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# The Exceptional Nature of Terrorism: The United States and Middle Eastern Legal Systems

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# The Exceptional Nature of Terrorism: the United States and Middle Eastern Legal Systems†

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The focus of this article is on the perception of the legal systems of the Arab Middle East from the perspective of the United States, in keeping with the theme of the panel, which asked how the so-called "West" sees the "Rest." Where such a theme, however provocative, is clearly too broad for any type of comprehensive analysis, this article's more directed inquiry attempts to partially answer the question of how the West sees the Rest in a specific context, which hopefully enriches the discussion generated by the conference. The choice of the United States is merited as its involvement and various entanglements in the Middle East far outstrip those of any other country or international organization. While United States influence is not limited to that of the Arab countries of the Middle East, the advantage to singling out the Arab world lies in the region's perceived status as the home of modern political violence of both the secular and Islamist bent.

By way of prefatory caveat, the Middle East provides an extreme example of the inability to divorce the legal from the political. In a region where repressive regimes and non-state actors frequently clash in a contest over whose narrow interest controls the fractious nation-state, establishing functioning independent and empowered legal systems has proved challenging. It should come

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as no surprise, therefore, that Western perceptions of Middle Eastern legal systems and the quality of rights they provide to their citizenry are negative and highly critical. However, with respect to the United States, there is a general exception to this rule in that the above critical posture will give way to political expediency, primarily in the context of fighting terrorism. In other words, Middle Eastern legal systems and institutions, such as they exist, as well as certain practices, will be criticized and scrutinized, unless there is some ostensible overriding reason for refraining from such criticism, usually based in strategic interests - in this case, terrorism.

The practice of criticizing countries in the Middle East for mistreating their own citizens except where such mistreatment aligns with United States interests is a cynical exercise in large part, since it rests on a double standard. While some might argue that there is no double standard, in keeping with the late Jeanne Kirkpatrick's attempt during the Cold War to distinguish between pro-American "authoritarian" regimes and pro-Soviet "totalitarian" regimes, such logic is unavailing.[1] It is, however, hardly unique, as powerful nations like the United States frequently take what they perceive to be the most beneficial course of action, regardless of whether there is the appearance of a double standard.

In the case of the Arab Middle East, condoning extreme tactics in the name of fighting terrorism hinders any serious effort to discuss legal reform in the region on account of the two-fold message. First, the implication is that the Middle East is a region devoid of the rule of law (in the most positive sense of the term), since due process and human rights protections are nonexistent in practice. While the point should not be read as an attempt to argue that the woeful state of human rights protections in the Middle East is due solely or primarily to foreign manipulation or interference, when the United States sends the message - whether in word or deed - that a particular country or region is incapable of a true change in its human rights policy, there can be no real change in that policy. If a state of affairs is perceived as immutable, after a while even illegal practices lose their novelty and risk becoming

1. *See, e.g.*, Juan E. Méndez & Javier Mariezcurrena, *Prospects for Human Rights Advocacy in the Wake of September 11, 2001*, 22 LAW & INEQ. 223, 229-30 (2004) (criticizing the theory on the basis that the distinction between potentially redeemable "authoritarian" regimes and irredeemable "totalitarian" ones was made entirely on the basis of whether the regime in question was pro-American. If so, it was considered authoritarian; if not, totalitarian).

accepted or tolerated in their status as commonplace and inevitable.

Second, any attempt to engage in genuine legal reform is effectively scuttled or dismissed out of hand, since the United States' role in pushing for such reform is perceived as hypocritical and/or insincere.[2] For example, when a government engaged in repressive measures against its own population is criticized by the United States, it can (and almost always does) point out that the United States has no business interfering in its internal affairs.[3] In addition, even serious American efforts to generate legal or human rights reform can be abandoned to political expediency, given the importance of certain regimes - whether they are U.S. allies or not - to U.S. interests.[4] The ultimate conclusion is that the United States, the most powerful actor on the world stage, is either incapable of or unwilling to effect real legal change in the Middle East, most prominently on the issue of human rights.

## I. Official Statements on Middle Eastern Legal Systems

There are several official United States government sources and/or policies that express disdain and generally condemn the overall human rights records of Middle Eastern countries. The archetype and primary vehicle for expressing this critical attitude comes in the form of the State Department's annual country reports on human rights, which are the most thorough, comprehensive, and systematic of their kind issued by a national government; they are also more extensive than anything issued by the United Nations or European Union. In the case of Arab Middle Eastern nations, the reports are replete with trenchant criticisms of the lack of established freedoms and the legal institutions to protect human rights. The overall negative and critical tenor of the reports is not affected in great part by a country's status as an ally or antagonist of the United States.[5] That said, it is important to note that human

2. Michael Slackman, *On Human Rights, US Seems to Give Egypt a Pass*, N.Y. TIMES, Oct. 16, 2007.

3. *Id.*

4. *Id* (Egypt, an American ally); Thanassis Cambanis,*Challenged, Syria Extends Crackdown on Dissent*, N.Y. TIMES, Dec. 14, 2007.

5. *See, e.g.*, UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2008, EGYPT, *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119114.htm; UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - JORDAN, *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119118.htm; UNITED STATES DEPARTMENT OF STATE,

rights considerations are but one factor that inform United States foreign policy with respect to a given country or region. Since they do not have the force of law or constitute an authoritative statement of policy, the human rights reports, however thorough or far-ranging, do not necessarily portend adverse consequences for falling below any type of legally mandated human rights threshold.

In contrast, with respect to binding judicial opinions, the Supreme Court, in the rare instance where it even touches on Middle Eastern legal systems, has done so in only highly tangential terms. Perhaps the most apt example of this phenomenon is the Court's decision in *Roper v. Simmons*, a 2005 opinion declaring the death penalty unconstitutional as applied to minors.[6] One of the points stressed in Justice Kennedy's majority opinion related to the prevalence of the practice of executing minors in the community of nations. Since 1990, only a few countries, among them Saudi Arabia, Yemen, and Iran, had executed minors, and even those countries have since repudiated the practice.[7] The opinion leaves the reader with the perhaps unintentional impression that it was unseemly for the United States to be in such company, thereby buttressing the conclusion that the practice was unconstitutional. To the extent that Middle Eastern legal systems were being discussed at the Supreme Court, they were discussed in only the most indirect and brief manner. In the academic literature, the opinion is far more noteworthy for its citation to foreign law and the ensuing debate on the advisability of that practice,[8] coming as it did despite Justice Scalia's unequivocal rejection of the position that foreign decisions or rulings should play a part in influencing how the Supreme Court interprets the Constitution.[9]

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COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - SAUDI ARABIA, *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119126.htm; UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - SYRIA, *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119127.htm; UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - LEBANON, *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119120.htm; UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - SUDAN, *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/af/119026.htm.

6. 543 U.S. 551 (2005).

7. *Id.* at 577.

8. *See, e.g.*, Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947 (2008).

9. Roper v. Simmons, 543 U.S. at 621-28 (Scalia, J., dissenting) ("More

While examples of federal court decisions rendering opinions on Middle Eastern legal systems are not commonplace, examples do exist. Consider the case of Sameh Khouzam, an Egyptian Coptic Christian who was detained immediately upon arrival in the United States on suspicion of having committed a murder in his native country.[10] Although two different federal appeals courts referred to the "serious reasons" to believe Khouzam had committed a murder, and despite a finding that his political asylum and withholding of removal claims were not established by credible evidence, his deportation to Egypt was deferred indefinitely on the basis that he would be subjected to torture at the hands of the Egyptian police were he to be returned there in violation of the United Nations Convention Against Torture and Other Cruel, Degrading, or Inhuman Treatment or Punishment.[11] After receiving diplomatic assurances from Egypt that he would not be tortured upon his return, the government tried again to deport Khouzam, but has seen its latest efforts stymied on the basis that he has been denied due process.[12]

Specifically, the Second Circuit credited evidence that "the Egyptian police have routinely tortured, abused, and killed suspected criminals to extract confessions," a conclusion that was

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fundamentally, however, the basic premise of the Court's argument-that American law should conform to the laws of the rest of the world-ought to be rejected out of hand.").

10. Khouzam v. Attorney Gen. of the U.S., 549 F.3d 235 (3rd Cir. 2008) [hereinafter *Khouzam I*].

11. *See id.*; *see also* Khouzam v. Ashcroft, 361 F.3d 161, 166, 169-71 (2d Cir. 2004) [hereinafter *Khouzam II*].

12. *Khouzam I*, 549 F.3d at 259. (The Third Circuit remanded the matter to the Board of Immigration Appeals (BIA) "in order to ensure that Khouzam is afforded due process before he may be removed on the basis of diplomatic assurances," and that due process in this context entails "opportunity to present, before a neutral and impartial decision maker, evidence and arguments challenging the reliability of diplomatic assurances proffered by the Government, and the Government's compliance with the relevant regulations," as well as "an individualized determination of the matter based on a record disclosed to the alien."). While the *Khouzam* cases leave open the possibility that he might be deported on the basis of diplomatic assurances that he will not be tortured, the European Court of Human Rights has recently disallowed deportation in similar circumstances. *See* Saadi v. Italy (App. No.37201/06), judgment of Feb. 28, 2008 (Eur. Ct. of Hum. Rts.) (holding that deportation of suspected terrorist to his home country of Tunisia would violate Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms' nonderogable ban on subjecting individuals to torture or inhuman or degrading punishment or treatment).

corroborated by the State Department's human rights report on Egypt.[13] Taken at face value, the *Khouzam* decisions constitute a clear statement by federal appeals courts of the United States that torture is rampant in Egyptian law enforcement. While the State Department's human rights reports say exactly the same thing, what makes this particular finding remarkable is that it has so far prevented the deportation of a murder suspect from the United States to one of its major allies and the second-largest recipient of annual foreign aid. Despite the very close political ties between the United States and Egypt, such relations will not prevent a federal court from officially recording its very negative opinion of a significant component of the legal system of a Middle Eastern nation, regardless of whether it is a close ally.

A final example of an official policy that through its very existence criticizes the legal system, or lack thereof, of a foreign country is that of political asylum. In broad legal terms, asylum is awarded to those who are "unable or unwilling to return to [their] home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[14] Recent legislative developments, explicitly geared at asylum applications by terrorists and/or based on fraudulent claims, have had the effect of rendering it much harder for individuals to receive asylum in the United States.[15] While the existence of political asylum as a policy and a practice has the noble goal of providing those seeking relief with a place of refuge from oppression, it also signals that the country under scrutiny is lacking in its respect for the rule of law, and therefore somehow lesser in the pantheon of nations.[16] Grants of asylum carry the same message, whether in the Middle Eastern context or otherwise, and in general terms reinforce the dismal picture of legal systems and human rights protections in the Middle East.

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13. *Khouzam II*, 361 F.3d at 169, 171.

14. I.N.S. v. Elias-Zacharias, 502 U.S. 478, 481 (1992) (quoting the Immigration and Nationality Act § 101(a)(42)(A), codified at 8 U.S.C. § 1101(a)(42)(A)).

15. David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1385-92 (2007) (also noting federal appellate court criticism of the haphazard and arbitrary manner in which asylum applications are adjudicated in immigration courts).

16. *Id.* at 1385-86.

## II. Contradictions and Complications

Taken as a whole, the above examples, however brief, serve as evidence of the first message such a critical posture represents - that the Middle East is a legal backwater where no protections for rights or due process exist. As this paper is not intended as an apologia for any of the regimes of the Middle East and their legal systems, there is strong evidence to substantiate the harsh criticisms of how the law functions - or rather, does not function - in the Middle East when one discusses human rights and the rule of law. Of course, this generally negative picture is not unique to the Middle East as a region, and there are many areas of the world that suffer from similarly defective legal regimes. The phenomenon dubbed "terrorism," which is understood to be shorthand for Islamic terrorism is, however accurately or inaccurately, identified with the region, and is employed as a justification for those tactics and methods that have been previously criticized. Put differently, when a state engages in, e.g., torture, the tone and nature of U.S. criticism of the practice will depend in large part on whether such torture is being used against individuals deemed terrorists.

Perhaps there is no tactic more exemplary of the exceptional nature of terrorism than the practice of extraordinary rendition, which involves sending a non-citizen to another country so as to face more coercive interrogation techniques, i.e., torture, than can be found in the United States.[17] The practice as now understood developed in the 1990s, as a tactic to thwart suspected terrorists from taking violent action in situations where their activities did not give rise to criminal prosecution in the United States.[18] The first instance of the United States engaging in the practice involved Talaat Fouad Qassem, an Egyptian national and spokesman for Al-Gama'a Al-Islamiyya, who was reportedly apprehended in 1995 by the CIA in Croatia, and subsequently turned over to the Egyptian authorities.[19] He was presumed executed.

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17. *See, e.g.*, Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Renditions and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1336 ("For the purpose of this Article, 'extraordinary rendition' is defined as the transfer of an individual, without the benefit of a legal proceeding in which the individual can challenge the transfer, to a country where he or she is at risk of torture.").

18. *See* American Civil Liberties Union "Fact Sheet: Extraordinary Rendition," (2005), *available at* http://www.aclu.org/safefree/extraordinaryrendition/22203 res20051206.html (last visited April 14, 2009).

19. Margaret L. Satterthwaite, *The Story of El-Masri v. Tenet*, *in* HUMAN RIGHTS

The practice of extraordinary rendition expanded in frequency and scope after September 11, 2001, which in turn exacerbated the potential for abuse or mistake in the process. Perhaps the two most paradigmatic cases in the context of rendition concern Maher Arar, a Canadian citizen of Syrian descent, and Khaled El-Masri, a German citizen of Lebanese origin. Arar was detained in the United States in September 2002, while en route from a family vacation in Tunisia to his home in Montreal, and, after a period of detention of around two weeks, sent to Syria, where he was jailed for a year and tortured on the mistaken basis that he was an al-Qaeda member.[20] Despite being completely exonerated and awarded significant compensation for his suffering by the Canadian government, Arar has been unsuccessful in obtaining relief in the United States.[21]

El-Masri was detained while on vacation in early 2004 by Macedonian authorities for approximately 23 days, and then sent to what he claims was a secret CIA prison in Afghanistan, where he alleges he was tortured. After spending months in incommunicado detention and being subjected to torture, American authorities apparently recognized their error, and returned him in the middle of the night to a deserted road somewhere in Albania.[22] Like Arar, El-Masri's post-release attempts to obtain relief through a lawsuit for damages against the American authorities have not borne fruit, albeit for different reasons. In particular, the government was successful in its attempt to argue that El-Masri's lawsuit was barred by the state secrets privilege, which would, it contended, forbid any inquiry into the existence and operation of the extraordinary rendition program.[23] This use of the state secrets privilege is seemingly set to continue despite the presence of a new administration in Washington. Recently, the Department of Justice has indicated that it will continue to invoke the state secrets privilege as a bar to lawsuits alleging abuses that resulted from an extraordinary rendition.[24]

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ADVOCACY STORIES 541-2 (Deena R. Hurwitz, Margaret L. Satterthwaite, and Doug Ford, eds. 2008); ANTHONY SHADID, LEGACY OF THE PROPHET: DESPOTS, DEMOCRATS, AND THE NEW POLITICS OF ISLAM 105 (2002).

20. Arar v. Ashcroft, 532 F.3d 157 (2nd Cir. 2008).

21. *Id.*

22. Satterthwaite, *supra* note 19, at 535-37, 542-43, 549-50.

23. El-Masri v. U.S., 479 F.3d 296 (4th Cir. 2007), cert. denied, 128 S. Ct. 373 (2007).

24. John Schwartz, *Obama Backs Off a Reversal on Secrets*, N.Y. TIMES, Feb. 9, 2009.

The main post-9/11 difference in the rendition scheme is that the practice now includes the element of the United States as renditionee; Khaled El-Masri serves as the highest profile victim of a rendition to U.S. custody, albeit in a detention center on foreign soil. Contrast this situation with Europe, where the European Court for Human Rights recently held that suspected terrorists cannot be deported to countries where they might be tortured or killed, even where the deporting state obtains diplomatic assurances from the country of origin that such treatment will not occur.[25] Where many European states have condemned the practice, Italy has gone so far as to try criminally both the Italian intelligence and CIA agents for the rendition of a cleric to Egypt.[26]

The tactic of rendition looks set to survive the change of administrations. Newly appointed CIA Director Leon Panetta testified at his congressional confirmation hearing that the agency will continue to engage in the practice of renditions, although he stated that individuals would not be sent to countries with a reputation for torture or actions "that violate our human values."[27] Regardless of the accuracy of this statement, the existence of a program of extraordinary rendition serves to reinforce the message that the countries of the Middle East, e.g., Egypt, Syria, Jordan, Morocco, etc., are legal backwaters where coercive interrogation and torture can happen. More pointedly, the indication is that torture needs to happen to effectively thwart terrorism, particularly that of an Islamic and/or Arab bent, notwithstanding the implication of such a policy for the rights and freedoms of citizens in the Middle East and elsewhere.

A further example of the exceptional nature of terrorism involves the successful attempt by the United States government to introduce, in a criminal trial, the confession made abroad to Saudi security agents by an American citizen suspected of membership in an al-Qaeda cell. Ordinarily, it is axiomatic that evidence gleaned by coercion will not be admitted in a criminal trial. In *United States v. Abu Ali*, the government was allowed to introduce the statements

25. Saadi v. Italy, *supra* note 12.

26. Rachel Donadio, *Italian Court Upends Trial Involving C.I.A. Links*, N.Y. TIMES, Mar. 11, 2009; Elizabeth Rosenthal, *Italian Trial of CIA Operatives Begins with Torture Testimony*, N.Y. TIMES, May 15, 2008.

27. Mark Mazzetti, *Panetta Open to Tougher Methods in Some C.I.A. Interrogations*, N.Y. TIMES, Feb. 5, 2009.

made by the defendant while in Saudi custody, even though he was held incommunicado without charge for over a year, and was even threatened with being made an enemy combatant by FBI agents who were allowed to interrogate him.[28] Abu Ali's confession was admitted despite the State Department's annual human rights report finding the existence of widespread torture practiced by the very same Saudi agency detaining him.[29] Abu Ali was in a difficult position to challenge the Saudi officers who testified at his trial, since they were permitted to do so via two-way videolink from Saudi Arabia under pseudonyms, thereby rendering any possibility of perjury sanctions remote at best.[30] Ultimately, while the United States government had acknowledged that Saudi Arabia has a longstanding history of torturing detainees, the subtext of the Abu Ali prosecution seems to be that in this case, involving a suspected al-Qaeda terrorist, it did not.

A final example of how the United States views terrorism as an extraordinary crime demanding extraordinary measures concerns the use of special military tribunals. Although the military tribunal scheme has been dealt severe setbacks by the Supreme Court,[31] it is useful to re-examine the original executive order issued by President Bush in November 2001, to recognize what was envisioned as a proper forum to try terrorist suspects. The order exhibits a willingness to establish the type of state security court prevalent in the Middle East in that it would allow for conviction upon only a vote of two-thirds of the presiding judges and imposition of sentence (including death) upon a similar two-thirds vote.[32] Further, it envisions the admission of secret evidence, evidence obtained by coercive means, no confrontation rights, and no right of appeal. The military order, the provisions of which were never actually enacted, reflects what sort of process the government believes the Islamist terrorist is entitled to. Lest we think that this

28. 528 F.3d 210 (4th Cir. 2008). Abu Ali's allegations of torture were far more extensive and only those undisputed facts are noted in this paper.

29. For a detailed description and analysis of the Abu Ali case, *see* Wadie E. Said, *Coercing Voluntariness*, 85 IND. L.J. __ (forthcoming 2009).

30. *Id.*

31. Rasul v. Bush, 542 U.S. 466 (2004), Hamdan v. Rumsfeld, 548 U.S. 557 (2006), Boumediene v. Bush, 128 S.Ct. 2229 (2008).

32. Military Order - Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, November 13, 2001, *available at* http://fas.org/irp/offdocs/eo/mo-111301.htm.

position originated with the Bush administration, recall that in 1995 then-Vice President Al Gore endorsed the Palestinian Authority's establishment of similar state security courts to try members of Islamist groups opposed to the Middle East peace process.[33] A restrictive and restricted tribunal is all those deemed Middle Eastern terrorists deserve, it seems.

## III. Conclusion

While much has been written on how the above mentioned phenomena reflect on the United States, in these brief remarks I have tried to focus on the use by the United States of extraordinary tactics against those real or perceived Middle Eastern terrorists and what those tactics say about Middle Eastern legal systems. Essentially, while the United States is generally very critical of how such legal systems operate and the level of rights they provide, it has demonstrated a willingness to tolerate tactics that would be illegal in the United States, for the purpose of fighting terrorism. This perceived double standard undermines the United States in any attempts to strengthen the legal systems of the Middle East. It also has the effect of weakening respect for international attempts to apply principles of human rights law to try government officials for violations. Stated another way, this position has allowed individuals such as the Sudanese president, Omar al-Bashir, to defy an arrest warrant issued by the International Criminal Court in connection with the war on civilian populations in Darfur. In so doing, al-Bashir has enjoyed popular support in Sudan and the region for standing up to what is perceived as a Western system of justice that punishes only those seen as hostile to its interests, yet turns a blind eye to similar practices by allied or "moderate" autocrats. It has also set the stage for non-state movements, such as Hezbollah, to refuse on principle to cooperate with the Special Tribunal for Lebanon, which was established by the United Nations to try those individuals responsible for the 2005 assassination of former Lebanese Prime Minister Rafik al-Hariri. The tribunal is viewed as biased in favor of one of two opposing political factions

33. Human Rights Watch, "Clinton Should Press Arafat to Abolish State Security Courts," March 21, 1999, *available at* http://www.hrw.org/en/news/1999/03/21clinton-should-press-arafat-abolish-state-security-courts (Human Rights Watch Middle East Director referring to the courts as "a mockery of justice").

in the country, a factor leading to severe criticism, to the point where Lebanese opposition leaders have stated that they will never allow a trial to take place.

Ultimately, however, it should be clear that the United States is willing to indulge deviations from the norm in the human rights context when Middle East legal systems are successfully able to characterize their extraordinary tactics as justified to fight terrorism. While there are perhaps strategic benefits that accrue to the United States in taking this position, ultimately the question needs to be asked if the price is worth losing the ability and credibility required to help establish the rule of law in the Middle East, a worthy goal in its own right.