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EXPECTATIONS OF THE ASEAN COMMISSION ON HUMAN RIGHTS

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Unlike the situation in Africa, Latin America or Europe, there has been no regional mechanism for the protection of human rights in place in Asia to date. Only few countries actually have a national commission on human rights. At the same time, the national courts generally don't exercise a protective function either. The enforceability of fundamental basic rights is therefore only ensured to a very limited extent, if at all, in most countries within Asia. It is in constitutional democracies such as India and Japan that the essential rights of citizens are protected effectively at best. But even in Japan, the death penalty is still applied. Many states have in fact signed international agreements on human rights, but in most cases they did not go on to ratify and implement them. However, there has been a trend towards more active engagement with the issue of human rights over the last few years, driven by an active civil society and impulses from science, but also by political activists in individual countries. One consequence of these endeavors has been the establishing of a commission on human rights for the Association of South East Asian Nations ASEAN¹. To be able to assess the importance of and outlook for this intergovernmental institution² one needs to first take a look at the general views on human rights and the rule of law in Asia.

- 1 | Association of South East Asian Nations ASEAN, consisting of the ten countries of Brunei, Indonesia, Cambodia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. ASEAN Intergovernmental Commission on Human Rights, subsequently AICHR.
- 2 | ASEAN Intergovernmental Commission on Human Rights AICHR

THE UNDERSTANDING OF HUMAN RIGHTS IN ASIA

In Asia, human rights as individual rights of defense and participation in the form of enforceable citizens' rights don't have anything like the importance that they have in Europe and that they should have according to the spirit of the Universal Declaration of Human Rights of 1948. There are undoubtedly historic and cultural aspects involved here. The religions and philosophies prevalent in Asia don't see the individual as an entity created by God that has inherent values and a fixed relationship with the community, but rather as a functional individual who has been allotted a certain role in society. This

engenders a pronounced egotism without this resulting in people demanding their rights. According to the predominant way of thinking, every person has to fight for their own advancement without recourse to a value-based system of actionable rights.

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Of course this generalizing description no longer applies without exception. Numerous civil society organizations promote the recognition and the protection of human rights in Asia in line with the Universal Declaration of Human Rights. They are, however, not yet in a position to bring about fundamental political change. The majority still think in the above-described classic patterns. The enduring opinion tends to be that a strong state provides more benefits; if the state were to consider the rights of individuals to a greater extent or even as a fundamental principle, this would in many people's opinion result in a destabilization of the system of government. Added to this is nationalism, which is widespread in Asia and demands a strong state. This also makes it more difficult to establish regional alliances, even restricted to economic issues. Ultimately, the interests of the individual countries are too different, especially since considerations of foreign and domestic policy also always play a role. Finally, you also have to take into account the influence of the two most populated countries of the world, China and India. Especially China, which is increasingly dictating the political agenda in Asia and beyond, hardly allows the other countries any opportunity of engaging with so-called softer political issues such as human rights.

It is remarkable that even abject poverty, which is still present in many countries in Asia, does not drive people to demand their social rights – at least not in mass movements. Extreme examples of this are probably North Korea and Burma (Myanmar); but in the Philippines or even in India, two countries where the poor make up a substantial proportion of the population, there have not yet been any popular movements fighting for human rights emerging either. Nevertheless, the constitutions of most countries in Asia (even of the communist countries of China and Vietnam) include a Bill of Rights.³ Such provisions are generally not taken seriously by the governments, especially since there is a lack of enforcing mechanisms anchored in the constitution. Besides a few exceptions such as India and South Korea, the judicial system is also no great help where the enforcement of basic and human rights is concerned. The greatest problem in this area is widespread corruption and in many countries also insufficient separation of the powers of the executive and the judiciary. Added to this is a lack of competence on the part of the justice officials, as for instance in Cambodia or Laos. Other states, such as Indonesia, have already invested a great deal of work in comprehensive reforms of the justice system; but the speed of reform leaves a lot to be desired. Consequently, the legal system is often not capable of contributing to the implementation of human rights and dealing adequately with violations from the recent past.

So, if it is the case that there are not even any effective mechanisms to enforce human rights available at national level, it comes as no surprise that it has not yet been possible to set up an effective regional system for the protection of human rights. Where states do cooperate, they tend to focus on narrowly defined interests relating to issues of foreign and security policy and the economy. And these are usually only bilateral collaborations. The ASEAN countries alone have taken a first step towards regional integration with their 2008 Charter.⁴ Of the ten member states making up ASEAN merely four have a national

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3 | Cf. e.g. Art. 50 ff. of the constitution of the Socialist Republic of Vietnam in: Clauspeter Hill and Jörg Menzel, ed., *Constitutionalism in Southeast Asia*, Vol. 1 (Singapore 2008), 363 ff.

4 | For charter text see: Hill and Menzel, 387 ff.

commission on human rights, these being Indonesia, Malaysia, the Philippines and Thailand. Cambodia is in the process of preparing to set up such an institution. The four national commissions had already founded a forum for a more intensive exchange and for the coordination of their activities back in 2007. It sees itself as a consultative body that does, however, intend to develop strategies and rules for implementation as well.

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You could call it a compliant coalition that wishes to set certain standards in its sphere of influence in order to be in a position to drive forward the protection of human rights at the supranational ASEAN level.

SIGNIFICANCE OF INTERNATIONAL HUMAN RIGHTS PACTS IN ASIA

Although many states have signed the international conventions on human rights protection, only very few went on to ratify, let alone implement them in their national legislation. At least almost all countries take the protection of children⁵ as well as the elimination of discrimination against women⁶ seriously. The corresponding conventions were ratified relatively early on, even though they are not necessarily observed in full or correctly in some countries in individual cases. But in the areas of regulation covered by the two aforementioned agreements these represent rare exceptions. Besides these two pacts on the protection of specific rights, a fair amount of attention has been paid to the protection of migrant workers over the last few years, both within the countries and across their borders. In a worldwide comparison, the Philippines, a member of ASEAN, is the country where the largest proportion of the available working population works abroad. In the People's Republic of China too, many millions of workers are flocking to the economic centers in the coastal areas to escape the unemployment in the predominantly agricultural hinterland

5 | Cf. Convention on the Rights of the Child CRC of November 20, 1989. On the state of ratification: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed May 12, 2010).

6 | Cf. Convention on the Elimination of all Forms of Discrimination against Women CEDAW of December 18, 1979. On the state of ratification: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (accessed May 12, 2010).

(central and western China). The convention on this issue⁷ will therefore play a more important role in future besides the two above-mentioned pacts. At least, within ASEAN, these three areas are now mentioned in the same breath when human rights issues are discussed. At the ASEAN Secretariat in Jakarta, a working group has been set up for each of these areas, which allows the assumption that these particular rights are gaining in importance in this association of states. A commission for the rights of women and children is to be set up in the near future.

Other important conventions on the protection of human rights, on the other hand, have been ratified by far fewer states. This is for instance the case with the Convention against Torture, the Convention on Civic and Political Rights, and even the Covenant on Economic and Social Rights. Optional protocols that might permit individual

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complaints were rarely signed, let alone ratified. This does not come as a surprise, since too many rights, especially of a procedural kind, would endanger the power monopoly of the respective ruling elites. This will no doubt delay the implementation of the Convention on Civic and Political Rights for years. As regards cultural, economic

and social rights, widespread application is more likely, at least regarding the aspects of greater social equality and standards at the workplace. Cultural rights involve things such as the protection of minors. In India alone, there are estimated to be several hundreds, in China and Vietnam respectively over 50 ethnic minorities. If you were to grant these ethnic groups greater autonomy, some governments fear that this would encourage separatist movements or, once again, lead to a loss of power. This cannot be refuted altogether, since conflicts between minorities and the ruling group exist in almost every country in Asia, at least in a latent state. In the Philippines and in Thailand, they have already manifested themselves openly; in Sri Lanka, they have been settled for the time being after many years of confrontation (even though it was done by force), while they are not yet over in Nepal.

7 | Cf. International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families ICRMW of December 18, 1990.

FACTORS INFLUENCING THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS

This intergovernmental Commission is based on Article 14 of the ASEAN Charter, which was approved by the heads of government of the ten member states on November 20, 2007 and came into effect on December 15, 2008 after ratification by all countries. With this Charter, the member states have now, 40 years from its inception, conferred legal personality to their association of states ASEAN in the form of an intergovernmental body, as stated explicitly in Article 3 of the Charter. This does not, however, mean that a different stage has been reached in terms of legally valid integration, because the governments will still make decisions based on the consensus principle and then implement the decisions at national level. The top principles remain the sovereignty of each state (Art. 2, para. 2 a) as well as non-interference in the internal affairs of the other member states (Art. 2, para. 2 e). In view of this, some people have criticized this Charter as ineffective and mediocre.⁸ Realistically, however, one could hardly expect more at this point in time. But at least the Charter was also co-signed by the military junta of Myanmar. One also has to take into account the age-old practice of the ASEAN countries of dealing with all the relevant issues by way of consultation. What this agreement of international law now actually enshrines are three essential aspects: There will be mechanisms to settle disputes (Art. 22), the Secretary General is endowed with competence to monitor the observance and implementation of the joint decisions in the individual countries (Art. 11), and finally, the yearly ASEAN summit is assigned the competence to take binding decisions on behalf of the association (Art. 7)⁹. Within the ASEAN Charter, democracy, the rule of law and human rights are referred to in several places. According to Article 1 para. 7, the promotion and protection of human rights are

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8 | Cf. Jusuf Wanandi, "Does a mediocre document really matter?" *Jakarta Post Daily*, November 26, 2007; "Toothless charter will hurt ASEAN credibility," *Bangkok Post*, November 19, 2007; Amy Kazmin, "ASEAN charter falls foul of Burma divisions," *Financial Times*, November 21, 2007.

9 | Cf. Simon S.C. Tay, "The ASEAN Charter: Between National Sovereignty and Regional Constitutionalism," in: *Constitutionalism in Southeast Asia*, ed. Clauspeter Hill and Jörg Menzel, Vol. 3 (Singapore, 2010).

some of the aims of the association of states. And according to Article 2 para. 2 i), its guiding principles also include respect for fundamental freedoms as well as the promotion and protection of human rights. Of course, these laudable intentions are counteracted by the overriding principles of non-interference and sovereignty. But each member state has declared its commitment to these principles in front of the whole world. Compared to the previous state of affairs, this is to be regarded as progress.

However, neither the ASEAN Charter nor the Terms of Reference for the Commission dictate in binding terms the criteria to assess the observance of human rights.

In the section on the ASEAN bodies, Article 14 envisages the setting up of a human rights body and dictates that the terms of reference of this body are to be determined by the foreign ministers; these events took place on October 25, 2009 and led to the establishment of the Intergovernmental Commission on Human Rights. However, neither the ASEAN Charter nor the Terms of Reference for the Commission dictate in binding terms the criteria to assess the observance of human rights. The Charter only makes cursory reference to the United Nations Charter and international law in Art. 2 para. 2 (j). The Terms of Reference state that the last of the Commission's six purposes is to uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.¹⁰ Amongst the guiding principles in the following text, respect for sovereignty and non-interference as embodied in Article 2 of the ASEAN Charter takes first place once again. In addition, the Commission is to pursue a non-confrontational and cooperative approach. This then puts in question the reference to the Universal Declaration of Human Rights and other worldwide conventions as assessment criteria. Neither were any legally binding criteria set down in the Terms of Reference. It is not until section 4.2 of the Terms of Reference that the development of an ASEAN Human Rights Declaration is mentioned as a mandate of the AICHR. This is another decisive difference in comparison to other regions with a binding human rights charter. But without such a concrete benchmark it is not possible to provide effective legal protection.

10 | Cf. No. 1.6 a), b) of the Terms of Reference ToR, <http://www.aseansec.org/DOC-TOR-AHRB.pdf> (accessed May 12, 2010).

CHARACTERISTICS OF THE COMMISSION

In section 3, the Terms of Reference define the AICHR explicitly as a consultative body. Besides the development of a human rights charter, its mandate includes amongst other things the development of strategies for the promotion and protection of human rights, public dissemination of information and education in this area, as well as providing encouragement to ASEAN Member States to consider acceding to and ratifying international human rights instruments. While underlining the caution with which the association of states approaches the human rights issue, this also points to the difficulties of trying to reconcile the diverging views on human rights held in the ten member states. It is not the case, however, that they merely agreed on the smallest common denominator. According to some of those involved, efforts were definitely made during the negotiations on the Terms of Reference to achieve a compromise in various areas.¹¹ When you consider that the military dictatorship of Myanmar, formerly Burma, is amongst these ten countries, it becomes clear that the outcome could not have been any better, even with mutual give and take. Reference has already been made to the strong limitations on the AICHR, compelling it to observe national sovereignty and the principle of non-interference and consequently avoid any confrontation. According to section 6.1 of the Terms of Reference, its decisions must be based on consultation and consensus.

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This principle also conforms to the 40-year-old tradition of the ASEAN association of states. The consequence of this is that although no optimum decision ever ensues, smaller advances are not totally blocked either – and not only in questions of human rights. In line with the customs within ASEAN, this consensual principle always means that a compromise is achieved. The Commission reports to the Foreign Ministers Meeting. In other words, it does not take binding decisions but acts as an advisory body to the governments. In line with this general remit, each government appoints a representative, who is therefore accountable to his or her government. The standard term

11 | Cf. the statement by the Philippines human rights lawyer Ray Paolo Santiago at the meeting of the American Bar Association on the subject of the AICHR on January 7, 2010 in Chiang Mai / Thailand.

of office is three years; but according to section 5.6 of the Terms of Reference, any government may recall and replace its representative at its discretion. This provision aroused the greatest misgivings in civil society.

When you look at the current line-up of commission members, this concern initially appears unfounded. Of the ten members, only the delegates from Indonesia and Thailand can be regarded as committed and independent human rights advocates. The other commission members are either former or current government officials or people close to the respective government. Some are described as very reticent, others as mere mouthpieces of their government. Indonesia and Thailand have consciously decided in favor of critical, yet respected personalities. It is unlikely that any of the other representatives will go against their government. The danger of the work of the Commission being curtailed or of undesirable statements on the part of the AICHR being prevented by a recall of its members is therefore only hypothetical at the moment. The current make-up of the Commission reflects the underlying circumstances of ASEAN: small steps are taken to try and deal with the sensitive issues of the association of states, seeking consensus all the time. Further possible means of disciplining the Commission are the fact that both its annual work plan and its budget need to be approved by the Foreign Ministers Meeting. This is what the committed actors of civil society will need to keep their eyes on in the near future.

From March 28 to April 1, 2010, the members of the Commission convened for their first session in the ASEAN Secretariat in Jakarta to debate these issues and the draft of the rules of procedure of the AICHR. So far, none of the discussed contents have become public. The publication of the rules and regulations approved by the Foreign Ministers Meeting is planned for July 2010. A network of non-governmental organizations had previously drawn up their own draft version of the rules of procedure and wanted to submit this to the Commission at its first session.¹² But the AICHR refused to receive the civil society representatives.

12 | Cf. Forum Asia, "AICHR must ensure effective Rules of Procedure in dealing with human rights violations," April 2, 2010 at: <http://www.forum-asia.org/index.php> (accessed May 14, 2010).

Similarly, the Commission refused to deal with the petition from family members of the journalists who had been killed during a massacre in the southern Philippines at the end of November 2009. According to all the evidence, it appears to be at the very least a case of the government authorities failing to ensure public safety out of politically motivated consideration for the suspected perpetrators.¹³ The lawyers of the surviving dependents had deliberately called the AICHR as early as the beginning of February in the knowledge that it had not approved any rules of procedure as yet. This was intended to induce the Commission to consider accepting input from outside for these rules. To date, such a wide remit of the AICHR has not been discussed in official circles and this is not to be expected either judging from the statutes that have already come into force. However, such activities are part of the strategy of civil society activists to draw public attention to existing deficiencies in an effective manner in order to possibly be able to initiate improvements.

PERSPECTIVES AND CHALLENGES FOR THE AICHR

In view of the depicted circumstances and the practices commonly followed within the ASEAN association of states in the past, it is clear that the process of developing a regional system for the protection of human rights is going to be very drawn out. It is therefore not likely that the Commission will be dealing with concrete instances of possible human rights violations as in the above-mentioned case in the Philippines. The mandated functions envisaged in the Terms of Reference suggest that the objective of the AICHR is to develop strategies on how to best protect human rights. This actually precludes dealing directly with individual occurrences. Although the promotion and protection of human rights are mentioned in the same breath in the ASEAN Charter and in the Terms of Reference, the predominant opinion in the Commission and in the governments appears to be that promotion should be dealt with first, with protection to follow at a later date.

13 | Cf. Nikko Dizon, *Philippine Daily Inquirer*, March 29, 2010, http://www.services.inquirer.net/print/print.php?article_id=20100329-261391 (accessed May 14, 2010); Carmela Fonbuena, "Kin of massacred journalists bring case to ASEAN," March 28, 2010 at: www.abs-cbnnews.com/print/93618 (accessed May 14, 2010).

The challenge for the ASEAN Commission on Human Rights is to forge a reputation as an instrument for the protection of human rights in their region that is to be taken seriously, while not appearing to work against a specific government. However, it will be necessary to introduce sanctioning mechanisms, at least in the medium term.¹⁴ This is likely to be a difficult undertaking in view of the consensus principle. And most of the observers from committed non-governmental organizations and science do regard the outlook with some misgivings, but also with the appropriate realism. The general view is that the undertaking of protecting human rights effectively is only just in the first stages. Setting up a commission such as the AICHR is one thing; but making it into an effective instrument is another matter altogether. The mainly pragmatic realists amongst the human rights activists view the Commission less as a static object and more as a process into which one can and should have some input.¹⁵ The Terms of Reference leave a number of aspects open for which the groups involved in human rights work can make constructive suggestions before the governments themselves give their response.

With the comprehensive independent draft for the rules of procedure of the AICHR, a first initiative was made in this direction. Even if it has not shown any results to date, the members of the Commission and their governments will no doubt have taken note of it. The possibility that ideas might inform the official version by this route cannot be discounted. Another field where civil society groups might become involved is in the wording of the envisaged ASEAN Declaration of Human Rights. Apparently, some organizations are already working on this. Yet another field of action for non-governmental organizations might be to influence opinion forming amongst government representatives as well as amongst citizens. As explained in the introduction, public opinion in Asia does not see each citizen having individual rights

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14 | Cf. Pavin Chachavalpongpun, "Don't celebrate just yet, many hurdles still ahead," *Straits Times*, October 23, 2009.

15 | Cf. Max de Mesa, in his lecture at 17th ASEAN KAS Colloquium on Human Rights on February 9, 2010; Ray Paolo J. Santiago, "Developments on the ASEAN Intergovernmental Commission on Human Rights," *HURIGHTS OSKAKA, Focus Asia-Pacific News*, 58 (December 2009), <http://www.hurights.or.jp/asia-pacific/058/04.html> (accessed May 15, 2010).

vis-à-vis the state and society that can be sued for and enforced through specific procedures. A public discussion on all aspects of human rights is therefore definitely required.

And the members of the Commission themselves can play their part to ensure that the AICHR achieves a respected position. It is true that they are accountable to their governments and depend on them. But at the same time, the Terms of Reference stipulate that they should

act impartially. This provides some leeway at least for the truly independent members, who can set an example in a given case by demonstrating a critical stance towards their

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own government. The Indonesian representative in the AICHR, Rafendi Djamin, himself a victim of human rights violations under the Suharto regime, considers dealing with cross-border problems one of the main areas to tackle.¹⁶ This concerns in the first instance refugees fleeing from one ASEAN country into a neighboring one, especially between Myanmar and Thailand as well as Thailand and Cambodia. He recommends that victims of human rights violations should get together with people from other ASEAN countries affected by similar events and submit the problems to the Commission under a topical aspect. Seeing that individual complaints will probably not be possible for the foreseeable future, this is certainly a suggestion aiming in the right direction. The advance by the Philippine group of surviving dependents from the massacre of Maguindana in November 2009 with their petition to the AICHR was therefore not suitable to solve the concrete problems. For the objective observer, it was highly unlikely that the Commission would deal with the submission. For one, there was not even a draft for the rules of procedure on the table, and secondly, the Terms of Reference that form the legal basis of the activities of the AICHR do not even allow for individual complaints. However, it was a useful initiative insofar as it brought the thorny issue out into the open and clearly demonstrated the deficiencies of current arrangements. This will no doubt have stimulated the discussion process behind the scenes.

16 | Cf. Interview with: Rafendi Djamin: *AsiaViews*, January/February 2010, 14 - 15.

Retired Justice of the High Court of Australia, Michael Kirby, special envoy of the UN Secretary General for human rights in Cambodia from 1993 to 1996, who has been a committed activist in this area ever since, summarized the state of the discussion on the ASEAN Intergovernmental Commission on Human Rights under three aspects: 1) Expectations and Hopes; 2) Possibilities und 3) Realism.¹⁷

The expectations made of the AICHR are that the envisaged networking with national, regional and international human rights institutions will lead to some sort of competition and thereby to a strengthening of the Commission. The drawing up of an ASEAN Declaration of Human Rights, making reference to the Universal Declaration of Human Rights and other international law, provides some hope

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that the AICHR will indeed develop into an effective protection mechanism. Respect for human rights are after all, states Kirby, an indispensable component of responsible governance and thereby an important prerequisite for attaining the Millennium Development Goals of the United Nations.

The latter represents an overarching political goal that all ASEAN countries aspire to. This gives some hope for better protection of human rights. The Terms of Reference offer a number of possibilities for intervention on the part of civil society and of the members of the Commission. Unclear terms or gaps in the regulations are to be interpreted according to the Vienna Convention on the Law of Treaties, which includes in particular the statement that a body should be allowed to take courses of action that are not explicitly forbidden. This can for instance be applied where functions and mandates are contradictory. According to Article 3 of the Terms of Reference, the AICHR is merely a consultative body; but according to Article 4.10 of these Terms of Reference it is also meant to obtain information from the member states. The last statement distinctly points to an investigative function. In this context it will depend on whether and to what extent the members of the Commission will be able to detach themselves from their governments. In this connection too, individual representatives could set an example by their action. However,

17 | Cf. Hon. Michael Kirby, during the meeting of the American Bar Association on the subject of the AICHR on January 7, 2010 in Chiang Mai / Thailand.

the realistic aspects include the fact that the Commission did not come about through an independent treaty under international law, that the appointment processes are not necessarily transparent, and that a number of provisions in the Terms of Reference mitigate against positive steps forward.

The mixed feelings on the ASEAN Intergovernmental Commission on Human Rights, the hopes, possibilities and realistic limitations lead to the conclusion that for the time being one needs to allow this institution, which was after all established only recently, some time and give it a chance. The rulers of the ASEAN region are aware of the fact that society activists will continue to fight for better protection of human rights and might do so with even more vigor than before. With the approval of the ASEAN Charter on the 40th anniversary of the association of states in 2007 and the similarly well publicized foundation of the AICHR in October 2009, the commitment to democracy, to the rule of law and to respect for human rights has been brought into the public arena. That can no longer be simply disregarded.

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