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Australian Government

**LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL
IN THE OCCUPIED PALESTINIAN TERRITORY
(REQUEST FOR ADVISORY OPINION)**

**ORDER OF THE INTERNATIONAL COURT OF JUSTICE
OF
19 DECEMBER 2003**

**WRITTEN STATEMENT
OF THE GOVERNMENT OF AUSTRALIA**

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WRITTEN STATEMENT OF THE GOVERNMENT OF AUSTRALIA

1. In Resolution ES-10/14 adopted on 8 December 2003, the General Assembly of the United Nations requested the International Court of Justice to give an advisory opinion on the following question:

'What are the legal consequences arising from the construction of the wall being built by Israel, the occupying power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?' (A/Res/ES-10/14, Dossier no. 2¹)

The following observations are submitted by the Government of Australia in response to the Order of the Court of 19 December 2003 fixing the time-limit within which written statements relating to the question may be submitted to the Court by the United Nations and its Member States.

2. The Request for an Advisory Opinion comes before the Court at a time of increased international consensus on the steps necessary for realising a comprehensive, just and lasting settlement of the Israeli-Palestinian conflict. The Australian Government strongly supports the '*Performance-Based RoadMap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict*' (RoadMap) (S/2003/529 of 7 May 2003, Dossier no. 70), prepared by the international 'Quartet'—consisting of representatives of the United States of America, the European Union, the Russian Federation and the United Nations—and unanimously endorsed by the Security Council in Resolution 1515 adopted on 19 November 2003 (S/Res/1515 (2003), Dossier no. 36). The Australian Government is concerned to ensure that no action is taken which might further

¹ The Dossier numbers cited throughout this Statement correspond with the Dossier numbers contained in the Dossier of Materials Compiled by the Secretariat of the United Nations pursuant to Article 65, paragraph 2 of the Statute of the International Court of Justice.

complicate the work of the international Quartet or jeopardise the implementation of the RoadMap. In this connection, the Australian Government will always remain fundamentally committed to the territorial integrity of Israel, and its right to live in peace behind secure and defined boundaries. At the same time, the Australian Government also recognises the legitimate right and aspiration of the Palestinian people to the establishment of a viable and democratic Palestinian State.

3. The Australian Government is of the view that the giving of an advisory opinion by the Court in the present case could have an adverse rather than a positive effect on the implementation of the RoadMap and the ongoing efforts of the international 'Quartet', particularly in light of the selective and one-sided nature of the question on which the opinion of the Court is sought. Moreover, Australia submits for the reasons set out below that a number of considerations lead inevitably to the conclusion that the Court should, in the exercise of its discretion, find that it is inappropriate to give an opinion on the question put to it.
4. The Australian Government makes no submission in relation to the substance of the question. On this aspect, Australia reserves its position.

THE COURT'S DISCRETION IN REQUESTS FOR AN ADVISORY OPINION

5. It is well established that Article 65 of the Statute of the Court confers on the Court a discretion as to whether it should give an advisory opinion, even where it has jurisdiction to entertain the request. As the Court said in the *Interpretation of Peace Treaties* case:

'Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request.... The Court possesses a large amount of discretion in the matter.'
(*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, *Advisory Opinion*, ICJ Reports 1950, p. 65 at p. 72)

Similarly, in the *Western Sahara* case, the Court said:

'In exercising this discretion, the International Court of Justice, like the Permanent Court of International Justice, has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions. If the question is a legal one which the Court is undoubtedly competent to answer, it may nonetheless decline to do so. As this Court has said in previous Opinions, the permissive character of Article 65, paragraph 1, gives it the power to examine whether the circumstances of the case are of such a character as should lead it

to decline to answer the request.' (*Western Sahara, Advisory Opinion*, ICJ Reports 1975, p. 12 at p. 21)

6. It is also undisputed that the exercise of the advisory jurisdiction of the Court should be accompanied by all the necessary judicial safeguards. Indeed, the Court has repeatedly emphasised that there are limitations that apply to the exercise of its advisory jurisdiction and that these limitations apply particularly to issues raised with the Court which jeopardise its judicial propriety (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion*, ICJ Reports 1950, p. 65 at p. 72; *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgement of 2 December 1963*, ICJ Reports 1963, p. 15 at p. 30; *Western Sahara, Advisory Opinion*, ICJ Reports 1975, p. 12 at p. 20; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion*, ICJ Reports 1989, p. 177 at p. 191; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, ICJ Reports 1999, p. 62 at p. 78).
7. The Court has demonstrated that it will consider whether compelling reasons exist to decline to exercise jurisdiction to give an advisory opinion. In this respect, the Court has been careful to relate its observations closely to the circumstances of each case, including the purposes for which the request was made (see: *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion*, ICJ Reports 1950, p. 65 at p. 71; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, ICJ Reports 1951, p. 15 at p. 19; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, ICJ Reports 1971, p. 16 at pp. 24-27; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, p. 226 at p. 235). The request for an advisory opinion in the present case raises the issue of propriety in an acute form.
8. Australia considers that compelling reasons exist for the Court, in the exercise of its discretion, to decline to give the opinion requested. First, the lack of consent by Israel renders the giving of an advisory opinion incompatible with the Court's judicial character, particularly in light of the fact that the request is undoubtedly directed at the rights and responsibilities of Israel. Secondly, the request should be declined as any opinion rendered by the Court would be devoid of object or purpose, particularly in light of the actions and decisions of the General Assembly and the Security Council. Thirdly, the giving of an advisory opinion could have a harmful effect upon current initiatives aimed at achieving a settlement of the Israeli-Palestinian conflict. Each of these considerations will be examined in turn.

(a) The lack of consent by Israel renders the giving of an advisory opinion incompatible with the Court's judicial character

9. The Court has consistently affirmed that it must act as a guardian of its judicial integrity. Moreover, as a judicial body, the Court has stressed that it must remain faithful to the requirements of its judicial character in giving advisory opinions (see: *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation, Advisory Opinion*, ICJ Reports 1960, p. 150 at p. 153; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, ICJ Reports 1971, p. 16 at p. 27; *Western Sahara, Advisory Opinion*, ICJ Reports 1975, p. 12 at p. 25; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion*, ICJ Reports 1982, p. 325 at p. 334). In this connection, the Court has affirmed that the absence of consent of an interested State to advisory proceedings is relevant to the appreciation of the propriety of giving an opinion (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion*, ICJ Reports 1951, p. 65 at p. 72; *Western Sahara, Advisory Opinion*, ICJ Reports 1975, p. 12; see also *Request for Advisory Opinion concerning the Status of Eastern Carelia*, 1923 PCIJ, Series B, No. 5, p. 6 at p. 29)
10. In the *Western Sahara* case, the Court expressly affirmed the type of situation in which a lack of consent should oblige the Court to refuse giving an opinion requested by the General Assembly. The Court said:
- ‘In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.’ (ICJ Reports 1975, p. 12 at p. 25)
11. An examination of the jurisprudence of the Court confirms that the question of whether the giving of an advisory opinion would be incompatible with the judicial character of the Court is to be determined having regard to the circumstances in each concrete case. The case-law of the Court establishes also that the Court will pronounce on the rights and obligations of States in the exercise of its advisory jurisdiction only where it is clear that such pronouncements would assist the work of the United Nations *and* would not have the effect of compromising the legal position of an interested State that has expressed its opposition to the proceedings.

12. For example, in the *Interpretation of Peace Treaties* case, the Court considered objections made by Bulgaria, Hungary and Romania, which had argued that a reply by the Court to the request for an advisory opinion would offend the principle that no judicial proceedings relating to a legal question pending between States can take place without their consent. In deciding to give the requested opinion, the Court stated:

‘As has been observed, the present request for an Opinion, is solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties, and it is justifiable to conclude that it in no way touches on the merits of those disputes... It follows that the legal position of the parties to these disputes cannot be in any way compromised by the answers that the Court may give to the Questions put to it.’ (ICJ Reports 1950, p. 65 at p. 71)

13. Similarly, in the *Western Sahara* case, the Court had before it a request by the General Assembly asking that the Court render an advisory opinion on questions embodying such concepts as *terra nullius* and legal ties in the context of the decolonisation of Western Sahara. In considering an objection by Spain against the propriety of the exercise of the advisory function of the Court, the Court concluded that it was appropriate to render the requested opinion for the following reasons:

‘There is in this case a legal controversy, but one which arose during the proceedings of the General Assembly and in relation to matters with which it was dealing. It did not arise independently in bilateral relations... The settlement of this issue will not affect the rights of Spain today as the administering Power, but will assist the General Assembly in deciding on the policy to be followed in order to accelerate the decolonisation process in the territory. It follows that the legal position of the State which has refused its consent to the present proceedings is not in any way compromised by the answers that the Court may give to the questions put to it.’ (ICJ Reports 1975, p. 12 at pp. 25 and 27)

14. The Court has adopted the same approach in considering the propriety of replying to requests for an advisory opinion in cases involving a legal question pending between the United Nations and a member State (see: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, ICJ Reports 1971, p.16; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, *Advisory Opinion*, ICJ Reports 1989, p. 177). For example, in the *Privileges and Immunities* case, the Court was asked to give an advisory opinion on the question of the applicability of the Convention of the Privileges and Immunities of the United Nations to the then Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (a Romanian

national). In dealing with the arguments submitted by Romania as to why the Court should decline to render the requested opinion, the Court stated:

'the Court must consider whether in this case "to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent". The Court considers that in the present case to give a reply would have no such effect. Certainly the Council, in its resolution requesting the opinion, did conclude that a difference had arisen between the United Nations and the Government of Romania as to the *applicability* of the Convention to Mr. Dumitru Mazilu. But this difference, and the question put to the Court in the light of it, are not to be confused with the dispute between the United Nations and Romania with respect to the *application* of the General Convention in the case of Mr. Mazilu.' (ICJ Reports 1989, p. 177 at p. 191)

15. Unlike the cases considered above, in the present case the Court is not being asked to clarify the applicability of certain conventions and other questions of a preliminary nature. Rather, the Court is being asked to pronounce at large on the 'legal consequences' of the conduct and activities of Israel judged by reference to the 'rules and principles of international law', including the Fourth Geneva Convention of 1949. The question before the Court has been formulated so as to relate directly to the rights and responsibilities of one party to the conflict where that party has expressed its strong opposition to the present proceedings. The effect of the request is to bring key elements of the Israeli-Palestinian conflict before the Court for determination without the consent of Israel. Unlike the *Privileges and Immunities* case, the Court in the present case is not simply being asked whether relevant conventions *apply*. The wording of the current request, if acceded to, goes much further and seeks the opinion of the Court on Israel's *compliance* with 'the rules and principles of international law, including the Fourth Geneva Convention of 1949'. In other words, the request requires the court to pronounce on whether particular breaches of particular treaties are occurring as a result of particular conduct of one State, where those treaties contain their own dispute settlement provisions or if there are no such provisions would be subject to the fundamental international law rule that a State cannot be subject to the jurisdiction of the International Court without its consent. To allow the advisory opinion procedure to be used in this way to overcome this rule has profound implications for States' participation in treaties and is clearly contrary to judicial propriety. It would not be appropriate for the Court to accede to that request in the absence of consent of Israel.
16. It is no answer to these concerns that such judicial pronouncements are not *per se* possessed of binding force. In this respect, it is worth recalling the observations made by Judge Gros in his Declaration appended to the Court's Advisory Opinion in the *Western Sahara* case:

...when the Court gives an advisory opinion on a question of law it states the law. The absence of binding force does not transform the judicial operation into a legal consultation, which may be made use of or not according to choice. The advisory opinion determines the law applicable to the question put; it is possible for the body which sought the opinion not to follow it in its action, but that body is aware that no position adopted contrary to the Court's pronouncement will have any effectiveness whatsoever in the legal sphere.' (*Western Sahara, Advisory Opinion*, ICJ Reports 1975, p. 69 at p. 73 (decl. Judge Gros))

This confirms that the rendering of an advisory opinion by the Court will have a real and direct effect on a party to the conflict. Consequently, there is a real and apprehended risk that the legal position of Israel may be compromised by any answers that the Court may give to the question put to it.

(b) An advisory opinion on this question would be 'devoid of object or purpose'.

17. It is well established that the Court does not give advisory opinions as an end in themselves. The Court has repeatedly reaffirmed that it will exercise its jurisdiction to give an advisory opinion only 'once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of object or purpose.' (*Western Sahara, Advisory Opinion*, ICJ Reports 1975, p. 12 at pp. 20 and 37)
18. In most cases where this issue has arisen, the Court has emphasised that the primary motivation for rendering an opinion has been to provide guidance to the requesting organ for the exercise of its constitutional functions. Indeed, the Court in the past has drawn attention to express terms of the relevant requesting resolution that made clear that the purpose of the request was to assist the relevant United Nations organ to carry out its functions. For example, in the *Western Sahara* case, the Court recalled that the General Assembly had referred to its intention to continue discussion of the question of the decolonisation of Western Sahara in the light of the Court's advisory opinion. Having taken note of this statement, the Court concluded that the opinion sought by the General Assembly would place the Assembly 'in a better position to decide....on the policy to be followed for the decolonisation of Western Sahara' (ICJ Reports 1975, p. 12 at p. 20) and would 'furnish the General Assembly with elements of a legal character relevant to its further treatment....' of the matter (ICJ Reports 1975, p. 12 at p. 37). Similar considerations guided the approach of the Court in both the *Reservations to the Convention on Genocide* case, where the Court recalled that the object of the request in that case was to 'guide the United Nations in respect of its own action' (ICJ Reports 1951, p. 15 at p. 19) and also in the *Namibia (South West Africa)* case, where the Court indicated that it was prepared to render an advisory opinion in response to a request by the Security Council, because to do so

'would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking' (ICJ Reports 1971, p. 16 at p. 24).

19. By contrast, General Assembly Resolution ES-10/14 containing the request for an advisory opinion in the present case contains no such statement on the objective of the request, as there is no likelihood that the opinion sought will assist the United Nations General Assembly carrying out its function in relation to the Israeli-Palestinian conflict. Moreover, the request calls for the Court to make pronouncements on substantive issues on which the General Assembly has already reached certain conclusions and expressed judgement. These conclusions are recited in General Assembly Resolution ES-10/13 adopted on 21 October 2003 and in the preamble to the very resolution in which the request to the Court is made. In this respect, operative paragraph 1 of Resolution ES-10/13 provides as follows:

'Demands that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice line of 1949 and is in contradiction to relevant provisions of international law.' (A/Res/ES-10/13, Dossier no. 14)

Similarly, the preamble to Resolution ES-10/14 states:

'Reaffirming the applicability of the Fourth Geneva Convention as well as Additional Protocol 1 to the Geneva Conventions to the Occupied Palestinian Territory, including East Jerusalem....'

Bearing in mind that the passage of time further compounds the difficulties on the ground, as Israel, the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all its detrimental implications and consequences....' (A/Res/ES-10/14, Dossier no. 2)

20. Consequently, an advisory opinion by the Court on the question submitted to it would not have any practical application for the General Assembly in view of the definitive views that the Assembly has expressed. The Resolution is seeking simple endorsement or approval of the legal conclusions already reached by the General Assembly. That is not an appropriate form of question. Nor is it consistent with the judicial propriety of the Court to accede to a request that it endorse legal conclusions already reached by the General Assembly (see: *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, p. 330 at pp. 333 and 367 (diss. op. Judge Oda))
21. In addition, the political organs of the United Nations are in no need of guidance on a policy to be followed in dealing with issues arising from the question upon which the opinion of the


Court has been sought in this case. There is agreement within the United Nations on a clear and comprehensive policy for dealing with the Israeli-Palestinian conflict including questions of security, the protection of settlements, and the movement of persons and goods. The terms of the RoadMap give expression to that settled policy. The RoadMap remains the cornerstone of international efforts to address issues that relate to the settlement of the conflict. The Australian Government therefore submits that an advisory opinion on this question would have no 'practical or contemporary effect' and would be 'devoid of object or purpose'.

(c) An advisory opinion on this question would likely have a detrimental effect on negotiations and on the work of the United Nations as a whole

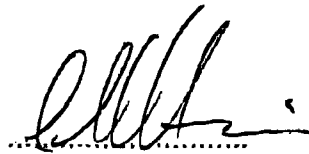
22. It is well established in the jurisprudence of the Court that the reply of the Court to a request for an advisory opinion represents the participation of the Court in the activities of the United Nations (See: *Reservations to the Convention on Genocide, Advisory Opinion*, ICJ Reports 1951, p. 15 at p.19; *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, Advisory Opinion*, ICJ Reports 1987, p. 18 at p. 31; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, p. 226 at pp.234-235). In this context, the Court has observed that it is 'constantly mindful of its responsibilities as the principal judicial organ of the United Nations' (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, p. 226 at pp.235; Charter of the United Nations, Article 92).
23. In view of the role and responsibilities of the Court, the emphasis should be on whether the Court can play a constructive role in assisting the other organs of the United Nations. In this connection, if a response to a request for an advisory opinion would be unlikely to provide any constructive assistance to the other organs of the United Nations, or would likely have a detrimental effect on the activities of the United Nations, both the duty of the court to protect its own judicial character and the need for it to play a constructive part as an organ of the United Nations call for the Court to exercise its discretion to decline to respond to the request.
24. The present case is exceptional. It comes before the Court at a time when the parties to the Israeli-Palestinian conflict have agreed to implement the RoadMap. The RoadMap is a performance-based and goal-driven plan for a final and comprehensive settlement of the Israeli-Palestinian conflict. It sets out the obligations of both sides with regard to sensitive political, security, economic, humanitarian and strategic aspects of the dispute (see: S/2003/529 of 7 May 2003, Dossier no. 70). The terms of the RoadMap have been endorsed and reaffirmed by the parties to the conflict, the Secretary-General of the United Nations, the General Assembly and by the Security Council, which has indicated that it remains 'seized of the matter' (see: S/RES/1515 (2003) of 19 November 2003, Dossier no. 36).

25. The activity of the Security Council adds an extra dimension to the present case. The Court has demonstrated that it will 'take cognizance' of the fact that a matter before it is also before the Security Council in the exercise of powers in which the Court possesses a discretion (*Aegean Sea Continental Shelf, Interim Protection Order of 11 September 1976*, ICJ Reports 1976, p. 2 at p. 12; *United States Diplomatic and Consular Staff in Tehran, Judgement*, ICJ Reports 1980, p.3 at pp. 21-2; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgement*, ICJ Reports 1984, p. 392). In those cases where the Court has decided on hearing a matter, it has emphasised that the simultaneous exercise of the functions of the Court and the Security Council would make a positive contribution to the peaceful settlement of a dispute or to the resolution of a situation being considered by the Security Council (see: *United States Diplomatic and Consular Staff in Tehran, Judgement*, ICJ Reports 1980, p. 3 at pp. 21-2; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgement*, ICJ Reports 1984, p. 392 at pp. 434-5). Accordingly, where it is reasonable to apprehend that the involvement of the Court would not have such positive effects, the Court should properly decline to pronounce on the matter.
26. Moreover, it would be inappropriate for the Court to render an opinion on a question that is framed in such an open manner (i.e., 'what are the legal consequences...') and yet which is also so selective in its subject matter when viewed in the context of the whole conflict. The Court would not assist the resolution of the conflict through implementation of the RoadMap by providing an advisory opinion on the security barrier. Other legal aspects of a current nature, such as the legality of, and international responsibility for, suicide bombings within Israel are not covered by the Question. The rendering of an opinion by the Court only on the legality of the security barrier would be, of necessity, fragmentary and of no assistance in resolving the conflict.
27. The Australian Government considers that if the Court were to give an opinion in the present case, it could not have a positive effect, either on the work of the Security Council or in the context of the activities of the United Nations as a whole in working towards a settlement of the Israeli-Palestinian conflict. The rendering of an advisory opinion could potentially make a lasting settlement of the conflict more difficult to accomplish. As indicated above, there is a substantial risk that provision of a legal opinion by the Court on the selective points of law raised by the request could well obstruct further progress on the RoadMap and compel the parties to the conflict to engage in fruitless debate on the implications of the Court's opinion rather than implementation of the obligations under the RoadMap. There is also a real risk that an opinion from the Court could cast doubt on past achievements and commitments. In short, whatever the view the Court were to reach on the merits of the question put to it, it is unlikely to assist in the peaceful settlement of the conflict.

28. In view of these considerations, the Australian Government submits that the Court may appropriately determine that the interests of the United Nations and the international community as a whole are best served by the Court declining the request to render an advisory opinion. Moreover, as indicated above, an advisory opinion which the Court might give on the question put to it would not be likely to contribute positively to the implementation of the RoadMap. Indeed, there is a real risk that it would have harmful implications for the peace process. In view of the considerations set forth in this Statement, the Australian Government submits that there are compelling reasons why the Court should exercise its discretion to decline to provide the requested opinion.



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