Safeguarding Human Rights: A Critique of the African Commission on Human and Peoples' Rights

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Résumé: *La charte africaine des Droits de l'Homme et des Peuples a prévu la mise en place d'une commission des droits de l'homme destinée à promouvoir et à protéger les droits de la personne sur le continent africain. Les pouvoirs et fonctions de cette commission sont le reflet de l'environnement social et politique de l'Afrique au cours des années 60 et 70. Ainsi la commission a eu à faire face à de nombreux problèmes d'ordre structurel. La commission n'est pas autonome par rapport aux chefs d'Etat; elle n'est pas non plus indépendante pour ce qui est de la collecte des données. Il n'y a pas de cour africaine des droits de l'homme devant compléter le rôle et l'importance de la Commission. Avec les vents de changement qui soufflent sur l'Afrique, il y a lieu de ré-écrire une nouvelle charte. Cependant, cette tâche ne devrait pas être laissée aux seuls Etats. Les ONG ainsi que les juristes indépendants devraient y être associés. Pour que les droits civils et politiques soient préservés il est nécessaire que les Etats cèdent de leur souveraineté au bénéfice de la promotion des droits de l'homme et qu'ils augmentent les pouvoirs de la commission africaine pour qu'elle soit plus efficace.*

Introduction

A human rights treaty can best provide real and proper protection of the rights of individuals it purports to safeguard if it provides for an organization or body that can give practical effect to the general intention of the state parties to the treaty by:

a) investigating alleged human rights abuses;

b) settling or adjudicating the alleged infringement of the rights guaranteed under any treaty and;

c) recommending to the state parties various legal avenues that can be used to protect human rights.

The importance of a safeguarding body cannot be over-emphasized. The International Covenant on civil and Political Rights (ICCPR), the European Convention on Human Rights and Fundamental Freedom (ECHR) and the American Convention on Human Rights have all established measures of safeguard of the rights of the individual that involve the setting up of a body to protect and promote human rights.

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African jurists and scholars, as far back as 1961, in the declaration known as the 'Law of Lagos' (Brownlie, 1971:440-447)[1] realized the need for a human rights convention for Africa which would give effect to the aims of the United Nations Universal Declaration of Human Rights. This declaration was subsequently followed by a number of seminars and conferences organized mainly by either the United Nations or lawyers and scholars who stressed the need for a human rights system for Africa. For the purpose of analyzing the effectiveness of the African Commission, a critical look will be taken at some of these seminars (Welch, Meltzer, 1984:338-339).

At the seminar on human rights in developing countries in Dakar, organized by the United Nations, the issue of establishing an institution to protect the rights of Africans within the framework of the Organization of African Unity, was discussed. The main argument in favour of this idea was that an African Commission could carry out functions similar to that of the European Commission thus enhancing the promotion and protection of basic human rights. It could thus possess powers of investigation of alleged human rights violations and the subsequent conciliation of human rights disputes (United Nations, 1966).

On the other hand, some of the speakers at the Dakar Seminar, although they were not opposed to such an idea *per se*, expressed their reservations on the grounds that the underdeveloped African countries, so recently freed from colonial oppression, were particularly jealous of their sovereignty. It would thus be rather difficult for them to accept the limitations on their sovereignty that accession to such an institution would entail (United Nations, 1966). Furthermore, it was argued that it would be appropriate to ensure the effective protection of the rights of the individual in the respective African countries before proceeding towards a regional or international institution. Thus in the short run, stress should be placed on bilateral or multilateral conventions on human rights which would ensure the protection of human rights within restricted fields prior to any gradual progression towards regional protection is made (United Nations, 1966).

Another step towards the establishment of a framework for the protection of human rights in Africa was taken at the seminar on the Establishment of Regional Commissions on Human Rights with special reference to Africa in Cairo (United Nations, 1969). An important theme underpinning the ration-

1 Brownlie (1971:440-447) declared '...That in order to give full effect to the Universal Declaration of Human Rights of 1948, this conference invites the African governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory states'.

ale for a human rights system at this seminar was that the political factors operating in Africa at the time served to reinforce the need for a human rights charter and paragraphs 16 and 18 of the seminar document throw more light on this issue.

Paragraph 16 (United Nations, 1969:4) states that due to the fact that Angola, Mozambique, Namibia, Rhodesia and South Africa were controlled by oppressive minority regimes where human rights were being violated, the establishment of a regional human rights Commission was seen as being very useful.

Paragraph 18 (United Nations, 1969) of the seminar document also has political undertones that merit comment. It states that a regional human rights Commission for Africa should be established without delay since all African countries were committed to African unity and they were agreed that they had a common destiny. Moreover, the African states were committed to the total liberation of the continent and any African Commission would certainly have an important role to play.

Social and cultural factors were also considered at the Cairo Seminar. Paragraph 23 (United Nations, 1969:6) points out the failure of human rights texts such as the Universal Declaration of Human Rights to reflect African values and traditions and that basically the Declaration was a European document that had little relevance for Africa and an African system which upheld African values would serve the continent's needs better.

The proposed Commission was to be accorded fact-finding and conciliation powers (United Nations, 1969:5). It was agreed that to be effective, the Commission should be empowered by the state creating it to establish the facts in situations of alleged violations of human rights in which the complainants might be states or individuals. The participants held the view that it was only when the actual facts could be placed at the disposal of the Commission that it could reconcile the difference between conflicting parties without compromising the basic tenets of promotion and protection of fundamental human rights. The Commission should therefore be afforded all facilities for fact-finding without hindrance from the member states.

It was also seen as being necessary to grant the proposed Commission advisory powers (United Nations, 1969). These powers would include advising interested parties on different aspects of fundamental human rights and how best to protect them, and more importantly the Commission should establish a relationship between itself and national committees inasmuch as such committees were able to influence directly policies and actions of governments.

In 1978, at a meeting of the African Bar Association in Freetown Sierra Leone, legal experts from English speaking countries in West and East Africa met and drew up the 'Freetown Declaration' (*West Africa*, 1978a:1588; *West Africa*, 1978b:1628, 1668). The Declaration amounted to

a reaffirmation of the basic rights of all Africans by stressing certain freedoms and rights which were seen as being essential to the attainment of international human rights standards.

The Declaration also condemned laws that purported to oust the jurisdiction of national courts on any matter emphasizing that such a practice was a derogation from the idea of fundamental human rights and is to that extent obnoxious. The declaration also deplored the enactment of *ex post facto* legislation and it also reiterated the Association's commitment to the enjoyment of such basic freedoms as the freedom from arbitrary arrest, freedom of speech and expression, freedom from inhuman treatment, freedom from discrimination on the grounds of religion, sex or ethnic origin, freedom of the individual to hold property and freedom of assembly, movement and association (*West Africa*, 1978a, 1978b).

Under the direction of the United Nations, a further step was taken in the direction of creating a human rights regime for Africa at the seminar on the Establishment of Regional Commissions on Human Rights for Africa in Monrovia in 1979 (United Nations, 1979). A number of important issues were raised:

The participants at the seminar hoped that an African Commission could play an important role in human rights standard setting by way of drafting declarations, model rules or draft conventions for possible signature and adoption by the respective African governments. These possible functions were not to replace United Nations standards but they could act as a supplement to them and perhaps, where possible, mould them to suit African conditions (United Nations, 1979:18).

Furthermore, a discussion of the relationship between the proposed Commission and the Organization of African Unity resulted in the view that in order to guarantee the Commission's independence, it should be set up within the institutional framework of the OAU but it should function independently of it.[2]

The participants also considered the concept of State sovereignty and the implications it could have for the effective functioning of any future human rights system (United Nations, 1979:5). The general consensus was that even though sovereignty was a very sensitive matter on which most African

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2 *Ibid.*, p. 12. A consensus was established (para. 66) that the Commission should submit annual reports to the Organization of African Unity (OAU) Council of Ministers or to the Heads of State and Government of the OAU. This was because of the possible need for a backup of the Commission's action at the political level. This view however should be read against the importance that the participants placed on the total independence of the Commission of any Government and the political organs of the OAU. See para 64. 20. *Ibid.*, p. 5.

leaders were unwilling to compromise, it should not be allowed to act as a stumbling block to the full enjoyment of human rights.

Stress was also placed on the desirability of a grassroots approach to human rights strategies (United Nations, 1973:5). After attaching importance to the fact that illiteracy and ignorance of their rights was a problem faced by most Africans, the Seminar acknowledged the fact that there was the need to work through national and local institutions, churches, trade unions, non governmental organizations, and town and village organizations.

Following on from the Monrovia Seminar, African leaders met in Dakar, Senegal, to present their first draft of the Charter and this was approved by the Eighteenth Assembly of Heads of State and Government in Kenya, Nairobi in 1981 (Welch, Meltzer, 1984:338-339; United Nations, 1966).

The import of the above discussion to some of the crucial issues that arose and were debated at the various seminars and conferences is that first of all, it provides an insight into some of the factors and attitudes that later on emerged as provisions of the Commission; and secondly it outlines the discrepancy between the ideal type of Commission that most African jurists and scholars hoped would be established and the actual powers that the drafters of the provisions of the Commission were prepared to accord it.

Based on the above comments concerning the proposed African Commission, and for the purpose of our critique of the Commission, we can assume that the profile of the Commission's powers was to include, *inter alia*:

- fact-finding and conciliation powers;
- advisory powers;
- it was to be free from any control by the state parties.

The African Commission

In order to promote human rights and to ensure their protection, the Banjul Charter provides, under Article 30 (Hamalengwa et al; 1988:12) for the African Commission. The Commission is to be composed of members:

> *chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples rights with particular consideration given to persons having legal experience (Hamalengwa et al; 1988).*

The Commission's functions with respect to human rights include:

- ensuring the protection of specified rights;
- interpreting provisions of the African charter;
- examining inter-State complaints;
- considering other communications;

- promoting human and peoples rights by undertaking studies, organizing conferences, and disseminating information;
- encouraging national and local institutions concerned with human rights;
- developing principles and rules aimed at solving legal problems relating to human rights, upon which governments may base their legislation;
- and any other tasks entrusted to it by the OAU Assembly of Heads of State and Government (Hamalengwa et al; 1988:14; Amnesty International, 1987:13).

The Charter creates a degree of neutrality as far as the provisions for the election of members to the Commission as well as their security of tenure is concerned. The only way by which a member of the Commission can be removed is set out in Article 39 (2) (Hamalengwa et. al; 1988:13). The removal of a member can be done only if, in the Commission's unanimous opinion, the member to be removed has ceased to discharge his duties for any other reason other than temporary absence. The article does not allow for removal either by the OAU or by any of the individual African governments. Thus it could be said that article 39 (2) does provide a considerable degree of security of tenure for the members of the Commission.

Article 31 (Hamalengwa et. al; 1988:13) is another example of the independence of the members of the Commission. It states that the members of the Commission shall serve in their personal capacity. We can infer from this that the members of the Commission are not supposed to act as representatives of the state parties that nominated them but rather they are to articulate opinions and views that reflect internationally defined rules and standards.

Article 43 (Hamalengwa et. al; 1988:14) also guarantees the Commission the necessary freedom to act without fear of outside interference. The article gives the members of the Commission diplomatic privileges that are consistent with those provided for under the general convention of the OAU. This provision is useful in that it protects members of the Commission from laws of state parties that could be used to hinder the execution of their functions.

In view of the above measures, the Commission could be seen as an independent body capable of discharging its functions fairly and freely. Loopholes, exist however, in the provisions relating to the Commission that can seriously compromise its independence and the first provision to note in this regard is article 33 (Hamalengwa et. al; 1988:12).

Article 33 provides for the nomination of the members of the Commission by the parties to the Charter. The potential problem is that the attitudes towards human rights in Africa may lead to the nomination of members who will have the same outlook towards human rights as the nominating state

party. Taking the frequent violation of human rights in Africa into consideration, a number of seats on the Commission could have been allocated to bar associations, national human rights bodies and other non-governmental organizations in order to enhance its impartiality.

The participants at the Cairo Seminar were of the opinion that the Commission should be able to give advisory opinions to interested parties and to be in a position to influence, more directly, national committees that had considerable leverage over actions of their governments. The Commission has in actual fact been granted powers to merely 'give its views and make recommendations to governments' (Hamalengwa et. al; 1988:15).

The wording of this provision raises two important issues in relation to the Commission: First of all, the article renders any advice given by the Commission non-binding, on the state parties to the Charter. Secondly, what is the legal effect of a state parties refusal to be bound by a recommendation of the Commission if all the other parties have agreed to be bound by it? No sanctions are provided for in the Charter and to that extent the effect of the article in question is purely figurative and has no legal effect whatsoever.

Articles 47-58 of the Banjul Charter deal with communications from both states and non-state parties. Under article 47, (Hamalengwa et. al; 1988:15) state communications concerning human rights abuses in other states can be drawn to the attention of the accused state, the OAU Secretary General and the Chairman of the Commission, and within three months the accused state is supposed to submit to the enquiring state a written statement on the matter concerning laws and rules of procedure applied and applicable as well as the redress given or the course of action available.

The first approach towards tackling human rights abuses however, is of an amicable and conciliatory nature. Article 48 (Hamalengwa et. al; 1988:15) states that the settlement of human rights violations should be through bilateral negotiations or any other peaceful means. The question that arises for determination here is what is the effect of article 48?

By resorting to negotiations between states in order to resolve human rights violations, the underlying presumption is that violations of individual rights have implications first and foremost, for the state concerned and not for the individual. Taking into account the fact that in Africa the state is the main violator of individual rights, there is the distinct possibility that common political interests among states (e.g. the suppression of the rights of their citizens) will dissuade states from interference in the affairs of other states and will thus undermine the effectiveness of this provision.

Article 50 (Hamalengwa et. al; 1988:15) further weakens the powers of the Commission. It allows the Commission to deal with human rights abuses only after local remedies have been exhausted but it fails to take into account the fact that in most undemocratic African states the exhaustion of local remedies is practically impossible.

Secondly, both the Commission and the Charter have failed to give a legal definition of what amounts to the exhaustion of local remedies within the framework of the African Charter and for this matter, interpretation might have to be dependent on the domestic laws or the opinion of the courts of the states parties.

Arising out of the uncertainty of this provision, the drafters of the Charter could have paid due attention to the provisions of the Inter-American Human Rights Convention that allows for an escape clause by virtue of article 46, the effect of which is to permit individuals to petition the American Commission if they can show that the said domestic remedies do not exist under their local law (Brownlie, 1971:339-427).

Article 55 (Hamalengwa et. al; 1988:16) allows for communications from parties other than states and it seems, from the construction of the wording, that one does not have *locus standi* and thus communications under article 35 can be filed by private individuals or organizations.

When a communication is received under article 55 it is first brought to the attention of the state concerned. If one or more communications 'relate to special cases which reveal a series of serious or massive violations of human and peoples rights' the Commission is to draw this to the attention of the OAU Assembly of Heads of State and Government. The Assembly may then request the Commission to undertake an in-depth study of these cases and make a factual report with findings and recommendations.

With respect to in-depth studies (Amnesty International, 1987), the Banjul Charter does not explain the procedure for participation of authors of the communications and the state concerned during the course of the study. Against this background, the Commission in order to function effectively will need to decide when and how the authors and the state will be:

- notified that an in-depth study has been initiated;
- invited to submit further and updated information to assist the Commission in reaching informed conclusions; and
- invited to comment on one another's submissions to the Commission.

After gathering the necessary information about a state's violation of human rights and upon coming to the conclusion that there is virtually no possibility of an amicable solution, the Commission shall write a report setting out the facts and the conclusions it has arrived at. The report is then presented to the Assembly of Heads of State and Government and if the Commission so wishes, it can append what it considers to be useful recommendations to its report.

The provision to this however is that the publication of the report is not binding on the Assembly of Heads of State and Government. Publication will be done only when the Assembly deems it necessary to do so (Hamalengwa, et. al; 1988:17). This stipulation gives shelter to the many

states in Africa that are guilty of human rights violations and also further weakens the confidence that observers have or ought to have in the Commission.

The same legal fetters prevent the Commission from making a meaningful impact on the communications submitted under article 55. Under the said article, any investigations conducted by the Commission will be done not *suo motu*, but rather under the sanction of the Assembly (Hamalengwa, et. al; 1988:25). This added dependence on the very people it is investigating in order to safeguard human rights on the continent insinuates that the Commission operates as an organ of the Assembly.

The Commission meets only twice every year, each session lasting between 8 and 10 days and it is questionable whether such a time frame is long enough to consider thoroughly the matters placed before it (Amoah, 1992). ' Furthermore the Charter does not make provision for the Commission to adopt extraordinary procedures (such as meeting at a shorter notice) in an emergency (Amoah, 1992). The same inhibiting procedure of acting on a request from the Heads of State and Government of the OAU restricts the effective functioning of the Commission and according to one legal commentator given the current schedule of the Commission's meeting, an in-depth study sanctioned by the Assembly and its actual completion by the Commission could possibly take the better part of a year.

The confidential nature of the proceedings of the Commission is also another structural predicament. Article 59 of the Charter states that: 'All measures taken within the provisions of the present chapter shall remain confidential until such time as the assembly of heads of state and government shall otherwise decide' (Hamalengwa et.al; 1988:17). In giving practical effect to this article, the Commission has been inclined not to divulge the names of states that are the subjects of complaints (Amoah, 1985:235). Thus the Commission is denied the very effective tool of bringing a state into disrepute which could consequently lead to it being subjected to a considerable deal of international pressure and possibly bring about a change in its attitude towards human rights.

Expressly, the African Commission does not have the power to carry out an independent investigation of alleged human rights violations. The powers of the Commission are limited to the drawing of the attention of the Assembly to human rights abuses it might uncover. The Assembly of Heads of State may then request the Commission to make a report accompanied by its findings and recommendations (Hamalengwa et.al; 1988:17).

Judicial powers of investigation can be justified on two grounds. First by being able to carry out its own investigations the Commission would no longer see itself as being subject to unnecessary restraints in the execution of its duties and as such it could adopt a more socially active stand. It would now be in a position to search for situations where civil and political liber-

ties have been violated. This change in outlook and function could certainly enhance its functions as a human rights watchdog.

Secondly the Commission lacks powers of enforcement. All decisions based upon its recommendations are acted upon by the state parties. If the Commission could enforce its own recommendations or if it had conciliatory powers of the kind envisaged at the Cairo Seminar (United Nations, 1969:5), it could bring about a marked improvement in the human rights situation in Africa. This suggestion can be borne out by two examples. First of all, countries that can have adverse decisions enforced against them might consider the political embarrassment that could be incurred and the sanctions that could be imposed. This possible impact upon a state's attitude towards the rights of its citizens stemming from enforcement powers given to the Commission is probably the most far reaching impact on human rights that the Commission could have.

In addition, this suggested change might also have an effect on non-state parties to the Charter. Individuals and organizations might be encouraged to petition the Commission if they can be assured that the injustice they seek to redress will be given effect to regardless of the pressure that the Assembly of Heads of State might bring to bear upon it. Viewed as a body that can contribute effectively to the protection of individual civil and political rights, there is the likelihood that non-state party communications would increase and this would contribute to the improvement of the human rights situation.

Another aspect of the weakness of the Commission's powers is that it does not have the power to declare domestic legislation of the state parties to be inconsistent with the fundamental human rights enshrined in the Charter. If the Commission had the power to question the validity of legislation or decrees of the governments of the state parties and to declare obnoxious legislation to be inconsistent with the spirit and letter of the Charter, then its capacity to safeguard human rights or at least act as a more vociferous promoter of human rights would be greatly enhanced.

A further criticism is found under Article 62 (ACHRR, nd). This article states that 'each state party shall undertake to submit every two years, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms guaranteed by the present Charter'. Ostensibly, this provision is to allow the Commission to monitor the human rights activities of the state parties and in the first instance, it seems to be a positive approach to human rights protection.

Placed under close legal scrutiny however, certain omissions in respect of Article 62 serve to limit the impact it could have. First of all, the Charter does not stipulate the form and content of the periodic reports. Presumably therefore, they are to be drawn up by the State parties and this raises doubts as to whether they will be reliable and accurate reports. Secondly, what line of action is to be followed if a state party fails to submit a report to the

Commission. Article 62 does not state the sanctions that will be imposed on any state that fails to comply with its obligations.

The African Charter does not provide for the creation of an African Court of Human Rights as a complement to the African Commission. The 'Law of Lagos' (Brownlie, 1971) asserted the need to establish a court 'of appropriate jurisdiction' in order to further the objectives of the UN Declaration on Human Rights and to protect the rights of the individual on the African continent.

Other references to the need for an African Court have been raised after the 'Law of Lagos'. At the Cairo Seminar the issue of the desirability of an African Court designed to act as an arbiter of human rights cases on the same lines as the European Court of human rights was discussed.

In an article published in the *Human Rights Law Journal*, a former Secretary-General of the OAU has stressed the need for a court of justice. He stresses the fact that the African Commission does not possess all the prerogatives that are enjoyed by the corresponding organs that exist outside Africa and that compared with the measures of safeguard conferred on the European Commission, those foreseen in the Banjul Charter appear to be elementary. He goes on to state that 'without a Court of Justice, like the European Court which plays the role of a genuine tribunal, how can the effective judicial protection of individual rights be assured'? (Kodjo, 1990).

A similar view on the need to establish a regional court to protect the rights of the individual was stated in the 'Banjul Affirmation' at the Banjul Judicial Colloquium on the Domestic Application of International Human Rights Norms. The participants at the colloquium were concerned with developing a system of justice in Africa that would have common application. To this end they expressed their belief that the time had come for an independent court of human rights to be established in Africa that would be similar to the European Court of Human Rights, and whose decisions would be binding (Developing Human Rights Jurisprudence, 1981:4; Interights Bulletin, 1990:39).

Furthermore, there is the added benefit of the binding nature of the determination of state-state dispute (Amoah, 1992:238). The present position (as outlined above) (Amoah, 1992:22, 24) is for the Commission to submit a report of its investigation into alleged human rights violations to the Assembly of Heads of State and Government which will then decide what measures to adopt. This could possibly result in a political compromise being reached by the Assembly to the detriment of the rights of the petitioner in question and thus undermining the objectives of the Charter. A legally binding decision however, would establish a judicial precedent in the field and would thus eliminate any uncertainty as to what will be the end result of an investigation into the alleged violation of the rights of anyone on the continent.

African dictators have kept themselves in power mainly by denying ordinary citizens basic civil and political rights. Thus the problem with any radical change of the powers of the Commission might result in the loosening of the grip on power that African despots have. It is this possibility that accounts for the weak powers of the Commission and yet at the same time it also serves to impress upon those committed to making civil and political rights effective in Africa, the need to expand the powers of the Commission.

Conclusion

Based on the legal appraisal of the Commission, we can come to the conclusion that:

a) The Commission's advice to African Governments is not binding on the state parties;

b) The Commission does not have independent fact-finding powers of its own thus severely limiting its impact;

c) A further shortcoming is that the Commission is not totally independent of the Heads of State of the OAU;

d) There is no African court to complement the role and importance of the Commission.

The powers of the Commission need to be reconsidered or reviewed. The premise for such a suggestion is that the social and political changes that prevailed on the African continent in the 1960s and 1970s and were consequently mirrored in the powers and functions of the Commission are no longer valid.

Winds of change similar to those that swept over the continent in the 1960s are beginning to blow over the continent once again. Pluralism, and constitutionalism have gained currency as political concepts in countries that used to be civilian or military dictatorships.

In order for civil and political rights to be properly guaranteed, consideration should be given to such concepts as state sovereignty and its compromise in the interest of the promotion of human rights, the individual and his relationship with society, and the possibility of increasing the powers of the African Commission so as to make it more effective.

Also the rewriting of any new Commission should not be left to the representatives of the state parties alone no matter how well intentioned they are. NGOs and African and international jurists should be involved in all aspects.

It should also be noted here that the Commission itself can play a part in increasing its powers by relying on article 60 of the Charter which enjoins it to rely on international human rights jurisprudence generally in the pursuance of its objectives

In the final analysis however, any variation of the powers of the Commission will depend, 'to a considerable extent', on the political will of African leaders. They should be made aware of the need for radical change.

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