DEATH PENALTY IN AFRICA

REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS
WORKING GROUP ON THE DEATH PENALTY IN AFRICA
Viewed in 25 Years of Existence of the ACHPR

PRESENTED BY
COMMISSIONER KAYITESI ZAINABO Sylvie
CHAIRPERSON OF THE WORKING GROUP ON THE DEATH PENALTY IN AFRICA

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YAMOUSSUKORRO, COTE D’IVOIRE
I. INTRODUCTION

At the time of the establishment of the African Commission for Human and People’s Rights some 25 years ago, the situation of the death penalty in Africa was bleak. Africa was largely a retentionist continent. African countries, except for the Portuguese-speaking ones, had the death penalty firmly written in their statute books before and at independence. They actively executed capital offenders, except for those of them lucky enough to get executive reprieve. At that time the death penalty was taken as a legitimate form of punishment. This form of punishment was justified on the ground that society needed to be purged of incorrigible, dangerous and undesirable persons. It appears to have been universally accepted without question. The question of its abolition was not even an issue. It was never raised.

The drafters of the Charter on Human and people’s rights therefore did not write into that treaty a provision outlawing capital punishment. The time for abolition had not come. Not even in Europe. Not even in Latin-America. It may be hypothesized that had the drafters of the Charter been so bold as to write an abolitionist clause into the treaty only an inconsequential number of Africa states would have subscribed to it. An untoward consequence would have been that the long-awaited African human rights system would have died stillbirth. African countries routinely used that penalty as a tool to remove inconvenient dissenters and opponents. They adopted the simplistic view that capital punishment was the answer to certain types of crime and to rising criminality. Given that context it seemed that condoning the death penalty was considered a small price to pay in order to midwife the African human rights system.

Very soon there was a perceptible slow change of attitude regarding the wisdom in maintaining the death penalty in the statute books. In some countries, judges got tired of condemning to death, especially in case where that harsh and definitive punishment

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was provided even for less serious crimes. Prosecutors got tired of seeking for the ultimate punishment. Judges got tired of sending people to the gallows. They evaded imposing the death penalty. They did so by resorting to such legal reasoning as would enable them to impose a custodial sentence where that option was available. In cases where the law provided for a mandatory death penalty, they readily admitted mitigating circumstances enabling them to impose only a custodial sentence, or to convict for a lesser offence. Prison officials who watched over death row prisoners began to voice the agony and trauma they faced daily having to confront persons who know they could be taken to the gallows any day. A combination of all these circumstances led to an ever diminishing rate of death penalty convictions in some countries.

Now days, in the matter of the death penalty, the African continent is changing. It is making strides in the direction of abolition that penalty, since abolitionists and retentionists have been engaged in a death-penalty debate fraught with emotions, complexities, controversies and contention. This is largely through the continuing effort of the African Commission and the international dynamic and trend toward the abolition of the death penalty.

II. INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK ON THE DEATH PENALTY

A. International Instruments

At the international level, the **Universal Declaration of Human Rights (UDHR)** adopted in 1948, is the first comprehensive human rights instrument, at its Article 3 of the UDHR "upholds the right to life, liberty and security of the person". Although this article makes no mention of the death penalty, there was a real consensus that the UDHR should take an abolitionist stance. Unlike the UDHR, the **International Covenant on Civil and Political Rights (ICCPR) (1966)** is very specific about the
right to life and the death penalty. Article 6 of the ICCPR which derives from Article 3 of the UDHR prohibits the arbitrary deprivation of life. It further acknowledges the death penalty as an exception to the right to life, while listing safeguards and restrictions on its implementation. For the imposition of the death penalty to be seen as exception to the right to life, it has to be imposed for the most serious crimes (Art.6 (2), procedural rules have to be respected, which include the right of anyone sentenced to death to seek pardon or commutation to sentence (Art 6(4), it must not be imposed on anyone below the age of eighteen or carried out on pregnant women (Art 6(5))2. Thus the imposition of the death penalty will not amount to a violation of the right to life if the above conditions are met3.

The adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights in 1989 (ICCPR II), was clearer in its context in Article 1, aiming at the abolition of the death penalty, commits its members to the abolition of the death penalty within their borders, although Article 2(1) allows parties to make a reservation allowing execution for grave crimes in times of war. In the same year in 1989, the adoption of the Convention on the Rights of the Child also prohibits the use of the death penalty for persons under 18 at the time of the crime4.

B. Regional Instruments

At regional level, Europe as the first abolitionist region in the world, adopted the European Convention for the Protection of Human Rights and Fundamental

2 Article 6(2)(4)(5),ICCPR

3 Lilian Chenwi (2007) Towards the Abolition of the Death Penalty in Africa. Pg

4 See Article 37 of The Convention on the Rights and Welfare of the Child
Freedoms in 1950. The Convention contains provisions defining a number of civil and political rights, including the right to life, to be enjoyed without discrimination. As a follow up of these efforts, the Parliamentary Assembly of the Council of Europe drafted a Protocol to the European Convention concerning the abolition of the death penalty. After some discussions, Protocol No. 6 was adopted in March 1983 and was the first agreement under international law to provide for the obligation of the parties to abolish the death penalty in peacetime. Years later in 2003, Protocol No. 13 was also adopted and it is not surprising, therefore, that today the continent of Europe has been turned into a death penalty-free zone.\(^5\)

At the Inter-American level, in the United States, the use of the death penalty is a decision left to democratically elected governments at the level of each individual state. Despite this position, there are legal instruments which regulate the application of the death penalty in the Inter-American states, the first of which is the American Convention on Human Rights (1969).\(^6\) Secondly, the Protocol to the American Convention on Human Rights on the Abolition of the Death Penalty (1990) provides that States Parties to the Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.\(^7\)

In Africa, the African Charter on Human and Peoples Rights (1989) which is the fundamental legal instrument established to Promote and protect human rights in Africa, makes (doesn’t mention) no mention of the death penalty unlike other European and American systems. Like the other instruments, the African Charter provides for the right to life in Article 4 which states that “Human beings are inviolable. Every human being shall be entitled to respect for his life and integrity of his person. No one may be arbitrary deprived of this right”. Notwithstanding, it is noteworthy that generally

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\(^6\) Art 4, American Convention on Human Rights 1969.

speaking, the provisions of the African Charter reflect the influence of the UN human rights instruments and traditions and as such the language of Article 4 of the Charter is similar to Article 6(1) of the ICCPR indicating a prohibition of the arbitrary use of capital punishment\(^8\).

**The African Charter on the Rights and Welfare of the Child (1999)** prohibits the use of the death penalty for persons under eighteen\(^9\) and **the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2003)** also prohibits in Article 4, the use of the death penalty on pregnant or nursing women. The **Arab Charter on Human Rights adopted in 1994** by the League of Arab States and which is applicable in African Arab countries is also an important treaty adopted for the protection and promotion of human rights. It gives effect to the provisions of the Charter relating to the death penalty in articles 5 and 10 which provides for the right to life and limits the imposition of the death penalty only to the most serious crimes and provides for right to seek pardon or commutation of sentence.

### III. THE CURRENT SITUATION OF THE DEATH PENALTY IN AFRICA

Currently, some African countries retain the death penalty and readily execute criminals sentenced to death by their courts; a big number of countries maintain the death penalty in national laws but have abolished de facto the Death penalty and observe a moratorium on the execution of death row prisoners; others have abolished totally the penalty and are committed to keep the status co.

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\(^8\) W. Schabas. The Abolition of the Death Penalty in International Law. pg335.

Today, on this anniversary, **17 States parties have abolished** the death penalty for all crimes: South Africa (1997), Angola(1992), Burundi (2009), Cape Verde (1981), Ivory Coast (2000), Djibouti(1995), Gabon (2010), Guinea Bissau (1993), Mauritius(1995), Mozambique(1990), Namibia(1990), Rwanda(2007), Sao Tome and Principe(1990), Senegal(2004), Seychelles(1993), Togo(2009).\(^{10}\) Benin is the most recent African State to have abolished the death penalty on 5 October 2012.\(^{11}\)

A further 19 states have a moratorium in place for more than ten years\(^{12}\). They have, in all these years, declined to execute capital offenders. They have thus abolished the death penalty in fact. It follows that in 36 of Africa’s current 54 states there is no judicial killing for crime. Besides, in retentionist states there is a growing reluctance to resort to death penalty. Also, the penalty is by law excluded in the case of minors, pregnant women, elderly persons, and persons who are mentally ill. Furthermore, there is always the possibility, even if remote in some instances, of the exercise of executive clemency and reconversion of death penalty in life imprisonment.

Of the fifty four (54) African countries, only nine(9) are parties to the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of death penalty. These states include Cape Verde Island, Djibouti, Mozambique, Namibia, Rwanda, Seychelles, South Africa, Benin and Liberia. Although it is worth noting that Liberia in 2008, reintroduced the death penalty in its legislation for

\(^{10}\) http://www.amnesty.org/en/death-penalty/countries-abolitionist-for-all-crimes

\(^{11}\) The National Assembly voted in favor of the ratification of the Second Optional Protocol to the International Covenant on Civil and Political aiming at the abolition of the death penalty in August 2011, and in July 2012, Benin went ahead and signed the Second Optional Protocol to the International Covenant on Civil and Political Rights.

armed robbery, terrorism or hijacking, thus contravening the provisions of the Second Optional Protocol to the ICCPR.

It is also worth noting that nine (9) African states have abolished the death penalty even though they have not ratified the Second Optional Protocol to the ICCPR (Angola, Burundi, Ivory Coast, Gabon, Guinea Bissau, Mauritius, Sao Tome and Principe, Senegal, and Togo).

At international level, African countries continue to support decisions in favor of the abolition of the death penalty. On 21 December 2007, seventeen (17) \textsuperscript{13} of the then 53 African states, voted in favor of the Resolution adopted by the UN General Assembly at its 65\textsuperscript{th} session, calling on states to adopt a moratorium on executions. Since then, the number of votes in favor of this resolution by African states has remained the same.

Other initiatives towards the abolition of the death penalty were taken by some African States. In 2009, Kenya and Tanzania commuted many death sentences to life imprisonment. Burkina Faso has announced plans to file a bill of law to abolish the death penalty. Mali made a similar commitment in 2007. The Tunisian Minister of Justice announced on 14 January 2012 a moratorium on all executions, commuting the death sentences to life imprisonment. On 13 February 2012, following a decision of the African Commission on Human and Peoples' Rights in \textit{Communication 334/06-Interights and EIPR(on behalf of Sabbah and others) v Egypt}, the Egyptian authorities announced the cancellation of death sentences against three people accused of being the authors of bombing attacks.

However between 2011 to date, there has also been a sudden wave of executions that have taken place in a number of African States, namely Botswana, Egypt, the Gambia, Algeria, Angola, Benin, Burkina Faso, Burundi, Cape Verde, Cote d’ Ivoire, Gabon, Madagascar, Mali, Malta, Mauritius, Namibia, Mozambique, Rwanda, Sao Tome and Principe, and South Africa.

\textsuperscript{13} Algeria, Angola, Benin, Burkina Faso, Burundi, Cape Verde, Cote d’ Ivoire, Gabon, Madagascar, Mali, Malta, Mauritius, Namibia, Mozambique, Rwanda, Sao Tome and Principe, and South Africa.

Most recently, the Gambia having been part of de facto abolitionist states for the past 27 years, on 26 August 2012, after an announcement made by the President to execute death row inmates, the government went ahead to execute nine (9) death row inmates.

**IV. THE ACTIONS AND STRATEGIES OF THE COMMISSION IN FACING THE CHALLENGES OF THE DEATH PENALTY**

It was not long before the Commission soon became persuaded to the view that the time for the abolition of the death penalty had come. Apparently a significant number of African states were now willing and ready to abolish capital punishment. The Commission began to envisage abolition continent-wide as a real possibility. It was encouraged in this by the examples of Europe and Latin America. However, it decided to proceed cautiously. The Commission acknowledged the evolution of international law and the trend towards abolition of the death penalty and basing on articles 1, 4, 5 and 7(1) of the Charter, and on the Second Optional Protocol to the ICCPR, it adopted resolutions on the death penalty.

**A. Resolutions**

The first strategy and action of the Commission to face the issue of death penalty was to adopt resolutions on the subject. The process commenced from the 26th Ordinary
Session of the Commission in 1999, seeing the number of persons sentenced to death and those executed; then adopted a Resolution Res/ACHPR 42(XXVI) of 1999. This initial resolution was timid but subsequent ones were progressively bolder. It calls merely to envisage a moratorium and states were urged “to envisage a moratorium on executions, to limit the imposition of the death penalty only for the most serious crimes, and to reflect on the possibility of abolishing it”.

After the UN adopted a Resolution on Moratorium in 2007, at its 44th Ordinary Session in 2008, the Commission adopted another Resolution ACHPR/Res.136 (XXXXIII) of 2008 on a moratorium on the death penalty to urge states Parties which retain the death penalty to observe the moratorium and take measures for the abolition of death penalty.

\[B. \textit{Advocacy for the Abolition of the Death Penalty in Africa.}\]

The second strategy and action consists in having during state periodic reporting and promotion missions a fruitful dialogue with State Parties on the issue of the death penalty. The dialogue provides the Commission with an opportunity to ask for information regarding the status of the death penalty, to congratulate abolitionist states and to urge a retentionist state to abolish.

\[C. \textit{Establishment of a Working Group on Death Penalty in Africa}\]

The third strategy and action was to set up under Article 45 of the Charter a special mechanism, the WGDP. At its 37th Ordinary Session in 2005, after a lengthy debate on

\[\text{ACHPR Res/ 42(XXVI) 99, adopted at the 26th Ordinary Session of the Commission, held from 1-15 November in Kigali, Rwanda.}\]

\[\text{ACHPR/RES.136 (XXXXIII).08, adopted at its'44th Ordinary Session, held in Abuja, Nigeria, from 10 to 24 November 2008.}\]
the issue, the Commission set up a Working Group on the Death Penalty in Africa (Working Group) composed of Commissioners and experts drawn from within Africa\(^{16}\).

The Working Group was mandated to further elaborate the draft document on the issue of death penalty in Africa and propose ways and means of tackling the question of the death penalty in Africa; develop a Strategic Plan(s), including a practical and legal framework on the abolition of the Death Penalty; collect information and continue to monitor the situation of the application of the Death Penalty in African States\(^{17}\).

Since 2007, the Working group undertook different activities and actions such as organizing conferences, conduct a Study on the issue of death penalty in Africa, addressed letters of appeal to States Parties and ensured the cooperation with partners working on death penalty.

\section*{The Study on the Question of the Death Penalty in Africa}

In 2004, at the 35\(^{\text{th}}\) Ordinary Session of the Commission, the Secretariat of the African Commission was requested to develop a draft document on the ‘Question of the Death Penalty in Africa’. Since 2007, the Working Group held a series of meetings to work on the draft document on the issue of death penalty which finely became ‘the Study on the Question of the Death Penalty in Africa’. Following the finalization of the Study by the Working Group, it was presented to and adopted by the Commission at the 50\(^{\text{th}}\) Ordinary Session, held in Banjul, The Gambia, from 24 October to 7 November 2011. The Study was also launched on 19\(^{\text{th}}\) April 2012 in collaboration with partners\(^{18}\) at the 51\(^{\text{st}}\) Ordinary Session held in Banjul, The Gambia, from 18 April to 2 May 2012. I take

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\text{To date, the Working Group comprises of three Commissioners and five expert members.}
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\text{Resolution ACHPR /Res.79 (XXVIII) 05.}
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\text{FIDH, FIACAT, WCADP}
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this opportunity to express my gratitude to those partners who contributed to the drafting of this Study, especially FIDH for its technical and financial support. This study contain key information on the history of the death penalty, the legal framework supporting the abolition of death penalty, strategies to address the issue of death penalty etc.

- **Regional Conferences**

As part of its activities, the WGDP organized two Regional Conferences, the first Regional Conference was held in Kigali, Rwanda, in September 2009, for Central, East and Southern Africa, and the second Regional Conference was held in Cotonou, Benin, in April 2010, for West and North Africa. The conferences brought together representatives of States Parties, AU organs, NHRI’s, Academics, International Organizations and NGO’s.

The objectives of the regional conferences were to seek to amongst others; take a position concerning the abolition of the death penalty which is consistent with the world trend and adopt political and legal strategies to give effect to the abolition, adopt a framework on the question of the death penalty in Africa and explore with a view to adopting a Protocol to the African Charter on Human and Peoples’ Rights on the Abolition of the Death Penalty in Africa. The conferences also permitted participants to comment and give their contributions on the draft document on the issue of death penalty in Africa.

The Regional Conferences created the Kigali and Cotonou Framework Documents, which details concrete recommendations for the abolition of the death penalty including the necessity of a Protocol to the African Charter on Human and Peoples’ Rights on the abolition of the Death Penalty in Africa, to fill the gaps in the African Charter on the inviolability and sanctity of human life.
Cooperation with Partners

From its very inception, the Working Group adopted a collaborative approach. It has so far worked in fruitful collaboration with International Federation for Human Rights (FIDH), International Federation for Action by Christians on the Abolition of Torture (FIACAT) and World Coalition against the Death Penalty (WCDP), the International Commission against the Death Penalty (ICDP), and Amnesty International. The Working Group participated in different meetings and events organized by these organizations, on the issue of the death penalty.

D. Urgent Appeal to States Parties.

The fourth strategy and action involves monitoring the death penalty situation in the continent. On information received that execution is imminent in a retentionist state the Chairperson of the WGDP or the Chairperson of the commission promptly issues Letters of Urgent Appeal to the state concerned not to carry out the executions and to consider deleting capital punishment from its law. For example, in 2011 the Chairperson sent Letters of Urgent Appeal on the situation of the death penalty to Nigeria, regarding five female inmates awaiting execution, to Sudan regarding four children aged between 15 and 17 years sentenced to death, to The Gambia, regarding the extension of the scope of capital punishment to cases of human trafficking, robbery, rape, and drug-related crimes. Letters of appeal were also sent to Botswana regarding the execution of an inmate on death row, to Equatorial Guinea for the execution of former military officials and a civilian and to Mauritania in respect of three juveniles sentenced to death.

The recent Letters of Urgent Appeal sent by the Chairperson of the Commission on and the Chairperson of the Working Group on the Death Penalty in Africa on 30 August
2012 respectively, were addressed to H.E the President of the Republic of The Gambia, expressing the deep concern of the Commission on the announcement made by his Excellency to resume executions and going ahead to execute of nine (9) prisoners on death row in the Gambia.

**E. Letters of Encouragement to States**

A fifth strategy and action recently recommended by the Working Group, is that of sending Letters of Encouragement to states that have a moratorium in place expressing the Commission’s appreciation of the fact that they have turned their back on capital punishment and urging them to take the next logical step of abolishing the death penalty by law. It is in that context that on 16 July 2012, the Chairperson of the Working Group on the Death Penalty in Africa sent a Congratulatory letter to the President of the Republic of Benin for signing the Second Optional Protocol to the ICCPR.

**F. Drafting an Additional Protocol on the Abolition of the Death Penalty**

A final strategy and action consists in coming up with a draft Additional Protocol on the Abolition of the Death Penalty in Africa to which all African States would be expected to subscribe. More recently in August 2012, in Johannesburg, South Africa, the Working Group held its first meeting after the launch of the Study on the Question of the Death Penalty in Africa to start the process of the drafting of an Additional Protocol to the African Charter on Human and Peoples’ Rights on the Abolition of the Death Penalty in Africa, which is one of the main recommendations of the Study on the Question of the Death Penalty in Africa.
Some of the obstacles in the way to abolition continent-wide include the lack of a unifying value system and huge diversities in matters political, legal and cultural. Restorative justice and compensation are some critical matters of justice that must always be borne in mind. A major obstacle still remains the scope of the death penalty, that is, whether it should cover case of extrajudicial killings and executions in time of war. Finally, the abolition of the death penalty will necessary have to go in tandem with a variety of measures such as prisons reform, effective alternative to the death penalty, sentencing guidelines, victimology, and forensic psychiatric.

VI. CHALLENGES

The effort to bring about the total abolition of the death penalty in Africa is not without challenges. The following are some of the challenges:

i. The ignorance of the human rights approach to the death penalty makes the acceptation of arguments in favour of the abolition of the death penalty even more difficult;

ii. The influence of tradition and religion. Both African customary law and Islamic law recognize the application of capital punishment for some serious crimes; and Christianity is not unequivocal on the subject.

iii. The African human rights system is the only system without a protocol or any other African regional legal instrument on the death penalty. The silence of African Charter on the issue of the death penalty is often used by African States to justify the retention of the death penalty in their domestic law.

iv. The lack of strong commitment and political will to accelerate the process of abolition of the death penalty.
VII. RECOMMENDATIONS

In its continuing efforts to secure the abolition of the death penalty in Africa the African Commission on Human and Peoples’ Rights has to pursue different strategies that include the following:

i. Continue to engage with States Parties on the necessity of the abolition of the death penalty, engagement through its Resolutions, Promotional Activities, Special Mechanisms, Examination of State Reports and Communication Procedures;

ii. Continue undertaking in African countries awareness raising activities aimed at eliciting continued support to abolish the death penalty.

iii. Adopting sensitization and human rights education programmes at all levels, including the adoption of a media strategy to create public awareness on the need to abolish the death penalty.

iv. Urging States Parties to the African Charter to demonstrate stronger political will towards the abolition of the death penalty.

v. Bringing on board the following as part of the public debate on the issue of the abolition of the death penalty: politicians including parliamentarians, Lawyers, Judges, Civil Society Organisations (CSOs), National Human Rights Institutions (NHRIs), Religious Leaders, traditional leaders, Non Governmental Organisations (NGOs), Trade Unions, Student Unions, Professional Associations, Regional Economic Communities, Academic Institutions, media and other stakeholders;
vi. Urging AU States Parties, which have not yet done so, to sign and ratify human rights instruments that prohibit the death penalty especially the Second Optional Protocol to the International Covenant on Civil and Political Rights on the abolition of the death penalty, and then to harmonize their national legislation accordingly;

vii. Working closely with United Nations bodies, in particular; the Office of the High Commissioner for Human Rights, as well as with National Human Rights Institutions and Civil Society Organizations in their respective capacities to mobilize towards the abolition of the death penalty;

viii. Recommending to the African Union and to State Parties the adoption of a Protocol to the African Charter on Human and Peoples’ Rights on the Abolition of the Death Penalty in Africa under any circumstances;

ix. Urging State Parties that still retain the death penalty, and pending the adoption and the entry into force of the proposed Protocol to the African Charter on Human and Peoples’ Rights on the Abolition of the Death Penalty in Africa,

a) to impose a moratorium on sentencing to death;

b) to impose a moratorium on the carrying out of death sentences and to commute death sentences already passed into fixed-term or life sentences, depending on the gravity of the circumstances of the offence; and

c) to refrain from resuming executions once they have a moratorium in place.

VIII. WAY FORWARD FOR THE WORKING GROUP ON DEATH PENALTY
Since the Study on the Question of the Death Penalty in Africa has been adopted and launched, and the process of drafting of an Additional Protocol on the Abolition of the Death Penalty has started, the Working Group will ensure that the Additional Protocol project sees the light of day. It would not be premature to start working on strategies to ensure that all African States quickly subscribe to that instrument when it is ready.

The Working Group on the Death Penalty expect, if funds are available to organize conferences include a Continental Conference on the Death Penalty for different stakeholders to examine the draft Protocol to the African Charter on Human and Peoples’ Rights on the abolition of the Death Penalty in Africa.

The Working Group will continue to seek further research to gather information on the issue of the death penalty, and to monitor the situation of death penalty in African countries to advise the commission for taking necessary measures.