

## The State's Economic Protection by the Criminal Justice System Corruption: A Case Study

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### ABSTRACT

**Keywords:**  
*Criminal Justice System;  
Economic Protection;  
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*This study aims to identify efforts to protect the state's economic security through the criminal justice system in the case of nickel mining in Malapulu Block, Kabaena Island, Southeast Sulawesi, Indonesia. The Supreme Court has decided the case with decision number 2633 K/Pid/Sus/2018. This research was conducted with a qualitative approach through analysis of the description of the prosecutor's indictment and the judge's decision. The results obtained in the study show that the KPK Prosecutor made a mistake by withdrawing the appeal that had been made. This condition results in the lack of consideration made by judges in decision making. Secondly, legal experts do not provide a difference in the meaning of economic and financial losses for the state in *judex factie* and *judex jurist*. Third, the indictment by the public prosecutor has not described the form of crime committed as an extraordinary crime. Fourth, there is negligence in the corporate sentence.*

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### 1. INTRODUCTION

Mining is the second oldest industry in the world after agriculture. The mining industry project is expected to be the pole of economic growth for the country and the surrounding area, such as in Indonesia. Indonesia is a country rich in natural resources and as a country known as the country that has the third-largest tropical forest in the world, with diverse ecosystems.<sup>1</sup>

The mining sector is often seen as an easy target to gain profit in practical ways through corruption. Generally, obtaining a mining business permit tends to take a long time, a long and convoluted process so that business actors tend to choose to take the fast and practical route by giving some money to the authorities for the issuance of a Mining

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<sup>1</sup> Mohammad Zulfan Tadjoeuddin, "A Future Resource Curse in Indonesia: The Political Economy of Natural Resources, Conflict and Development," *CRISE Working Paper*, 2007.

Business License (IUP).<sup>2</sup> Mining licenses also require higher costs because before conducting exploration, companies are required to attend a review related to an analysis of environmental impacts (AMDAL). In addition, mining also requires permission from the head of the local area, which often requires quite a long process.<sup>3</sup>

The state loss caused by the mining permit case according to the Deputy Chairman of the KPK, Laode M. Syarif, exceeds e-KTP case that had occurred in Indonesia.<sup>4</sup> The Government of Indonesia has provided mining business regulations through Law No. 4 of 1999 concerning Mineral and Coal Mining (Minerba Law). However, in the Malapulu Block, Kabaena Island, Southeast Sulawesi, there was a collusion case which was decided by the Supreme Court with decision number 2633/K/Pid/Sus/2018. The case involved a non-active Governor of Southeast Sulawesi (NA) who was sentenced to 12 years in prison by a panel of judges at the Jakarta Corruption Court. NA is also required to pay a fine of IDR. 1 billion in 6 months confinement. In addition, NA is also expected to pay replacement money of IDR. 2.7 billion. According to the judge, NA was proven to have misused the authority as governor in giving the Mining Area Reserve Approval, Exploration Mining Permit (IUP) Agreement. Then, the Approval to Increase Exploration IUP to Production Operation IUP to PT Anugerah Harisma Barakah (AHB). This verdict is lower than the demands of the prosecutors of the Corruption Eradication Commission (KPK) for 18 years. However, in the lawsuit against NA, the KPK first used environmental damage to assess state financial losses. In this case, it is necessary to interpret the state's economy with state finances. As in the provisions of Article 2 of Law Number 31/1999 as updated through the Law, Number 20 of 2001 concerning Corruption Eradication. This paper seeks to uncover the "state economy progressively" which basically means "state finance" aimed at filing lawsuits and court orders on criminal corruption cases, mining forest land management projects.

## 2. RESEARCH METHOD

The research method used is a descriptive qualitative method through case studies. This research was conducted by examining the decision of the Central Jakarta District Court and carrying out the FGD with legal experts. Qualitative analysis uses Miles and Huberman Models, an interactive analysis that aims to explore the meaning in cases

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<sup>2</sup> Terry O'Callaghan and Vlado Vivoda, "Regulatory Regimes, Foreign Mining Investment, and Risk in the Asia-Pacific Region: Comparative Evaluation and Policy Implications," in *Mining in the Asia-Pacific: Risks, Challenges and Opportunities*, ed. Terry O'Callaghan and Geordan Graetz (Switzerland, 2017), 35–48, <https://doi.org/10.1007/978-3-319-61395-6>.

<sup>3</sup> Vicky Fernando Walelang, "Penyalahgunaan Kewenangan Kepala Daerah Dalam Penerbitan Izin Usaha Pertambangan (IUP) Sebagai Tindak Pidana Korupsi," *Lex Privatum* 5, no. 8 (2017): 13–20, <http://www.albayan.ae>.

<sup>4</sup> Reky Kalumata, "Kerugian Negara Akibat Korupsi Izin Tambang Supian Hadi Lebih Kasus E-KTP," *Suara.Com*, February 2, 2019, <https://www.suara.com/news/2019/02/02/021500/kerugian-negara-akibat-korupsi-izin-tambang-supian-hadi-lebih-kasus-e-ktp>.

related to deep corruption involving devices. This interactive model consists of four main things, namely (1) data collection (in this case the Court's decision to the Supreme Court), (2) data reduction, (3) data presentation and (4) drawing conclusions.

### 3. LITERATURE REVIEW

#### 3.1. *An Overview of the State's Economy*

Based on *judex factie* from the Central Jakarta District Court Number 123/Pid.Sus/TPK/2017/PN.Jkt.Pst, and the decision of the High Court of the Republic of Indonesia DKI Jakarta The Supreme Court of the Republic of Indonesia Number 2633/PID.Sus/2018, concluded that the state's economy is all forms of activities that utilize the natural forest and productive, protected forests can dominate the livelihoods of the people, and can be utilized for the most significant benefit of the prosperity and welfare of the people”.

This definition is taken from Article 33 of the 1945 Constitution of the Republic of Indonesia (UUD 1945) which states as follows:<sup>5</sup>

1. The economy is structured as a joint effort based on the principle of kinship;
2. The State controls branches which are important to the State and which control the livelihoods of the public;
3. The earth and water and the natural resources contained therein shall be controlled by the State and used for the greatest prosperity of the people.

In the Fourth Amendment, in the same article stated as follows:

1. The national economy is organized based on economic democracy with the principles of togetherness, sustainability, environmental insight, independence, and by maintaining a balance of progress and national economic unity;
2. Further provisions regarding the implementation of this article are regulated in the law.

In the State's economic growth, the Central Statistics Agency (BPS) announced that Indonesia's gross domestic product (PDB) in the third quarter of 2019 was IDR. 4.067,8 trillion at current prices.<sup>6</sup> PDB in quarter III of 2018 increased 5.04 percent. Regarding the release of quarterly economic growth figures in quarter III of 2019, Gareth Leather, Capital Economist Ltd London doubted its accuracy. Stable economic growth in the range of 5 percent throughout Joko Widodo's first administration was considered to not reflect reality due to the fact that economic activity declined in the third quarter (Economic Analysis, Growth and Productivity).

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<sup>5</sup> Republik Indonesia, “Undang - Undang Dasar Negara Republik Indonesia Tahun 1945,” Pub. L. No. 1945 (1945).

<sup>6</sup> Badan Pusat Statistik, “Pertumbuhan Ekonomi Indonesia Triwulan IV-2019,” *Www.Bps.Go.Id*, 2020, <https://www.bps.go.id/pressrelease/2020/02/05/1755/ekonomi-indonesia-2019-tumbuh-5-02-persen.html>.

In the directory of the Supreme Court of the Republic of Indonesia in relation to corruption, it is stated that the state's economy is "Economic life compiled as a joint venture based on the principle of kinship or the business of an independent community based on government policy, both at the central and regional levels in accordance with applicable laws. aims to provide welfare and welfare benefits for the entire life of the people. "Thus, this definition is very abstract and very different from concrete" state finance ".<sup>7</sup>

### 3.2. *State Losses in Legal Overview*

According to Article 1 paragraph 22 of Law Number 1 of 2004 concerning the State Treasury stated that "State Losses/Region is a lack of money, securities, and tangible and definite items as a result of unlawful acts, intentionally or negligently".<sup>8</sup>

However, if examining prosecutors' demands, court decisions, and Supreme Court decisions relating to the above mining permit case, it does not explore the case article in a quo, so it appears to be the public prosecutor only calculating State losses from the nominal side of state finances. In fact, the article covering proverbs 2 Verse (1) Jo. article 18, article 13 Jo. Article 18 of Law No. 3/1999 concerning Corruption Eradication Law as amended by Law No. 20/2001 Jo. Proverbs 55 paragraph (1) 1 of the Criminal Code, the scope of the alleged article also talks about the economic loss of the State.

For this reason, an understanding of the state's economy is very important to be reviewed to maximize the claims and demands of the Public Prosecutor, especially in the case of mineral and coal mining as in the case of the quo. In addition, the public prosecutor also based his indictment on other laws such as Law 4/2009 on mineral and coal mining, Law No. 41/1999 concerning forestry, and others.

Consequently, referring to Article 1 paragraph 22, Makawimbang specifies the definition of "State Losses" as the domain of State Administrative Law in the form of schemes as follows:<sup>9</sup>

1. Terminology, reduced money, securities or tangible and definite items, due to unlawful acts both intentionally or unintentionally and negligent;
2. Article of Claims of Treasury (CT) and compensation of the country/ region non-Treasurer (TGR);
3. Article of return of state losses as eliminating acts;

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<sup>7</sup> Azizah, "Mahkamah Agung Berperan Dalam Pertumbuhan Ekonomi Negara," Mahkamah Agung Republik Indonesia, 2020, <https://www.mahkamahagung.go.id/id/berita/4026/mahkamah-agung-berperan-dalam-pertumbuhan-ekonomi-negara>.

<sup>8</sup> Guntur Rambey, "Pengembalian Kerugian Negara Dalam Tindak Pidana Korupsi Melalui Pembayaran Uang Pengganti Dan Denda," *De Legis Lata* 1, no. 1 (2016): 137–61, <https://doi.org/10.31219/osf.io/k4fvd>.

<sup>9</sup> Henny Juliani, "Penyelesaian Tuntutan Ganti Kerugian Negara/Daerah Terhadap Pegawai Negeri Bukan Bendahara Dan Pejabat Lain," *Law Reform* 13, no. 2 (2017): 234, <https://doi.org/10.14710/lr.v13i2.16158>.

4. State losses incurred due to *Force Majeure* (natural disasters, fire or economic crisis);
5. There is no relevance to “The offense of enriching oneself or one's own, other people, corporation” and “Abuse of authority and position” (Article 2 and Article 3 of the Law Number 31/ 1999).

A note on the scheme present ed by Makawimbang, that it does not reflect the loss of the State's economy where State officials carry out “abuse of authority” and there is reciprocation in a particular project that can provide concessions to the economy of the State. For example, a corporation that deliberately does not pay taxes whereas the corporation gets a significant profit from the implementation of certain projects. This means that there is a deficiency (underpay) in the form of a certain nominal value that can be interpreted as “funds or money”, which deficiency can occur due to deliberate or negligent. Such this case occurs in research analysis of court decisions studied in this paper. So, one of thing that can cause State losses on the economic side is “The existence of abuse of authority” as in Article 2 and Article 3 of the Law. Number 31/1999, which implies a lack of money that should be obtained by the State as stipulated in Article 1 number 22 of the Law Number 1 of 2004.

#### **4. RESULTS AND DISCUSSION**

##### **4.1. *Analysis of Court Decision***

On January 23, 2013, when NA was the Governor of Southeast Sulawesi together with Witness Burhanuddin as Head of the General Mining Department of the Department of Energy and Mineral Resources (ESDM) of Southeast Sulawesi, and Witness Widdi Arwinda (Director of PT. Billy Indonesia) conducted mining on Kabaena Island Malapulu Block, and Bombana. Kendari. According to the KPK Public Prosecutor, the defendant was suspected of committing an offense. Against the alleged violation, the defendant NA was convicted of illegal actions by "giving approval of the mining area reserves, approval of the Exploration Mining Business License (IUP), and the approval of the MBP Increase for MBP Production Operations to PT. Anugrah Harisma Barakah (AHB). "This policy is considered contrary to the Public Prosecutor with Article 37 letter b, Article 39 paragraph (1) Article 51 paragraph (1) of Law No. 4/2009 regarding Mineral and Coal Mining, then Article 38 paragraph (3) of Law No. 41/1999 concerning Forestry, Article 17 paragraph (1) PP No. 75/2001 and several other articles As for the violation method according to the Court Decision, the NA Governor asked Ihsan Rifani (IR) to find a company engaged in the mining sector, the IR approved it. One week later, IR told the NA Governor that the company's request was ready.

On this basis, NA directs to IR to submit related documents, and the documents referred to were surrendered to Widdi Aswindi (WA) in Jakarta. WA itself was a winning consultant to the NA defendant during his candidacy as Governor of Southeast Sulawesi at that time. Based on the Indonesian criminal law system, this act is classified as an act

of collusion or nepotism. Shortly, PT. AHB regarding the application for Mining Authorization was made by Burhanuddin and Kamrullah (Head of Mineral Materials Section at the Department of Energy and Mineral Resources of Southeast Sulawesi Province in 2009-2013 by stating backdate on 28th November 2008. This means, the Decree of the The NA Governor was juridical defect because it was unrealistic and categorized.

Finally, it was concluded that the actions of NA as a defendant committed illegal administration of the state, had implications for harming state finances and the State's economy, enriched themselves and a corporation. As for PT Billy Indonesia, the wealth gained from the activities was IDR. 1.593,604,454,137. Or it is estimated that it will harm the state finances of IDR. 4.325.130.590.137 which involving foreign corporations, namely Richorp International Ltd which is domiciled in Hong Kong.

#### ***4.2. Analysis Based on the Legal System National Criminal***

The Malapulu Block mining project on Kabaena Island, Kendari, which area consists of protected forests and limited production forests. A quo case contains elements of the influence of power by means of acts against the law. From mining exploration related to the use of existing policies, according to provisional estimates, this is related to corruption as one of the transactional political implications. KPK as a sub-system of the criminal justice system aims to save the finances and economy of the State based on its authority.

It can be seen that there is a separate value where the KPK is not merely in the procedural domain. Even though it is known that the realm of procedural justice as a concept of the rule of law is something that cannot be ignored as part of the system itself. It means, KPK not only in the normative substantial domain but must be progressive.

In the decisions of the court of first instance and appeal, revealed the participation of several cooperatives both domestically and abroad such as PT. AHB, PT. Billy Indonesia, Richorp International Ltd, and Well Victory International Lid domiciled in Hong Kong in the implementation of the Nickel mining project on the Malapulu Block, Kabaena Island, Buton Regency, Bombana village, Southeast Sulawesi, Indonesia. *Judex factie* also revealed that there were State losses, as a result of the destruction or ecological reduction in the environment of damage to the land and the environment in the form of forests at the mine site. The overall state loss as a result of the act against the law is estimated IDR. 4.325.130.590.137.

The normative and symbolic approach, KPK acts on behalf of the State and enters into a praxis space, a space where the law becomes the benchmark for something that is *actus reus* or criminal act. In critical philosophy, there is something called "Habitus" or body. If the law is made on behalf of the State as a system, then there are two components as its habitat, namely society and individuals. These two components called community.

The society and individuals, when associated with the law, the intended is legal certainty and justice. The mediator in which the KPK acts on behalf of the State to achieve legal certainty and justice, namely the world of entities called reality in legal reactions.

In the Supreme Court decision, independent and careful legal construction is needed. One of the problems of judges in deciding is the emergence of independent variables that affect the construction of several Judges so that the decision is not independent. Normative order can also affect legal justice, both individuals and society. There is a mismatch in the application of law which is not the goal of the court justice system. On that basis, a holistic source is needed, but it is still needed as a source of entities.

The court needs to find and find relationships with others to open all questions that have not been revealed. For example, motives involving some people as *dader*, or *delneeming*, or concursus that cause illegal actions such as *actus reus* or criminal acts using Article 55 and Article 64 of the Criminal Code. Although the decision of the Central Jakarta High Court Number 16/Pid.Sus-TPK/2018/PT.DKI jo. Decision of the Supreme Court of the Republic of Indonesia Number 2633 K / Pid. Sus / 2018 does not become part of the dictum. However, it is important to look at cause and effect relationships in process, policy and power.

In the NA case, the judge must explore the facts of political payment as part of legal considerations that *actus reus* so that the defendant can be convicted conclusively. The legal system governing regional elections after reform, corruption and politics has increasingly formed synergies. Synergy is formed through business practices including management of economic and financial revenue nodes such as the management of forest and mining concessions. Mining management is a very big business because it often involves not only people but also domestic and foreign companies. Not surprisingly, the Deputy Chairperson of the Corruption Eradication Commission (KPK) has stated that "The business world is one area where the potential for corruption is huge. The majority of corruption that the KPK handles as much as 80% involves business actors". Corruption, business and politics seem inseparable from things like logging and mining concessions in building corrupt behavior.

In the doctrine of returning compensation as a State loss, the Supreme Court does not separate two things between state losses and gratification on the other as in the prosecutor's indictment. While in the decision, it only confirms one legal fact, which is only enjoyed by the defendant. It means that, the act of gratification does not become a legal consideration in *judex jurist*. Whereas gratification should be part of *judex jurist*, so that practically only one indictment is believed to be proven even though the legal doctrine of Article 64 paragraph 1 of the Criminal Code, needs to be more concrete as in the construction of the indictment.

The most responsible for a criminal offense, there is a causality of criminal acts that are asynchronous.<sup>10</sup> It means, there is a certain part of the effect that is eliminated. Parties who are bound by condition *sine quo non* in acts against the law or *mala prohibita*, which should also be punished with substitute money that can be sued (*vervolgbaarheid*) as part of *strafmart*.<sup>11</sup>

KPK must continue to demand other participation in relation to Article 55 paragraph 1 of the Criminal Code. It means, that not only the defendant NA, but corporally, PT AHB, PT Billy Indonesia and two other foreign companies must have separate positions in the prosecutor's indictment system, especially those relating to funds of IDR. 4.325.130.590.137. This is one of a part called the progressive criminal justice system. It means, not only NA is considered to violate the law.

The interesting part in the Prosecutor's indictment is that environmental damage as part of the loss of the country has also become one of things that has developed and is full of discussion participants where environmental damage due to mining is part of the State loss. Based on such experience, the KPK needs to reformulate and construct more progressive indictments, especially if in a criminal act of corruption involving a corporation, as in this NA case study. Criminal punishment against corporations already has Supreme Court Regulations No.13/2016 on Procedures for Handling Corruption Crime Act jo. Number 1/2004 Concerning State Treasury.

#### **4.3. Money Laundering Criminal Acts**

Alleged criminal acts that indicate an indication other than cooperative activities is also a crime of money laundering but escapes *judex jurist* consideration. However, of course the lack is not entirely a burden on the Supreme Court, possible construction of indictment which does not accommodate this. For this reason, the construction of the indictment of KPK prosecutor needs to be reformulated with the form of indictment by taking lessons from this case. That is, the impression of the KPK prosecutor's indictment is still limited and elementary. Because it is still an element in the framework of a building or construction of an extraordinary crime colored indictment that is needed.

The alleged crime also indicated the existence of a money laundering crime.<sup>12</sup> Unfortunately, these allegations are not part of legal considerations. The possibility of construction of the indictment does not accommodate this. The construction of the KPK prosecutor's indictment needs to be reformulated with the form of the indictment by taking experience from this case. The impression is that the KPK prosecutors' indictments

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<sup>10</sup> Ahmad Sofian, "Novus Actus Interveniens in The Context of Criminal Law in Indonesia," *Humaniora* 7, no. 2 (2016): 243, <https://doi.org/10.21512/humaniora.v7i2.3527>.

<sup>11</sup> Michael L Traverst, "Mistake of Law in Mala Prohibita Crimes," *The University of Chicago Law Review* 62, no. 3 (1994): 1301–32.

<sup>12</sup> David Mühlemann and Stefan Mbiyavanga, "Natural Resources and Money Laundering," in *OECD Global Anti-Corruption & Integrity Forum* (Switzerland: OECD Global, 2018).



are still limited and basic. Because it is still an element in the framework of the construction of extraordinary crimes that are colored by varied accusations. According to Satjipto Rahardjo, "the law is actually dead (black matter law). Even though it was only promising, and threats on paper. Then it has become a reality through human hands with common sense.

The Supreme Court judge's decision, found a sentence with the terms "State's losses and State Financial Losses". However, the sentences used by the Courts, both in the First Courts and in the Court of Appeals and the Supreme Court Judges, do not distinguish the two. For this reason, it is necessary to separate the meaning and context of the two terms. The context of the sentence is the context of the sentence State Losses and State Financial Losses can expand the horizons of other special criminal laws namely corporate criminal acts and money laundering. As such, the indictment can be regulated by an extraordinary crime dimension like the existence of the KPK.

Using the phrase "State's losses" can mean "the economic loss of the State".<sup>13</sup> Whereas, if the phrase "State Financial Losses" is used, then that means the nominal value of the state money being harmed. State financial loss conditions need to be based on official and reliable auditor team calculations. In Indonesia, state financial losses are assessed by the Supreme Audit Agency (BPK). For this reason, the description of state financial losses in the prosecutor's indictment requires a careful description based on legal provisions. On the other hand, the decision of the panel of judges also did not see a fund of IDR. 4,325,130,590,137 are included in the scope which can be categorized into "Economic Damage of the State".

Based on the description above, there is a difference between state financial losses and state losses. If the state financial loss is a nominal amount of money that can be calculated through the auditor team, the state loss still requires a definition to justify the factual loss from the economic side because the two contexts are different, although ultimately the value will be the same.

In the legal literature, it is difficult to find the definition of state losses which means losses to the country's economy. In the Indonesian Dictionary (KBBI), the meaning associated with the term "economy" is the knowledge of the principles of production, distribution, use of goods and wealth (such as financial, industrial and trade issues, use of money, valuable labor time, governance managing a country's economy). This means that the management of Nickel mining is part of the definition of the economy because it can generate state foreign exchange that connects the country's economy. When crimes occur in mining management as in the case *in casu*. From this condition, the defendant should have been prosecuted based on Article 2 of Law No. 31 of 1999

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<sup>13</sup> Herry Ludiro Wahyono, Jati Utomo Dwi Hatmoko, and Rizal Z. Tamin, "State Financial Losses in Public Procurement Construction Projects in Indonesia," *Buildings* 9, no. 5 (2019): 1–8, <https://doi.org/10.3390/buildings9050129>.

concerning Eradication of Corruption Crimes Jo. Law Number 20/2001 concerning Corruption Crimes, and not just Article 3 *a sich*. Care needs to be taken in preparing the indictment of an extraordinary dimension.

There is one measure that indicates that corruption in the company and gratuity in the case quo has occurred. That is, all policies related to correspondence in accordance with the Nickel mining management made by the defendant, "Almost all treaty letters are applied backwards". According to our analysis, this condition shows that this corruption effort was carried out systematically, because it involved many government parties by signing all agreements with the date that they were applied backwards.

## 5. CONCLUSION

The KPK prosecutor made a mistake in revoking the appeal as stated in the Supreme Court's Decision. If the KPK Prosecutor does not withdraw his appeal, the judges of the Supreme Court receive adequate legal considerations in decision making. In addition, *judex factie* and *judex jurists* do not make a difference in terms of economic losses and financial losses for the State. The public prosecutor's indictment has not provided a constructive description of the indictment as an extraordinary form of crime. There is a real omission in the corporate sentence. However, the company's involvement in implementing mining project cases is not considered in *judex factie* or *judex jurist*. Every indictment made by the KPK prosecutor in relation to corruption in forest management and mining must be established broadly, so that the indictment provides a description of extraordinary crimes. If in a criminal act of corruption in the management of forests for mining such as Nickel and others involving the company, then it must be categorized in the consideration of *judex factie* and *judex jurist* as *vervolgvaarheid*. at least through these conditions can indicate network corruption.

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