

## Missing Migrants and Unidentified Bodies in the Mediterranean Sea \*

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### 1. Missing Migrants and Unidentified Bodies in the Mediterranean Sea

In 2016, 5098 people died while crossing the Mediterranean Sea, 4581 of which in the Sicily Channel<sup>1</sup>.

The majority of their bodies has not been recovered yet and they are still lying at the bottom of the sea around European coasts.

Nevertheless, in the few cases in which migrants' bodies are recovered, they are not identified and end up buried in anonymous graves in Sicilian cemeteries. Furthermore, behind every dead migrant there is a family waiting for him/her, both in Europe and in their respective home countries, risking never to know about the disappearance of their loved ones.

Italian Institutions and civil society have drawn attention to this dramatic problem especially after the shipwreck that occurred in Lampedusa on October 2013, which caused the deaths of more than four hundred human lives and after the sinking in April 2015 of a boat which ended up at the bottom of the sea with eight hundred bodies inside.

The proximity to the Italian coasts let Italian institutions, the academic community and NGOs not to remain indifferent and to closely cooperate to seek pragmatic solutions to such a dramatic situation.

The recovery and the identification of migrants' bodies in the Mediterranean Sea leave open a series of problems not easily solvable both from a practical point of view, due to the technical difficulties related to the identification and to the *ante mortem* data collection, not easily available in the countries of origins, and both from a legal point of view, due to the absence of common standard rules related to this issue.

This ambiguity is confirmed, for example, by the contradictory approach adopted by the prosecutors during the investigations opened after the October 2013 and April 2015 shipwrecks.

In the first case, the public prosecutor from Agrigento recognised that it is "necessary to identify the bodies, to withdraw their DNA and to compare it with the relatives' one, because it is a duty to guarantee the victims' relatives right to bring a civil action". In a second case, on the contrary, a public prosecutor from Catania

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1 See <https://missingmigrants.iom.int/mediterranean> .

stated that the recovery of those bodies would not be useful for the purpose of the investigations<sup>2</sup>.

In such a situation of legal uncertainty, Hannah Arendt's spirit, according to which the breach of human rights' system coincide with the connection between human rights protection and national states, seems to be dramatically actual. The breach is demonstrated by the fact that refugees and stateless people, not belonging to any State or political community, are even denied the "right to have rights", owing to the impossibility to find an institution willing to take on responsibility for them<sup>3</sup>.

How can we react to this "grey-zone" in the protection of fundamental rights, regardless of States' borders? How can we guarantee the dignity of the dead and of the relatives of those migrants disappeared in the Mediterranean Sea? Does there exist a legal commitment imposing States or the international community to recover and identify bodies drown in a shipwreck?

## **2. A legal point of view: the dignity of dead migrants and the rights of their relatives**

The recovery and the identification of bodies represents a quite unknown topic for legal experts, who are still anchored to the common conviction that only those who live bear rights.

Respecting the dignity of the dead is, instead, an essential part of our culture, as illustrated by different traditions and religious rites as well as by the literature of all times, from Ugo Foscolo's "Of the sepulchres" to the "Antigone" tragedy.

Like all behaviours well-rooted in society, traditions related to the dignity of the dead have become relevant also from a legal point of view.

In fact, there are areas of law that prescribe specific rules aimed to guarantee the dignity of those who have died: for instance, the international humanitarian law which provides for a large number of norms focused on the dignity of the dead<sup>4</sup> and the Italian criminal code which punishes crimes against dead's piety<sup>5</sup>. Furthermore, in few cases the jurisprudence protects "the dignity, identity and integrity of "everyone" who has been born, whether now living or dead"<sup>6</sup>.

Nevertheless, in order to argue for the need of common legal framework on the recovery and identification of bodies, it should be considered that behind every dead migrant there is a relative that is waiting for him/her and thus the treatment of the dead is always closely linked to human rights protection.

At the bottom of the sea, there lie unnamed bodies as well as stories of entire families, who have been denied the right to know the fate of their missing relatives, the right to remember and to bury them according to their own traditions. Interviews with eighty-six families of missing migrants, mainly from Tunisia and Syria, conducted by the University of York, the City University London, and the International Organization for Migration, under the "Mediterranean Missing project", clearly underline the negative impact of ambiguous losses on their lives<sup>7</sup>.

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2 See: [http://www.repubblica.it/cronaca/2015/05/17/news/\\_quei\\_corpi\\_non\\_servono\\_alle\\_indagini-114537950/](http://www.repubblica.it/cronaca/2015/05/17/news/_quei_corpi_non_servono_alle_indagini-114537950/)

3 H. Arendt, *The Origins of totalirism*, Houghton Mifflin Harcourt, 1973.

4 See The Geneva Conventions of 1949 and their Additional Protocols.

5 See Italian Penal Code, Article 407 – Article 413 .

6 ECtHR, *Elberte v. Latvia*, (61243/08), 2015.

7 Mediterranean Missing Project, "Like a part of a puzzle which is missing": *The impact on families of a relative missing in migration across the Mediterranean, Report on the situation of families*,

Moreover, this “limbo” where relatives of missing people are blocked has not only psychological consequences, as it prevents the elaboration of mourning, but also it could have legal consequences, compromising the guarantee of fundamental rights.

Firstly, the lack of information regarding a loved one could affect the right to health, which is protected by the Italian Constitution “as an inviolable sphere of human dignity” (see It. C. const., judgement no. 252 of 2001). Although we are aware of the peculiarity of the relatives’ situation, it should be pointed out that the Italian Constitutional Court firmly argued that the “irreducible core of the right to health” has to be granted “to foreigners, irrespective of their situation as regards the provisions regulating entry into and residence in the State” (see It. C. const. judgements no. 432 of 2005 and no. 269 of 2010).

Secondly, the lack of a proper identification of the dead could represent a violation of the right to personal identity “consisting of a set of ideological, religious, moral or social convictions, that differentiates but at the same time characterizes a person as a human being” (see It. C. const. judgement no. 13 of 1994).

Thirdly, the lack of information on a relative’s fate could prevent “the access to familiar history” that represents “an important element of the constitutional system, as recognised in the European Court of Human Rights’ case-law” (see It. C const. no. 178 of 2013).

Furthermore, many international reports highlight that ambiguous loss could impede access to justice, compromising the right to effective judicial protection<sup>8</sup>. This problem likewise exists with respect to the relatives of missing migrants, who are not always granted the right to join civil actions in criminal proceedings against those who are allegedly responsible for the shipwrecks.

Lastly, a study carried out by the UN Working Group on Enforced or Involuntary Disappearances shows as the missing of a relative could violate social, cultural and economic rights<sup>9</sup>. Even if this report mainly focuses on the peculiar situation of enforced disappearance, which is different from the topic at issue, it underlines that the disappearance impacts on the enjoyment of a number of rights pertaining to the relatives: “these include, the right to education, the right to take part in cultural life, the right to social security, the right to property, the right to family life and the right to housing”. These violations appear even more evident when the person who left is the man of the family, the primary source of income of the family. For example, “the family’s right to adequate housing may also be violated because the family may be ineligible to inherit the house they live in without a death certificate for the disappeared person”.

It is not only an economic matter, but the losses disrupt the daily lives of the families, especially those of women and children. It could happen that “wives refuse to behave as widows”, until they receive accurate information about their husbands’ deaths, risking to lose their “clear role in society”. It could also happen that “the surviving parent may be unable to pay school fees or may need the older children to quit school and find work to provide financial support”. The lack of a

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<sup>8</sup> See V. Nesiah, *Overcoming tensions between family and judicial procedures*, in *International Review of the Red Cross*, Vol. 84, n. 848, 2002.

<sup>9</sup> UN Commission on Human Rights, *Report of the Working Group on Enforced or Involuntary Disappearances - Study on enforced or involuntary disappearances and economic, social and cultural rights*, 9 July 2015.

death certificate could, finally, deny family reunification of minors who lost their parents in the Mediterranean Sea.

Even if in this paragraph we analysed rights guaranteed in situations which differ from those at issue in this paper, they demonstrate the complexity and the importance to investigate from a legal viewpoint the dramatic phenomenon of missing migrants in the Mediterranean Sea.

### **3. The international obligation to guarantee the dignity of dead migrants and the rights of their relatives**

Missing migrants' alarming situation assumes legal significance on the basis of several laws stated by the international humanitarian law and the international human rights law<sup>10</sup>.

The humanitarian international law, applicable only in cases of armed conflicts, prescribes specific rules aimed to guarantee the dignity of dead and to protect the rights entitled to migrants' relatives.

The Geneva Conventions and additional protocols force Parties to "record as soon as possible, in respect of each shipwrecked, wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification (e.g. nationality, name and surname, date of birth, and any other particular shown) (Article 19 II Geneva Conv.); "to ensure that burial at sea of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made" (Article 20 II Geneva Conv.; Article 17 I Geneva Conv.); "to facilitate the return of the remains of the deceased and of personal effects to the home country" (Article 34 I Additional Protocol).

Although, as previously stated, applicable only in cases of armed conflicts, the international humanitarian law can represent a useful point of view, highlighting fundamental principles and fixing basic humanitarian standards.

According to the prescriptions of the Human Rights Council Advisory Committee, the commitment to solve cases of disappeared people are not exclusively based on the humanitarian international law, but also on the international human rights law, that has to be respected in every case and circumstance<sup>11</sup>.

In the context of international human rights law, it is primarily necessary to focus on the right to know, created under the humanitarian international law and today representing "the pillar of the protection due to disappeared people and their families"<sup>12</sup>. This right is closely linked to other fundamental rights, as the right to access to justice, the right to health, the right to personal identity.

The right to know the truth is "an inalienable and autonomous right, recognized in several international treaties and instruments as well as by national, regional and international jurisprudence and numerous resolutions of intergovernmental bodies at the universal and regional levels"<sup>13</sup>.

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10 See S. Grant, *Dead and Missing Migrants: The Obligations of European States under International Human Rights Law*, in [www.mediterraneanmissing.eu](http://www.mediterraneanmissing.eu), 2016.

11 UN Human Rights Council, *Progress report of the Human Rights Council Advisory Committee on best practices on the issue of missing persons*, 22 March 2010.

12 UN Human Rights Council, *Progress report of the Human Rights Council Advisory Committee*, cit., 2010.

The right to know the truth has both an individual as well as a social dimension: the entire society has the right to know the truth and to preserve the memory of past gross violation of human rights, in order to prevent future violations.

As regard to the content of the right to know, it includes not only the right of the family to know the fate of their relatives, but also state's obligation to investigate and to inform the family<sup>14</sup>.

Furthermore, human rights' International organisations implemented "the right to know", recommending States to introduce effective measures to guarantee the right to know, as appropriate means to achieve a real protection of human rights.

In that regard, the "Report of the Office of the United Nations High Commissioner for Human Rights on the right to the truth and on forensic genetics and human rights (2010)", recognizes and promotes the use of forensic genetics as a key tool of forensic science in situations where there have been violations of human rights. More specifically, the report recommended "the establishment of protocols for ante mortem data collection, autopsies and identification based on scientifically valid and reliable methods and technologies"<sup>15</sup>.

Starting from the Turkish invasion of Cyprus, at the end of the seventies, that caused the disappearance of thousands of people, also the Council of Europe has drawn attention on missing people's issue, in order to individuate adequate measures to solve the problem and to guarantee their families' rights<sup>16</sup>. In the last years, the Council of Europe focused its activities also on the subject of missing persons in the context of migration and it recently recommended States to "set up a proper system of data collection of the mortal remains of people who lost their lives in the Mediterranean and make it swiftly accessible to relatives"<sup>17</sup>.

The principles of the international human rights law we just evaluated highlight the need to guarantee the right to know of missing migrant's relatives.

#### **4. The rights of the relatives of missing people in the perspective of the European Court of Human Rights' case-law**

In the European Court of Human Rights' case-law we do not register any case concerning the rights of relatives of missing migrants.

Nevertheless, some cases, although different from the topic at issue - they are mainly about cases of enforced disappearance<sup>18</sup> - contribute to highlight some fundamental principles, providing a useful reading key to face from a legal point of view the dramatic phenomenon of shipwrecks in the Mediterranean Sea.

First of all, it comes to light cases where the European Court stated the denial or an excessive delay in returning bodies or ashes to relatives represent an interference with the right to respect family life, provided under Article 8 of the

13 UN Commission on Human rights, *Study on the right to the truth - Report of the Office of the United Nations High Commissioner for Human Rights*, 8 February 2006.

14 UN Commission on Human rights, *Report of independent expert to update the Set of principles to combat impunity*, 18 February 2005.

15 Un Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the right to the truth and on forensic genetics and human rights*, 24 August 2010.

16 See COE Commissioner of Human Rights, *Missing persons and victims of enforced disappearance in Europe*, 2014.

17 COE Parliamentary Assembly, *The "left-to-die boat": actions and reactions*, Resolution n. 1999, 24 June 2014.

18 See COE Commissioner of Human Rights, *Missing persons and victims of enforced disappearance in Europe*, 2014.

ECHR<sup>19</sup>. From Article 8 it would come out, according to the Strasbourg Court, the right for families to attend their children's funeral, or that of a missing relative<sup>20</sup>.

Secondly, there come to light those judgements in which the European Court paid attention to the right to know and linked it with ECHR Article 2 "Right to life", Article 3 "Prohibition of torture", Article 5 "Right to liberty and security".

The European Court, starting with the 1998 case *Kurt v. Turkey*, stated that the behaviour of public authorities not undertaking adequate investigations on people's demise configures a violation of Article 3 of the European Convention<sup>21</sup>.

Particularly relevant is the case *Cakici v. Turkey*, where the Court, although concluding for the non-violation of the invoked conventional provisions, pointed out a range of criteria according to which the behaviour of public authorities can be defined inhuman and degrading in regard to families<sup>22</sup>.

According to the Court, the violation of Article 3 of the Convention depends on "special factors", able to create pain and distress caused by a gross violation of human rights.

Among these factors, the Court considered the proximity of the family tie, the circumstances of the relationship, the extent to which the relative witnessed the events in question, and the involvement of the family member in attempts to obtain information on the disappearance. The interpretation of the silence of public authorities as an inhuman and degrading treatment is confirmed by the *Varnava v. Turkey* case<sup>23</sup>. This case is particularly interesting because the Court states that from Article 2 "Right to life", Article 3 "Prohibition of torture", Article 5 "Right to liberty and security", it emerges a positive obligation for the contracting States to enquire the destiny of missing people; and the obligation also persists where there is knowledge that the person at issue could be dead already. Adequate investigations have to be undertaken until the recovery of the missing person, and in case of death, until the identification of the body. The Court came to the same conclusion in the *Cyprus v. Turkey* case<sup>24</sup>.

We have to underline that the Strasbourg Court did not limit itself to recognize the violation of conventional provision, but it adopted several precautionary, compensatory and reparatory measures, in order to protect in an effective way the rights of victims' relatives.

In the majority of cases, the Court granted the relatives of missing people the right to compensation for the "moral" damages they suffered. In 2014 the Court compelled Turkey to compensate the relatives of missing people, during the clashes in Cyprus, for a total amount of 30 million euros<sup>25</sup>.

Furthermore in the *Aslakhanova and Others v. Russia* case the Court imposed reparatory measures. According to the Court, in fact, the lack of investigations in North Caucasus came "from systemic problems at the national level, for which there is no effective remedy". That is why the Court obliged the State to undertake

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19 ECtHR *Abduleyeva v. Russia* (38552/05), 2014; ECtHR *Sabanchiyeva & Others v. Russia* (38450/05), 2013.

20 ECtHR *Hadri-Vionnet v. Switzerland* (55525/00), 2008.

21 ECtHR *Kurt v. Turkey* (24276/94), 1998.

22 ECtHR *Cakici v. Turkey* (23657/94), 1999.

23 ECtHR *Varnava v. Turkey* (16064/90), 1999.

24 ECtHR *Cyprus v. Turkey* (25781/94), 2001.

25 ECtHR *Cakici v. Turkey* (25781/94), 2014.

adequate measures to heal violations and to stop the pain of the relatives of missing people<sup>26</sup>.

There are cases in which the Court faces situations that are different from the one of migrants missing in the Mediterranean, involving cases of forced demise, generally of member states' citizens, in which it is possible to point out a responsibility of the State or of the national security forces in the demise and death of the person; a conclusion that on the contrary can not be granted in the case of missing migrants in the Mediterranean Sea.

However, from this point of view, it is relevant to underline principles emerged in cases of environmental disaster. In the *Onerlydiz v. Turkey* case, in fact, the Court considered the state's failure to prevent deaths caused by unsafe conditions as a violation of Article 2, in circumstances where the authorities 'had known or ought to have known' of a threat to life<sup>27</sup>.

### **5. How to guarantee the dignity of the dead and the rights of missing migrants' relatives?**

From the international human rights law and principles of European Convention of Human rights, we just analysed, it seems to emerge States' obligation to protect "the right to know" of the relatives of missing migrants in the Mediterranean Sea: a right that can be granted only by the recovery and identification of bodies, and the involvement of families in the investigations related to their missing relatives' fate<sup>28</sup>.

However, once these situations have been recognised as deserving protection from a legal point of view, it does not mean these obligations are actually respected.

This is due to several reasons.

The first problem is about the identification of the competent State for the recovery and the identification of bodies. Often it is not possible to precisely find out the shipwreck's position. This implies uncertainty about jurisdiction of States. Moreover, even when we know the precise position of the accident, it is not always easy to identify the competent State.

Another problem is the lack of standards and shared rules at European and international level. On the one hand, the international law conventions set as a priority the rescue of lives in the sea, without clearly mentioning the case of recovery and identification of the dead. On the other hand, at the European level, the tasks of Frontex - European boards and coast guard Agency - appear to be limited to the borders' control and rescue operations<sup>29</sup>.

A further problem is the real possibility of recovery and identification, due to the high cost of those operations.

However, in front of the clear violation of human rights, the inaction of States or other authorities cannot be justified. International law imposes States to undertake actions to grant an actual protection of human rights. Besides, when a State, which is supposed to be competent, has failed to fulfil its obligations, it is a duty of

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26 ECtHR *Aslakhanova and Others v. Russia* (2944/06), 2012.

27 ECtHR, *Onerlydiz v. Turkey* (48939/99), 2004.

28 See S. Grant, *Dead and Missing Migrants: The Obligations of European States under International Human Rights Law*, cit..

29 See EU Regulation 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard.

the whole international community to ensure the compliance with international human rights law.

In regards to the problem of cost recovery and identification, we could reflect whether the European Union should provide a financial support in favour of a member State supposed to be competent for these operations.

EU Treaties clearly state that “policies on border checks, asylum and immigration” and “their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States” (Article 80 TFEU).

Although the Article 80 TFEU introduces a proper “duty to support”, in order to share responsibilities among Member States, it is not granted that the sphere of application of Article 80 includes the recovery and identification actions, since policies on “border checks, asylum and immigration” are primarily oriented to the rescue and assistance of migrants who crossed European frontiers alive. Nevertheless, we can also ask ourselves if other Treaties provisions could be relevant on the issue of this paper, as the Article 122 TFEU related to economic assistance to Member State is in difficulties caused by “exceptional occurrences beyond its control” or the Article 4 TEU, which establishes the general “principle of sincere cooperation”<sup>30</sup>.

According to provisions provided under EU Treaties, is it possible to draw a boundary for EU member States and institutions to assist a member State that is considered competent to grant recovery and identification of migrants bodies in the Mediterranean Sea?

In conclusion, the lack of shared rules, together with the difficulty to identify competent States and the high costs of recovery operations, does not justify the inaction of EU member states. This would allow the existence of a “grey zone” in which fundamental rights are not protected; this is clearly not compliant with the international system of human rights.

## **6. Best practices and perspectives**

In such a contest of legal uncertainty, the problem has been faced by international organizations, like the International Red Cross, undertaking the project “Restoring family links” and the IOM, developing the project “Missing migrants” aiming at collecting ante and post mortem data<sup>31</sup>.

So far, the only State which intervened in order to recover and identify bodies of migrants missing in the Mediterranean is Italy.

In 2014 indeed, the Extraordinary Committee for Missing People of the Italian Government signed a protocol with the Legal Medicine Department of the University of Milan and the Italian Domestic Affairs Ministry in order to collect ante and post mortem data of the 386 victims of the shipwrecks that occurred in Lampedusa on October 2013. The families of 66 victims were able to attend the data-collection meetings held in Rome and Milan by a specialised staff. This has made possible the identification of more than 50 per cent of those victims: among them there were also the parents of two 8 and 10-year-old children who acquired the right to family reunification with their relatives resident in Europe<sup>32</sup>.

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30 M. I. Papa, *Crisi dei rifugiati, principio di solidarietà ed equa ripartizione delle responsabilità tra gli Stati membri dell'Unione europea*, in [www.costituzionalismo.it](http://www.costituzionalismo.it), 3/2016.

31 See <https://familylinks.icrc.org/en/Pages/home.aspx> and <https://missingmigrants.iom.int/>

In addition, the Italian Government, thanks to an important action of the Italian navy, recovered the wreck of the ship sunk on April 18 2015 between Libyan and Italian waters, with about 800 migrants on board. University of Milan, in partnership with experts coming from other universities (mainly Palermo and Catania) and forensics, undertook the huge operation of bodies recovery and data collection<sup>33</sup>.

A further step by Italy to face the big tragedy in the Mediterranean is represented by the protocol signed on April 12 2017 by the Extraordinary Committee for Missing People of Italian Government with the Foreign Affairs Ministry, in order to support the activity of victims' identification conducted by the International Red Cross. The protocol also prescribes that diplomatic representations in the countries of origin will spread advises to inform the victims' families. Those contacts will allow to collect ante mortem data that will be compared with post mortem data by forensics and by the specialised staff coming from thirteen universities, coordinated by professor Cattaneo, University of Milan<sup>34</sup>.

Projects like these are undoubtedly worthy, but in the absence of a legal framework and a real commitment of the European Union and the international community, they risk to be isolated cases.

According to key findings of the "Second Conference on the management and identification of unidentified decedents, with an emphasis on dead migrants: the experience of European Mediterranean countries", in order to protect the rights of missing migrants' relatives, it is necessary that "European countries and Inter-Governmental Organizations, including the European Union and the Council of Europe" closely cooperate "in search, recovery, documentation, identification and proper management of dead migrants in Europe"<sup>35</sup>.

In conclusion, it is clear that the primary objective of Europe and Member States is to avoid deaths in the Mediterranean Sea. Nevertheless, today we cannot remain unconcerned towards this huge humanitarian tragedy, made of nameless bodies and families looking for their loved ones. It is mainly up to international and European politics, to try to provide responses for the questions mentioned above, that can be translated into clear legal rules, according to the fundamental principles provided under the Italian Constitution, EU Treaties and international conventions.

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32 Protocollo tra l'Ufficio del Commissario straordinario del Governo per le persone scomparse e il Rettore dell'Università degli Studi di Milano, per favorire l'identificazione delle vittime del naufragio di Lampedusa dell'ottobre 2013, 30 September 2014.

33 "Protocollo tra l'Ufficio del Commissario straordinario del Governo per le persone scomparse e il Rettore dell'Università degli Studi di Milano, 23 July 2016.

34 See Protocollo di Intesa tra il Ministero degli Affari Esteri e l'Ufficio del Commissario straordinario del Governo per le persone scomparse, 12 April 2017.

35 Key findings. Outline for future action, Second Conference on the management and identification of unidentified decedents, with an emphasis on dead migrants: the experience of European Mediterranean countries, Barcelona, 29 and 30 October 2015.