

CONTRIBUTI

# COMBATTERE LA VIOLENZA DOMESTICA: LIMITI E POTENZIALITÀ DELLA CONVENZIONE DI ISTANBUL

*Estratto di una tesi sulla violenza domestica.*

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# COMBATTERE LA VIOLENZA DOMESTICA: LIMITI E POTENZIALITÀ DELLA CONVENZIONE DI ISTANBUL

La violenza domestica, intesa come violenza di genere, è una delle più diffuse e radicalizzate forme di violenza esistenti nella società; le statistiche rivelano che nella maggior parte dei casi le donne sono uccise per mano dei loro partner. Tuttavia, va precisato che tale tipo di violenza può assumere anche forme diverse da quella fisica: la violenza psicologica ed economica ne sono un esempio.

La violenza subita dalle donne ad opera del proprio partner è una forma di controllo finalizzata a riprodurre nella coppia, o più in generale in famiglia, la sottomissione della donna esistente nella società. Tale subordinazione produce disuguaglianza e squilibrio tra uomini e donne nel godimento dei diritti fondamentali. Questa questione risulta essere un problema strutturale ed endemico della società contemporanea, che lo Stato tende a rendere perpetuo. Infatti, secondo la critica femminista, lo Stato è un'istituzione patriarcale, poiché rappresentata dagli uomini: esso perciò incorpora e preserva gli interessi degli uomini. Conseguentemente, solo quelle materie che corrispondono alle priorità maschili saranno oggetto di regolazione e disciplina da parte dello Stato; al contrario, quelle materie inerenti gli interessi femminili verranno lasciate alla sfera privata, sottraendole all'interferenza statale. L'interpretazione femminista della dicotomia "pubblico-privato" ha spiegato, dunque, come lo Stato, abbia cristallizzato nella legge la disuguaglianza di genere esistente nella società, informando il piano del "dover essere" della legge su quello dell'"essere" proprio della società. In questo modo, la subordinazione della donna e la violenza come forma di controllo vengono legittimate e legalizzate.

Il diritto internazionale, in quanto fondato sul consenso degli Stati, riflette tale dicotomia: perciò, questioni prettamente femminili, quali ad esempio diritti sessuali e riproduttivi, violenza di genere in tempi di pace o di guerra, sono state a lungo escluse e trascurate dal diritto internazionale, in quanto rientranti in quelle materie incluse nel "domaine réservé" degli Stati, e quindi riservate alla sovranità statale.

Solo negli ultimi decenni, con la progressiva rottura di tale dicotomia, ma soprattutto con la costruzione della teoria degli obblighi positivi degli Stati, la violenza domestica è stata inserita nell'ambito dei diritti umani, e dunque intesa come violazione del diritto ad essere uguali davanti alla legge, del diritto alla vita privata, fino alla configurazione della violenza domestica come violazione del diritto a non essere soggetti a tortura (ciò è stato possibile grazie alla ricostruzione, supportata da parte della dottrina, di una simmetria strutturale degli elementi costitutivi del reato de qua con il reato di tortura).

Il riconoscimento della violenza domestica come violazione dei diritti umani implica che lo Stato è considerato responsabile non solo per le azioni commesse dai propri organi, ma anche per quelle commesse da attori non statali, qualora lo Stato non soddisfi il proprio obbligo di rispettare, proteggere e prevenire tali violazioni.

La Corte Europea dei Diritti dell'Uomo, quale organi di controllo della Convenzione Europea sui Diritti Umani (CEDU), si è adeguata ai nuovi standard di protezione internazionale dei diritti umani attraverso un'interpretazione estensiva dei diritti umani già codificati nella CEDU: inizialmente la violenza domestica è stata, perciò, configurata come violazione del diritto alla vita privata ex art 8 CEDU. Tale diritto considerato inclusivo del diritto all'integrità fisica e morale è stato ritenuto violato in tutti i casi in cui lo stato aveva omesso di adottare in via preventiva le dovute misure idonee a proteggere la vittima dagli atti di violenza del suo carnefice, intervenendo con misure restrittive della libertà personale o di allontanamento coattivo dall'abitazione comune, oppure aveva omesso di svolgere le indagini necessarie a punire i responsabili.

Tuttavia, l'art. 8 offre una tutela attenuata in quanto il diritto alla vita privata non ha carattere assoluto e dunque, nell'adempiere agli obblighi ad esso inerenti gli stati possiedono ampia discrezionalità. Con l'entrata

in vigore della Convenzione del Consiglio d'Europa sulla prevenzione e la lotta alla violenza contro le donne e la violenza domestica (detta Convenzione di Istanbul) nel 2014 la posizione della Cedu si rafforza. In primis la violenza domestica è stata ricondotta all'interno dell'art 3, che protegge gli individui dal reato di tortura ed ha valore assoluto: di conseguenza, il margine di apprezzamento lasciato allo stato in tale materia viene ristretto e lo scrutinio da parte della Cedu circa il rispetto degli obblighi incombenti sullo Stato viene ampliato. La Cedu ha poi dato un contenuto più ampio agli obblighi dello Stato di proteggere, prevenire e punire le violenze domestiche. In tal senso, l'utilizzo della tecnica di fertilizzazione incrociata ha permesso alla Corte di interpretare la CEDU in modo conforme alla Convenzione di Istanbul. Inoltre, la Cedu ha provveduto a riconoscere la violenza domestica come forma di discriminazione ex art. 14 CEDU, dichiarando che ogni singola violazione è da ricondurre ad una pratica discriminatoria e dunque generalizzata degli Stati, che non adottando le misure necessarie condonano de facto tali violazioni e ne favoriscono la sistematicità.

# INTRODUCTION

The Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter Istanbul Convention)<sup>1</sup> adopted by the Council of Europe in 2011, is the first instrument that expressly addresses of domestic violence, as a separate issue within the ambit of violence against women. It defines domestic violence as a human rights violation and a form of discrimination against women. The drafters were conscious that this phenomenon is strongly influenced by gender stereotypes: social constructed roles imposing to women a certain behaviour relegate them in a position of disadvantage. As a consequence, in drafting the obligations of the State to address the issue, the interconnection between gender-based violence, inequality and gender stereotypes is always taken into account. This is a great step in the development of international human rights law, that has for a long time refrained to deal with this issue, thus reflecting the “public-private” dichotomy.

Since the innovative character of this instrument, in terms of advancement in the level of protection that the State has to ensure to women, the present paper seeks to offer a perspective on how the Istanbul Convention could contribute to the evolution of a gender oriented interpretation of the European Convention on Human Rights (hereinafter ECHR)<sup>2</sup>.

## The ECtHR’s “evolutive” interpretation

Since the Istanbul Convention crystallized the evolution of customary international law in such matter, the cross-fertilisation among these two instruments cannot be analysed without taking into account the evolution in international law, as described in the first section. The effect of the cross-fertilization was three-fold; from a substantial perspective, the ECtHR started to understand the egregiousness of domestic violence through the recognition of it as inhuman treatment covered by the more absolute prohibition contained in art. 3 of the ECHR; from the procedural aspect, the ECtHR has elaborated, always in the light of the Istanbul Convention, a new content of the due diligence standard, that allows to expand the realm of States obligations in this field, thus rendering the criterion to entail State’s responsibility stricter than before; ultimately, the ECtHR has upheld the systemic and endemic spread of the phenomenon, and its consequent discriminatory nature. This last point is essential for the understanding of the need of a holistic and comprehensive approach to eradicate domestic violence.

The first turning point in the evolution of the jurisprudence in harmony with the Istanbul Convention and customary international law was the acknowledgment of the egregiousness of domestic violence. The fact that domestic violence was considered a form of degrading or inhuman treatment falling under art. 3 means that the ECtHR has finally adopted, after *Talpis v Italy* (a case concerning attempted murder of the applicant and murder of her son because of the authorities’ lack of intervention) a correct understanding of the act. Even if the inappropriate criterion of severity was still applied to determine if the treatment

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1 Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS No 210 (Istanbul Convention).

2 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force September 1953) ETS No 005. 3

inflicted overcomes the threshold established by art. 3, the ECtHR gave relevance to some aspects, that were overlooked in the previous jurisprudence. In *Valiuliene v Lithuania*, a case concerning the repeated dismissals of investigations for minor bodily harm, after the complaint lodged by the applicant against her partner for the repeated beatings reported, the ECtHR in considering the different components that render the alleged ill-treatment serious enough to fall under the protection ensured by art 3, underscored for the first time that the psychological element is relevant in cases of domestic violence.<sup>3</sup> In arguing that, the Court stressed the feelings of fear and helplessness suffered by the victim of domestic violence.<sup>4</sup>

Even if the ECtHR still put too much weight on the proof of the element of the duration and the repetitions of the acts of violence throughout the time, as well as the proof of the severity of the physical attacks (in all the cases taken into account there was medical evidence in support of the proof of physical acts of violence), the understanding of the psychological impact as an integral part of the offence, deriving from the influence of the definition contained in the Istanbul Convention,<sup>5</sup> has opened the way to the final recognition of the egregiousness of the violation, rejecting firmly any attempt to support its qualification as trivial. In the same direction, should be read the acknowledgement made by the Court that domestic violence can also take the form of economic abuse, independently from the severity of the physical abuse.<sup>6</sup>

Nevertheless, in many of the cases analysed, the ECtHR has refused to qualify the ill-treatment suffered by the victim of domestic violence as inhuman, degrading treatment or torture.<sup>7</sup> This position has some advantages: upholding that it is covered by art. 3 reinforces the absolute character of its prohibition; at the same time, not classifying it as one specific form of ill-treatment situates it outside the hierarchy between the different forms of ill-treatments codified in art. 3, and opens the way for future developments towards the qualification of domestic violence as a form of torture. However, from the elements isolated by the jurisprudence we have to maintain that domestic violence overlaps the notion of inhuman treatment elaborated by the ECtHR: this position is confirmed in one of its ruling on such matter, *Eremia v the Republic of Moldova* in 2013.<sup>8</sup>

## The content of the due diligence standard after the entry into force of the Istanbul Convention

The use of the cross-fertilization technique has permitted the ECtHR to comply with the Istanbul Convention. One effect is the raise of the threshold of due diligence required to the State in order to satisfy its positive obligation to protect women from domestic violence. The focus of this paragraph is to clarify how the procedural aspect of the obligation to protect under art. 3, protecting the right to human treatment,

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3 *Valiuliene v Lithuania*, para 69.

4 *Ibid*, para 70; *MG v Turkey* para 99. In this decision the ECtHR underlines the feeling of fear, vulnerability and insecurity suffered by the victim of domestic violence. See also, *Talpis v Italy*, para 114.

5 Istanbul Convention, art 3(b).

6 *TM and CM v the Republic of Moldova*, para 47.

7 *Valiuliene v Lithuania*; *Eremia v the Republic of Moldova*; *Talpis v Italy*; *MG v Turkey*.

8 *Mudric v the Republic of Moldova*, paras 45, 54 and 55.

has developed in relation to domestic violence, and which are the differences from the positive obligation stemming from art. 8.

Raising the threshold of due diligence has the effect to widen the positive obligations of the States towards individuals and increasing the level of scrutiny of the ECtHR in the action taken by the Respondent State to protect the individual from third parties' offences.

Therefore, the structure of the judgements and the extent of the scrutiny adopted by the ECtHR has evolved, reflecting the holistic and comprehensive system of prevention formulated in the Istanbul Convention.

The first advantage in declaring violated art. 3 instead of art. 8 ECHR is that the use of the margin appreciation doctrine can't find application, given the absolute character of the former. Therefore, the ECtHR can exercise a deeper level of inquiry on the measures applied at the general and particular level in order to satisfy the positive obligation to protect under art. 3. In the opinion of the ECtHR, the State has the positive obligation to create an effective legal system, and at the same time to guarantee an effective law-enforcement machinery aiming at preventing, investigating and punishing the breaches of the legal provisions. Whereas in the previous jurisprudence the ECtHR has denied its competence to assess the adequacy of the legal system<sup>9</sup>, now it explicitly recognises its power to evaluate if the legal system provides adequate protection.<sup>10</sup> Unfortunately, even if the ECtHR enlarges the real of scrutiny, still the ECtHR condones the State's tendency to privatise the matter. For example, *Valiuliene v Lithuania*, the ECtHR was satisfied by the Lithuanian legal provision, establishing that criminal offences causing minor bodily are pursued only after the victim's complaint, leaving discretion to the public prosecutor to pursue them if he considers the offence of public importance.<sup>11</sup> Applying this norm to domestic violence has a discriminatory effect on women (they usually don't report the offences, and institutions in general have a passive reaction) and contributes to maintain the offence as private.

The evolution of the due diligence standard in the light of the Istanbul Convention is, on the contrary, connected to the assessment of the effective protection deployed by the State in responding to an offence.<sup>12</sup> Art. 5 of the Istanbul Convention, enshrining the due diligence principle, binds the State to take the necessary legislative and other measure to exercise of due diligence to prevent, investigate, punish and provide reparation.<sup>13</sup>

The ECtHR takes the same position, recognising that the "mise en place" of an adequate legal system is pre-condition for the display of due diligence. However, other factors and institutions, such as the police and the judiciary, play a role in the response to the violence occurred or to the risk of it, and their reaction is taken into account to assess State's responsibility. In this regard, the ECtHR explicitly upholds that, even if the choice of the measures through which the national courts ensure protection in the concrete case, belongs to the State party, still the ECtHR maintains a power of review and to intervene in case of disproportion between the gravity of the facts and the result achieved,<sup>14</sup> thus extending the circumstances justifying its intervention if compared to the previous jurisprudence.<sup>15</sup>

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<sup>9</sup> *Bevacqua and S. v Bulgaria*, para 82.

<sup>10</sup> *Valiuliene v Lithuania*, para 75.

<sup>11</sup> *Valiuliene v Lithuania*, para 78.

<sup>12</sup> Explanatory Report, paras 58, 59.

<sup>13</sup> Istanbul Convention, art 5.

<sup>14</sup> *Valiuliene v Lithuania*, para 76.

<sup>15</sup> *Infra* 22, 23.

Once established when the ECtHR has the competence to decide, the Court defines which is the minimum degree of due diligence required to the State in order to respond effectively to an attack (occurred or attempted) to the victim. Also in this case the Istanbul Convention has influenced the content of this obligation.

However, the minimum degree of due diligence is still determined in relation to the use of the concept of “vulnerability” promoted by the Court. If compared to the previous jurisprudence on the same matter, this concept has evolved. The category of subjects that fit in it is no more so vague as before, as well as the level of protection the State is entitled to. In several rulings, such as *Eremia v Moldova*, *MG v Turkey* and *Talpis v Italy*, the ECtHR has been consistent with the position adopted in *Opuz v Turkey*, stating that women, victims of domestic violence, are more vulnerable and therefore have the right to special protection in the form of effective prevention.<sup>16</sup> In other words, vulnerability is to be considered the legal justification to raise the threshold of due diligence incumbent on the Respondent State.

The application of the concept of vulnerability in the ECtHR jurisprudence is different from the definition contained in the Istanbul Convention. In the Explanatory Report of the Istanbul Convention there is an exhaustive list of those subjects who are considered *ex ante* more vulnerable because of specific and identified circumstances (for example pregnant women and women with young children or migrants and asylum seekers): they are all cases of intersectionality, where different grounds for discrimination are together combined, independently from being victimised in consequence of domestic violence. Because of this situation of intrinsic need, States are entitled *ex ante* to positive action and specific preventive measures.<sup>17</sup>

In the jurisprudence of the ECtHR the condition of vulnerability is considered *ex post*,<sup>18</sup> therefore is generalised and extended to all victims of domestic violence, as a direct consequence of it. Even if in principle the ECtHR is right in affirming that, because of the trauma, women who have experienced such a human rights violation need a higher degree of attention by the authorities, anchoring the obligation to an alleged weakness of the victim means to overlook the discriminatory social attitude that has pushed women in a disadvantageous condition and to reinforce gender stereotypes.

Once the ECtHR has appreciated the vulnerability of the victim, and therefore the right *in abstracto* to higher level of protection, the ECtHR has to assess under which conditions the due diligence obligation is triggered and what it entails in terms of effective prevention. At this stage, the influence of the Istanbul Convention comes once again into play. The achievements of the Istanbul Convention that shape the new extent of the obligation to protect, expanding in this way its boundaries, are the following ones: first, the awareness of the specificities of domestic violence even if considered within the ambit of violence against women; the attention to the victims’ needs in every step of the procedure;<sup>19</sup> the adoption of a more specific criterion for the risk assessment and therefore a new diligence test that takes into account the seriousness of the situation, the repetition of the offence and the lethality of the risk; the emphasis on the element of promptness in the reaction of the authorities.<sup>20</sup>

All these factors can be found in the jurisprudence of the ECtHR. This new understanding emerges in *Eremia v the Republic of Moldova*, a case deserving particular attention because it dealt with domestic

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16 *Eremia v the Republic of Moldova*, para 72; *Talpis v Italy*, para 99; *MG v Turkey*, para 95.

17 Explanatory Report, para 87.

18 Alexandra Timmer, “A quiet Revolution: Vulnerability in the European Court of Human Right” in M Albertson Fineman and A Grear (eds) *Vulnerability: Reflection on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 155.

19 Istanbul Convention, art 49; *Talpis v Italy*, para 129.

20 Istanbul Convention, art 50.

violence (assaults, harassment, verbal abuses, death threats and psychological violence) committed by a police man towards her wife (violation of art 3) and her daughters (violation of art 8 because of detrimental psychological effect of assisting to their father's violence), that was treated with extreme inaction by the authorities, by failing to act promptly and deciding to suspend the criminal investigation against him.<sup>21</sup> In this occasion the ECtHR, starting from the *Osman Test* related to art. 2, reframed the due diligence obligation in the light of the Istanbul Convention, as it is self-evident from the importance given to a promptly reaction at the relevant time, in all cases of domestic violence but especially when, as in that case, the perpetrator possesses a firearm. In this context, the promptness of the reaction is pivotal because the possession of a firearm increases the risk of homicide, as recognised in art. 51 of the Istanbul Convention (it is considered one of the factor to take into account in the risk assessment). Therefore, it is implicit in the reasoning of the ECtHR that higher is the risk, prompter has to be the authorities' intervention in order to fulfil the obligation to an effective prevention.

According to the ECtHR, the obligation to protect, in terms of a prompt reaction in a relevant time, arises when the State knows or ought to have known that a violence has occurred (here the evaluation of the seriousness of the situation) or of the risk of it (included its recurrence), and if so, all "reasonable measures" have been taken in order to protect the victim and punish the perpetrator.<sup>22</sup> It means that the ECtHR is particularly strict in requiring from the States a prompt investigations (time has a relevant influence in the effectiveness of them), and to prosecute without delay the perpetrator, in order to guarantee the safety of the victim. Interestingly, because of the special vulnerability of the victim of domestic violence, the ECtHR upheld that when the police is aware that these illegal acts have occurred, it has the duty to investigate independently from the formal complaint of the victim.<sup>23</sup> So even if *in abstracto* a system not imposing the obligation to pursue *ex officio* the crime of domestic violence is not incompatible with the ECHR, in the concrete case the due diligence imposes the obligation to investigate in the commission of the acts *ex officio*.

The ECtHR should declare the incompatibility with ECHR of a legal system admitting *ex parte* initiative for the prosecution of domestic violence's offences.

However, in general, the ECtHR is quiet consistent in holding the violation of art. 3 from its procedural dimension, in consequence of the passivity of the different authorities in the decision on the protective measures, in the investigation or in criminal proceedings, arguing that the institutions in charge of ensuring effective protection didn't take into account the needs of the victim, and didn't adopt the reasonable measures expected to protect her.

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21 *Eremia v the Republic of Moldova*, para 64.

22 *MG v Turkey*, para 85; *Rumor v Italy*, para 58.

23 *TM and CM v the Republic of Moldova*, para 46.

# Embracing a gender oriented interpretation of the ECHR through the identification of stereotype

Notwithstanding the above-mentioned advancements in the jurisprudence, the cross fertilization should foster another important development: the introduction in the ECtHR jurisprudence of a gendered interpretation of the ECHR, aimed at the identification and isolation of the gender stereotypes underlying the discriminatory attitude found out by the ECtHR. This should be possible if we consider that the Istanbul Convention is one of the first instrument to contain an exact definition of what is “gender”,<sup>24</sup> and that the drafters were aware of the link between discrimination and gender stereotype.

This step will allow the ECtHR to go further in the fight against discrimination and structural inequality underlying domestic violence, since discrimination is based on harmful gender stereotypes that reflect social ideas and preconceptions about women.<sup>25</sup> Gender stereotypes, intended as social construction imposing a position of power to men and of submission to women, are cultural mechanisms that preserve and reinforce the oppression of women (forcing the individual in a specific role or position) preserving patriarchal hierarchy, degrading women and diminishing their dignity.<sup>26</sup>

If the ECtHR named and contested them in its jurisprudence on the matter, it would uncover the structural causes of discrimination and would offer the State a clear way to trigger a cultural and social change. The IACHR in crucial decision on domestic violence<sup>27</sup> and the IACtHR in a case of violence against women<sup>28</sup> offered in this sense a valid model to follow.

The Istanbul Convention seems to embody the strategy of combating violence against women and discrimination through the removal of harmful gender stereotypes, since in the opinion of the drafters “stereotypes reproduce unwanted and harmful practices and contribute to make violence against women acceptable”.<sup>29</sup> Their removal was interpreted as a precondition to achieve substantial equality. Nevertheless, art. 12 underlines the strict connection between prejudices, customs and traditions based on the idea of inferiority of women and the promotion of changes in social and cultural patterns, imposing certain kind of behaviours according to gender: so, to promote social change is necessary first to address stereotypes and gender biased traditions. Interestingly, it emphasizes that the media play a role in fighting violence against women and has to refrain from harmful gender stereotyping, in compliance with different resolutions of the Council of Europe,<sup>30</sup> since they can help, as education, to raise awareness on these harmful practices.<sup>31</sup> Under the Istanbul Convention, the State is responsible to direct the action of the media and create educational programme aiming at promoting non-stereotyped gender roles.<sup>32</sup>

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24 Istanbul Convention, art 3 (c): “gender” shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.

25 Timmer, *supra* (n 104) 715.

26 Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2010) 63-65.

27 *Jessica Lenahan (Gonzales) et al v United States*

28 *González et al ('Cotton Field') v Mexico*.

29 Explanatory Report, para 43.

30 The IACtHR adopted the same position in *González et al ('Cotton Field') v Mexico*.

31 Explanatory Report, para 109.

32 Istanbul Convention, art 14.

The ECtHR should not remain neutral: when it identifies discrimination in the systemic practice of domestic violence, as demonstrated by the statistical evidence provided by the applicant, it should be coherent and identify which is the harmful stereotype on which discrimination is based, otherwise it risks to overlook the real cause of discrimination. Naming and contesting the stereotype would strengthen the position of the ECtHR in contrasting discrimination and will limit the practice of the States to legitimize stereotypes appealing to culture and tradition.

Applying these principles to the jurisprudence on such matter would entail the explicit recognition that the social stereotype of women as subordinate to men justifies domestic violence as a form of legitimate control or dominance of men over women; at the same time, upholding that the role of women as mainly caregivers reinforces the relegation of women to the private sphere would make blatant that the discriminatory inactivity of the authorities is due to the belief that domestic violence is a private matter. Uncovering this social mechanism underneath domestic violence would make the State unable to justify it and will induce the State to take concrete measures towards the removal of them. On this ground the necessary measures aiming at the economic empowerment of women can be effective in order to achieve *de facto* equality.

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