

# **Indigenous Peoples' Contributions to Multilateral Negotiations on their Rights to Participation, Consultation, and Free, Prior and Informed Consent<sup>1</sup>**

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## **Abstract**

*Since the 1970s, international organizations have been the places where Indigenous Peoples from all over the world congregate along with States, for recognition and affirmation of their collective rights, such as the rights of participation, consultation, and free, prior and informed consent. Because of their presence and contributions, the process of adopting the UN Declaration on the rights of indigenous peoples has been the most open negotiation of an international human rights text by right holders representing their peoples to date. Their sustainable participation has a role in the identification of customary international law.*

## **Introduction**

The degree of involvement of inhabitants or groups in matters that directly affect them or that are in their interests varies considerably. In any case, the right to participation is recognised as an individual right and as a collective right in the International Bill of Human Rights and other regional legal instruments<sup>2</sup>.

When the rights-holder are Indigenous Peoples, their inclusion translates into a greater degree of autonomy and competencies from a collective point of view, which is known today as “the right of Indigenous Peoples to self-determination, conceived as the right to decide their political

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The opinions expressed in this document are the sole responsibility of the authors and do not represent the official position of the Indigenous Peoples' Centre for Documentation, Research & Information (Docip).

<sup>2</sup> See article 1 and 25 to the International Covenant on Economic, Social and Cultural Rights (1966), articles 1, 16, 20, 25, 27 & 47 the International Covenant on Civil and Political Rights (1966), and article 27 the Universal Declaration of Human Rights (1948).

condition and determine what their future will be” (International Law Association, 2012, p. 2). This right was defined in articles 3 and 4 of the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

In order for the collective rights of self-government and autonomy to materialise the collective rights to self-government and autonomy, other rights of Indigenous Peoples are invoked, such as the right to participate in decision-making on matters concerning them, the right to be consulted on any project that may affect them, and the right to Free, Prior and Informed Consent (FPIC) to regarding projects that have a significant impact on their rights and/or ways of life.

The manner in which these rights relate to each other may vary. For some Indigenous representatives, consent is the rule, and consultation and participation are the exceptions to the rule. In accordance with a 2018 study the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) “Free, prior and informed consent is a manifestation of the right of Indigenous peoples to determine for themselves their cultural, social and economic priorities. These are three interrelated and cumulative rights: the right to be consulted, the right to participate and the right to their land, territory and resources. According to the declaration, there cannot be free, prior and informed consent if one of those components is missing” (EMRIP, 2018, p. 5).

Indeed, classifying the three rights into participation, consultation, and consent, in determining the degree to which those rights should be obligatory, has been a common practice in multilateral negotiations on international legal instruments that contain Indigenous rights. For example, during negotiations of ILO Convention No.169 Concerning Indigenous and Tribal Peoples in Independent Countries of 1989 (ILO 169), the parties preferred the terms “participation” and “consultation” instead of “self-determination” and “consent” as required by some Indigenous Peoples (Dahl, 2009).

Hence, by bearing in mind that the origin of those rights proceeds to their compilation in multilateral regulatory texts, this article offers an overview of how participation, consultation,

and FPIC have been repeatedly affirmed by the Indigenous delegates that participated in the preparatory work for the adoption of the international legal instruments on their rights.

Having said this, this chapter starts from the assumption that FPIC is an internationally recognised right, and is part of customary international law (Sambo, 2013, p. 149). Indeed, in addition to the practice of international organisations on Indigenous Peoples' issues, there is abundant State practice in adopting resolutions related to Indigenous Peoples which can contribute to the crystallisation of the status of this right as customary international law. A 2018 report by the International Law Commission of the UN, adopted by the General Assembly, warns that while only the practice of States can create or express customary international law, in certain cases, the practice of international organisations also contributes to the formation, expression, and identification of rules of customary international law (General Assembly, 2018, p. 130). According to the same report, although the behaviour of entities that are not States or international organisations does not contribute to the formation or expression of regulations of customary international law, “[it may] have an indirect role in the identification of customary international law, by stimulating or recording the practice and acceptance as law (*opinio juris*) of States and international organizations” (General Assembly, 2018, p. 131).

Therefore, this chapter begins with a short outline of the first affirmations of Indigenous rights to participation, consultation, and consent. Next, it highlights the discussions that shaped the articles that refer to such rights in the ILO Convention No.107 Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries of 1957 (ILO 107) and the ILO 169. Finally, it focuses on the role of the international Indigenous movement in the development of FPIC in the preparation and adoption process of the UNDRIP.

### **Early affirmations of Indigenous rights to participation, consultation, and consent<sup>3</sup>**

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<sup>3</sup> See Doyle.C. (2015) for a detailed analysis on the genesis of the FPIC.

According to the theory of the origin of public international law – which claims to exist only after the emergence of Nation States – States are the exclusive subjects of international law. However, throughout different periods of colonial rule, there were also rules that regulated relations between States and other political entities, including Indigenous Peoples. For example, the agreements reached between colonial powers and local political entities were some of the means by which rights, territorial sovereignty, and property were acquired or recognised (Hebie, 2015).

During decolonisation processes, new Nation States were then created with border that sometimes united but often divided several of the peoples that lived there before the colonial powers arrived. The principle of “inherent sovereignty” in US jurisprudence establishes that the powers which are legally conferred on a people are those which predate the colonisation of what is now known as the Americas and have never been revoked (Green & Work, 1976). These are known as ancestral rights, prior to the formation of modern States, under the principle of *prior in tempore, potior in iure*. Other principles of international law such as the Blue Water Thesis and the *Uti Possidetis* were used against Indigenous Peoples to assert States’ inherent sovereignty and territorial dominion (Gilbert, 2006).

Notwithstanding, examples of FPIC were present, such as in several sections of the *Popol Vuh*, one of the sacred texts of the Quiche Maya (Goetz, Morley Griswold, Weil Kaufman, & Jackson, 1954) where two of the deities use consultation<sup>4</sup>. Colonial practices, mainly in the Americas, were consistently and uniformly based on treaties and agreements between colonial powers and native peoples. Finally, the Spanish Requirement (*Requerimiento*) of 1513, which was a declaration by the Spanish monarchy of Castile, included a divinely ordained right to take possession of the territories of the Indigenous Peoples, including what could also be construed as a reference to consultation.

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<sup>4</sup> “Then came the word. Tepeu and Gucumatz came together in the darkness, in the night, and Tepeu and Gucumatz talked together. <sup>5</sup> They talked then, discussing (*consultando*) and deliberating; they agreed, they united their words and their thoughts.” (Goetz, Morley Griswold, Weil Kaufman, & Jackson, 1954, p.4).

Rights are derived these sovereign exercises between Nation States and local authorities, including Indigenous Peoples, such as participation, representation, consultation, and consent on decisions that affect the rights holders, which are, in essence, a means to guarantee other rights. While important, treaties, are not the only proof of sovereign power; however, they are evidence of the recognition of Indigenous Peoples' sovereignty. A former UN Special Rapporteur on the rights of Indigenous Peoples reaffirmed “[the] widespread recognition of ‘overseas peoples’ – including Indigenous Peoples [...] – as sovereign entities by European powers [...]” (Commission on Human Rights, 1999, p. 17).

In the twentieth century, the League of Nations was created. It emerged from the 1919 Treaty of Versailles, which ended World War I. The inclusion of the doctrine of guardianship in the article 23.b of the League of Nations Covenant shaped the doctrine's definition during the interwar period (Rodríguez-Piñero Royo, 2004, p. 60).

In 1923, Chief Hoyaneh Deskaheh was the first Indigenous representative to come before the League of Nations to try - albeit unsuccessfully - to persuade the international community to recognise the Iroquois Confederacy as an independent state, in accordance with Article 17 of the Covenant of the League of Nations. His request was based on the treaties and agreements made between his people and the colonial powers. According to the request, consent was a right derived from the sovereignty recognised by the colonial authority, which was later known as the self-determination of the peoples (Deskaheh, 1923). In 1924, a Maori delegation headed by Pita Te Turuki Tamati Moko - secretary of Tahupōtiki Wiremu Rātana, a Maori religious leader - travelled to Geneva to speak to the League of Nations about the Treaty of Waitangi of 1840 (Orange, 2004, p. 417). After the creation of the UN in 1945, a group of Indigenous delegates from Ecuador went to the UN headquarters in New York, and met with Benjamín Cohen Gallerstein, Under-Secretary-General for public information to thank the UN for the support they received after the 1949 earthquake.

Only after many decades, the late independence of many colonies, the emergence national civil liberties and human rights movements, and the adoption of ILO 107 on Indigenous and Tribal

Peoples, were other Indigenous Peoples able to go to the UN with a robust agenda that included the recognition and establishment of their rights.

In September 1977, several Indigenous delegates participated in the first Conference on discrimination against Indigenous Peoples in the Americas (Ortiz, 2015). The economic commission of this conference recommended “support [for] the right of self-determination of aboriginal people in the development of their land and resources according to their own values and social structures and laws” (International Indian Treaty Council, 1977, p. 15). For its part, the legal commission of the conference brought with it the issue of self-determination, understood as “the inherent legal right of Indigenous Peoples to control and regulate their own affairs” (International Indian Treaty Council, 1977, p. 21), including the principle in the draft Declaration of Principles for the Defence of the Indigenous Nations and Peoples of the Western Hemisphere. In addition, the commission concluded that “[...]lands, land rights and natural resources [...] should not be taken, and their land rights should not be terminated or extinguished without their full and informed consent” (International Indian Treaty Council, 1977, p. 23)<sup>5</sup>.

### **Participation, consultation, and consent in the ILO Conventions**

In 1957, the ILO adopted Convention No.107 (ILO 107) as well as the Recommendation No.104 regarding Indigenous and Tribal Peoples. For its part, ILO 107 recognised the obligations of States with respect to Indigenous Peoples and considered it essential to adopt general international standards for their protection. There is no record of the participation of Indigenous Peoples in the negotiation and adoption of the Convention. ILO 107 is still in force for those countries that have ratified it, except for those that subsequently ratified ILO 169, because that ratification involved *ipso jure* the immediate denunciation of ILO 107, in accordance with its Article 36.

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<sup>5</sup> See Akaitcho Dene and Hupacasath First Nation (2004) on the 1975 Advisory Opinion of the ICJ submitted to the General Assembly on the case of Western Sahara.

Regarding the right to participation, ILO 107 had a protectionist and integrationist perspective, and both the preamble and Article 5.C stipulate the State duty of collaboration, which represents a nuanced tone of the right to participation, both individually and collectively. Nothing is mentioned regarding consultation, but in Articles 4<sup>6</sup> and 12, the right to free consent is specifically recognised in two cases: when applying the provisions of the Convention which relate to integration, and when transferring Indigenous Peoples from their habitual territories, albeit with the exceptions provided for by domestic legislation regarding national security, the economic development of the country, or the health of these populations.

The revision process of ILO 107 was carried out in response to repeated requests from several organisations, particularly the UN. It should be noted that in 1982, a Working Group on Indigenous Peoples (WGIP) was established at the UN level and that there is a correlation between the revision of the Convention and the international Indigenous movement (ILO, 1987). For the commission of ILO 107, there was consensus on the fact that the integrationist doctrine was no longer acceptable, and that Indigenous and Tribal Peoples should be genuinely associated with any decision that affects them. “The essence of the revision [of Convention 107] was procedural and the principle was the participation of Indigenous and tribal peoples as social partners with the right to organise - an approach which was entirely consistent with the work of the ILO” (International Labour Conference, 1989a, pp. 25-26).

For its part, ILO 169 refers to States’ obligations, considering participation in article 2.5.C, 6.B, 7.1 and 2, 15.1, 22.1 and 2, 23.1, 27.2 and 29. The right to consultation is framed as a duty of the State in article 6.1 and 2, 15.2, 17.2, 22.3, 27.3 and 28.1; and the right to informed consent in its articles 6.2, and 16.2. In this case, there is evidence of indigenous delegates’ participation in the negotiation and adoption of the Convention. Even government advisers highlighted the valuable contribution they made (International Labour Conference, 1989b). As mentioned

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<sup>6</sup> According to article 37 of the Convention 107, the English and French versions of the text are equally authoritative. However, on article 4, the English version replace the French verb “*consentement*” by “willing”, so it’s necessary to follow the rules of articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties. Under article 32, the record of proceedings of the article 4 was adopted unanimously, without discussion, and it was reflected since the text of the “Proposed Conclusions concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries” (International Labour Conference, 1956, p. 748).

previously, this is in contrast to ILO 107. Indeed, once the report of the Committee on ILO 107 was submitted, adopting the text of the Convention, Indigenous organisations took the floor and said in their final interventions: “We did not come here so that the ILO could tell the world it had consulted Indigenous Peoples during the revision of ILO 107. Because in point of fact we have not been consulted” (International Labour Conference, 1989c, p. 31.1).

The principles of participation, consultation and consent were repeatedly presented by Indigenous representatives during the revision and adoption process of ILO 107 (Huaco Palomino, 2015). For example, “Several representative non-governmental organisations of Indigenous and Tribal Peoples argued that it was contradictory to speak of respect for the cultures, institutions and life systems of these peoples while reserving the right of governments entitling them to undertake actions to which the former are opposed” (International Labour Conference, 1989d).

### **The UNDRIP drafting process**

UNDRIP sets forth participation as a collective right in articles 5, 13, 18, 27 and 41. For its part, consultation is contained in seven articles (15.2, 17.2, 19 [together with FPIC], 30.2, 32.2, 36.2 and 38) as a duty of the State. Finally, FPIC is enshrined in articles 10, 11.2, 19, 28.1, 29.2 and 32.2.

As mentioned above, the WGIP was established in 1982 (ECOSOC, 1982). At the first meeting, it proposed to start working on a declaration - and later on even a convention - and suggested the model of open negotiations for Indigenous delegates who did not have consultative status before the Economic and Social Council (ECOSOC). In that same year, the Indian Law Resource Center (1982) submitted a series of principles to guide the deliberations of the WGIP, including the imperative that “[I]ndigenous Peoples shall not be deprived of their rights or claims to land, property, or natural resources, without their free and informed consent. No state shall claim or retain, by right of discovery or otherwise, the territories of Indigenous Peoples, except such land as may have been lawfully acquired by valid treaty or other freely-made



cession. Under no circumstances shall [...] Indigenous Peoples or groups [be] subject to discrimination with respect to their rights or claims to land, property, or natural resources” (p. 1).

Since 1982, it is clear that the subject of FPIC has not only been limited to land. Indeed, “[A]ny family planning programme or programme for the adoption or foster care of Indigenous children must be approved only after prior consultation and close collaboration with, and with the active participation and control of, the Indigenous communities and groups concerned” (WGIP, 1982, p. 2).

In 1983, with regard to land and natural resources, Indigenous delegates highlighted the need for the participation of Indigenous Peoples in all decision-making processes regarding development projects in their territories or the land they lived on or regarding projects that could have an impact on their lives, thereby underlining the need for consultation and consent (Commission on Human Rights, 1983; Anti-Slavery Society for the Protection of Human Rights, 1983). In 1985, the World Council of Indigenous Peoples (1984) submitted to the WGIP a document, which outlined 17 fundamental principles of Indigenous Peoples. These included principles 9 and 12 on free and informed consent in cases related to traditional land and its resources. They specified the scope of free and informed consent as follows:

Principle 9. Indigenous People shall have exclusive rights to their traditional lands and its resources, where the lands and resources of the Indigenous Peoples have been taken away with their free and informed consent such lands and resources shall be returned (...) Principle 12. No action or course of conduct may be undertaken which, directly or indirectly, may result in the destruction of land, air, water, sea ice, wildlife, habitat or natural resources without the free and informed consent of the Indigenous Peoples affected (World Council of Indigenous People, 1984, p. 11).

That same year, another declaration of principles was submitted to the WGIP by a special assembly of Indigenous organisations, which reviewed the drafted principles by the World

Council of Indigenous Peoples (1985), and included the issue of granting usufruct of the land with reference to FPIC: “Rights to share and use land, subject to the underlying and inalienable title of the Indigenous nation or people, may be granted by their free and informed consent, as evidenced in a valid treaty or agreement” (p. 2).

For its part, the study on discrimination by José Martínez Cobo, the first Special Rapporteur on the Rights of Indigenous Peoples, began in 1972 and was completed in 1986, based on 37 specialist works, making it the largest study of its kind (Commission on Human Rights, 1986; 1993). However, this study did not include information on Africa and Asia, which were home to many Indigenous Peoples. The WGIP session in 1990 was very important because identification criteria were extended, going from groups that had been subjected to European colonialism to other groups in which the historical process was not the only relevant factor, thanks to the participation of Indigenous delegates from those regions in the 1980s. For example, lifestyles connected to land use and self-identification as Indigenous became relevant (Eide, 2009).

In 1993, coinciding with the International Year of the World’s Indigenous Peoples, the World Conference on Human Rights was celebrated, thanks to the participation of Indigenous delegates, including Rigoberta Menchú, who won the Nobel Peace Prize in 1992. Consequently, the Vienna Declaration and Programme of Action (1993) was adopted, which stated that “[...]States must guarantee the total and free participation of indigenous populations in all aspects of society, particularly in matters that concern them” (p.8), and called for the early finalization of the draft declaration.

In August of the same year, the WGIP also finalised the draft of a declaration on the rights of Indigenous Peoples, which included free and informed consent. The draft was presented to the Sub-Commission on the Promotion and Protection of Human Rights, which, after approving the text, sent it on to the Commission on Human Rights. In 1995, they established the Working Group on the Draft Declaration on the Rights of Indigenous Peoples (WGDD) as a subsidiary body (Commission for Human Rights, 1993b). The WGDD met for over a decade in Geneva with the aim of preparing a draft declaration that would address the staunch disagreements of

opposing States. In their meetings, participation was not limited to member States, Indigenous organisations and other NGOs in consultative status with ECOSOC, but it was also extended to other relevant Indigenous organisations with no ECOSOC consultative status (ECOSOC, 1995).

Despite Indigenous Peoples have endorsed the draft contained in the annex to resolution 1994/45 of 26 August 1994 as representing the minimum standard, some States proposed substantial changes to the text such as to remove all reference to self-determination from the Declaration and to replace it with the term self-management. As proof of the position of Indigenous delegates, in February 2003, the International Indian Treaty Council (2003) submitted a written statement before the Commission on Human Rights, mentioning the following: “[o]ur right to self-determination is not up for negotiation. It must be made clear that Indigenous Peoples must be recognised as peoples with the same fundamental rights as all other peoples” (p. 4). The same year, the WGIP decided that it would initiate the preparation of a legal commentary on the principle of FPIC from Indigenous Peoples in relation to development affecting their land and natural resources and included it in its 2004 work programme, when various Indigenous statements were made on the subject. It stated:

The Indigenous Peoples [...] need [...] to promote, to encourage our [indigenous] participation in economic and social development and decision-making, mainly those that concern our communities. This minimum framework would allow us to express our free, prior and informed consent on the positions and decisions that are made when development projects or inherent policies affect our lives, land or territory and natural resources. (Organización OTM de los Niños Mayas de Guatemala, 2004, p. 1)

Many Indigenous Peoples’ organisations supported the 2004 Preliminary Working Paper on the principle of FPIC in relation to development affecting their lands and natural resources, which was inspired by varied statements from Indigenous delegates and updated in 2005 (Commission on Human Rights, 2004; 2005). Demonstrating the value of the aforementioned working document, the Sami Council and the Inuit Circumpolar Conference affirmed: “the right to free, prior and informed consent is truly a right, and any attempt to deviate from such standards

constitutes a violation of international, and, as additionally shown, often also of domestic law” (Sami Council & the Inuit Circumpolar Conference, 2004, p. 2).

During the same session, an Indigenous representative of the *Dayak-iba* group in the State of Sarawak, Malaysia, clarified the meaning of FPIC:

Free, prior and informed consent means: 1. All members of the communities, who are affected, consent to the decision. 2. Consent is determined in accordance with customary laws, rights and practices. 3. Freedom from external manipulation, interference or coercion. 4. Full disclosure of the intent and scope of the activity. 5. Decisions are made in a language and process understandable to the communities. 6. Indigenous Peoples’ customary institutions and representative organisations must be involved at all stages of the consent process. 7. Respect for the right of Indigenous Peoples to say NO. (Dayak peoples, Orang Asii peoples, & Kadazan-Dusun peoples, 2004, p. 2)

This subtlety is important because it was contained in a request from Indigenous Peoples themselves on the basis of the 1994 draft declaration. Such consensus on the concept implied that these were the minimum standards that any declaration should contain. For instance, other Indigenous organisations stated that: “[t]he principles of prior and informed consent and full collaboration with the affected indigenous peoples must be applied for the effective implementation by the States of the provisions throughout the declaration” (International Indian Treaty Council et al., 2004, p. 8).

With the risk of the deterioration of the minimum standards of the draft declaration, proposals were included to replace the verb “obtain” with “seek” with respect to FPIC (WGDD, 2004, pp.10-13). This occurred in the same year that Indigenous Peoples held a four-day hunger strike and spiritual fast at the UN headquarters in Geneva to draw the world’s attention the continued attempts of some States, as well as the UN process itself, to weaken and undermine the draft declaration (Carmen, 2009).

Since the first sessions of the UN Permanent Forum on Indigenous Issues, the need to clarify the principle of FPIC was noted, and after a seminar in 2005, a report clarified the methodological approach of the principle, concluding that various international instruments, as well as pronouncements, provide a normative basis for FPIC. The report also highlighted that FPIC, as a principle, is based on approach to development from a human rights perspective, and as a right, is related to the right to self-determination as well as the treaties and rights regarding land, territory and natural resources, and that consultation and participation are crucial components of a consent process (Permanent Forum on Indigenous Issues, 2005).

In 2007, the General Assembly adopted the UNDRIP after a negotiation between the Indigenous caucuses, friendly States that supported the UNDRIP, and the African states. Another bloc of States, including New Zealand, the USA, Australia, and Canada opposed the draft because of their concerns, for instance, that UNDRIP went too far in expanding FPIC as a right (General Assembly, 2007). Later on, in 2014, the General Assembly itself adopted a resolution reaffirming UNDRIP agreements on consent before adopting and applying legislative or administrative measures that affect Indigenous Peoples (General Assembly, 2014).

Even after the adoption of the UNDRIP, there has been a significant presence of Indigenous delegates at instances at different levels, which has allowed them to illustrate the dynamic nature of the right to FPIC. For example, the latest report of the EMRIP flagged that “[f]ree, prior and informed consent operates fundamentally as a safeguard for the collective rights of Indigenous Peoples” (EMRIP, 2018, p. 4).

## **Conclusions**

This chapter has argued that Indigenous delegates made a significant contribution to multilateral negotiations on international instruments that proclaim Indigenous Peoples’ rights, particularly to what is understood by participation, consultation and FPIC. However, these contributions were often not reflected in the final texts.

It has been shown that, since the first intervention of Indigenous delegates from many regions of the world, participation, consultation and FPIC have been placed at the centre of multilateral discussions concerning Indigenous rights, grounding them on and aligning them with the principles/rights of self-determination and equality or non-discrimination, cultural rights, and the principle of permanent sovereignty over natural resources.

The dynamic presence of Indigenous representatives at the international level has also redefined the practice of international organisations<sup>7</sup>. It raised the debate on how international organisations should work with Indigenous Peoples, illustrating and developing institutional policy frameworks through which the principle of FPIC has also been solidified.

Finally, it is worth questioning whether, in addition to being an exercise of their right to self-determination, the participation of Indigenous Peoples in international organisations with the aim of seeking the recognition of their rights could contribute directly to the formation of regulations of customary international law, or whether, on the contrary, this contribution is indirect.

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<sup>7</sup> On the international participation of indigenous peoples see Charters (2010).

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