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**National Refugee Law for India:
Benefits and Roadblocks**

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Overview of Refugees Situation in India

India's status as a preferred refugee haven is confirmed by the steady flow of refugees from many of its subcontinental neighbours as also from elsewhere. India continues to receive them despite its own over-a-billion population with at least six hundred million living in poverty with limited access to basic amenities. However, the Indian legal framework has no uniform law to deal with its huge refugee population, and has not made any progress towards evolving one either; until then, it chooses to treat incoming refugees based on their national origin and political considerations, questioning the uniformity of rights and privileges granted to refugee communities. Indeed, the National Human Rights Commission (NHRC) has submitted numerous reports¹ urging the promulgation of a national law, or at least, making changes or amendments to the outdated Foreigners Act (1946), which is the current law consulted by authorities with regard to refugees and asylum seekers. The primary and most significant lacuna in this law is that it does not contain the term 'refugee'; consequently under Indian Law, the term 'foreigner' is used to cover aliens temporarily or permanently residing in the country. This places refugees, along with immigrants, and tourists in this broad category,² depriving them of privileges available under the Geneva Convention.³

¹ Rajeev Dhavan, "On the Model Law for Refugees: A Response to the National Human Rights Commission (NHRC)," *NHRC Annual Reports 1997-1998, 1999-2000* (New Delhi: PILSARC, 2003).

² *Ibid.*

³ The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, "The 1951 Geneva Convention," UNHCR-Public Relations Section, <http://www.unhcr.org/home/PUBL/3b5e90ea0.pdf>. Accessed on 8 July 2007.

Despite these factors, the current number of refugees and asylum seekers in India stands at approximately 435,900 according to the World Refugee Survey 2007 conducted by the United States Committee for Refugees and Immigrants (USCRI),⁴ and supported by the latest figures from the United Nations High Commissioner of Refugees (UNHCR). According to these sources, new asylum seekers for 2007 numbered about 17,900, in contrast to the mere 600 recorded departures from the country. India mostly plays host to refugees from its neighbouring countries who are either forced to leave their countries of origin due to internal or external conflict, political persecution or human rights infringements. India has offered refuge status to asylum seekers from countries like:

1. China: Refugees and asylum seekers from Tibet number around 110,000.
2. Nepal: Excluding migrant workers, the population stands at 100,000 refugees. However this number is not usually considered because of the Indo-Nepal Friendship Treaty.⁵
3. Sri Lanka: Total strength of conflict-induced refugees of Tamil origin stands at 99,600.
4. Myanmar: Currently 50,000 refugees and asylum seekers.
5. Bangladesh: The mass exodus following the 1971 war has come down to 35,000, following repatriation of refugees.

⁴ "World Refugee Survey 2007," United States Committee for Refugees and Immigrants, http://www.refugees.org/WRS_Archives/2007/48-69. Accessed on 12 July 2007.

⁵ "Treaty of Peace and Friendship between the Government of India and the Government of Nepal," Ministry of External Affairs, Government of India, <http://meaindia.nic.in/searchhome.htm>. Accessed on 17 July 2007.

6. Afghanistan: 30,400 refugees and asylum seekers comprised mainly of Hindus and Sikhs.
7. Bhutan: The ethnic Nepalese population settled in India amounts to 10,000 refugees and asylum seekers⁶.

The circumstances underlying the exodus of refugees from their countries of origin vary from political persecution in the case of the Chin refugees of Myanmar to civil war with the community of Sri Lankan Tamils caught between the Tamil nationalists and the Sinhalese government. However, it is clear that all these refugee populations deserve their basic human rights and the assistance that can be afforded by the Government of India. To define the word 'refugee' in Indian legal terms is theoretically not possible since neither the Foreigner's Act (1946) nor its amendments or additions, contains or defines the term. However, this study shall consider the definition propounded by a commission chaired by Justice P N Bhagwati in 1997,⁷ whose task was to construct a uniform national law on refugees. Although the bill was never tabled in Parliament, the term 'refugee' was adequately defined in the 'Model Law' as either

Any person who is outside his/her Country of Origin and is unable or unwilling to return to, and is unable or unwilling to avail himself / herself of the protection of that country because of a well-founded fear of persecution on account of race, religion, sex, ethnic identity, membership of a particular social group or political opinion

⁶ "World Refugee Survey 2007," US Committee for Refugees and Migrants, <http://www.refugees.org/article.aspx?id=1941>. Accessed on 09 July 2007.

⁷ Drafted under the auspices of the Regional Consultations on Refugees and Migratory Movements in South Asia initiative in 1995, with Justice P N Bhagwati as the Chairperson of the Drafting Committee of the India-specific version of the national law on refugee protection.

or

*... owing to external aggression, occupation, foreign domination, serious violation of human rights or events seriously disrupting public order in either part or whole of his / her Country.*⁸

It is important to note that India is not a signatory to the 1951 Convention relating to the status of refugees or the 1967 Protocol. This makes India's international position in terms of treatment of refugees, disputable. However, it is equally important to note that India is a signatory to various other international and regional treaties and conventions relating to universal human rights and refugees such as the UN Deceleration on Territorial Asylum (1967), the Universal Declaration of Human Rights, and the International Convention on Civil and Political Rights.⁹ India is also a member of Executive Committee (ExCom) of the UNHCR which approves and supervises the material assistance programmes of the UNHCR; all this without actually supporting or acknowledging the role of the UNHCR on its own territory. Taking this into account, it is clear that India respects international treaties on the treatment of people residing within its territory; but, it chooses to maintain its own administrative arrangements for dealing with temporarily or permanently settled refugee communities, while providing the UNHCR little room to assist except in emergency situations like the displacement of Chakma tribals from Bangladesh or rehabilitation of refugees from Afghanistan or the Autonomous Region of Tibet.¹⁰ It was estimated in 1998

⁸ Rajeev Dhavan, *Refugee Law and Policy in India* (New Delhi: PILSARC, 2004), p. 156.

⁹ T Ananthachari, "Towards a National Refugee Law for India," in P R Chari, Mallika Joseph, and Suba Chandran (eds.), *Missing Boundaries: Refugees, Migrants, Stateless and Internally Displaced Persons in South Asia* (New Delhi: Manohar, 2003), pp. 99-107.

¹⁰ Sarbani Sen, "Paradoxes of the International Regime of Care," in Ranabir Samaddar (ed.) *Refugees and the State: Practices of Asylum and Care in India, 1947-2000* (New Delhi: Sage Publications, 2003), pp. 404-405.

that out of more than 300,000 refugees in India, only 18,500 have received UNHCR protection.¹¹ The restricted role of the UNHCR as the international watchdog body provides the basic reason for Indian policymakers to establish the framework of a uniform national law on refugees to meet international criticism regarding the condition of refugees in the country.

During the course of this brief analysis of India's refugee policy, or the lack of it, this paper intends to ascertain whether a uniform national law would be beneficial to the interests of the three main parties involved with refugee policy in India, namely the Government of India, the UNHCR and the refugee communities themselves. Based on the current condition of refugees in India, the rights conferred upon them, the political objections to the framing of a uniform law and the current favorable conditions and advantages of having such a law would also be discussed.

¹¹ H K Thames, "India's Failure to Adequately Protect Refugees," Washington College of Law 2000, <http://www.wcl.american.edu/hrbrief/v7i1/india.htm>. Accessed on 20 July 2007.

Roadblocks to Formulating a Law

For every reason that points to an impending need for such a law, there seems to be an equally large number of reasons that policymakers have given for opposing it, urging that India should remain content with the Foreigners Act and that passage of a refugee law would hinder Government of India's policy concerning refugees. Despite the fact that even bodies like the National Human Rights Commission (NHRC) have sponsored requests for making changes to the Foreigners Act or formulating a new law, policymakers continue to remain obtuse on this issue. On 2 October 1997, the NHRC initiated a dialogue with senior officers of the Indian Ministry of External Affairs requesting them to examine afresh the possibility of India becoming party to the 1951 United Nations Convention relating to the Status of Refugees and the 1967 Protocol on the subject.¹² The Commission is of the view that it is essential that India develops a national policy and possibly a national law, fully in consonance with the 1951 UN Convention and the 1967 Protocol have been recounted in its earlier reports.¹³

It is clear that there are more pressing obstacles on the government and policymakers than human rights infringements perpetrated by their own authorities. One of the reasons behind the hesitancy to move forward with the law is that the current arrangement of managing the influx of migrants and asylum seekers through 'ad hoc' administrative decisions, based on political and security considerations, rather than specific legislative enactments is politically more convenient on the basis of India's bilateral relations with the country of origin of the refugees in question. Since India has

different treaties with its neighbouring countries, a uniform law to deal with the refugee groups would not be politically or practically viable. As stated in *Paradoxes of the International Regime of Care*, "India has concluded that unwanted migrations, including those of refugees, are a source of bilateral and not multilateral relations, and international agreements could constrict her freedom of action."¹⁴ This sheds some more light on India's reluctance to sign the International Convention or the Protocols on refugee law.

Security considerations rank high on India's list of priorities, given its geopolitical influence in the region and its vulnerability to cross-border infiltration due to the porous nature of its borders. Taking this factor into account, anti-refugee law legislators argue that the proposed law would encourage more refugees to enter India, with promises of increased legitimacy, more rights and government services, which will increase the threat of social, economic and political insecurity. Mahendra P Lama in his report 'Managing Refugees in South Asia'¹⁵ provides a three-dimensional model to explain the risk to national security through refugee movements that present different threats due to

1. Strategic-level security, when Refugees are armed and when the Government loses control over the refugees.
2. Structural-level security is threatened by increasing demands on and conflict over scarce resources.

¹² Dhavan, n. 1

¹³ *Ibid.*

¹⁴ Sen, n. 10, pp. 404-405.

¹⁵ Mahendra P Lama, "Managing Refugees in South Asia," Refugee and Migratory Movements Research Unit (Dhaka: Refugee and Migratory Movements Research Unit, 2000), pp. 19-24.

3. Regime-level security is threatened when refugees enter the domestic political process and create pressures on the government.

According to the Indian policymakers, these three dimensions of threat heighten the risk of further inward refugee movements, and present an obstruction to the formation of any law. However, these three dimensions lie in the sphere of political security. What is feared more among the local populace in a refugee-populated area is the risk they pose to economic and social security. Inadequate relief to refugees can lead to civil unrest, as in the case of the Sri Lankan Tamil refugees. India has also been used as a base for terrorist operations in the past which has led to disastrous consequences like the assassination of former Indian Prime Minister Rajiv Gandhi by the Liberation Tigers of Tamil Eelam (LTTE) cadres. The full dimensions of the refugee threat to economic and social security has been seen in Pakistan which harbours more than a million Afghan refugees, mostly concentrated in its North-West Frontier Province (NWFP) which has become an area of lawlessness and a centre for small arms and opium trade. Another risk associated with the encouragement of more refugees would be the problem of migrant labourers in search of work presenting themselves as refugees. The difference between the two is that refugees are those who are forced to flee their homelands due to conflict and persecution, while migrants are those who cross borders in search of employment and better economic opportunities. This is a simple distinction

that can be established through a basic screening process but policymakers feel that a uniform law would encourage a larger migrant movement for whom employment and income generation would have to be provided, in terms of the clauses of the proposed 'Model Law.'

A third factor contributing to the legislators' hesitancy is their contention that India is observing the basic tenets of treatment of refugees as proposed in the 'Model Law' and the Convention. India's Supreme Court has gone so far as to extend the application of Article 14 (Right to Equality) and Article 21 (Right to Life and Dignity) to everyone, including migrants and refugees residing within the territory of India, and also basic human rights as defined by the UN have been conferred upon the refugees. In addition, policy watchdogs claim that India affirms the principle of Non-Refoulement which is integral to any law on refugees. This prohibits the expulsion of a refugee to another country, including his/her country of origin, if he or she might again be subjected to persecution. However, despite the fact that the MEA and the Union Government have acknowledged the NHRC's numerous reports and recommendations advising the need for a separate law, policymakers continue to cite the irrelevant fact that any discrepancies that may exist in the human rights aspect of dealing with refugees are adjudicated by the NHRC which acts as a watchdog authority, and that until it suggests otherwise (which they have in fact on numerous occasions), a change in legislation is highly unlikely.

The Refugee Law and Its Benefits

Many experts in the area of refugee law believe that the more practical alternative to proposing an entirely new law is to push for changes in India's current policy regarding refugees. As stated above, no current Indian law refers directly to refugees.

The Registration of Foreigners Act, 1939, the Foreigners Act, 1946, and the Foreigners Order, 1948 are the primary documents dealing with the treatment of foreigners in India. Article 2 of the 1939 Registration of Foreigners Act defines a foreigner as "a person who is not a citizen of India." The Foreigners Act of 1946 and the Foreigners Order of 1948 also uses this definition of a "foreigner." Both the Act and the Order affirmatively grant the Indian government powers to restrict the movement of foreigners inside India, to mandate medical examinations, to limit employment opportunities, and to control the opportunity to associate, and the ability to refoule, or "return," refugees. The Refugee Convention, however, bars all these actions.¹⁶

Therefore, the reasoning that India's policy toward refugees already matches international standards and is, consequently, not in need of any change is not acceptable to watchdog agencies like the UNHCR and the NHRC and rightly so. It is patently obvious that although India grants its refugees certain rights and privileges, these are only conferred upon select groups, leaving the question of equality and uniformity unanswered. A clear case of this is the preferential treatment conferred upon the Tibetan and Sri Lankan Tamil refugees. Until the assassination of Rajiv Gandhi in 1991, Tamil refugees were 'encouraged' to enter India; even now the Sri Lankan Tamil refugees are taken as refugees depending

upon which party is in power in Tamil Nadu.¹⁷ The Tibetan refugee community was granted land to set up educational institutions and other socially useful programmes, apart from the permission to set up a government-in-exile. It is imperative that uniformity is exercised in the application of refugee law and factors like regional politics be abandoned. The current ad hoc arrangements of dealing with refugees based on administrative, political and economic calculations should not be the policy in a country like India, which has accepted such a large refugee population.

A more significant objection is the question of security considerations, given India's volatile situation in South Asian politics, and the presence of terrorist groups in almost all its neighbouring countries. The Maoists and the Islamist groups have infiltrated into India from Nepal and Pakistan respectively; organizations like the United Liberation Front of Asom are based in Bangladesh, and the LTTE has a strong presence in India. It is clear, therefore, that security considerations rank high on the policymakers' list of priorities in opposing the promulgation of a refugee law, which would 'legalize' the influx of dangerous elements. However, it is made clear in Article 4 of the 'Model Law' on refugees that anyone guilty of a crime against peace, a war crime, a crime against humanity or a serious non-political crime, prior to his or her admission into India as a refugee, would not be accorded refugee status.¹⁸ The advantage, on the other hand, is that enactment of refugee protection legislation will enable the creation of a framework for the determination of refugee status based on agreed standards of refugee status determination, protection and treatment. V

¹⁶ Thames, n. 11.

¹⁷ Lama, n. 15, pp. 36-37.

¹⁸ Dhavan, n. 9, p. 156.

Suryanarayan has argued for a national refugee law and cites the case of the terror threat posed by Sri Lankan Tamils to illustrate the urgent need for one.¹⁹ For instance, he states that among the accused in the Rajiv Gandhi assassination case, half a dozen were registered as refugees.²⁰ He clearly states that “the absence of a well-defined national refugee law has created a number of anomalous situations.” With the issue of such a law, refugees would not be dealt with at the discretion of administrative officials, and the establishment of a standard protocol, the logical step forward would be a security database to quell insurgencies and infiltration.

Another objection to the framing of a refugee law is the question of India’s bilateral relations with its neighbouring countries and the countries of origin of its refugee communities. India hesitates to sign any international convention or even accept any regional or national framework to deal with refugees as it is of the firm belief that the issue of accepting or rejecting refugees is a unilateral decision and, therefore, there is no real need to pass an entirely new law to consider multilateral and bilateral agreements. However, it may be argued as it has by many others in this field, including the UNHCR, that the enactment of legislation for refugee protection will help to avoid frictions between the host country and the country of origin of the refugees. The act of granting asylum being governed by law, rather than an ad hoc policy, will then be better understood by other states as a peaceful, humanitarian and legal action under a judicial system, rather than a hostile political gesture. In this case, India’s decisions to accept or reject refugees cannot be spun around to be interpreted as serving political ends by the country of origin or other countries in the region. It would also

provide legitimacy to the refugee determination process, and lower the risks of altercation with the countries of origin. The construction of a security database, as mentioned earlier would also solve the problem of unwanted migrant workers receiving refugee status, which is a major problem facing India. Rajeev Dhavan points out the difference between ‘refugees,’ ‘asylum seekers’ and ‘migrants.’ “‘Refugees’ and ‘asylum seekers’ are externally displaced persons forced out or forced to leave their countries and who cannot return because they have a well-founded fear of persecution. They are not bereft of ideas of social and economic betterment. But, they are distinct from ‘migrants’ voluntarily seeking a better life.’”²¹ Local populations in border or refugee-receiving areas dislike the attempt to assimilate migrants who, by working for lower wages, bring down the wage-rate, thereby affecting the livelihood of the local population. In addition, since the government makes no lawful distinction between migrants and refugees, they are often eligible for the same humanitarian services offered to refugees, often provoking local unrest. The Sri Lankan Tamil refugees receive cash doles and other essential items like rice, sugar, and kerosene at highly subsidized rates, which are not available to the local population.²² With the passage of a law and the laying down of proper procedures for the classification of aliens, and the construction of a security database, the government would not have to face this problem on as large a scale as it does currently.

A question that arises in urging the case for establishing a uniform national law is that of meeting international obligations. How does India satisfy the obligations and standards of the UNHCR as a member of its governing body, ExCom, without signing the 1951 Convention? How does India, which has signed numerous treaties of the UN and the

¹⁹ V Suryanarayan, “Humanitarian Concerns and Security Needs: Sri Lankan Refugees in Tamil Nadu,” in Chari et al, n. 9, pp. 55-56.

²⁰ Robert Payas, Jayakumar, Shanti (Jayakumar’s wife), Vijayan, Selva Lakshmi (Vijayan’s wife), and Bhaskaran (Vijayan’s father-in-law). Lama, n. 15.

²¹ Dhavan, n. 9.

²² Suba Chandran, “Refugees in South Asia: Security Threat or a Security Tool?,” in Chari et al, n. 9, pp. 99-107.

SAARC affirming the protection to human rights for all within its territory, prove its sincerity without a law protecting refugees? Policymakers, since the Convention's inception, have made numerous objections to its Euro-centric nature and principles embedded in Cold War-era politics, like the fear of imprecise legal responsibility for the vast number of persons seeking shelter. The MEA has, in the past, stated that 'it considers the 1951 Convention and the 1967 Protocol a 'partial regime for refugee protection drafted in a Euro-Centric Context.' In a backgrounder issued by the MEA, the primary objection seems to be the fact that the Convention does not 'address adequately situations faced by developing countries, as it is designed primarily to deal with individual cases and not with situations of mass influx.'²³ Without delving deeper into this issue, it is possible to summarize many experts' current views on the convention in B S Chinmni's words, "The Convention is being dismantled by the very states which framed the convention." Taking into account this open disregard for the Convention, it is clear that to appease the UNHCR, which protests the poor conditions of residents in refugee camps, it is imperative that the government must formulate a law governed by a central authority. The current watchdog of India's refugee policy, the NHRC, has made numerous recommendations advising the formulation of such a law, in accordance with the articles of the Convention, but with an Indo-centric nature and content.

²³ UN Division, Ministry of External Affairs, Refugees (NO. UI/1515/9/99). Quoted in Chari et al, *ibid.*, pp. 54-59.

Conclusion and Recommendations

The status of refugees in India, although measured by humanitarian relief and political recognition, has very little to do with these two factors. Minority politics is an important factor that can be used to explain the reluctance of India's lawmakers to move towards resolving the issue. It is a fact that illegal immigrants have been used by vote-seeking parties to secure a majority in the central and the state legislatures. Opportunist sections of political parties in refugee-populated areas have tried to use these illegal immigrants as captive vote-banks by trying to regularize their stay.²⁴ In the case of the illegal immigrants from Bangladesh in Assam, the repeal of the Illegal Migrants (Determination by Tribunals) Act of 1983 has been continuously vetoed by the ruling Congress Party to secure the steadily growing 'vote-bank' of immigrants they are obtaining although they are not registered as citizens of India. It has been suggested that the presence of immigrants in India is beneficial for its interests, as long as they remain illegal immigrants, and the government does not have to answer to international agencies regarding their treatment. The role of political motives cannot be ignored in the development of this stalemate pertaining to the refugee population residing in India. However, since refugee protection is an international issue, concerns like these political motives are considered less important than the threat posed by refugees to national security and economic stability, perhaps to negate the role of political parties in this dismal refugee situation. In fact, clauses have been inserted in the proposed Indian refugee law ensuring that, "the decision to grant asylum is a humanitarian

act that should be made without political considerations."²⁵

Although India's past efforts in dealing with mass influxes has been commendable, its geopolitical position in the subcontinent makes it a preferred destination for asylum seekers and migrant workers. Moreover, India's economic resurgence and status as the only stable democracy in the region makes it an attractive destination for asylum seekers. This, more than anything else, explains the cross-border movement into India, which should be an incentive to frame a national refugee law, the need for which increases with every escalation in conflict in the South Asian region. Asylum seekers from Sri Lanka, Tibet and Myanmar will continue to seek refuge as the political strife in these countries has not ceased and with no viable plans to usher peace in the foreseeable future, the possibility of repatriation also remains bleak. In addition to a population of 435,000 refugees and asylum seekers, there are approximately 600,000 internally displaced persons, the majority of who are the Hindu Pandit community, formerly resident in the Kashmir Valley.

The need for a refugee law is immediate. The uniform treatment of refugees is a must as long as India continues to accept asylum seekers across its porous borders. The restrictions and unequal treatment imposed on the refugee population by the Indian government is discriminatory and tarnishes its human rights record, which is not outstanding in any case. Article 3, subsection 2, clause (e) of the Foreigner's Act (1946), contains a list of nine orders embodying government regulations on rights and freedoms that the Convention

²⁴ Sumbul Rizvi, "Managing Refugees: Role of the UNHCR in South Asia," in Chari et al, *ibid.*, pp. 195-196.

²⁵ "The Refugees and Asylum Seekers (Protection) Bill, 2006," Public Interest Legal Support and Research Centre, www.pilsarc.org. Accessed on 29 July 2007.

guarantees. For example, India can require foreigners to reside in mandated areas, thereby barring their right of movement across the country, and providing India the ability to confine foreigners to refugee camps and conduct periodic camp inspections.²⁶ Clauses must be inserted in bilateral agreements regarding the treatment and role of refugees to prevent any conflict between the two countries in question. Without any law or protocol, the Indian government has full autonomy to decide which rights and freedoms should be conferred upon which groups. Even 'favoured' communities like the Tibetan refugees have suffered due to lack of a firm policy. In 1991, for example, when Chinese Premier Li Peng visited New Delhi, certain Tibetan refugee camp leaders and activists were arrested, and most Tibetan settlements and community organizations were put under surveillance.²⁷ The fact that members of the Tibetan community are among the most well-treated refugee populations in the country provides an illustration of the drawbacks of ad hoc administration in this area.

As important as the need for a law directly dealing with the treatment and rehabilitation of refugees and asylum seekers is the need for a firm structure and authority dealing with refugee issues, which most proposals have allowed. For example, in the Refugees and Asylum Seekers (Protection) Bill,²⁸ the fourth chapter deals with the constitution, functions and powers of authorities. It caters for a Commissioner for Refugees along with a Refugee Appellate Board, with minimum judicial representation and a maximum term of office. The duties of officials are carefully outlined and the right to determine an asylum seeker's refugee status vests with them, besides all administrative functions dealing with refugees. According to the UNHCR officials, there is no dearth of manpower to

meet this objective and such an organization could function effectively within the guidelines provided to it.

India has so far dealt with situations of mass influx without a refugee law but with a continuously enlarging population of refugees and asylum seekers, a large section of who may not be repatriated in the near future, a uniform law would allow the government to maintain its huge non-citizen population with more accountability and order, apart from allowing them to enjoy uniform rights and privileges. A regional treaty can be beneficial in improving ties with its neighbours, but, India will be better placed by having its own law owing to the large number of different communities that it hosts, and the unstable relations that it shares with several of its neighbours.

²⁶ Thames, n. 11.

²⁷ *Ibid.*

²⁸ "The Refugees and Asylum Seekers (Protection) Bill," n. 25.

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