

## ABSTRACT

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The present research study has been modulated by making a general study on research problem Unlawful Killing by State Forces in India, with specific reference to Fake Encounter: A legal Study. The researcher has made intense study on the research problem and tried to find the role of State in protecting the life of the people against the arbitrary, summary execution by its agency. The term unlawful killing by state forces or extra-judicial killings covers executions which violate domestic penal, or human rights or humanitarian law. Common forms of extra-judicial killings include killing caused by excessive use of force by police, indiscriminate killings of civilians during an armed conflict, and murder by state security forces or paramilitary groups, when these are not adequately investigated, prosecuted or punished. The most fundamental characteristic of extra-legal killings is that they are carried out outside the ambit of law “which have no sanction or permission under the law or which cannot be covered or defended under any provision of law.”

The police encounter in India is officially portrayed as spontaneous, unplanned shoot-out in which the criminal or perpetrator is almost invariably killed. The general absence of any eyewitnesses or rather, the failure of eyewitnesses even if there are any, to come forward and counter the police statement contributes to the overall silence on the issue. In just a handful of encounter killings there are alternative accounts provided by family members or eyewitnesses of how the person killed was picked up by the police prior to the 'encounter' or who may have seen that the police version is less than accurate. These come to be called 'fake' encounters or staged encounter, and some questions are raised by the media and on rare occasions, inquiries are initiated against the police. In the absence of any regular investigation into these cognizable offences committed 'by the police, whether an encounter can be established as real or fake becomes dependent on the arbitrary factor of whether or not there were eyewitnesses or others willing and able to counter the police story; a difficult task under any circumstances. Extrajudicial executions and other grave human rights abuses by member's police forces have been described

as an issue of concern and basis for communication between the UN Special Rapporteur and the Government. A closer look at reported news and case law emerging in the high court's reveals that the convictions in most cases of extra-legal killings are not properly investigated; not surprisingly, the police resist registration of cases against their fellow policemen even when the legal heirs of the deceased "criminals" press for charges of murder. Some killings are motivated by personal monetary gain. The Special Rapporteur has reported on police killings occurring at police checkpoints, where attempts at extortion can escalate into extrajudicial executions. Fake encounter staged by the police officer resulting in the killing of even killing of even criminal is illegal & has very rightly landed the senior police officer behind the bars.

Encounter killings were first employed in Andhra Pradesh in the 1960s to describe extra-judicial killings because of the frequency with which officials claim that the deceased had been killed in an 'encounter' with police". In the 1960s and 1970s, custodial and extrajudicial killings of naxalites became standard police practice and still continue in naxalite affected areas today. When the naxalites splits from Marxist in 1969 in India and began a strategy of people war, including the annihilation of class enemies, police respond to their campaign of rural and urban terrorism with the encounter killing of suspect. If the number of killing by police is a large percentage of all homicidal that suggests that the police may be using a disproportionate amount of deadly force in relation to the actual hazard of their work and of life. In counter insurgency operations in the states of the Northeast, Punjab and Kashmir, fake encounters became routine as a quick way to rid society of "terrorists" and opponents of the State. The manner in which the police and armed forces were granted impunity in Punjab for fake encounters of alleged terrorists during the 1980s and 1990s has led in the emboldening of security forces and administration around the country to indulge in the illegal elimination of minorities, the disadvantaged, and those accused of criminal activity.

The Constitution of India has guaranteed a wide range of human rights in the form of fundamental rights in part III of the Constitution. Article 21 which specifically focus on the protection of life and personal liberty has been extensively discussed by the Supreme Court of India. Arbitrary and

Contradiction to Rule of Law fake encounter draws to the complicated matrix of the State affairs. Impunity for violence is produced and reproduced through the strategic manufacturing of the State consent. In the human right discourse impunity refers to the condition in which perpetrator are immune to or exempted from punishment for their crime committed. It is also due to the consequences of the unlimited flow of sovereign power as power quasi state agent violence without accountability due to their position simultaneously inside and outside Rule of Law.

The protection given the armed forces under AFSPA cannot overcome the protection of life and personal liberty of person. AFSPA provide wide ranging power to Indian armed forces in respect of using lethal force in various instances and fails to provide safeguard in case of excessive use of such power which eventually leads to numerous account of violation committed in area where AFSPA is applied . The power granted under AFSPA are in reality broader than that allowable under the state of emergency as the right of life may effectively be suspended under the Act and the safeguard applicable in the state of emergency are absent . The widespread deployment of the military creates an environment in which the exception becomes the rule; the use of lethal force is seen as the primary response to conflict.

### **Brief Analysis of Chapters**

#### **Chapter I – Introduction**

This chapter introduces the topic of thesis work .In this process this chapter has covered research problem, research methodology, significance of study, hypothesis. Thereafter, this chapter gives the framework in very brief. This chapter also mentions the objective of thesis. The Introduction has covered the description of the unlawful killing by state forces in India and role of government and its instrumentality in protection of Right to life in India. The Judicial approach has been briefly discussed in the chapter.

#### **Chapter II – Conceptual Analysis of Unlawful Killing by State Forces**

According to the UN Special Rapporteur on extra judicial executions, the most common forms of police killings occur due to excessive use of force in law

enforcement operations, including during attempts to arrest suspected criminals, crowd or riot control, and purported “shoot-outs” with alleged armed criminals. Some killings are motivated by personal monetary gain the Special Rapporteur has reported on police killings. As a threat and reacted with utterly disproportionate force even when it had become clear that they posed no threat to the lives of the members of armed forces. The incident was apparently a result of combination of the aforementioned factors. Some incidents of extrajudicial killings occur in the context of poorly planned and unlawful policing policies and operations, for example, where police engage in heavily militarized operations without adequate safeguards or community support. Police engage in “social cleansing”, intentionally killing suspected criminals or members of poor or marginalized communities. In extreme cases, the police operate as part of a formal death squad or militia. Killings also occur as a result of torture or the denial of life-saving treatment while the victim is in police custody. Other killings by police occur outside the context of any purported official police activity, and result from off-duty police officers acting as vigilantes or hired killer to collect direct statistics for incidents of extra-judicial killings is a difficult task as state authorities do not proactively reveal such violations. Statistical data, media reports, judicial reporting, inquiry reports and efforts by some rights based organizations are useful and have been utilized.

Extrajudicial executions and other grave human rights abuses by member’s police forces have been described as an issue of concern and basis for communication between the UN Special Rapporteur and the Government. A closer look at reported news and case law emerging in the high court’s reveals that the convictions. As most cases of extra-legal killings are not properly investigated; not surprisingly, the police resist registration of cases against their fellow policemen even when the legal heirs of the deceased “criminals” press for charges of murder.

The violations of the right to life in police and judicial custody take place on daily basis. In order to address the menace, on 14 December 1993 the NHRC issued Guidelines directing “the District Magistrates and Superintendents of Police of every district to report to the Secretary General of the Commission about custodial deaths within 24 hours of occurrence or of these officers having

come to know about such incidents” and further that the “failure to report promptly would give rise to presumption that there was an attempt to suppress the incident”.<sup>1</sup>

Disproportionate use of force, in particular, fire-arms by the police while controlling crowd causes violation of the right to life of a large number of people every year. The non-implementation of the principles of “absolutely necessary”, a stricter and more compelling test of necessity, and “proportionality for the use of force” as provided in the CrPC and the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, has led to blatant deprivation of the right to life. The still high number of deaths in police firing is indicative of non-implementation of the principles of “absolutely necessary”.

### **Chapter III – International Legal Perspective on Unlawful Killing**

The provisions protecting the right to life, personal liberty and integrity, freedom from torture, freedom of expression, and the right to an effective remedy exist in all general human rights instruments. All human rights treaty-based bodies have interpreted these provisions as imposing a broad range of positive obligations upon the contracting parties. The right to life and the right to freedom from torture are non-derogable under all the instruments considered (Article 4 of the International Covenant on Civil and Political Rights, Article 15 of the European Convention on Human Rights, Article 27 of the Inter-American Convention on Human Rights, Article 4 of the Arab Charter on Human Rights), and therefore cannot be suspended even in times of war or other emergency threatening the life of the people of the nation. Moreover, save for express derogations from conventional obligations, the remaining rights continue to be applicable in conflict situation alongside the provisions of international humanitarian law.

There are no explicit provisions in the Indian constitution regulating the incorporation and status of International law into the Indian legal system. However, Article 51(c) stipulates as one of the Directive Principles of state policy, that: “The state shall endeavor to foster respect for international law and

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<sup>1</sup> Available at <http://www.nhrc.nic.in/Documents/sec-1.pdf>

treaty obligations in the dealings of organized people with another”. International treaties do not automatically become part of national law: they must be expressly incorporated into domestic law by a legislative act. While treaty law is not directly applicable, customary international law has direct application provided that it is not inconsistent with national legislation. There are lot of international legal instruments, binding and non-binding, addressing human rights in general; very few instruments are specifically concerned with the situation of unlawful killing by state forces. In recent years there has been an increasing tendency towards the adoption of legal initiatives, both at UN level and in virtually all regional level, designed to respond to the specific human rights violations experienced by accused person. The measures envisaged are all non-binding in nature. In addition to the provisions of the ICCPR, the UN system encompasses certain conventions, such as the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984, in force since 1987) and the International Convention for the Protection of All Persons from Enforced Disappearance (2006, in force since 2010).

Considering the relevant international instruments relating to prohibition of torture, inhuman and degrading treatment, extra-judicial killings and forced disappearances, it is apparent that India has clear obligations under international law to prosecute and investigate allegations of human rights violations. Despite not ratifying CAT and CPAPED, India is still bound by their provisions. The prohibition on torture and inhuman and becoming treatment contained in CAT for example, is a jus cogens principle of International Law. Furthermore while India has yet to ratify CPAPED, protection against forced disappearance is contained within the ICCPR. It has been repeatedly brought to the attention of the international community by inter -governmental organizations, NGOs and various stakeholders. Numerous resolutions and reports, from Amnesty International, the UN Special Rapporteur on the promotion and protection of the right to life from unlawful killing by state forces, the Parliamentary Assembly of the Council of Europe, have identified the spread of a climate of impunity in some States as a threat to human rights and the democratic process, and called for urgent action to bring it to an end. Statistical data provided by the amnesty international and, human right watch, also indicate high numbers of unlawful

killing by state forces in the world. The United Nations Special Rapporteur on protection against arbitrary, summary execution drew the attention to the increase in the number of unlawful killing by state forces, identifying it as social and legal problem. The special rapporteur on unlawful killing by state forces have visited many countries and submitted its report on the response and responsibility of various states on such issue.

#### **Chapter IV – Constitutional and Legal Perspective of Unlawful Killing by State Forces and Fake Encounter**

The foundation of any democratic society is based on Rule of Law. The Rule of Law governs all aspects of our State and it is guaranteed by the provision of Part III and other provision of the Constitution of India. State and for all matter the police as its principal law enforcing agency have undoubted duty to bring offender to bring them behind the bars. Even so, the law and procedure adopted by the State for achieving this laudable social objective have to conform to civilized standards. In the battle against crime and delinquency, State and its Officer cannot on any account forsake the decency of State behavior and have recourse to extra-legal method for the detection of crimes and criminals. The increasing incidents of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the rule of law and the administration of criminal justice system.

Study of Article 19 to 22, as contained in part III of the Constitution of India, would reveal that even the Constitution guaranteed certain freedoms to the citizen only also the restriction that may be imposed on them by the State. The fundamental right to life, which Article 21 deals with, is the most precious human rights and forms the arc of all other rights. Articles 32 and 226 of the Constitution of India and number of other constitutional principle provided protections for victims of human rights violations. The right to constitutional remedies embodied in Articles 32 and 226 of the Indian Constitution guarantee the right of individuals who have had their fundamental rights violated by the State to approach the Supreme Court or the High Courts for their protection. The courts are given the power to take immediate action to stop violation of a fundamental right and to punish those responsible. The domestic legal

framework also contains a number of specific provisions that prohibit the use of torture and extra –judicial killings by State actors; in particular the police. Domestic legal provisions seeking to uphold the rights of the accused and prohibit ill- treatment and torture in custody are contained in the Indian Penal Code of 1860 (IPC), the Indian Police Act of 1861 (IPA), the Evidence Act of 1872(IEA) and the Code of Criminal Procedure of 1973 (Cr PC).

Chapter V of the Criminal Procedure Code 1973, deals with the power for arrest of a person and the safeguard which are required to be followed by the police to protect the interest of the arrested person Section 41 Cr.P.C., confers power on any police officer to arrest a person under the circumstances specified therein without any order or a warrant of arrest from a Magistrate. Section 46 of Code provides the method and manner of arrest. Under this section no formality is necessary while arresting a person.

On receipt of information, the officer in-charge of the police station in purported compliance with the provisions of Sec. 154 of Cr.P.C –records the information and enumerates certain provisions of the Cr.P.C. All the enumerated provisions of the substantive law implicate the alleged criminal conduct of private individuals killed in the encounter- wherever Sec. 100 IPC is enumerated in the FIR, it is a reflection of the plea of self-defense claimed by the police party. If ever, is the criminal conduct of member(s) of the police party mentioned. In a large number of cases a uniform feature thus appears to be that police officials convey initial information to the jurisdictional Police Station. The practice in general is that when an encounter death takes place, the leader of the police party engaged in the encounter furnishes information to the police station about the encounter and the persons that died. The stand taken by the police in all such cases is that the deceased persons on sighting the police opened fire at them with a view to killing them and were, therefore, guilty of the offence of attempt to murder under Section 307 IPC. The police justify their firing and killing as done in exercise of their right of self-defense. This information is recorded in the police station describing the persons killed by the bullets fired by the police station describing the persons killed by the bullets fired by the police as accused and FIRs are drawn up accordingly. Without any more investigation, the cases are closed as having abated, in view of the death of accused. No attempt

whatsoever is made to ascertain if the police officers that fired the bullets resulting in the killings, were justified in law for having done so. Under the criminal law, the police have not been conferred any right to take away the life of any person. The scheme of criminal law prescribes that it would not be an offence if the death were caused in the exercise of the right of private defense. Another provision, under which police officer can justify the causing of death of another person, is Section 46 of the Code of Criminal Procedure (CrPC) which has to be read with section 100 of IPC. Section 46 allows the police to use force, extending up to the causing of death only where the person to be arrested is accused of an offence punishable with death or with imprisonment for life. When death caused in an encounter is not justified as having been caused in exercise of the legitimate right of private defense, or in proper exercise of the power of arrest under Section 46 of the Cr P C read with section 100 of IPC, the police officer causing the death would be guilty of the offence of culpable homicide. Whether the causing of death in the encounter in a particular case was justified as falling under any one of the two conditions can only be ascertained by proper investigation and not otherwise.

#### **Chapter V – Role of Indian Judiciary in Protection of Life in Fake Encounter**

The right to life in Article 21 as read with Article 14 right to equality of Constitution of India, for example, has been interpreted expansively by the Supreme Court to include the right to life of dignity, freedom from exploitation and a number of socio-economic rights contained in the directive principles of the Constitution. Reasoning in this manner, the Supreme Court constructed Article 21 of the Constitution to include the prohibition of torture and inhuman and degrading treatment. In addition to the efforts of the Supreme Court to incorporate the prohibition on torture and inhuman and degrading treatment into the domestic law, the Court has, in the absence of specific laws regarding the fake encounter, intervened and ordered reforms and improvements to the system to prevent abuses by State forces in custody. In addition to giving expansive readings to fundamental constitutional rights, the Supreme Court has issued a number of guidelines predominantly cases of fake encounter that seek to give

added practical protection for citizens from violations of their constitutional rights.

*In Prakash Kadam vs Ramprasad Vishvanath Gupta*<sup>2</sup> the Supreme Court held that the accused are police personnel and it was their duty to uphold the law, but far from performing their duty, they appear to have operated as criminals. Thus, the protectors have become the predators. The Supreme Court held that in cases where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare cases. Fake 'encounters' are nothing but cold blooded, brutal murder by persons who are supposed to uphold the law.

*In Rubabbudin Sheikh V. State of Gujarat*<sup>3</sup> the Supreme Court held that considering the nature of crime that has been allegedly committed not by the third party but by the police personnel of the state of Gujarat, the investigation concluded in the present case cannot be satisfactorily held and considering the involvement of the state police authorities and particularly the high official of the state of Gujarat are involved, the Supreme Court directed CBI authorities to investigate in to the matter. Similarly in *Narmada Bai V State of Gujarat*<sup>4</sup> the Supreme Court thought it would be advisable and desirable and interest of justice to entrust the investigation at early date to the independent agency like CBI. Since CBI has been investigating the case of Soharubuddin fake encounter case and this case seems to relate to the part of transaction as alleged by petitioner thereby above investigation is entrusted to CBI.

*In Peoples Union for Civil Liberties v. Union of India and another*<sup>5</sup>, the Court dealing with question of the right to life in a situation where the State was infested with terrorism and insurgency. It may be necessary to fight terrorism with a strong hand which may involve vesting of good amount of discretion in the police officers or other paramilitary forces engaged in fighting them. If the version of the police with respect to the incident in question were true, there could have been no question of any interference by the court. Nobody

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<sup>2</sup> (2011) 6 SCC 189

<sup>3</sup> (2010) 2 SCC 200

<sup>4</sup> (2011) 5 SCC 208

<sup>5</sup> AIR 1997 SC 1203

can say that the police should wait till they are shot at. It is for the force on the spot to decide when to act, how to act and where to act. It is not for the court to say how the terrorists should be fought.

In *Extrajudicial Execution Victim Family Association and another V. Union of India*<sup>6</sup> the Supreme Court observed that the life of a policeman or a member of the security forces is no less precious and valuable than any other person. The lives lost in the fight against terrorism and insurgencies are indeed the most grievous loss. And in a situation where the Court finds a person's rights, specially the right to life under assault by the State or the agencies of the State, it must step-in and stand with the individual and prohibit the State or its agencies from violating the rights guaranteed under the Constitution. That is the role of this Court and it would perform it under all circumstances. The Supreme Court constituted a three member commission. The commission found that all six cases the encounter of the victim was not genuine not a true encounter with the police or security forces. Nor it is case that it was in the exercise of their right of private defence by the security forces. The deceased did not had any adverse criminal antecedent.

In *PUCL v. State of Maharashtra*<sup>7</sup> the Supreme Court of India heard on the question of the procedure to be followed in the investigating police encounter and laid down a guidelines for it. The Supreme Court directed that above requirements /norms must be strictly observed in all cases of death and grievous injury in police encounter by treating them as law declared under Article 141 of the Constitution of India.

In *Andhra Pradesh Civil Liberties Committees and others vs. State of A.P.*<sup>8</sup> the constitutional bench of A.P. High Court held that where a police officer causes death of a person, acting or purporting to acting discharge of official duties or in self-defense as the case may be, the first information related to such circumstances shall be recorded and registered as FIR, enumerating the relevant of Law and shall be investigated. The existence of circumstances bringing a case within any of the exception in the Indian Penal Code including the exercise of

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<sup>6</sup> (2013) 2 SCC 493

<sup>7</sup> AIR 2014 SCC 119

<sup>8</sup> 2009 (1) ALD (Cri) 291

the right of private defense cannot be conclusively determined during investigation. The opinion recorded by the Investigation Officer in the final report forwarded to the Magistrate is only an opinion. Such opinion shall be considered by the Magistrate in the context of the record of investigation together with the material and evidence collected during the course of investigation. The Magistrate shall critically examine the entirety of the evidence collected during Investigation to ascertain whether the opinion of the Investigating Officer is borne out by the record of investigation. The Magistrate has the discretion to disregard the opinion and take cognizance of the offence. A Special Leave Petition was filed immediately by Police Officers Association of Andhra Pradesh against final judgment passed by A.P. High Court in Supreme Court of India named as *M/S A.P. Police Association vs. A.P. Civil Liberties Committees and others*. The Supreme Court of India passed interim stay in the A.P. High Court judgment in the SLP. The matter is sub-judice since 2009 before the full bench of Supreme Court of India.

In *Paramjit Kaur V. State of Punjab and Others*<sup>9</sup> the Supreme Court laid down that protection of sanction is an assurance to an honest and sincere officer to perform his duty honestly and to the best of his ability to future public duty. However authority cannot be camouflaged to commit crime.

In *General Officer Commanding, Rashtriya Rifles v. Central Bureau of Investigation & Another*,<sup>10</sup> the Supreme Court has observed that it is for the competent authority to decide the question of sanction whether it is necessary or not and not by the court as sanction has to be issued only on the basis of sound objective assessment and not otherwise. Prior sanction is a condition precedent. The Supreme Court has laid down that the law on the issue of sanction can be summarized to the effect that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty.

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<sup>9</sup> (1996) 7 SCC 20

<sup>10</sup> 2012(6) SCC 228

In *Prakash Singh vs. Union of India*<sup>11</sup> the Supreme Court gave guidelines for police reforms. However these are not completely implemented. So, after analyzing all the cases, it can be said that the Apex Judiciary of India protected the right to life of the persons and justified its role vested by the Constitution as a guardian and protector. Supreme Court of India upholds rule of law and punished the law breaker. Everyone is equal before eyes of law whether it's a common man or any person holding any authority.

1. Unlawful Killing by State Forces remains pervasive. Most of the unlawful killings by state forces are unreported and underreported. Reported cases are not investigated by meaningful way.
2. The crime rate does not decrease by the encounter killing. The law and order situation cannot be controlled by the encounter killing.
3. The encounter killing is not politically motivated. The law breaker in the fake encounter cases does not hold nexus with the political head of the government. Hence the encounter killing cannot be considered as state sponsored killing.
4. Impunity is the serious issue of concern. Prior sanction cannot be camouflaged to commit crimes. The delinquent police officers who abused the power or authority were punished and the Apex court did not showed any mercy to such officers. The sincere and honest police officers who acted in good faith and under color of office were provided the protection holds good in law.
5. The criminal law lacks various lacunae to convict the delinquent state forces .The government has amended the criminal law and added the victim compensation scheme. But it is not effectively executed by the authorities. The Supreme Court provided compensation to the kith and kin that were unlawfully killed by state forces in fake encounter cases.
6. The AFSPA is required for the forces who are sacrificing their life for the country. The AFSPA should not be repealed till the law and order situation is normal in the affected area.

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<sup>11</sup> (2006) 8 SCC 1

## **Chapter – 6 Conclusion and Suggestions**

1. The government should effectively investigate the allegation of human rights that have made regarding the conduct of its security forces and provide a detailed public response, acknowledging abuses and identifying errors.
2. The government should fully implement its zero tolerance policy and investigate arrest and prosecute delinquent state forces responsible for abuse. It should ensure strict control including a clear chain of command over the officers responsible for apprehension, arrest, detention or those official authorized by law to use force and firearms.
3. Government should prohibit order from superior officers or public authorities authorizing or inciting other persons to carry out extrajudicial execution.
4. The body of the deceased person shall not be disposed of until an adequate autopsy is conducted by a panel of physician. The autopsy should be video graphed.
5. A credible Commission of Inquiry into extrajudicial execution in India, or at least the most affected by extrajudicial execution should be appointed by the government.
6. Ratification of following treaties should take place promptly: (a) the convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol and (b) the International Convention for the Protection of All Persons from Enforced Disappearance.
7. Ratification of the following instruments should be considered: (a) the two Optional Protocols to the ICCPR; (b) the Optional Protocol to CEDAW; (c) the Rome Statute of the International Criminal Court; and (d) the Rome Statute of the International Criminal Court; and two Optional to the Geneva Convention.
8. India should enact the Prevention of Torture Bill and ensure its compliance with CAT.
9. Government should ensure that FIR registration is prompt and made mandatory in all cases of unlawful killing by state forces.

10. Compensation should be promptly to the victims of extrajudicial execution.

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