee's jurisdiction.

4.5 The State party rejects the authors' allegation that they are a victim of a violation of article 14, paragraph 5, and affirms that their cases were in fact properly reviewed by the Court of Appeal.

5.1 In his comments, counsel refers to his original communication and states that the constitutional remedy is not available to the authors in their circumstances, since legal aid is unavailable. With regard to the claim under article 6, it is submitted that when the death sentences against the authors were passed, the Offences against the Person (Amendment) Act was not yet enacted. It is argued that this Act cannot retroactively deprive the authors of the protection of article 6.

5.2 As to the authors' complaints of ill-treatment in pre-trial detention, counsel points out that they had no access to legal advice and representation.

5.3 In respect of Mr. Henry's claim that he was denied medical attention, counsel states that Mr. Henry's doctor informed him on 15 April 1993, at Kingston Public Hospital that he had submitted a report to the Governor General of Jamaica, appealing against his continued detention on the basis of his ill-health and the necessity for proper treatment. Counsel argues that no further effective domestic remedy was available to Mr. Henry; in this context, he argues that the abuse of condemned prisoners has been a common occurrence for at least 20 years and that the fear of reprisals prevents prisoners from submitting official complaints. Moreover, it is argued that Mr. Henry, because of his severe illness, depended more than the average prisoner on the good-will of prison staff, thereby reducing the possibility of filing a complaint.

5.4 Counsel states that Mr. Henry died at St. Catherine Prison on 12 December 1993. He claims that throughout the four years of his terminal illness, Mr. Henry was prevented from receiving proper treatment and his condition was exacerbated by the conduct of prison staff and authorities. In this connection, counsel states that Mr. Henry remained in a cell in prison without medical facilities, despite his need for medical care; that he had to find money to pay for his medication, including pain killers and chemotherapy, and that on occasion his supplies were interrupted, causing him additional pain and distress; that his special dietary needs were not met in any way; that the combination of the cold cell, the inadequate treatment and unsuitable food made him feel weak and ill; that medical appointments were obstructed. Counsel states further that prison authorities were aware of his condition and of his special needs, but made no attempt to improve the conditions of his detention in any way. Counsel therefore submits that articles 7 and 10, paragraph 1, of the Covenant were violated in Mr. Henry's case. 1/

The Committee's admissibility decision:

6.1 During its 53rd session, the Committee considered the admissibility of the communication. Regarding the State party's contention that the communication was inadmissible for failure to exhaust domestic remedies, the Committee recalled its jurisprudence that for purposes of article 5, paragraph 2(b), of the Optional Protocol, domestic remedies must be both effective and available. Noting the State party's argument that a constitutional remedy was still open to the authors, the Committee observed that the Supreme Court of Jamaica had, in some cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed. The Committee, however, recalled that the State party had indicated on several occasions 2/ that no legal aid was made available for constitutional motions. It considered that, in the absence of legal aid, a constitutional motion did not constitute an available remedy which needed to be exhausted for purposes of the Optional Protocol.

6.2 The Committee noted that counsel had continued to represent the late Mr. Henry before the Committee. The Committee observed that the issues raised in the initial communication concerning lack of medical treatment and unsatisfactory conditions of detention relate directly to the circumstances of Mr. Henry's death. Noting that counsel had a broad authorization from Mr. Henry to present a communication to the Committee on his behalf, the Committee considered that, in the circumstances, counsel had standing to continue his representation on the pending communication.

6.3 The Committee considered inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, that part of the authors' claim which related to ill-treatment during pre-trial detention. The Committee noted that this claim had never been brought to the attention of the Jamaican authorities, either at the trial, or on appeal, nor in any other way. The Committee referred to its jurisprudence that an author should show reasonable diligence in the pursuit of available domestic remedies. The Committee noted counsel's argument that the authors had no access to legal advice but observed that the authors were represented on trial by a privately retained lawyer, and that no special circumstances existed that prevented them from exhausting domestic remedies in this respect.

6.4 The Committee further considered inadmissible that part of the authors' case relating to the evaluation of evidence, to the instructions given by the judge to the jury and to the conduct of the trial. The Committee reiterated its jurisprudence that it was for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. Similarly, it was not for the Committee to review specific instructions to the jury by the trial judge, unless it could be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice.

6.5 As to the authors' complaint that counsel did not consult with them prior to the trial and did not take instructions from them, the Committee concluded that the State party could not be held accountable for alleged errors made by privately retained counsel, unless it would have been manifest to the judge or the judicial authorities that the lawyer's behaviour was incompatible with the interests of justice. This part of the communication was therefore deemed inadmissible.

6.6 With regard to the authors claim that their right to obtain the attendance and examination of witnesses was violated, because the judge failed to grant an adjournment to call a certain witness, the Committee, having examined the court documents, noted that there was no reference to the defence's request to call this witness, and that the judge, on three

occasions, adjourned the trial in order to give the defence the opportunity to obtain the attendance of another witness. The Committee considered that the authors had failed to substantiate, for purposes of admissibility, that their rights under article 14, paragraph 3(e), had been violated. This part of the communication was deemed inadmissible under article 2 of the Optional Protocol.

6.7 The Committee considered that the claim that Mr.Henry was unrepresented during the preliminary hearings might raise issues under article 14, paragraph 3(d), which should be examined on the merits. It also concluded that the delay between the authors' arrest and the start of their trial, as well as the delay between the conclusion of the trial and the appeal judgment, might raise issues under article 9, paragraph 3; 14, paragraph 3(c), and paragraph 5 juncto 3(c).

6.8 The Committee further considered that the authors' complaint about the conditions of their detention and the circumstances of Mr. Henry's death might raise issues under articles 7 and 10, paragraph 1, of the Covenant, which should be examined on the merits.

7. On 16 March 1995, therefore, the Human Rights Committee declared the communication admissible in as much as it appeared to raise issues under articles 7; 9, paragraph 3; 10, paragraph 1; 14, paragraphs 3(c), (d), and 5 juncto 3 (c), of the Covenant.

State party's submission under article 4 (2) of the Optional Protocol and counsel's comments:

8.1 In a submission dated 18 October 1995, the State party states that with regard to the claim that article 14, paragraph 3 (d), has been violated because Mr. Henry was not represented during the preliminary hearing, the author was entitled to receive legal aid, and if he chose not to exercise his right, failure to do so cannot be attributed to the State party.

8.2 The authors alleged a violation of article 9, paragraph 3, and of 14, paragraph 3 (c) and 5 juncto 3 (c), because of an unreasonably long delay between their arrest and the beginning of their trial, as well as the delay between the conclusion of the trial and the appeal judgment. The State party considers that the two and half years of delay between arrest and trial, during which a preliminary hearing was held, does not constitute "undue delay". It further notes that a period of 3 years and four and a half months between trial and appeal, although undesirably long, cannot be considered to be excessive.

8.3 In a further submission, dated 7 June 1996, the State party notes that Mr Henry died of cancer and that he received regular treatment for his medical condition. It submits that the author received medical attention for various complaints from the Prison medical officer, at Kingston General Hospital, at Spanish Town Health Centre, at Spanish Town Hospital and at the St Jago Dental Clinic. It notes that the records show that these visits took place on 19 July 1985, 24 February and 18 March 1986, 15 April, 21, 22 and 24 November 1989, 11 October 1990, and 7 January 1993 (when the author is diagnosed as having cancer), 2 February, 15 April, 7 and 15 July, 23 August, 14 and 31 October, 10 November, and 6 December 1993. On 12 December 1993, the author died at Kingston Public Hospital. It is stated that the prison records indicate that whenever the author was prescribed a special diet, he received it.

8.4 The State party further submits that Mr. Henry received financial subsistence from relatives who visited him regularly, and if the author chose to spend this subsistence on food and on medication, it was by his own choice and not because the institution failed to provide these to him. Finally, the State party contends that there is no trace of a report from a doctor at

Kingston Hospital requesting that the author's detention regime be modified on the basis of his ill-health. The State party therefore refutes that there has been a violation of articles, 7 and 10 paragraph 1 in respect of the treatment the author received while on death row prior to his death.

8.5 By submission of 4 January 1996, counsel states that as Mr. Henry is deceased, it is impossible to ascertain why he failed to exercise his alleged right to claim legal aid. Counsel assumes that the late Mr. Henry was unable to obtain legal aid for the preliminary hearing, due to the notoriously low remuneration rate for legal aid.

8.6 With respect to the issue of undue delay, counsel reiterates that five and a half years between arrest and appeal is excessive and in violation of articles 9, paragraph 3, and 14, paragraphs 3 (c) and 5 juncto 3 (c).

8.7 In a further submission, dated 10 July 1996, counsel refutes the State party's contention that the author received adequate treatment for his cancer. In this respect counsel contends that by the State party's own admission, the author only began to receive treatment for his cancer in 1993 whereas he had been diagnosed for cancer in 1989, counsel however fails to produce any evidence.

Examination of the merits:

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

9.2 As regards Mr. Henry's claim that he was not represented by legal counsel during the preliminary enquiry, the Committee notes that the State party argues that this was by Mr. Henry's own choice and that the State party cannot be held responsible for Mr. Henry's decision not to engage counsel. Mr. Henry was represented by private counsel during the trial and there is no indication that Mr. Henry's lack of counsel during the preliminary hearing was due to Mr. Henry's inabilility to pay for counsel.

9.3 With respect to the claim of "undue delay" in the judicial proceedings against the authors, two issues arise. The authors contend that their right, under articles 9, paragraph 3 and 14, paragraph 3 (c), to be tried without "undue delay", was violated because two years and six months elapsed between their arrest and the opening of the trial. The Committee reaffirms as it did in its General Comment No 6 [16] on article 14, that all stages of the judicial proceedings should take place without undue delay, and concludes that a lapse of 30 months between arrest and the start of the trial constituted in itself undue delay, and cannot be deemed compatible with the provisions of article 9, paragraph 3, and 14, paragraph 3 (c), of the Covenant, in the absence of any explanation from the State party justifying the delay or as to why the pre-trial investigations could not have been concluded earlier.

9.4 Regarding the delay in the hearing of the appeal, and bearing in mind that this is a capital case, the Committee notes that a delay of 3 years and four and a half months between the conclusion of the trial on 13 June 1983 and the dismissal of the authors' appeal on 31 October 1986, is incompatible with the provisions of the Covenant, in the absence of any explanation from the State party justifying the delay; the mere affirmation that the delay was not excessive does not suffice. The Committee accordingly concludes that there has been a violation of article 14, paragraphs 5 juncto 3 (c), of the Covenant.

9.5 With regard to the authors' claim of ill-treatment on death row, and

in Mr. Henry's case prior to his death, two separate issues arise: the ill-treatment each author was subjected to while detained on death row including, this is, in Mr. Henry's case, being kept in a cold cell after being diagnosed for cancer, and in Mr Douglas' case having medical problems caused by a gunshot wound. These allegations have not been contested by the State party. In the absence of a response from the State party, the Committee must give appropriate weight to these allegations, to the extent that they have been substantiated. In the opinion of the Committee, therefore, the conditions of incarceration under which Mr. Henry continued to be held until his death, even after the prison authorities were aware of his terminal illness, and the lack of medical attention, for the gunshot wounds, received by Mr. Douglas, reveal a violation of articles 7, and 10 paragraph 1, of the Covenant. As to Mr. Henry's claim that he did not receive adequate medical attention for his cancer, the State party has forwarded a report which shows that the author did visit various hospitals and received medical treatment for his cancer, including chemotherapy. With regards to the contention of counsel for Mr Henry that the author's cancer had been diagnosed in 1989 rather than in 1993, as asserted by the State party, the Committee concludes that counsel for Mr. Henry has failed to produce any evidence to support the contention advanced. In this respect the Committee finds that there has been no violation of articles 7 and 10, paragraph 1, of the Covenant on this count.

10. 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 disclose violations of articles 7; 9, paragraph 3; 10, paragraph 1, and 14, paragraphs 3 (c) and 5 juncto 3 (c), of the Covenant with respect to both authors.

11. In capital punishment cases, the obligation of States parties to observe rigorously all guarantees for a fair trial set out in article 14 of the Covenant admits no exceptions. The delays in the proceeding constitute a violation of article 14 paragraphs 3 (c), and 5 juncto 3 (c) of the Covenant; thus Eustace Henry and Everald Douglas did not receive a fair trail within the meaning of the Covenant. Consequently, they are entailed, under article 2, paragraph 3 (a), of the Covenant to an effective remedy. The Committee has taken note of the commutation of Mr Douglas' death sentence, but is of the view that in the circumstances of the case, the remedy should be the author's early release. In the case of Mr. Henry, the remedy should entail compensation to the author's family. The State party is under an obligation to ensure that the similar events do not occur in the future.

12. Pursuant to article 2, paragraph 3 (a) of the Covenant, Mr. Douglas is entitled to an effective remedy, entailing compensation, for the conditions of his detention, in particular, for the inadequate medical attention he received. The Committee reaffirms that the obligation to treat individuals deprived of their liberty with respect for the inherent dignity of the human person encompasses the provision of adequate medical care during detention; this obligation, obviously, extends to persons under sentence of death. The State party is under an obligation to ensure that the similar events do not occur in the future.

13. Bearing in mind, that by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

Notes

1/ In this context, counsel refers to articles 9, 19, 21, 25 and 26 of the Standard Minimum Rules for the Treatment of Prisoners and to the Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment.

2/ See e.g. communications No. 283/1988 (Aston Little v. Jamaica), Views adopted on 1 November 1991; No. 321/1988 (Maurice Thomas v. Jamaica), Views adopted on 19 October 1993; No. 352/1989 (Douglas, Gentles and Kerr v. Jamaica), Views adopted on 19 October 1993.

[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.]