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Title/Style of Cause: Gary T. Graham v. United States
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Decided by: Chairman: Helio Bicudo;
Second Vice-Chairman: Juan Mendez;
Commissioners: Marta Altolaguirre, Peter Laurie, Julio Prado Vallejo
Commission Members Profs. Claudio Grossman, First Vice-Chairman, and Robert Goldman did not take part in the discussion and voting on this case, pursuant to Article 19(2) of the Commission's Regulations.
Dated: 15 June 2000
Citation: Graham v. United States, Case 11.193, Inter-Am. C.H.R., Report No. 51/00, OEA/Ser.L/V/II.111, doc. 20, rev. (2000)
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I. SUMMARY

1. On April 26, 1993, the Inter-American Commission on Human Rights (the “Commission”) received a petition from the International Human Rights Law Clinic at the Washington College of Law, American University (the “Petitioners”) against the Government of the United States (the “State” or “United States”). The petition was presented on behalf of Mr. Gary Graham, now known as Shaka Sankofa (“Mr. Sankofa” or “Sankofa”), who is incarcerated on death row in the state of Texas. The petition stated that in October 1981, Mr. Sankofa was convicted of a May 1981 homicide in the state of Texas and sentenced to death, and that he was scheduled to be executed on April 29, 1993. Mr. Sankofa's execution was subsequently stayed on several occasions as a consequence of various domestic legal proceedings. As of the date of this Report, Mr. Sankofa was again scheduled to be executed on June 22, 2000, following the denial by the U.S. Supreme Court on May 1, 2000 of his most recent petition for a writ of certiorari.

2. In their initial petition and subsequent observations, the Petitioners claim that Mr. Sankofa has brought three applications for writs of habeas corpus in the Texas state courts and four applications for writs of habeas corpus in U.S. federal courts, alleging, inter alia, ineffective assistance of counsel at trial and evidence of his innocence, and that none of these applications has been successful. The Petitioners also claim that Mr. Sankofa has been precluded under domestic law from filing additional habeas corpus applications in state or federal courts. Accordingly the Petitioners contend that Mr. Sankofa has exhausted domestic remedies, and alternatively that he falls under the exceptions to the exhaustion of domestic remedies rule prescribed in Article 37(2) of the Commission's Regulations. The State has argued conversely

that domestic remedies remain under state and federal law for Mr. Sankofa to exhaust, and therefore that the Commission should declare the Petitioners' petition to be inadmissible.

3. With respect to the substance of their petition, the Petitioners allege that the State is responsible for violations of Mr. Sankofa's right to life and his right to equality before the law under Articles I and II of the American Declaration of the Rights and Duties of Man (the "American Declaration"), because he was 17 years of age at the time of the offense for which he was convicted and sentenced to death. The Petitioners also claim that the State has violated Mr. Sankofa's right to a fair trial and to due process of law under Articles XVIII and XXVI of the American Declaration, because Mr. Sankofa has been denied a forum for any legal body to review identification and other evidence that suggests that he is innocent of the crime for which he has been condemned. The Petitioners allege further violations of Articles XVIII and XXVI of the Declaration on the basis that Mr. Sankofa was denied effective assistance of counsel at trial. Finally, the Petitioners allege violations of Mr. Sankofa's right not to be subject to torture or cruel, infamous or unusual punishment under Article XXVI of the American Declaration because of the delay in his execution. The State denies these allegations, on the basis, inter alia, that domestic courts have reviewed Mr. Sankofa's evidence of ineffective assistance of counsel and innocence, that this evidence does not substantiate Mr. Sankofa's allegations that he was denied a fair trial or that he is innocent, and that U.S. constitutional law allows for the execution of offenders who were 16 years of age or older at the time of their crimes.

4. As set forth in this Report, having examined the information and arguments provided by the parties on the question of admissibility, and without prejudging the merits of the matter, the Commission decided to admit the present petition, and continue with the analysis of the merits of the case. The Commission also decided to reiterate its request under Article 29(2) of its Regulations that the State take all necessary measures to ensure that Mr. Sankofa's execution is stayed pending the Commission's investigation of the matter.

II. PROCEEDINGS BEFORE THE COMMISSION

5. Following the lodging of the Petitioners' initial petition dated April 26, 1993, the Commission by note dated April 27, 1993 requested that the Governor of the State of Texas stay Mr. Sankofa's execution pending a full investigation into the factual allegations raised by him. By note of the same date, the Commission provided the State with a copy of its communication to the Governor of Texas.

6. By communication dated May 5, 1993, the Petitioners provided the Commission with a copy of a Proclamation dated April 28, 1993 from the Governor of Texas by which she exercised her power under the Constitution of Texas to grant one 30-day reprieve of Mr. Sankofa's execution. The Petitioners also informed the Commission that a new execution date had been set for June 3, 1993, and indicated that further emergency intervention by the Commission was not necessary at that time.

7. By note dated June 1, 1993, the Commission again requested that the Governor of Texas stay Mr. Sankofa's execution scheduled for June 3, 1993, pending a full investigation into the factual allegations raised by him. The Commission subsequently received information that on or

about June 3, 1993, the Texas Court of Criminal Appeals granted Mr. Sankofa a stay of execution pending a decision by the United States Supreme Court in another death penalty case, *Dorsie Johnson v. State of Texas*, relating to the constitutionality of the treatment of youth as a mitigating circumstance in the Texas capital sentencing process.

8. On or about August 5, 1993, additional observations were delivered to the Commission on Mr. Sankofa's behalf by his Texas attorney. Included with the observations were documents setting forth the procedural history of Mr. Sankofa's criminal case. The observations indicated that Mr. Sankofa's execution was scheduled for August 17, 1993, and contended that his execution would violate international law and standards, because he was innocent of the capital offense for which he was sentenced to death. The observations referred in this regard to exculpatory eyewitness evidence, and indicated that Mr. Sankofa had been denied a forum by any legal body to review this evidence. The observations also indicated that Mr. Sankofa was 17 years of age when he was accused of the capital offense.

9. On August 11, 1993, the Commission decided to open Case No. 11.193, and transmitted the pertinent parts of the Petitioners' petition to the State, together with copies of all prior documentation forwarded to the State and the Governor of Texas with respect to the matter, and requested information from the State on the petition within 90 days as established by the Commission's Regulations. Also by note of the same date, the Commission requested that the Governor of Texas stay Mr. Sankofa's execution pending a full inquiry into the factual allegations raised by him.

10. By note dated August 12, 1993, the Governor of Texas informed the Commission that, having expended the single temporary reprieve that she was authorized to grant under the Texas Constitution, she was without power to grant further clemency unless the 18-member Texas Board of Pardons and Paroles made a clemency recommendation. The Governor also indicated that the issue of what type of clemency review by the Board would be held was the subject of a civil suit in the domestic courts, and therefore it was not clear whether Mr. Sankofa's execution would be further delayed.

11. By note dated August 16, 1993, the State responded to the Commission's August 11, 1993 note by indicating that a copy of the Commission's correspondence and pertinent documents had been forwarded to the Governor of Texas by facsimile transmission on August 13, 1993, and that the State would inform the Commission as soon as it received a response from Texas regarding the information requested in the Commission's letter.

12. In a communication dated September 14, 1993, the Petitioners requested a hearing in Mr. Sankofa's case during the Commission's next session. By notes dated September 16, 1993, the Commission informed the Petitioners and the State that a hearing had been set in the matter for October 4, 1993 during the Commission's 84th Period of Sessions.

13. By note received by the Commission on October 4, 1993, the State responded to the Commission's September 16, 1993 communication. In its note, the State provided the Commission with a communication dated September 21, 1993 from the Office of the Attorney General of the State of Texas, which contained observations on the admissibility and substance

of the Petitioners' petition. The State also indicated that, given that a request by Mr. Sankofa for clemency or a reprieve was pending before the Texas Board of Pardons and Paroles and was the subject of a civil law suit in the state courts in Texas, the Petitioners had not exhausted domestic remedies, and therefore that the petition was inadmissible. Further, the State indicated that a representative would attend the Commission's October 4, 1993 hearing for the purposes of observing but understood that, as the time had not expired for the State to respond to the petition, the Commission would not reach any conclusions on the case until the State responded or the time for doing so expired.

14. The hearing before the Commission proceeded on October 4, 1993, with representatives of the Petitioners and the State in attendance. At the hearing, the Petitioners provided the Commission and the State with additional written observations dated October 4, 1993, and the Petitioners were provided with a copy of the State's October 4, 1993 communication and the observations from the Office of the Attorney General of the State of Texas attached thereto. Also during the hearing, the Petitioners asked the Commission to adopt precautionary measures pursuant to Article 29(2) of its Regulations, requesting, inter alia, that the State ensure that Mr. Sankofa was afforded a fair hearing before the Texas Board of Pardons and Paroles, and that the State urge the Board to recommend that he be pardoned of the capital offence of which he was convicted.

15. Also during its 84th Period of Sessions, the Commission decided to request precautionary measures from the State in Mr. Sankofa's case, pursuant to Article 29(2) of the Commission's Regulations and the Petitioners' request during the October 4, 1993 hearing. In its request for precautionary measures, the Commission noted that Mr. Sankofa was 17 years of age at the time of the commission of the offense for which he was sentenced to death, that Mr. Sankofa's case dealt with the most important right, the right to life, and that a mistake on the part of authorities could result in irreparable harm. On this basis, and without prejudice to the final decision in the case, the Commission called upon the State to take the necessary measures to ensure that Mr. Sankofa was afforded a hearing before the Texas Board of Pardons and Paroles. The Commission also requested that the Governor of Texas and the State ensure that the death sentence not be carried out on Mr. Sankofa, for humanitarian reasons and to avoid irreparable harm. The Commission transmitted the precautionary measures to the State and to the Petitioners by communications dated, respectively, October 27, 1993 and October 29, 1993.

16. On October 11, 1993, the Petitioners delivered to the Commission observations respecting the September 21, 1993 communication of the Attorney General for the State of Texas. By note dated October 28, 1993, the Commission transmitted the pertinent parts of the Petitioners' observations to the State, with a response requested within 30 days.

17. By note dated January 11, 1994, the Commission reiterated its request that the State provide information concerning Mr. Sankofa's case, and called for a response within 30 days.

18. The State responded by note dated February 10, 1994, in which it indicated that knowledgeable authorities in Texas had informed the State that Mr. Sankofa's matter was still before the U.S. courts, as oral arguments in Mr. Sankofa's civil suit had been heard on December 1, 1993 with no decision yet issued. The State also indicated that Mr. Sankofa had filed a new

request for habeas corpus relief in federal district court, which was denied on August 13, 1993, and that he had appealed that decision to the U.S. Court of Appeals for the Fifth Circuit. The State therefore argued that Mr. Sankofa had not exhausted domestic remedies available with respect to the subject matter of the petition, and that the petition was therefore inadmissible. The State also reserved the right to address the substance of the petition if there was a need to do so. The Commission transmitted the pertinent parts of the State's observations to the Petitioners, with a response requested within 30 days.

19. By communication dated March 24, 1994, the Petitioners requested an extension of time of two weeks within which to respond to the State's February 10, 1994 observations. The Commission granted the Petitioners' request by note dated March 29, 1994. In a communication dated April 11, 1994, the Petitioners delivered a response to the State's observations, in which the Petitioners argued, *inter alia*, that their petition was admissible because Mr. Sankofa had exhausted domestic remedies, and alternatively that the Petitioners should be exempt from the requirement of exhaustion of domestic remedies because the legislation in Texas makes such an attempt futile. The Commission transmitted the pertinent parts of the Petitioners' response to the State by note dated April 20, 1994, with a response requested within 30 days.

20. The State delivered observations on the Petitioners' March 24, 1994 response by note dated May 25, 1994. In its observations, the State argued that Mr. Sankofa's case was still pending before the State's domestic courts. The State also indicated that a recent decision of one of these courts, *Holmes et al. v. Third Court of Appeals*, 1994 W.L. 135476 (Tex. Crim. App., April 20, 1994), opened an avenue previously closed to Mr. Sankofa and allowed him to assert his claim of innocence. By note dated June 7, 1994, the Commission transmitted the pertinent parts of the State's observations to the Petitioners, with a response requested within 30 days.

21. By communication dated July 12, 1994, the Petitioners delivered a response to the State's May 25, 1994 observations. In this communication, the Petitioners reiterated their position that their petition was not inadmissible for failure to exhaust domestic remedies, and that the case should be considered to fall under the exceptions to exhaustion in Articles 37(2)(a) and 37(2)(b) of the Commission's Regulations. Further, without making any concessions as to the admissibility of their petition, the Petitioners asked that the Commission take no further action in the case until after the resolution of Mr. Sankofa's appeal to the Fifth Circuit U.S. Court of Appeals and the hearing that he might ultimately be accorded under the *Holmes* decision. By communication dated July 19, 1994, the Commission transmitted the pertinent parts of the Petitioners' observations to the State, with a response requested within 30 days.

22. In a note dated September 19, 1994, the State responded to the Petitioners' July 12, 1994 observations. In its response, the State argued that the Commission was obliged to respect its Regulations, which required the dismissal of petitions filed in cases where the remedies available under domestic law have not been exhausted. The State contended further that, as Mr. Sankofa appeared to "concede" that he had not yet exhausted domestic remedies available under United States federal and state law, the Commission should dismiss the petition forthwith.

23. By communication dated November 30, 1995, the Commission requested that the Petitioners provide it with information concerning the status of Mr. Sankofa's case in the United

States domestic courts. In a communication dated March 27, 1996, the Petitioners indicated that they were considering the Commission's request and would send a response to the Commission at the completion of their research on the status of the domestic proceedings.

24. Subsequently, in a response dated March 8, 1999, the Petitioners informed the Commission that Mr. Sankofa had taken the Muslim name Shaka Sankofa, and that he had fully exhausted all available domestic relief available to him as of February 25, 1999, when the Fifth Circuit U.S. Court of Appeals barred him from further pursuit of habeas corpus relief by application of the State's Anti-Terrorism and Effective Death Penalty Act ("AEDPA") of 1996. Further, the Petitioners indicated that they anticipated that a new warrant of execution would be issued within four to five weeks, with an execution dated set between April 10 and May 10, 1999. The Petitioners therefore requested the Commission to issue precautionary measures, or alternatively to schedule an emergency hearing in the matter.

25. By letter dated August 30, 1999, the Petitioners requested a hearing in Mr. Sankofa's case, during the Commission's October 1999 Period of Sessions. The Commission informed the Petitioners by note dated August 31, 1999 that due to the large amount of requests for hearings during the Commission's 104th Period of Sessions, it would not be able to accede to their request.

26. By letter dated November 24, 1999, the Petitioners again requested a hearing in Mr. Sankofa's case, during the Commission's February 2000 Period of Sessions. The Commission informed the Petitioners by note dated February 4, 2000 that, due to the large amount of requests for hearings during the Commission's 106th Period of Sessions, it would not be able to accede to their request for a hearing. The Commission also informed the Petitioners that, by communication dated February 4, 2000, it had reiterated to the State the Commission's October 1993 request for precautionary measures. Finally, the Commission requested that the Petitioners provide it with any additional information relevant to the case, following which the Commission would proceed to consider the admissibility and, if necessary, the merits of the case.

27. Correspondingly, by communication dated February 4, 2000, the Commission reiterated to the State the Commission's October 1993 request for precautionary measures. Further, the Commission requested that the State provide it with any additional information relevant to the case, following which the Commission would proceed to consider the admissibility and, if necessary, the merits of the case.

28. In a communication dated March 10, 2000, the Petitioners provided the Commission with additional observations on the admissibility and merits of their case. The Petitioners also indicated that Mr. Sankofa could face execution as soon as May 2000. By note dated March 13, 2000, the Commission transmitted the pertinent parts of the Petitioners' observations to the State, with a response requested within 30 days.

29. On or about May 23, 2000, the Commission received information that Mr. Sankofa's application for a writ of certiorari before the U.S. Supreme Court had been dismissed on May 1, 2000, and that his execution had been scheduled for June 22, 2000.

III. POSITIONS OF THE PARTIES

A. POSITION OF THE PETITIONERS

30. In relation to the admissibility of their complaint, the Petitioners claim that Mr. Sankofa has exhausted his domestic remedies in the United States, as required under Article 37(1) of the Commission's Regulations. Alternatively, they argue that Mr. Sankofa should be considered exempt from the requirement to exhaust domestic remedies under the terms of Article 37(2) of the Commission's Regulations.

31. More particularly, as of their most recent March 10, 2000 observations, the Petitioners allege that Mr. Sankofa has exhausted all domestic relief and is procedurally barred from any further relief under federal and state law. In this regard, the procedural history of Mr. Sankofa's criminal proceedings in the U.S. state and federal courts, as described by the Petitioners, can be summarized as follows:

October 1981 - Mr. Sankofa was convicted of capital murder and sentenced to death for the shooting death of Bobby Grant Lambert in a Safeway parking lot in Houston at 9:30 p.m. on May 13, 1981. Mr. Sankofa was 17 years of age at the time of the offense. The prosecution's case rested on the evidence of one of the eyewitnesses to the crime, Ms. Bernadine Skillern, who identified Mr. Sankofa as the perpetrator in a line up and at trial. The prosecution also relied upon evidence that the caliber of the lethal bullet matched that of a gun found in Mr. Sankofa's possession at the time of his arrest.

July 1987 - Mr. Sankofa brought the first of three applications for a writ of habeas corpus in the state courts in Texas, alleging ineffective assistance of counsel at trial, that Mr. Sankofa was not mentally competent to be executed, and that the capital punishment scheme in Texas was constitutionally defective. This application was denied by the Texas court following an evidentiary hearing in February 1988.

February 1988 - Mr. Sankofa brought the first of three applications for a writ of habeas corpus in the federal courts, based upon essentially the same grounds argued in his first habeas application in the state courts. The federal district court adopted the state court's findings without an evidentiary hearing and denied the writ. The U.S. Court of Appeals for the Fifth Circuit, the federal reviewing court, affirmed the district court's determination. The United States Supreme Court, however, reversed this finding and remanded the case for reconsideration of whether the Texas capital sentencing scheme adequately considered youth as a mitigating factor in sentencing. The Fifth Circuit ultimately determined that Texas had sufficiently considered youth as a mitigating factor in Mr. Sankofa's case, and reinstated its prior mandate affirming the district court's dismissal of his habeas petition.

April 1993 - Mr. Sankofa brought his second state application for a writ of habeas corpus, again alleging that he received ineffective assistance of counsel at trial and that the punishment issues raised at trial did not allow for adequate consideration of youth as a mitigating factor. Mr. Sankofa also alleged that he was innocent, and relied in this regard upon several new affidavits of eyewitnesses who disputed trial witness Bernadine Skillern's identification of Mr. Sankofa as

the shooter. In addition, the Petitioners provided an affidavit from an investigator retained by Mr. Sankofa's trial counsel which suggested that the trial attorney did not conduct a thorough factual investigation or present the exculpatory testimony of witnesses. In April 1993, the Texas state court made supplementary findings of fact without holding an evidentiary hearing and denied relief, and the Texas Court of Criminal Appeals adopted the findings and denied habeas relief. Mr. Sankofa filed an application for a writ of certiorari in respect of this decision in the U.S. Supreme Court, which was denied by that Court in May 1993.

April 1993 - also in April 1993, Mr. Sankofa filed his second federal habeas corpus application. He voluntarily withdrew this application, however, after the Governor of Texas granted him a 30-day reprieve on April 29, 1993 in connection with his executive clemency proceedings.

July 1993 - Mr. Sankofa brought his third application for a writ of habeas corpus in the federal courts, claiming ineffective assistance of counsel and actual innocence. In this regard, Mr. Sankofa presented new evidence that was not presented to the state courts, including: the affidavits of two eyewitnesses who were never contacted by Mr. Sankofa's trial lawyers; an affidavit corroborating the affidavit of one of the alibi witness that had previously been determined to be "not credible" by the state habeas judge, and two reports by psychologists who had reviewed the statements and affidavits of witnesses and concluded that Ms. Skillern's identification of Mr. Sankofa was unreliable. The Petitioners also provided a Houston Police Department Firearms Report of May 1981 which indicated that the firearm confiscated from Mr. Sankofa upon his arrest was not the firearm used to shoot Bobby Lambert. The district court held that the new evidence did not meet the "actual innocence" threshold established by the U.S. Supreme Court's in the case *Herrera v. Collins* 113 S. Ct. 853 (1993) and adopted the Texas court's finding that Mr. Sankofa did not have ineffective assistance of trial counsel. On appeal from that decision, the U.S. Court of Appeals for the Fifth Circuit dismissed Mr. Sankofa's appeal without prejudice in August 1996, on the basis that he had failed to exhaust state remedies respecting the new evidence presented, pursuant to 18 U.S.C. §254 (b) and (c). On remand, the federal district court dismissed Mr. Sankofa's claim for failure to exhaust state remedies.

April, May and August 1993 - Mr. Sankofa sought and was denied clemency by the Texas Board of Pardons and Paroles on April 26, 1993 and May 25, 1993. In August 1993 a state district court held that the Texas Board of Pardons and Paroles was required to hold an adversarial hearing on Mr. Sankofa's clemency application. Subsequently, in April 1994, the Texas Board of Pardons and Paroles denied Mr. Sankofa a hearing on his case despite the state district court's August 1993 order, and denied clemency. Mr. Sankofa appealed to the Texas Court of Appeals, which enjoined his execution pending the appeal. In April 1994, the Texas Court of Criminal Appeals held that the Texas Court of Appeals did not have jurisdiction to issue a temporary injunction and that appropriate relief for Mr. Sankofa was through state habeas relief. Subsequently, in June 1994, the state court determined that Mr. Sankofa was not entitled to a clemency hearing before the Board. The Texas Court of Appeals affirmed the state district court's decision on appeal in January 1996, holding that Mr. Sankofa's prior state habeas review satisfied his right to a hearing and that he was not entitled to a full clemency hearing.

April 1998 - Mr. Sankofa brought a third application for a writ of habeas corpus in state courts, in which he presented three new affidavits and the same evidence previously presented to the

courts, and raised the same issues that he had raised in his third federal habeas application. He also argued that the state of Texas had violated his Eighth and Fourteenth Amendment rights by sentencing him to death for a crime committed when he was 17 years old without a pre-trial determination that he was competent to be tried as an adult, and that his youth had not been sufficiently considered by the court as a mitigating factor in sentencing. On appeal, in November 1998, the Texas Court of Criminal Appeals dismissed his application as an abuse of process pursuant to a new 1995 Texas law.

December 1998 - Mr. Sankofa brought a fourth application for a writ of habeas corpus in federal courts, in which he raised the same issues that he raised in his third state habeas application. The district court dismissed for lack of jurisdiction pursuant to the AEPDA, under the terms of which Mr. Sankofa was required to obtain permission from the Fifth Circuit to file a "successive" habeas application. In January 1999, Mr. Sankofa filed a motion for a stay of execution, a notice of appeal from the dismissal of his fourth habeas application and a request for recall of his 1996 habeas case. On January 8, 1999, the U.S. Court of Appeals for the Fifth Circuit granted a stay of execution. However, in February 1999, the Fifth Circuit denied Mr. Sankofa permission to file a successive federal habeas application in the district court under the AEDPA, and held that the AEDPA applied to Mr. Sankofa because, inter alia, his re-filed post-exhaustion application before the Court was not a "continuation" of his third federal habeas application because the third application had been dismissed in 1996 without prejudice for lack of exhaustion. The Court also refused to recall its 1996 mandate, on the basis that the AEDPA applied to the motion to recall because the Court itself had not done so sua sponte.

March 11, 1999 - Mr. Sankofa's counsel filed a petition for a rehearing en banc in the Fifth Circuit, which was subsequently denied

October 1999 - Mr. Sankofa submitted a petition for a writ of certiorari to the U.S. Supreme Court in respect of the Fifth Circuit's February 1999 decision, which was outstanding as of the Petitioners' March 10, 2000 observations, and was subsequently dismissed on May 1, 2000.

32. In light of the procedural history of Mr. Sankofa's case, the Petitioners argue that Mr. Sankofa has exhausted available domestic remedies, based upon an application of the exhaustion rule that considers the human rights context of the Petitioners' case. In this regard, the Petitioners emphasize the reasoning behind the principle of exhaustion, that "a State should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility [could] be called into question at the international level"[FN1], and claim that this principle was designed within the context of the law of state responsibility for injuries to aliens and the practice of diplomatic protection, and not within the context of redressing human rights abuses.

[FN1] Petitioners' March 10, 2000 observations, pp. 14-15, citing A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Human Rights 1* (Cambridge University Press 1983).

33. Essentially, the Petitioners argue that the rationale for strict application of the domestic remedies rule in the context of international law does not logically apply to the human rights context. Further in this regard, the petitioners cite the exceptional nature of a capital case that must be considered in applying the exhaustion of domestic remedies rule. They claimed in Mr. Sankofa's case in particular that it was statistically unlikely that the U.S. Supreme Court would grant certiorari on his claim, and that if the Commission waited for the Supreme Court to determine Mr. Sankofa's writ of certiorari and he was unsuccessful, his execution date would be set quickly thereafter. Consequently, according to the Petitioners, if the Commission waits until the last moment to declare the petition admissible and then decide the merits, Mr. Sankofa "is sure to lose the opportunity to benefit from the Commission's decision."

34. Alternatively, the Petitioners argue that Mr. Sankofa falls within the three exceptions to the exhaustion of domestic remedies rule set out in Article 37(2) of the Commission's Regulations. They argue first that a new Texas habeas law enacted in 1995, as well as the federal AEDPA of 1996, make an attempt to exhaust remedies "futile" because they prevent Mr. Sankofa from filing successive habeas corpus petitions in the federal and state courts. Consequently, the Petitioners argue that Mr. Sankofa is not afforded due process to protect the rights allegedly violated in his petition, as provided for under Article 37(2)(a) of the Commission's Regulations.

35. Further, the Petitioners argue that there has been unwarranted delay in determining the Petitioners' case, as provided for under Article 37(2)(c) of the Commission's Regulations, so as to render international action in support of Mr. Sankofa ineffective. In particular, the Petitioners allege that the federal and state courts have unduly delayed rendering a judgment in Mr. Sankofa's case by retroactively imposing procedural bars through the 1995 Texas habeas law and the 1996 federal AEDPA that deprive Mr. Sankofa of due process. The Petitioners note in this regard that these laws were passed during the two-year delay in the rendering of judgment by the Fifth Circuit on Mr. Sankofa's third federal habeas application. Essentially, the Petitioners argue that nineteen years after his conviction, Mr. Sankofa is effectively barred from habeas corpus relief and the right to present new evidence of his innocence before an unbiased court of law in the State. Consequently, the Petitioners argue that the Fifth Circuit U.S. Court of Appeals' February 25, 1999 decision on Mr. Sankofa's fourth habeas corpus application constitutes complete exhaustion of domestic relief in his case.

36. The Petitioners also argue that Mr. Sankofa is legally prohibited from pursuing the remedy that he now seeks before the Commission as provided for under Article 37(2)(b) of the Commission's Regulations, because procedurally he is barred from raising the issue of his innocence under a Texas law that requires that a motion for a new trial based upon newly-discovered evidence of innocence to be filed within 30 days of conviction. They also note that the Texas Constitution prevents the Governor of that State from granting more than one stay of execution in the absence of a recommendation by the Texas Board of Pardons and Paroles. The Petitioners therefore suggest that domestic remedies are not effectively available.[FN2]

[FN2] Petitioners' March 10, 2000 observations, pp. 20-21, citing Eur. Court H.R., De Wilde, Oomas and Versyp Cases, 10 June 1971, Publ. E.C.H.R. Ser. A, Vol.12, p. 34, para 37.

37. Finally, the Petitioners contend that in filing his petition, Mr. Sankofa deferred to State authority for as long as he reasonably could, thereby giving "extreme deference" to the domestic courts, and that the State is using the exhaustion rule as an "escape clause" by forcing Mr. Sankofa to be on the brink of death before he might qualify for redress before the Commission. They also note that Mr. Sankofa's petition for a writ of certiorari before the U.S. Supreme Court would not itself provide Mr. Sankofa with a full and fair evidentiary hearing on the question of his innocence, and therefore did not bar the presentation to the Commission of a petition which seeks this very relief.

38. With respect to the substance of their complaints against the State, the Petitioners raise several claims. First, they argue that the State has violated Mr. Sankofa's right to prove his innocence implicit in Articles XVIII and XXVI of the American Declaration[FN3] by denying his right to a fair trial and due process of law. In particular, they claim that the federal and state courts have denied Mr. Sankofa a fair hearing in which he could present exculpatory evidence, including evidence that was proffered, but not substantively considered, in his third state and third federal habeas applications. As indicated previously, this evidence includes ballistics tests that reveal that the fatal bullet was not fired from Mr. Sankofa's gun. It also includes evidence from other eyewitnesses to the crime that is said to impugn Bernadine Skillern's identification of Mr. Sankofa as the shooter and demonstrate the ineffectiveness of Mr. Sankofa's trial counsel. For example, according to the Petitioners, of eight eye witnesses to the crime, only three testified at trial. Of these, two did not identify Mr. Sankofa in a line up and were not asked at trial whether Mr. Sankofa was the gunman or whether they had identified him in a line up. Of the five remaining witnesses who did not testify, the Petitioners indicate that only one identified Mr. Sankofa in a line up and three are confident that Mr. Sankofa was not the gunman. Further, the Petitioners claim that six of the eight eyewitnesses estimated the height of the assailant to be under Mr. Sankofa's height of five feet, six inches. The Petitioners also refer to evidence from an investigator retained by the defense that both he and Mr. Sankofa's lawyer assumed Mr. Sankofa's guilt and therefore undertook no investigation of his guilt or innocence.

[FN3] Articles XVIII (right to a fair trial) and XXVI (right to due process of law) of the American Declaration provide as follows:

XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

XXVI. Every accused person is presumed to be innocent until proven guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

39. Also based upon this evidence, the Petitioners claim that Articles XVIII and XXVI of the Declaration have been violated because, due to the ineffective assistance of trial counsel, Mr.

Sankofa never received a fair opportunity to present his case during his trial, and has been barred from doing so in subsequent proceedings.

40. Further, relying in part upon this Commission's decision in *Andrews v. United States*,^[FN4] the Petitioners argue that the delay in Mr. Sankofa's execution in and of itself constitutes a violation of Article XXVI of the Declaration, the right not to be subjected to cruel, infamous or unusual punishment. The Petitioners emphasize in this regard that Mr. Sankofa was sentenced at the age of seventeen years and has been imprisoned on death row for nineteen years, and contend that these factors suggest that the treatment to which Mr. Sankofa has been subjected constitutes cruel, infamous or unusual punishment. In support of their claim, the Petitioners rely upon the jurisprudence of the European Court of Human Rights in the case *Soering v. United Kingdom*,^[FN5] in which that Court precluded the extradition of a German national to the United States for prosecution on a capital charge committed when the victim was eighteen years of age. The Court's decision was based in part upon evidence of the effects of extended periods of time on death row in extreme conditions, taken together with the age and mental state of the applicant.

[FN4] I/A Comm. H.R., *Andrews v. United States*, Case No. 11.139, Res. 57/96, 19 February 1998.

[FN5] Eur. Court H.R., *Soering v. United Kingdom*, 11 E.H.R.R. 439 (1989).

41. The Petitioners argue further in this regard that Mr. Sankofa has been subjected to cruel, infamous or unusual punishment under Article XXVI of the American Declaration so severe as to be classified as torture, which the Petitioners claim is implicitly prohibited under Article XXVI of the Declaration. In particular, they contend that a condemned person suffers "undue psychological torture" awaiting execution of a death sentence, and cite judicial decisions in the United States and several other common jurisdictions in support of this proposition.^[FN6]

[FN6] Petitioners' March 10, 2000 observations, p. 29, citing, inter alia, concurring opinion of Brennan J. in *Furman v. Georgia*, 408 U.S. 238 (U.S.S.C.); *Vatheeswaran v. State of Tamil Nadu*, 2 S.C.R. 348 (India 1983).

42. Finally, the Petitioners argue that the State has violated Mr. Sankofa's rights to life, liberty and security of the person and of equality before the law under Articles I and II of the Declaration,^[FN7] based upon the fact that Mr. Sankofa was under eighteen years of age at the time of the commission of the crime for which he has been convicted and sentenced. The Petitioner's cite in support of this argument this Commission's decision in the case *Roach and Pinkerton v. United States*,^[FN8] in which the Commission found that the diversity of state practice in the United States results in very different sentences for juvenile offenders for the commission of the same crimes, and therefore violated Articles I and II of the Declaration. The Petitioners contend in this regard that the U.S. and Texas governments have not made reforms in the disparate application of the death penalty to juveniles since the *Roach and Pinkerton*

decision, and that in Mr. Sankofa's case, as in Roach and Pinkerton, the failure of the U.S. Government to preempt the states in regard to protection of the right to life for juveniles under sentence of death results in a pattern of arbitrary deprivation of life and inequality before the law.

[FN7] Articles I (right to life, liberty and personal security) and II (right to equality before law) provide as follows:

- I. Every human being has the right to life, liberty and the security of his person.
- II. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

[FN8] I/A Comm. H.R., Roach and Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987.

B. POSITION OF THE STATE

43. With respect to the admissibility of the Petitioners' petition, the State has argued in its various observations in this case that domestic remedies remain for Mr. Sankofa to exhaust, and therefore that the Petitioners' petition is not admissible under Article 37 of the Commission's Regulations.

44. In this regard, the State provided some information respecting the history of Mr. Sankofa's criminal proceedings. In particular, in its October 4, 1993 observations, the State delivered to the Commission a September 21, 1993 communication from the Office of the Attorney General of the State of Texas. This communication was presented by the Government of the State in response to the Commission's request for information, and set forth several observations respecting the background of Mr. Sankofa's criminal proceedings, including the following:

- a. The communication indicated that the May 13, 1981 murder for which Mr. Sankofa was condemned was the first in a series of fourteen violent robberies, four involving shootings and one involving kidnapping and rape, which occurred over an eight day period, and that Mr. Sankofa was sentenced to death, as well as to concurrent 20 year sentences pursuant to guilty pleas for aggravated robbery in 10 of these other robberies.[FN9]

[FN9] In their October 11, 1993 response to the September 21, 1993 observations from the Office of the Attorney General of the State of Texas, the Petitioners take issue with the statement that the murder in question was Mr. Sankofa's "first in a series of fourteen similar violent robberies". Rather, the Petitioners indicate that Mr. Sankofa pled guilty to ten charges of armed robbery and aggravated armed robbery for crimes that occurred between May 14 and May 20, 1981, one week after the murder of Mr. Lambert, and that the remaining four charges were never well-founded enough to prosecute. The Petitioners also claim that the 10 robberies admittedly committed by Mr. Sankofa did not involve open threats or assaults on the victims in public view and therefore were not that similar to the Lambert murder.

b. In Mr. Sankofa's first state habeas corpus application, denied in February 1988, the court conducted an evidentiary hearing on the alleged ineffectiveness of trial counsel for failing to present four alibi witnesses. After hearing evidence that included testimony from Mr. Sankofa's two trial attorneys and two of the alibi witnesses, the court concluded that the alibi witnesses were not credible, that Mr. Sankofa never informed counsel of the alibi witnesses, and that counsel provided effective assistance;[FN10]

[FN10] In their October 11, 1993 response to the September 21, 1993 observations from the Office of the Attorney General of the State of Texas, the Petitioners claim in respect of this evidentiary hearing that none of the eyewitness evidence was presented, and that only two of the alibi witnesses testified. They also state that the alibi testimony of Loraine Johnson was not presented, even though she had made an effort to testify at Mr. Sankofa's trial but was "rebuffed" by Mr. Sankofa's attorney. The Petitioners suggest that this evidence, if presented during the first state habeas application, would have changed the evidentiary picture on the application "dramatically".

c. In his second state habeas corpus application filed in April 1993, Mr. Sankofa re-urged his ineffective assistance of counsel claim and made a claim of "actual innocence". He also added evidence of a newly found eyewitness who claimed that Mr. Sankofa did not commit the crime, and two eyewitnesses who claimed that the assailant was shorter than Mr. Sankofa. These claims were rejected by the state courts on the basis that these new eyewitnesses were refuted on the record as a whole, and the U.S. Supreme Court affirmed this determination on May 24, 1993;[FN11]

[FN11] In their October 11, 1993 response to the September 21, 1993 observations from the Office of the Attorney General of the State of Texas, the Petitioners note that the Court did not hold an evidentiary hearing on Mr. Sankofa's second state habeas application, despite the presentation of affidavits from the crime scene witnesses, the alibi witnesses and the defense investigator Merv West. Rather, the Court found all of the witnesses incredible solely on the basis of their written affidavits, and relied on its finding in the 1988 hearing despite the new evidence.

d. Mr. Sankofa's first federal habeas application, which raised arguments similar to those in the first state habeas application, was rejected by the district court in February 1998 and affirmed by the Fifth Circuit U.S. Court of Appeals, but was subsequently reversed by the U.S. Supreme Court and remanded on the question of whether Mr. Sankofa's youth at the time of the offense could be considered in mitigation of punishment. The Fifth Circuit subsequently concluded that Mr. Sankofa's youth could adequately be considered, and the U.S. Supreme Court affirmed this decision in January 1993;

e. In his federal habeas application filed in July 1993, Mr. Sankofa claimed, inter alia, lack of effective assistance of counsel for failing to raise an alibi defense and for failing to discover

the newly-related discrepancies in eyewitness evidence. The federal district court denied the writ on the basis that the new evidence presented in support of this application did not constitute the high threshold showing necessary under U.S. Supreme Court jurisprudence to make an "actual innocence" claim;

f. The State also contends that Mr. Sankofa received two temporary reprieves, one 30-day reprieve by the Governor of Texas in April 1993 and another by the Texas Court of Criminal Appeals in June 1993. Further, Mr. Sankofa sought executive clemency on two occasions, one where he presented videotape evidence of the witnesses referred to in his petitions and where clemency was refused on a 12-1 vote, and a second filed on May 25, 1993.[FN12]

[FN12] In their October 11, 1993 response to the September 21, 1993 observations from the Office of the Attorney General of the State of Texas, the Petitioners claim that the vote of the Texas Board of Pardons and Paroles denied Mr. Sankofa's clemency request by a vote of 12-5, not 12-1 as indicated by the State.

45. In the context of this procedural history, the State has consistently argued that Mr. Sankofa has failed to exhaust domestic remedies. In the State's view, such domestic remedies have included Mr. Sankofa's request for clemency or a reprieve before the Texas Board of Pardons and Paroles and the related civil law suit, as well as Mr. Sankofa's application to the Fifth Circuit of the U.S. Court of Appeals in respect of his second request for federal habeas corpus relief.

46. In further response to the Petitioners' observations, the State contends that there is no support for, and indeed authority against, the proposition that the requirement of exhaustion of domestic remedies should be applied less rigorously in the human rights context. In particular, the State emphasizes that existence of the exhaustion requirement in numerous international human rights instruments, including Article 41(c) of the International Covenant on Civil and Political Rights, Article 11(3) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 26 of the European Convention on Human Rights and Fundamental Freedoms, and Article 46 of the American Convention on Human Rights. The State specifically notes that the Commission's own Regulations require domestic remedies to be exhausted "in accordance with general principles of international law". Further, the State suggests that the principles cited by the Petitioners as underlying the exhaustion of domestic remedies, namely to "give the state concerned an opportunity to offer redress within its domestic legal framework to the individual who alleges to have been wronged", supports the State's position that the Petitioners' petition should be declared inadmissible.

47. With respect to the substance of the Petitioners' complaints, the State in several of its communications provided observations on the admissibility of the petition, and indicated that it reserved its right to make observations on the substance of the case, in the event that there was a need to do so. At the same time, as noted previously, in its October 4, 1993 observations, the State delivered to the Commission a September 21, 1993 communication from the Office of the Attorney General of the State of Texas, in response to the Commission's request for information

in the case. This communication sets forth several arguments respecting the substance of Mr. Sankofa's allegations.

48. Regarding the Petitioners' arguments respecting Mr. Sankofa's age at the time that he committed the offense, the State indicates that the U.S. Supreme Court in the case *Stanford v. Kentucky*, 492 U.S. 361 (1989) determined that the U.S. Constitution allows for the arrest, conviction and execution of murderers who were 16 years or older at the time of their crime. The State argued further that Mr. Sankofa's youth was properly considered by the jury in mitigation of punishment.

49. With respect to the alleged misidentification of Mr. Sankofa by Bernadine Skillern, the State argues that all of the evidence and information available indicates that Ms. Skillern did not misidentify any one. In this regard, the State refers to the length of time available to Ms. Skillern to identify Mr. Sankofa, and the fact that she was unequivocal in identifying Mr. Sankofa in the line up and at trial.

50. With respect to the "newly-related" eyewitness evidence, the State essentially argues that, in light of the dearth of useful eyewitness evidence at the time of the crime and the subsequent police investigation, and inconsistencies in the statements that these witnesses had previously given to police and their current allegations, their claims should be considered with suspicion. The State also points in this regard to inconsistencies and implausibilities in the observations and affidavits of the additional eyewitnesses relied upon by the Petitioners.

51. With respect to the Petitioners' claim of denial of a legal forum in which to review new evidence, the State contends that Mr. Sankofa's claim of alibi, raised within a claim of insufficient assistance of counsel, had, at the time of the State's September 21, 1993 submission, been reviewed on the merits by the state district and appellate courts twice, the U.S. district court twice, and the U.S. Court of Appeals once. They also note that all of the witnesses and evidence upon which Mr. Sankofa's relies were presented to the Texas Board of Pardons and Paroles as a basis for executive clemency, which request was subsequently denied. Accordingly, the State contends that Mr. Sankofa's complaint is not that his evidence has never been reviewed, but rather that he disagrees with the conclusions reached by the bodies that have reviewed it.

IV. ANALYSIS

A. COMPETENCE OF THE COMMISSION

52. The Petitioners claim that the State has violated Mr. Sankofa's rights under Articles I, II, XVIII and XXVI of the American Declaration of the Rights and Duties of Man. The State is a Member State of the Organization of American States that is not a party to the American Convention on Human Rights, as provided for in Article 51 of the Commission's Regulations, and deposited its instrument of ratification of the OAS Charter on June 19, 1951.[FN13] The events that relate to the Petitioners' claim occurred subsequent to the State's ratification of the OAS Charter. The alleged victim is a natural person, and the petition was lodged by the staff of the International Human Rights Law Clinic, who are authorized to lodge petitions with the

Commission under Article 26 of the Commission's Regulations. The Commission is therefore competent to examine this petition.

[FN13] The Inter-American Court and Commission have previously determined that the American Declaration of the Rights and Duties of Man is a source of international obligation for the United States and other OAS Member States that are not parties to the American Convention on Human Rights, as a consequence of Articles 3, 16, 51, 112, and 150 of the OAS Charter. See Charter of the Organization of American States, Arts. 3, 16, 51, 112, 150; Statute of the Inter-American Commission on Human Rights, Arts. 1, 20; Regulations of the Inter-American Commission on Human Rights, Arts. 26, 51-54; I/A. Court H.R., Advisory Opinion OC-10/8 "Interpretation of the Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, July 14, 1989, Ser. A No. 10 (1989), paras. 35-45; I/A Comm. H.R., James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, paras. 46-49.

B. ADMISSIBILITY OF PETITION

1. Duplication of Procedures

53. There is no information on the record indicating that the subject of this petition is pending settlement in another procedure under an international governmental organization of which the State is a member, or that the case essentially duplicates a petition pending or already examined and settled by the Commission or other international governmental organization of which the State is a member, as provided for under Article 39 of the Commission's Regulations.[FN14] The State has not contested the issue of duplication of procedures. The Commission therefore finds no bar to the admissibility of the petition under Article 39 of the Commission's Regulations.

[FN14] Article 39(1) of the Commission's Regulations provides: "The Commission shall not consider a petition in cases where the subject of the petition: a) is pending settlement in another procedure under an international governmental organization of which the State concerned is a member; b) essentially duplicates a petition pending or already examined and settled by the Commission or by another international governmental organization of which the state concerned is a member."

2. Exhaustion of Domestic Remedies

54. Article 37(1) of the Commission's Regulations specifies that, in order for a case to be admitted, "remedies under domestic jurisdiction must have been invoked and exhausted in accordance with the general principles of international law." When domestic remedies are unavailable as a matter of fact or law, however, the requirement that they be exhausted may be excused. Article 37(2) of the Commission's Regulations specifies that this exception applies if

the domestic legislation of the state concerned does not afford due process of law for protection of the right allegedly violated, if the party alleging the violation has been denied access to domestic remedies or prevented from exhausting them, or if there has been an unwarranted delay in reaching a final judgment under the domestic remedies.

55. In addition, the Inter-American Court of Human has observed that domestic remedies, in order to accord with generally recognized principles of international law, must be both adequate, in the sense that they must be suitable to address an infringement of a legal right, and effective, in that they must be capable of producing the result for which they were designed.[FN15]

[FN15] I/A Court H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, Ser. C No. 4, (1988), paras. 64-66.

56. Further, when a petitioner alleges that he or she is unable to prove exhaustion, Article 37(3) of the Commission's Regulations provides that the burden then shifts to the State to demonstrate that the remedies under domestic law have not previously been exhausted.

57. In the present case, Mr. Sankofa has pursued numerous domestic avenues of redress since his conviction and sentencing to death in October 1981. The various proceedings are described in the observations of the Petitioners and of the State, as set out in Part III of this Report, as well as in the February 25, 1999 decision of the U.S. Court of Appeals for the Fifth Circuit on Mr. Sankofa's fourth federal habeas corpus application,[FN16] and include the following:

[FN16] Graham v. Johnson, Case No. 99-20014, 1999 W.L. 98513 (5th Cir. (Tex.)).

a. Following his conviction and sentencing in October 1981, Mr. Sankofa appealed his capital conviction and death sentence, which were affirmed by the Texas Court of Criminal Appeals in 1984. Mr. Sankofa did not seek certiorari from the U.S. Supreme Court in respect of the appeal court's decision;

b. Mr. Sankofa brought three applications for writs of habeas corpus in the state courts in Texas.

In the first state habeas application, Mr. Sankofa raised three principal issues: ineffective assistance of counsel, in part for failure to call alibi witnesses; Mr. Sankofa's mental competence to be executed; and the constitutionality of the capital punishment scheme in Texas for various reasons, including the ability of juries to consider youth as a mitigating factor in sentencing. After holding an evidentiary hearing, the state habeas trial court concluded that Mr. Sankofa had received effective assistance of counsel and recommended that the Texas Court of Criminal Appeals deny habeas relief, which the Court of Criminal

Appeals did on February 19, 1988.

In the second state habeas corpus application, Mr. Sankofa argued that he was innocent and that he had been represented by ineffective counsel, and supported his ineffectiveness claim by several new affidavits. These included affidavits from eyewitnesses who disputed the identification evidence given by witness Bernadine Skillern at trial, and an affidavit from an investigator retained by Mr. Sankofa's trial counsel indicating that he and counsel assumed Mr. Sankofa was guilty and therefore gave his case relatively little attention. Without conducting an evidentiary hearing, the state habeas trial court found, inter alia, that the new affidavits were not credible, and recommended that the Texas Court of Criminal Appeals deny habeas relief, which that Court did in April 1993. The U.S. Supreme Court subsequently denied certiorari.

In his third state habeas application, filed in April 1998, Mr. Sankofa presented the evidence that he had presented in his previous state and federal habeas applications, together with three new affidavits, and raised, inter alia, the same issues that he had raised in his third federal habeas application, namely ineffective assistance of counsel and innocence. In November 1998, the Court of Criminal Appeals dismissed his application as an abuse of process under the new 1995 Texas habeas law.

c. Mr. Sankofa brought four applications for habeas corpus relief in the federal courts. In the first application, Mr. Sankofa raised the same grounds as in his first state habeas application. The district court adopted the state court's findings without an evidentiary hearing and denied the writ. The U.S. Court of Appeals for the Fifth Circuit subsequently affirmed this determination on appeal, but the U.S. Supreme Court subsequently reversed this finding and remanded the case to reconsider the issue of whether the Texas capital sentencing scheme adequately considered youth as a mitigating factor in sentencing in light of prevailing jurisprudence. Upon reconsideration, the Fifth Circuit Court of Appeals ultimately found en banc that the Texas capital sentencing scheme allowed adequate consideration of Mr. Sankofa's mitigating evidence, particularly his youth, and affirmed the denial of habeas relief. The U.S. Supreme Court affirmed.

Mr. Sankofa's second federal habeas corpus application was filed immediately after the decision of the Texas Court of Criminal Appeals on his second state habeas application, but was withdrawn voluntarily after the Governor of Texas granted a 30-day reprieve in connection with Mr. Sankofa's executive clemency proceedings.

In Mr. Sankofa's third federal habeas application, filed in July 1993, he again claimed ineffective assistance of counsel and innocence, and relied upon evidence that was not presented to the state courts, including: the affidavits of two eyewitnesses who were never contacted by Mr. Sankofa's trial lawyers; an affidavit corroborating one of the alibi witnesses' affidavits that had previously been determined by the state court not to be credible; reports by two psychologists who had reviewed the statements and affidavits of witnesses and concluded that Bernadine Skillern's identification of Mr. Sankofa was unreliable; and a Houston Police Department Firearms Report of May 1981 which indicated that the firearm confiscated from Mr. Sankofa on his arrest was not the firearm used to shoot Bobby Lambert. The state of Texas waived the issue of exhaustion before state courts in relation to this new evidence, and the district court held without an evidentiary hearing that the new evidence did not meet the "actual innocence" threshold established in the U.S. Supreme Court's case in *Herrera v. Collins* 113 S. Ct. 853 (1993) and

adopted the state court's finding that Mr. Sankofa did not have ineffective assistance of trial counsel. On appeal, the U.S. Court of Appeals for the Fifth Circuit declined to accept the waiver by the state of Texas of exhaustion and remanded the case to the district court, and the district court subsequently dismissed Mr. Sankofa's third federal habeas application for failure to exhaust state remedies.

Finally, in his fourth federal habeas application, filed in December 1998, Mr. Sankofa raised the same issues that he had raised in his third federal habeas application. The district court dismissed for lack of jurisdiction pursuant to the AEPDA, pursuant to which Mr. Sankofa was required to obtain permission from the Fifth Circuit to file a "successive" habeas application. In January 1999, Mr. Sankofa filed a motion for a stay of execution, a notice of appeal from the dismissal of his fourth habeas application and a request for recall of his 1996 habeas case. On January 8, 1999, the Fifth Circuit granted a stay of execution. However, in February 1999, the Fifth Circuit denied Mr. Sankofa permission to file a successive federal habeas application in the district court under the AEDPA, and held that the AEDPA applied to Mr. Sankofa because, *inter alia*, his re-filed post-exhaustion application before the Court was not a "continuation" of his third federal habeas application because the third application had been dismissed in 1996 without prejudice for lack of exhaustion. In March 1999, Mr. Sankofa's counsel filed a petition for a rehearing *en banc* in the Fifth Circuit, which was subsequently denied. In October 1999, Mr. Sankofa submitted a petition for a writ of certiorari to the U.S. Supreme Court, which was subsequently denied on May 1, 2000.

d. Mr. Sankofa also brought two applications for executive clemency, and a related civil law suit. Mr. Sankofa sought executive clemency before the Texas Board of Pardons and Paroles on April 26, 1993 and May 25, 1993, which the Board denied on both occasions. Subsequently, Mr. Sankofa brought a civil claim against the Board seeking an evidentiary hearing before that body on his innocence-based clemency request. In August 1993, a state district court issued a temporary injunction requiring the Board to hold a hearing on Mr. Sankofa's innocence claim. The Board appealed, and ultimately the matter came back before the state district court, which held, contrary to its earlier decision, that Mr. Sankofa was not entitled to a clemency hearing before the Board on his actual innocence claim. The Texas Court of Appeals affirmed this decision in January 1996, holding that Mr. Sankofa's prior state habeas review satisfied his right to a hearing for his claim of actual innocence.

58. From the foregoing procedural history, it appears that there are certain aspects of Mr. Sankofa's claims of due process violations currently before this Commission that have been addressed substantively before a domestic court of the State, and others that have not. In particular, in Mr. Sankofa's first and second state habeas applications, the state habeas trial courts considered certain of the evidence relating to Mr. Sankofa's claims of ineffective assistance of counsel, including the affidavits of several eyewitnesses who contested Bernadine Skillern's identification of Mr. Sankofa as the murderer.

59. At the same time, Mr. Sankofa's claims of ineffective assistance of counsel and innocence do not appear to have been addressed substantively in any of his domestic proceedings, in respect of several pieces of evidence presented in support of his third state and federal habeas applications, including: the affidavits of two eyewitnesses who were never contacted by Mr.

Sankofa's trial lawyers; an affidavit corroborating one of the alibi witnesses' affidavit that had previously been determined by the State court not be not credible; reports by two psychologists who had reviewed the statements and affidavits of witnesses and concluded that Bernadine Skillern's identification of Mr. Sankofa was unreliable; and a Houston Police Department Firearms Report of May 1981 which indicated that the firearm confiscated from Mr. Sankofa on his arrest was not the firearm used to shoot Bobby Lambert. This evidence was not considered by the state and federal courts as a consequence of interpretations of state and federal legislation by those courts that precluded Mr. Sankofa from filing successive habeas corpus applications. It appears, therefore, that Mr. Sankofa has either exhausted all available domestic remedies in respect of the due process claims raised before this Commission, because the domestic courts have considered and rejected his claims, or has been precluded from doing so, because domestic legislation bars Mr. Sankofa from introducing new claims before state and federal courts.

60. In addition, with respect to the Petitioners' alleged violations of Articles I and II of the American Declaration relating to Mr. Sankofa's age at the time of the commission of the offence in question, and the Petitioners' alleged violations of Article XXVI of the American Declaration based upon the delay in Mr. Sankofa's execution, the State does not appear to have specifically contested the admissibility of these claims, based upon exhaustion of domestic remedies or otherwise. In any event, prevailing jurisprudence in the United States suggests that any proceedings instituted on these issues would have no reasonable prospect of success. More particularly, the State itself notes that its Supreme Court in the case *Stanford v. Kentucky*[FN17] determined that the U.S. Constitution allows for the arrest, conviction and execution of murderers who were 16 years or older at the time of their crime. Similarly, U.S. Supreme Court recently denied applications for writs of certiorari in two cases, *Knight v. Florida* and *Moore v. Nebraska*,[FN18] in which the petitioners raised the very question of whether the U.S. Constitution prohibits as cruel and unusual punishment the execution of prisoners who have spent nearly 20 years or more on death row. The former case involved a post-sentencing delay of 19 years and 4 months, and the latter case involved a post-sentencing delay of 24 years and 6 months. Consequently, based upon the information available, the Commission finds that any proceedings raising these claims before domestic courts would appear to have no reasonable prospect of success, and therefore would not be effective in accordance with general principles of international law.[FN19]

[FN17] *Stanford v. Kentucky*, 492 U.S. 361 (U.S. Sup. Ct., 1989).

[FN18] *Knight v. Florida* and *Moore v. Nebraska*, 1999 U.S. West Law 7479; 68 U.S.L.W. 3307 (U.S. Sup. Ct., 8 November 1999).

[FN19] See similarly *Eur. Court H.R., De Wilde, Oomas and Versyp Cases*, 10 June 1971, Publ. E.C.H.R. Ser. A, Vol.12, p. 34, paras. 37, 62 (suggesting that domestic remedies need not be exhausted in circumstances in which an applicant believes that there is no reasonable chance of success and where that doubt is supported by the jurisprudence of the state's highest court); *Eur. Court H.R., Avan Oosterwijk v. Belgium, Judgment (Preliminary Objections)*, November 6, 1980, Case No. 7654/76, para. 37.

61. Based upon the information before it, therefore, the Commission finds that Mr. Sankofa has exhausted or has been precluded from exhausting domestic remedies, or that any available domestic proceedings would provide no reasonable prospect of success, in respect of his claims before the Commission. Consequently, the Petitioners' petition is not barred under Article 37 of the Commission's Regulations.

3. Timeliness of the Petition

62. In accordance with Article 38(1) of the Commission's Regulations, the Commission must refrain from taking up petitions that are lodged after the six month period following the date on which the complaining party has been notified of the final ruling, in cases where the remedies under domestic law have been exhausted.

63. In the present case, the Petitioners' petition was not lodged beyond six months from the date on which Mr. Sankofa was notified of the final ruling in his case, May 1, 2000. The State has not specifically contested the timeliness of the Petitioners' petition. Consequently, the Commission concludes that the Petitioners' petition is not barred from consideration under Article 38 of the Commission's Regulations.

4. Colorable Claim

64. Article 41(c) of the Commission's Regulations require the Commission to declare inadmissible any petition when the petition is manifestly groundless or inadmissible on the basis of a statement by the petitioners or the government.

65. The Commission has outlined in Part III of this Report the substantive allegations of the Petitioners, as well as the State's responses to those allegations to the extent that such responses have been provided. After reviewing the allegations in light of the information provided by both parties, the Commission does not find the allegations to be manifestly groundless or inadmissible. This is particularly evident in light of the Commission's previous decisions in the case *Roach and Pinkerton v. United States*,^[FN20] in which the Commission found violations of Article I and II of the American Declaration in relation to the age of the complainants in that case at the time they committed the offenses for which they were sentenced to death, and in the case *Andrews v. United States*,^[FN21] in which the Commission found a violation of Article XXVI of the American Declaration partly in relation to the complainant's time and conditions on death row. Accordingly, the Commission concludes that the Petitioners' petition is not inadmissible under Article 41(c) of the Commission's Regulations.

[FN20] I/A Comm. H.R., *Roach and Pinkerton v. United States*, Case 9647, Res. 3/87, 22 September 1987.

[FN21] I/A Comm. H.R., *Andrews v. United States*, Case No. 11.139, Res. 57/96, 19 February 1998, para. 178.

V. CONCLUSIONS

66. The Commission concludes that it has the competence to examine this case, and that the petition is admissible in accordance with the Commission's Regulations.

67. On the basis of the findings of fact and law set forth above, and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present case admissible, in respect of Articles I, II, XVIII and XXVI of the American Declaration.
2. To transmit this Report to the Parties.
3. To continue with the analysis of the merits of the case.
4. To reiterate its request under Article 29(2) of the Commission's Regulations that the State take all necessary measures to ensure that Mr. Sankofa's execution is stayed pending the Commission's investigation of the matter.
5. To publish this Report and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Brasilia, Brazil, on the fifteenth day of the month of June, 2000.
(Signed): Hélio Bicudo, Chairman; Juan Méndez, Second Vice-Chairman, Marta Altolaguirre, Peter Laurie and Julio Prado Vallejo, Commissioners.