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**The African and European Courts of  
Human Rights: Application of Article 6  
CEDAW**

**Alumna: Raquel López Garrido**

**Directora: Raquel Regueiro Dubra**

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# 1. PURPOSE AND MOTIVES

Through History, the fight for the protection of human rights has been crucial in order to understand the relationships shaped nowadays. It is true that there have been many improvements when talking of human rights, but not so many when talking of women's rights. In 2019, 31.911 women have suffered gender-based violence only in Spain (Instituto Nacional de Estadística, 2020). In Spain in that same year, 55 women have been killed by their partner or their ex-partner (Instituto Nacional de Estadística, 2020). And this is only in Spain.

Worldwide, one in three women suffers physical or sexual violence in her lifetime. Around 46 million people are involved in slavery and trafficking networks in which seven out of ten are women or girls. One in three girls on the planet is forced into marriage against her will before the age of 18. Two thirds of the human beings who cannot read or write in the world are women. Women make up less than a quarter of the world's parliaments (Ayuda en Acción, 2018). And yet, women make up half of the population.

Women's rights do exist, but they are not respected. International Human Rights Law plays an essential role in the protection of women's rights, and the international community should push states that are not complying with their obligations on the protection of women's rights in order to make a change.

Prostitution and trafficking in women are two of the worst situations in which a woman can see herself involved in. They happen anywhere and could almost happen to any women. In fact, the more vulnerable women are the ones getting involved in those practices. This is why, in this essay, we will be analyzing their international protection through article 6 of CEDAW, which prohibits those practices and encourages States to do as much as it is needed to end with that practice. The two regional mechanisms of protection of human rights that we will be studying are the European Court of Human Rights and the African Court on Human and Peoples' Rights.

## 2. STATE OF THE QUESTION

Prostitution and trafficking in women are issues that exist all over the world. Nowadays, the awareness and concern for these problems have increased so much that many countries, international organizations and other institutions are taking action against them, trying to eradicate or at least decrease the human rights' violations. In fact, with the feminist wave and the awakening in the gender equality areas, the criticism towards the systems that allow and perpetuate those violations against women is raising.

There is not an agreed definition of prostitution although it is a global problem. Prostitution has been defined by some authors that have studied the topic. However, not all definitions comprise the same the same "requirements" for prostitution to be considered it. For Stuart P. Green, prostitution "is understood to refer to the practice of providing sexual services for payment; [...] At its heart, then, prostitution seems to involve a commercial transaction." (Green, 2016). The European Parliament considers prostitution as "paid rape" (European Parliament, 2014). This raises the question of: What happens with the people that do it voluntarily? It is true that the majority of women that are engaged in prostitution don't do it because they want to, but it is also true that there are some that could want to work on it. Therefore, if they are not seen as prostitutes, what are they? Coming back to the agreed definition, most if the institutions that work on this problem have not stated a definition for it. This constitutes a problem as there is no limit on what prostitution is. For example, the World Health Organization (WHO) defines what is sexual exploitation as "actual or attempted abuse of a position of vulnerability, power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another" (World Health Organization, n.f.). However, is sexual exploitation the same as prostitution? It seems to be, so, why do they do not include the definition of prostitution?

Since there are many definitions, prostitution has also been studied from many perspectives; we can approach it from the people that are affected by it because it is their only way to make money, from the point of view of the people that consume it and finally, the public institutions that take advantage of it or have taken steps to abolish it. Today, this "employment" is a problem for the society since it is a market in which we can mainly find women "employed", which means that the "consumers" are mainly men. Furthermore, the people that usually consume it can take advantage of their more

powerful position and do not respect that those women have rights. Prostitution has been something present in all periods in History. The main reasons as per why women would engage in prostitution are the lack of economic resources and low level of studies. Through the History until the present, there has been many ways of approaching this issue; from the complete abolitionism to the complete legalization and regulation of it.

A common thought among people is that prostitution is an activity in which women can be engaged if they want and can get out whenever they want too. However, women cannot freely choose to take part in this market. The decision to engage in an activity such as prostitution is usually motivated by poverty, drug addiction, and fear (Farley, M., & Kelly, V., 2000). In this essay, we will analyze both prostitution and trafficking in women together as they seem to be one of the hardest human rights violations towards women. Nevertheless, in the case of prostitution there is an added fact that makes the women's rights violation more difficult to analyze; while no one doubts if trafficking in women should be illegal and constitutes a human right violation, not everyone agrees if prostitution is in the same page. In fact, some consider that prostitution might be consensual and therefore should be regulated.

This is why prostitution has been treated differently depending on the country. There are four main approaches to prostitution: abolitionism wants to prohibit it in order to stop the perpetuation of this kind of sexual violence, it wants to prosecute third parties (men that uses the prostitutes to satisfy their demands); decriminalization sees prostitutes as independent contractors, which are not regulated by any norm and no control over that sector; legalization tries to regulate it by letting people use prostitutes, giving them rights and legitimizing the use of sex work and sex abuse; and criminalization, which tries to prosecute prostitutes, clients and pimps (Corrigan & Donohoe, 2007).

International law considers prostitution as a human rights violation, and therefore supports that it should be abolished at all costs, like the Convention on the Elimination of All Forms of Discrimination against Women in article 6: "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women" (United Nations, 1979). It is also stated in the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, article 1 "The Parties to the present Convention agree to punish any person who, to gratify the passions of another: (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2)



Exploits the prostitution of another person, even with the consent of that person. Prostitution is incompatible with human rights and dignity” (United Nations, 1951). This is because prostitution is very linked with sex trafficking and sexual abuse. In fact, prostitutes experience a much higher rate of violence and abuse than women that are not engaged in it. It is difficult to actually record data about it as in most States it is illegal, so the recollection of data is very hard. Nevertheless, some studies show that violence against prostitutes only in their “workplace” ranges from 45% to 75% in the year 2014 (Deering, et al., 2014). It is a very wide difference that makes 45% to 75% but, however, at least 45% of prostituted have suffered any kind of violence, and we are only taking into account those that happened in the brothel.

In order to understand what is trafficking in women, we need to take a look at the definition provided by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children article 3. In this article, we can see that human trafficking is “the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.” (United Nations Human Rights, 2000). If we add the gender variable, we can say that trafficking in women is the “the recruitment, transportation, transfer, harboring or receipt of women”. There are many definitions, for example, Donna M. Hughes defines trafficking of women for sexual exploitation as “Trafficking is any practice that involves moving people within and across local or national borders for the purpose of sexual exploitation. Trafficking may be the result of force, coercion, manipulation, deception, abuse of authority, initial consent, family pressure, past and present family and community violence, economic deprivation, or other conditions of inequality for women and children.” (Hughes, 2000).

Prostitution and trafficking in women are interconnected and often people treat them as if they constituted the same problem. Mostly women that are trafficked is for sexual purposes. As we have argued before, prostitution is almost always forced by the social conditions of the women prostituted, they are recruited in local brothels before they are trafficked transnationally with the idea that “they will get a better life”. The trafficking in women for sex purposes’ value is between seven and twelve billion dollars per year (Hughes, 2000). Every year, approximately 50,000 women and children are trafficked for

sexual exploitation into the United States alone (Balos, 2004). If this is only in the United States, what about the whole world? Prostitution and trafficking in women are indeed interrelated, thus they can be included in the same concept: sex trafficking. Sex trafficking is “the merchandising of women’s bodies for the sexual gratification of men in a sex industry that mirrored other industries in its growing globalization” (Leidholdt, 2003). These two concepts are treated the same way under article 6 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW from now on). Article 6 CEDAW states that: “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women” (United Nations, 1979).

In this essay we will analyze how are women’s rights protected, specifically how is trafficking in women and prostitution regulated in the European Court of Human Rights and in the African Court on Human and Peoples Rights. This will be done through article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women, which states the prohibition of both prostitution and trafficking in women. This essay will have a section of explanation of what are women’s rights and how are they protected, what is CEDAW and how does it work. Furthermore, we will explain how the European Court of Human Rights and the African Court on Human and Peoples Rights work and what are they. Finally, we will analyze how is article 6 of CEDAW applied in both of the Human Rights’ Courts in order to see if there is a good application or if they are doing nothing about prostitution or trafficking in women.

### **3. CONCEPTUAL FRAMEWORK**

#### **3.1. Women's Rights as Human Rights**

Human rights are those rights inherent to all human beings, no matter their race, sex, nationality, ethnicity, language, religion, or any other status. Human rights comprise the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, among others. Everyone is entitled to these rights, without discrimination (United Nations, 2020). The mechanism that develops and determines the obligations that national Governments need to do in order to promote or protect human rights is called International human rights law.

The first international document to mention human rights was the UN Charter which was signed on 26 June 1945, in San Francisco and came into force on 24 October 1945. This Charter has been made after the Second World War in order to ensure that the crimes committed would not be done again, and to guarantee the protection of the human dignity. However, in the beginning, human rights were rights for “all men”. The four women that were to sign the UN Charter -Minerva Bernardino from the Dominican Republic, Amalia de Castillo Ledón from Mexico, Bertha Lutz from Brazil, and Virginia Grildersleeve from the United States- did not agree with this expression as language matters, and some people could take advantage of it and not think of women's rights. Therefore, they pushed in order to include the word *women* in the Charter, which we can see now in the Preamble “We the Peoples of the United Nations Determined [...] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small” (United Nations, 1945).

The most important declaration of human rights is the Universal Declaration of Human Rights (UDHR) by the United Nations. Since this was created in 1948, it has been expanded and now it comprises also child's rights, women's rights, rights of the persons with disabilities, etc. However, the UDHR is not binding. There are two sources of Human Rights that are binding: The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The ICCPR was adopted by the General Assembly of the United Nations on December 1966. It is a multilateral treaty that recognizes civil and political rights and

establishes mechanisms for their protection and guarantee. The ICESCR is a multilateral treaty that recognizes economic, social and cultural rights and establishes mechanisms for their protection and guarantee. It was adopted by the General Assembly of the United Nations on December 1966 too. As we can see, they both are mechanisms of protection of human rights. The ICCPR states in article 8.1 that “No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited” (ICCPR, 1966). In fact, the prohibition of slavery is an *ius cogens* rule (Gallagher, 2008).

Therefore, universal human rights are guarantees in law, in the forms of treaties, customary and international law, general principles and other sources of international law, which state multiple obligations on Governments (Dubin, 2019).

As we can see, discrimination based on sex is prohibited under almost every international human rights treaty. In the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), we have article 3 that states that all parties that have signed the Covenants should ensure equal rights for men and women.

States have some obligations in order to ensure that everyone can enjoy their human rights. These obligations are obligation to respect, obligation to protect and obligation to fulfill. Obligation to respect means that the Government should not stop someone from having rights and also has to refrain from breaching them. Obligation to protect means that the Government should take all appropriate measures in order to ensure that the right is not being violated and take action if it is violated in order to stop the violation. This means to establish all appropriate measures to prevent violations from taking place. Obligation to fulfill means that the Government needs to provide those rights and to guarantee a social environment that favors the full enjoyment of human rights. (Rona & Aarons, 2015).

Women’s rights are those rights established in the Universal Declaration of Human Rights but for women, this means, without having the gender-based discrimination. Those rights are based on that kind of discrimination and aim to ensure the equality between men and women, as well as stop the practices that are harmful for women such as genital mutilation, prostitution, etc. (United Nations Human Rights, 2014).

### **3.2. History of CEDAW**

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW from now on) is a human right's instrument dedicated only to the respect and protection of women's rights of the United Nations. This Convention tackles all forms of discrimination against women, understood as any gender-based discrimination, abuse or violence.

With the creation of the League of Nations and the rising consciousness in Human Rights, women's rights were first mentioned for international protection. However, it was not until 1935 that this topic was brought to the League of Nations' agenda. In 1937, a Committee of Experts was appointed in order to carry out an inquiry into the legal status of women. However, this was not successful as the League of Nations failed with World War II.

After World War II and the creation of the United Nations, the question of the gender-based discrimination was brought again, and the United Nations Charter was the first international agreement that dealt with this in article 1(3) "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." (Charter of the United Nations, 1941) However, it was not until 1967 that the CEDAW was started to take form. The first step towards the creation of the Convention was drafted by the Commission on the Status of Women (CSW from now on) (this was a separate commission of the ECOSOC) and debated in the United Nations General Assembly. It has the same structure than the Universal Declaration of Human Rights, which we will study further on.

This United Nations General Assembly resulted in the Declaration on the Elimination of Discrimination Against Women (DEDAW). This declaration was not binding; however, it was the first step towards an agreement on a binding instrument for the protection of women's rights. Many of the provisions of this declaration are now reflected in the CEDAW. Finally, in 1979, the Convention was adopted –signed and ratified by States–. In the present, there are six States that have not ratified the CEDAW. These are: Iran, Palau, Somalia, Sudan, Tonga, and the United States.

### **3.3. What is CEDAW**

The CEDAW is the international instrument most important for the protection of women's rights. It is important for three reasons: Firstly, it is legally binding. This means that Member States have to eliminate all forms of discrimination against women. Secondly, it needs to guarantee the development of women in order to ensure that their human rights are being respected. Lastly, the CEDAW can recollect data from States in order to see their improvement or lack of it every four years according to article 18 CEDAW (CEDAW, United Nations Human Rights, 1979).

Right now, there are 189 States parties to the Convention. This means that 90% of the states of the United Nations have agreed to fulfill, respect and protect women's rights. However, there are many of them that have made reservations and, therefore, do not have to comply with some of the articles of the Convention. CEDAW covers all forms of rights: civil, political, social, but also expression, work... is a transversal convention. It is not a document that creates new rights, it focuses on the elimination of discrimination of women in both the public and private spheres by the respecting of the rights that have already been created.

It Covers many areas, but there are three that are particularly important: Obligation of the state to eliminate trafficking; recognition of difficulties faced by rural women; calls on states to deal with marriage and family.

It also focuses on two types of discrimination: direct and indirect:

“Direct discrimination against women constitutes different treatment explicitly based on grounds of sex and gender differences. Indirect discrimination against women occurs when a law, policy, programme or practice appears to be neutral as it relates to men and women, but has a discriminatory effect in practice on women, because pre-existing inequalities are not addressed by the apparently neutral measure” (CEDAW, United Nations, 2010).

The CEDAW is formed by a preamble and six parts. The first part comprises articles 1 to six, which declare what are the State parties' obligations. Part II goes from article 7 to 9, which deals with public life and civil and political rights. Part III includes articles 10 to 14, which talk about economic and political rights. Part IV comprises articles 15 and 16, which englobe all things related to legal status and family issues. Part

V goes from article 17 to 22 and talks about the Committee. Finally, part VI includes articles 23 to 30 which are the final provisions.

There is also an Optional Protocol (which will be addressed later on). It was adopted in 1999 and is “an international treaty which establishes complaint and inquiry mechanisms for the Convention on the Elimination of All Forms of Discrimination Against Women” (Optional Protocol to the CEDAW, United Nations Human Rights, 1999).

### **3.4. CEDAW Committee**

The CEDAW Committee is an institution created through a treaty and that is in charge of monitor the application of the Convention. It is formed by 23 independent experts which are elected for a period of 4 years. Its main task is to study and analyze the situation of women in any member State of the Convention. They do it through a periodic report and through research with experts. Once this is done, the Committee creates a document in which we can see the situation of women and some recommendations for countries to improve women’s rights. States that are party to the treaty have to submit regular reports to the Committee to see if the rights of the Convention are being implemented. During this sessions, the Committee considers each report and reports its concerns and recommendations to the State party as concluding observations.

### **3.5. Problems of definition and interpretation**

The CEDAW is the only Convention dedicated to the protection and defense of women’s rights. However, as any other Convention, there are some concepts of crucial importance for the protection of these rights that have not been defined or that do not have a common agreed definition. Therefore, all those terms have to be interpreted according to the normal rules of public international law stipulated in the article 31 of the Vienna Convention on the Law of Treaties (VCLT), which are widely accepted as customary international law (Marcha, Chinkin, & Rudolf, 2013). This means that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (Vienna Convention on the Law of Treaties, 1969). In this case, for this investigation project, and as we have seen before, there is a lack of definition (or lack of agreed definition) for what is prostitution.

There are some articles that are necessary to understand the approach of the Convention and its impact on the defense of women's rights.

Article 1 talks about gender-based discrimination, which conforms the basis of all the human rights violations for women. It gives a definition of discrimination, which is:

“the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field” (CEDAW, United Nations Human Rights, 1979).

Article 2 asks the States parties to condemn that discrimination in all its forms and encourages them to take any measures that they consider necessary. Article 5 is one of the most important articles in the Convention as it sets the basis for the changing in cultural perceptions of women. This means that it establishes the abolition of all ideas or stereotypes that women can have in a given society. Also, it asks for maternity to be seen as a “social function and the recognition of the common responsibility of men and women in the upbringing and development of their children” (CEDAW, United Nations Human Rights, 1979).

Article 6 (the one in which we will be focusing) asks states parties to take all appropriate measures in order to abolish prostitution and all forms of traffic in women. Article 10 talks about the importance of education in the achievement of equality between men and women. The last article that we will mention here is article 16, in which all the requirements to achieve equality are mentioned, and it focuses in the equality inside the marriage.

These articles are very important in order to see what CEDAW wants and how it will implement those articles. However, this is not all. CEDAW changes as the society does, and therefore it makes general recommendations. By now, there are more than 30 general recommendations. This aims to adapt the articles to the needs of the women in the society.



### **3.6. Optional Protocol of CEDAW**

The Optional Protocol of the Convention on the Elimination of All Forms of Discrimination Against Women (OP) was adopted on 1999 by a UNGA Resolution. It entered into force on December 2000, for States to sign and ratify. There are 114 states parties and 80 signatories up to now (Optional Protocol to the CEDAW, United Nations Treaty collection, 2000). This Optional Protocol a protocol establishes the complaint and investigation mechanisms of the Convention on the Elimination of All Forms of Discrimination against Women.

States parties grant the CEDAW competence to hear complaints from individuals or to investigate severe or systematic violations of the Convention, which has resulted in a number of decisions taken against Member States, in matters such as domestic violence, parental leave and forced sterilization, among others.

The (CEDAW) banned gender discrimination, which obliged states parties to revoke discriminatory laws and ensure equality in the fields of public health, employment and education. However, its optional feature, states may not ratify it (AWID, 2008). Even those states that do ratify it can make reservations to the communication and inquiry procedures.

In the Protocol, articles 1 to 7 create a complaints mechanism that is similar to those of the First The participants have agreed to recognize the competence of the Committee on the Elimination of Discrimination against Women to consider complaints "by or on behalf of" individuals or groups claiming that their rights under the Convention have been violated (Optional Protocol to the CEDAW, United Nations Human Rights, 1999). If a complaint is made on behalf of a victim, the victim's consent is required, unless the person making the complaint can justify why they did it without the consent of the victim (Optional Protocol to the CEDAW, United Nations Human Rights, 1999). The power submit complaints on behalf of victims is vital to allow non-governmental organizations, such as feminist organizations and human rights groups, to use the Protocol to enforce the Convention.

In order to use the Protocol, complainants must have exhausted all measures provided by their domestic law. The Committee can request information and make recommendations to a State member, but its decisions are not binding.

Articles 8 to 10 establish the investigation mechanism. States Parties may allow the Committee to investigate, report and make recommendations on "grave or systematic violations" of the Convention (Optional Protocol to the CEDAW, United Nations Human Rights, 1999). States Parties may choose not to submit to this obligation upon signature or ratification of the Protocol, through a special declaration. However, only Bangladesh, Belize and Colombia have done so (Isa, 2003).

Article 11 requires States parties to ensure that complainants under the Optional Protocol are not subjected to treatment or intimidation; Article 13 obligates States parties to inform their citizens about the Convention, the Optional Protocol and the decisions of the Committee, so as to facilitate complaints; Articles 12 and 14 concern the procedure and the preparation of reports by the Committee to deal with complaints; Lastly, articles 15 to 21 deal with the ratification, entry into force and amendment of the Protocol.

We have seen all that concerns universal human rights. In this essay, we will analyze how article 6 of CEDAW is applied in the European Court of Human Rights and in the African Court on Human and Peoples<sup>1</sup> Rights. Therefore, we are going to see all that is related to these two mechanisms of protection of human rights.

### **3.7. European Court of Human Rights**

The European Court of Human Rights is the institution in charge of guaranteeing that States parties comply with their obligations of the protection of human rights and the fundamental freedoms. It was created in 1959. It is an international court that does not act only at the behest of States, but also individuals which can be citizens or any person under the jurisdiction of a member state. This Court has its headquarters in Strasbourg, and it is formed by 47 Judges (one from each member State). Its official languages are English and French.

The main duty of the Court is to supersede if the member states have respected the rights and freedoms of their citizens mentioned in the Convention for the Protection of Human Rights and Fundamental Freedoms. For this, it is necessary that the demand has been through all national institutions available before going before the Court.

This does not mean that the European Court of Human Rights is perfect. States do not like to be told when they make mistakes or need to change some laws. In a nutshell, States do not like to lose sovereignty. However, this is the Court's job: to check if the actions and decisions that States take are in accordance with human rights. Furthermore,

the Court is having some difficulties as the cases are facing a backlog. The problem is that, the Court was not created to substitute national courts nor national mechanisms of protection of human rights, it was only created to supersede if States were implementing those rights in the right way (Mignon, 2012).

The Convention for the Protection of Human Rights and Fundamental Freedoms entered into force in 1953. It is composed of 59 articles divided in three parts. The European Convention for the Protection of Human Rights and Fundamental Freedoms was the most effective international system for protection of human rights until now. The list of rights has grown since then as additional protocols have been created. These rights have been interpreted by the Convention institutions and the national Courts

of the member states. As a result, a modern body of human rights law was created. The institutions of the European Convention changed a lot since its creation (Donoho, 2017).

Article 1 makes all member states to adopt the commitment of respecting and protect the rights stated in the Convention to all people under their jurisdiction, not only to their nationals or residents.

“Article 1 – Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention” (European Convention on Human Rights, 1953).

In Section I, which goes from article 2 to 18, the basic human rights under the protection of the Convention are named. In Section II, which comprises article 29 to 51, the competences, regulation and functioning of the Court is appointed. Lastly, Section III goes from article 52 to 59, and it regulates other questions related to the Convention.

### **3.8. African Court on Human and Peoples' Rights**

The African Court on Human and Peoples Rights was a milestone development in the field of international human rights law in Africa. It is a “continental court established by African countries to ensure the protection of human and peoples’ rights in Africa. It complements and reinforces the functions of the African Commission on Human and Peoples' Rights” (African Court on Human and Peoples' Rights , Welcome to the African Court, 2020).

The Assembly of Heads of State and Government of the Organization of African Unity (OAU) adopted the Protocol to the African Charter on Human and Peoples' Rights (Protocol to the African Charter on Human and Peoples' Rights, 1998) in 1998, in Burkina Faso. With the adoption of the Protocol, Africa got a step closer to Europe and Inter-America in the regional mechanisms of protection of Human Rights. The Charter enshrines generous human rights guarantees, including the “rights to life, integrity, human dignity, liberty, security, non-discrimination, and a fair trial, [...] freedom of conscience, religion, association, assembly, and movement, [...] rights to property, fair wages, health, education, family, a healthy environment, and economic, social and cultural development” (Murray, 1997). In order to protect, respect and fulfill those, there has been created the African Commission on Human and Peoples' Rights.

The Court is composed of eleven Judges, which are citizens of member states of the African Union. According to the Protocol (Article 5) and the Rules (Rule 33), the Court should receive complaints and/or applications that are submitted to it by the African Commission of Human and Peoples' Rights or State parties to the Protocol or African Intergovernmental Organizations. If a Non-Governmental Organizations with observer status and individuals from States which have made a Declaration have accepted the jurisdiction of the Court, they can also submit cases before the Court. However, only nine countries have completed the declaration. Those countries are Burkina Faso, Ghana, Malawi, Mali, Rwanda, Tanzania, Republic of Côte d'Ivoire, Tunisia and Gambia (African Court on Human and Peoples' Rights, The Gambia Becomes the Ninth Country to Allow NGOs and Individuals to Access the African Court Directly, 2018).

This African system of protection of Human Rights still has many flaws that need to be solved in order to be functional. Some of them are: limitations of specific rights that are often not clearly stated; there are very few applications overall and most do not go past the Commission; the lack of knowledge of the existence of this Court System as people need to have knowledge on how to access the system, how to file a complaint, but States have not been willing to inform citizens so people have an abstract idea that it's there, but they don't know how it works; languages are an obstacle when obtaining access to the court, especially in rural areas; lack of access to it as fax, email, post are not always available or trustworthy. Furthermore, illiterate people cannot file complaints, as they must be written, and there are large amounts of population in Africa that are illiterate, especially in rural areas; and lastly, lack of funding (Dubin, 2019).

As we have now explained the structure of the European Court of Human Rights and in the African Court on Human and Peoples<sup>1</sup> Rights, we need now to explain and analyze all that is related with article 6 of CEDAW in order to understand later how is it applied in those mechanisms of protection of human rights.

### **3.9. Article 6 of CEDAW**

“States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women” (CEDAW, United Nations Human Rights, 1979).

At the moment of the creation of the Convention, there were many issues that were already addressed by other conventions. This was the case of the trafficking in persons and prostitution, which has been addressed in the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949. This Convention declared that prostitution and trafficking in persons are “are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community” (CEDAW, United Nations Human Rights, 1979). However, in the CEDAW, the terms are not defined, which creates a problem of interpretation. This article has two main issues that wants to eradicate: all forms of traffic and the exploitation of prostitution.

Also, we can take a look at General Recommendation 26 on women migrant workers It addresses women in jobs with low salary and that could have a risk of being discriminated and therefore never got the opportunity to apply for citizenship nor a resident card on the country in which they are staying. However, the Committee gives more attention to the trafficking in women’s issue as they consider it an emergency.

#### **3.9.1. All forms of Traffic**

The convention does not define what does “all forms of traffic” mean. However, the Convention has been focusing on sex trafficking. However, in the General Recommendation 19, the CEDAW includes the new forms of exploitation such as “sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organized marriages between women from developing countries and foreign nationals” (CEDAW, General Recommendation No. 19: Violence against women, 1992).

### **3.9.2. Exploitation of Prostitution**

This term, as we have been seeing, lacks definition. The Convention itself has not focused on the elimination of prostitution itself, but on the elimination of the exploitation of prostitution. Inside the Convention, expertise has developed two stances: those who are in favor of abolitionism and those who oppose abolitionism.

Those who are in favor of abolitionism believe that prostitution should be abolished at all costs and no matter what as it constitutes a form of discrimination against women and it affects the dignity of prostitutes. Those who oppose abolitionism believe that women should be free to choose if they want to engage in prostitution and therefore should have protection, as the lack of legal protection leads to sex trafficking.

The Committee divides states in three groups according to how do they tackle prostitution: criminalization, decriminalization and legalization/regulation. Criminalization paradigm believes that all activities related to prostitution should be penalized, and even prostitutes themselves are targeted. Decriminalization defends that prostitution should be a personal choice and therefore should be agreed. Thus, the only penalized acts would be those who are not consensual. Legalization/regulation believes in licenses for brothels in certain areas, health checks, etc. by addressing the issue outside criminal law (Marcha, Chinkin, & Rudolf, 2013).

The Committee also targets the root causes of prostitution, which they consider that are all those activities that makes women seen as a sex object; sex phone lines, cabaret dancers, among others. Also, they urge the importance of mass media programs or seminars focused on gender violence, trafficking in personas, prostitutions and all forms of gender-based discrimination.

### **3.9.3. Obligation to Respect**

Trafficking in women constitutes a violation of human rights. However, these victims are often arrested or abused for moving countries and forced to work in illegal terms or in illegal activities. The Committee has determined that there should be no women that has been trafficked to be punished nor penalized for engaging in those activities.

The Committee has also required States parties to ensure the training of the police in the borders of the States in order to recognize the victims of trafficking and provide support for them (Marcha, Chinkin, & Rudolf, 2013).

### **3.9.4. Obligation to Protect**

Any prohibition is not effective if the persons most vulnerable under that protection are not protected. There is the need to penalize both trafficking and exploitation of prostitution in all regional and international courts and instruments. It has also issued States to target demand for prostitution although they have not call upon its criminalization.

Victim support and protection is basic for their well-being and their dignity. The Convention has obliged States parties to provide protection visas, reintegration and support services for all victims of trafficking (Marcha, Chinkin, & Rudolf, 2013).

### **3.9.5. Obligation to Fulfill**

International anti-trafficking laws have developed some remedies for victims of trafficking such as establishing civil or criminal actions against traffickers, compensations for the victims of trafficking and residency permits that can let the victims to enjoy and have these remedies.

Trafficking is perpetuated as the demand keeps existing. It is important to reduce that demand in order to tackle the root of the problem, and therefore States and international instruments such as the Convention are developing systems of data collection on these issues (Marcha, Chinkin, & Rudolf, 2013).

## 4. METHODOLOGY AND RESEARCH QUESTIONS

In order to analyze how is article 6 of CEDAW applied, we will take a look of any article related to prostitution or trafficking in women in the Convention for the Protection of Human Rights and Fundamental Freedoms of the European Court of Human Rights and the Protocol to the African Charter on Human and Peoples' Rights of the African Court on Human and People's Rights.

We have chosen the European Court of Human Rights and the African Court on Human and People's Rights in order to see if the regional mechanisms of protection of Human Rights succeed in protecting women's rights. As women's rights is a very broad topic, we have chosen to focus on prostitution and trafficking in women, which are both collected in the Convention on the Elimination of All Forms of Discrimination Against Women. It is interesting to see not only how the obligations under article 6 of CEDAW are fulfilled at a national level but also at a regional level.

In the case of the European Court of Human Rights, we will analyze article 4 of the Convention for the Protection of Human Rights and Fundamental Freedom, which does not state directly either prostitution nor trafficking in women, but both can fall under its protection. Furthermore, we will analyze the following cases: *Rantsev v. Cyprus, T.I. and Others v. Greece* and *L.E. v. Greece*. This will be made in order to understand how the European Court of Human Rights is applying article 6 of CEDAW.

On the other hand, we will be analyzing the Protocol to the African Charter on Human and Peoples' Rights of the African Court on Human and People's Rights. In this case, we find an article that push states to protect women against trafficking in women. However, there is not an article that does the same with prostitution explicitly. We will be seeing how the Court applies its Charter and what problems or advantages does it have.

The analysis for both regional mechanisms of protection of human rights will be different as they present differences in terms of their Charter and norms, jurisprudence and conditions. Thus, we will be analyzing each one independently of the other and make separate conclusions for each one.

As it is usually used in international law, we will be analyzing this through the deductive method, we will be linking premises with conclusions. This means that we will first study and see how both of the Human Rights Courts are doing in the implementation of rules and jurisprudence related to prostitution and trafficking in women and then we



will see if that is enough in order to fulfill article 6 of CEDAW, or if they should change their methods in order to be more efficient.

Therefore, the main research question would be: In what degree are CEDAW standards on prostitution and trafficking applied in the European Court of Human Rights and in the African Court on Human and People's Rights? In order to answer this question, we would need to also take into account if there is anything wrong with the application of the article 6 CEDAW or if their implementation should be improved.

## 5. ANALYSIS

### 5.1. European Court of Human Rights

As we have seen earlier, the European Court of Human Rights is the institution in charge of guaranteeing that States parties comply with their obligations of the protection of human rights and the fundamental freedoms. Regarding to prostitution and trafficking in women, the Convention for the Protection of Human Rights and Fundamental Freedoms, there is not a specific article that pushes for the abolition of prostitution and trafficking in women. However, there is an article that has been interpreted as dealing with those matters. This is Article 4, which states the following:

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term “forced or compulsory labour” shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.

(Convention for the Protection of Human Rights and Fundamental Freedoms).

The establishment of the relation between article 4: Prohibition of slavery and forced labor and article 6 of CEDAW can be made through the case *Rantsev v Cyprus and Russia* (Rantsev v Cyprus and Russia, 2010). This case revealed how sex industry in Europe has a human cost. The applicant for this case was the father of Oxana Rantseva, who wanted justice for the death of his daughter. He sought justice in Cyprus, Russia and lately, at the European Court of Human Rights. This case brought light to the sex industry of Cyprus and has become a landmark for the interpretation of article 4 of the Convention

for the Protection of Human Rights and Fundamental Freedoms in the matter of prostitution and trafficking in women.

Ozana was a woman that moved from Russia to Cyprus, where she started to work as a “cabaret artiste” (it is known that, in Cyprus, a “cabaret artiste” means prostitute). Her boss took her to the authorities as he wanted to fire her by saying that she was illegal in the country. The authorities found that she was staying there legally, and so she returned to her job. That night she fell off a balcony while trying to escape from the apartment where his boss kept her and died. As the death was under mysterious circumstances, the authorities never looked into human trafficking nor any other reason as per why this could have happened.

After this, the Court found (unanimously) that human trafficking fell under article 4 (above mentioned) even if it has not been explicitly written within it. Furthermore, the Court made clear the obligation for States in the issue of human trafficking. It was such so that the Court considered that the domestic legislation of each state should ensure protection for victims of trafficking. The European Court of Human Rights found that Cyprus had violated the following articles: Article 2 (right to life), Article 3 (prohibition against torture), Article 4 (prohibition against exploitation) and Article 5 (right to liberty). However, their judgement was mainly centered on article 4.

The term “trafficking” is not present in article 4. However, the Court said its interpretation has to be done considering article 31 of the Vienna Convention of 1969 on the Law of Treaties, mentioned above.

According to this, the Court determined that article 4 also referred to human trafficking. Therefore, this case is considered a landmark for the European Court of Human Rights when talking about human trafficking and, most importantly for this essay, trafficking in women (Allain, J., 2010).

However, here we need to ask ourselves if slavery, and therefore human trafficking, is being protected just because it is considered an *ius cogens* norm instead of being in accordance with article 6 CEDAW. We could make this assumption as prostitution is not mentioned anywhere, and thus is not considered in article 4.

There is another case that reflects what we have seen above about article 4 and its application for cases of human trafficking. This is the case *T.I. and Others v. Greece*, in which a violation of article 4 has also been found. In this case, three Russians claimed to

be victims of both human trafficking and prostitution in Greece. These three women have been arrested for working as prostitutes, for which Greece has been sentenced to pay reparations. Thus, the Court considered that the legal framework had not been effective to punish the people who trafficked with these three women and to protect them, so they made clear, again, that human trafficking with the purpose of sexual exploitation (prostitution) falls under the scope and protection of article 4.

Another case that illustrates this is *L.E. v. Greece*, in which a Nigerian woman was forced into prostitution in Greece. She has been officially recognized as a victim of human trafficking for the purpose of sexual exploitation. However, the Nigerian women had to wait for nine months since she informed the authorities of her situation. Therefore, the Court found that there has been a failure and a delay too prolonged for the Greek Tribunals to fulfill its procedural obligations. Furthermore, as Greek failed to fulfill its procedural obligations, it has failed to protect the victim under the scope of article 4.

It is after the case *L.E. v. Greece* that the Court starts considering sex exploitation (prostitution) under the scope of article 4, as we can see in the Guide on Article 4 of the European Convention on Human Rights (European Court of Human Rights, 2019). They guaranteed the protection against human trafficking for the purpose of sexual exploitation.

As we can see with the cases above mentioned -*Rantsev v. Cyprus, T.I. and Others v. Greece* and *L.E. v. Greece*-, the European Court of Human Rights does protect the victims of trafficking in women (or human trafficking) and prostitution (often called sexual exploitation). This can be seen as a fulfillment of article 6 CEDAW. However, there is no articles that guarantee the exclusive protection in those matters and therefore there is not an agreed proceeding as to how to deal with those matters. Of course, they are now doing so under article 4, but would not it be much easier to just include an article that protects women explicitly under those circumstances?

The Court defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised” (European Court of Human Rights, 2019). As we have seen in the article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, human trafficking is defined as:

The recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. (United Nations Human Rights, 2000).

As we see, the definitions are not the same and have little in common. Therefore, the scope of article 4 for human trafficking or trafficking in women is limited, and the Court should consider adding an article about trafficking in women and prostitution.

However, in the Guide on Article 4 of the European Convention on Human Rights (2019) it is stated that:

Account must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part (European Court of Human Rights, 2019).

This means that the Court, when needed, could apply directly article 6 of CEDAW as it must be taken into account if the parties had ratified the CEDAW. The scope of the application of article 6 CEDAW in the ECHR is very limited as we have not seen it referring directly to that article nor to half of its content (mostly related to prostitution).

Therefore, in the matter of application of article 6 of CEDAW, the European Court of Human Rights is not failing to protect women that get engaged on prostitution or/and trafficking in women, but it is failing to address the question directly. Yes, it is true that it can be seen in article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms that human trafficking (and therefore trafficking in women) is considered within the scope of slavery. However, the need of an article or a full convention that addresses women's rights specifically or that focuses only in trafficking in women is necessary to make clear that they will not tolerate those kinds of violations of women's rights.

Furthermore, there is a much greater need for an article that focuses specifically on prostitution as it is not mentioned almost anywhere in the Convention. Yes, we can see that after the case *L.E. v. Greece*, human trafficking for the purpose of sexual

exploitation is mentioned. However, there is a need for an article that addresses the matter of prostitution itself even if prostitution is very related to trafficking in women and human trafficking (considering it as the general term for trafficking), but it is not the same thing. There can be prostitution without human trafficking and vice versa. Therefore, there is a great need for an article that addresses both of them, and more importantly, only prostitution.

## **5.2. African Court on Human and Peoples' Rights**

As we have seen earlier, the African Court on Human and Peoples' Rights was a milestone development in the field of international human rights law in Africa. It adopted the Protocol to the African Charter on Human and Peoples' Rights in order to protect Human Rights. Furthermore, it has not only adopted a general Protocol, but they have a specific one on the rights of women: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

In the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, there is an article that mentions trafficking in women. This is Article 4.1 and 4.2.8.:

### Article 4

#### The Rights to Life, Integrity and Security of the Person

1. Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.

2. States Parties shall take appropriate and effective measures to:

[...] g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk;

(Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003).

It is important to highlight that in this article, there is not a need to harm or carry out any kind of exploitation against women (other than the trafficking in women itself) in order to be considered as trafficking in women. This means that, even in trafficking in women and prostitution are deeply related, there is no need for sexual exploitation in order to classify the practice as trafficking in women.

It can be clear the reason as per why Africa would have an article on trafficking in women: this kind of issue is based on the sociopolitical structure in Africa, which derive from wars, conflicts, poverty, etc. (Onohua, B., 2009).

Although the Court has all on its favor in order to judge and apply article 4 of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Court has not been able to prosecute those who breach this article. This is mainly because the Court has not sufficient financial and other human resources, and because women are too afraid to go before the Court. Furthermore, without those elements, the Court cannot carry out effective investigations –all of these taking into account that it has many other cases to look to. The court has also decided to leave it to each State's responsibility as it encourages its Member States to take measures in order to guarantee the safety of the victims and to carry out trials.

In the case of the victims, the Court should have the resources to help out the victims. This means that it should be able to guarantee legal protection, assistance, translation or interpretation, etc. All of this without mention the economic compensation for injuries.

By leaving the trafficking in women responsibility to the domestic level, the Court is letting States to put into balance if it is worth to actually prosecute the criminals that traffic in women. As we have seen earlier, this is an activity that generates money in the underground economy, which can be beneficial for some extremely poor countries that need that money (Jalloh C.C., Clarke K.M., O. Nmehielle, V., 2019).

However, this could be fixed by using criminal proceeds. As we have pointed out, a large amount of money is made of trafficking in women and prostitution, and the Court could use that in order to mitigate that shortage. The money that the traffickers made can be used to support the victims and carry out the investigations needed. Nevertheless, this can also create issues. The confiscation cannot be carried out until the Court is sure and has judged the trafficker and it is often seen as another form of punishment. If the Court takes too much time in a certain case (which it does), then the trafficker can hide or donate that money and the Court will not have it. Therefore, this measure requires action sooner rather than later. However, that cannot be done unless the Court has enough means to

return the money confiscated in case they do not find the trafficker as guilty or do not have enough evidence of it (ibid.).

Furthermore, most of the women that get engaged in either prostitution or trafficking in women is because that have been fooled or because they are poor and do not have enough resources to live. Therefore, the Court needs to be careful when confiscating because they could do worse to that people as they would be marginalized and seen as criminals.

Even if there is not an article dedicated to prostitution, the Protocol to the African Charter on Human and Peoples' Rights has an article that is interesting when talking about women's rights. This is Article 3.1, which states that "The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned" (Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003)

Therefore, the legal framework of the African Court on Human and Peoples' Rights is much higher than that of any other Court. Many states parties to the Court have ratified the CEDAW, thus giving the Court the legitimacy to protect those rights even if they are not explicitly written in the Charter or the Protocol. If a woman goes before the Court, she can invoke any of the treaties that have been ratified in order to protect her rights. (Robert, E., 2002).

As we have seen, the African Court on Human and Peoples' Rights has a protocol for the protection of the rights of women, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which has an article specifically on trafficking in women. This is great on the scope of the application of the article 6 of CEDAW. However, the African Court on Human and Peoples' Rights has not registered any cases to see its implementation, and if it is effective or not. This is a handicap on the application of article 6 CEDAW as we cannot put in practice what the Protocol determines. Furthermore, the Protocol has no article on the issue of prostitution.

As we have seen in the European Court of Human Rights, there was no article for prostitution nor trafficking in women, but the rights of the women that got engaged in that kind of practices were protected as they considered to be under article 4 of their Convention. In the Case of the African Court on Human and Peoples' Rights, we cannot



see if prostitution falls under the scope of article 4.1 and 4.2.8. of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa as there is no jurisprudence on the matter. This means that we will have to wait and see if there is a good application in the future.

However, even if we cannot see how those articles can be applied, this Court has the article 3.1, which makes all treaties to act as applicable legislation for the Court. This means that article 6 of CEDAW counts as if it was its own article for the African Court on Human and Peoples' Rights, so in theory, the application should work as determined by the CEDAW and its general comments. Nevertheless, as mentioned above, it would be interesting to see this in practice and not only in theory, as we have seen that the Court has not the necessary resources to carry out investigations nor make effective decisions.

## 6. CONCLUSIONS

Prostitution and trafficking in women are two of the worst scenarios in which a woman wants to see herself. However, they are most common than what we think. There are many articles and conventions that fight for the protection of women's rights and the abolition of prostitution and trafficking in women. One of those is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In fact, article 6 of CEDAW pushes for the action of States in the abolition of prostitution and trafficking in women.

Regional courts of human rights are very important nowadays to ensure that human rights are being protected. In fact, they ensure that all peoples in that given region enjoy the same rights as far as possible. In this essay we have analyzed the application of article 6 CEDAW in the European Court of Human Rights and the African Court on Human and Peoples' Rights.

In the case of the European Court of Human Rights, we have seen that, in the Convention, there is an article that prohibits slavery. This is article 4. Human trafficking is interpreted as to fall under that article, even if it is human trafficking for the purpose of sexual exploitation. However, they do not have an article that explicitly prohibits trafficking in women nor prostitution.

After having analyzed the application of article 6 CEDAW in the European Court of Human Rights, we can determine that there is a need for an article that pushes for the prohibition of both prostitution and trafficking in women. If that happened, the application of article 6 CEDAW would be direct as they would have incorporated that article into their own convention, not as now, that they could be applying it (as stated in the Guide on article 4), but there is no direct application. Furthermore, if we talk about women's rights, a Convention that specifically protects those rights would be a step forward on the abolition of prostitution and trafficking in women.

In the case of the African Court on Human and Peoples' Rights, they have a protocol only for the protection of women's rights. Here, the theory is well done, but the practice still is to be seen. There is no jurisdiction that can prove that article 6 CEDAW is being applied correctly, or if its application is effective.

Article 6 CEDAW can be applied directly by the African Court, but there is no jurisprudence that can prove this. This lacks effectiveness in the application of

international norms and in the abolition of prostitution and trafficking in women. Yes, they have done great by stating that any international norm can be applied directly or by having a Protocol inly to protect the right of women. However, if there is no practice, it is worth nothing.

As we have been seeing during this essay, Regional Courts for the protection of Human Rights are important in the application of international norms for the protection of women's rights. However, these two that we have analyzed have failed in it. This means that there is still much work to do for the protection of women's rights and the abolition of prostitution and trafficking in women, in which, hopefully, we will see a development in the future.

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