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The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's comments

By Lewis F. Matuszewich

Thank you to Cindy Galway Buys and Southern Illinois University School of Law. Because of them, we have an eighth issue of *The Globe* for this ISBA year. Cindy, a past Chair of the International and Immigration Law Section Council and currently, serves on both the International and Immigration Law Section Council and the Women in Law Committee as a Professor of Law and Director of International Law Programs at SUI School of Law. She and Julia Kaye Wykoff, a student at the Southern Illinois University School of Law, have co-authored, "Women in Conflict – a U.N. Response."

Tania Linares Garcia is a second year law student at Southern Illinois University School of Law, focusing her studies in immigration and constitution law. She authored the article, "Recent Decisions Clarifying the "Particular Social Group" Requirement Make it Easier for Former Gang Members to Get Asylum."

Patrick M. Kinnally is a member of the Section Council and is a frequent contributor to The Globe has authored "Prosecutorial Discretion and Administrative Closure in Immigration Law: A New Adjudicatory Rule."

We have continued to introduce the readers of *The Globe* to the members of the International and Immigration Law Section Council. In this issue we have included the biography for Glen L. Bower, a retired U.S. Immigration Judge and a recent appointee to the International and Immigration Law Section Council.

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Women in conflict—A UN response

By Cindy Galway Buys and Julia Kaye Wykoff

> *"It has probably become more dangerous to be a woman than a soldier in an armed conflict."*
>
> *—Major General Patrick Cammaert, former UN force commander*

In areas of armed conflict, horrifying reports of violent rapes made their way to the United Nations Security Council. Rather than conventional war tools such as guns, tanks, and bombs, raping and abusing women seemingly became a favorite tactic in many war-torn countries.

The most brutal stories of sexual violence come from the Democratic Republic of the Congo.[1] Soldiers in the Congo "trademark" their manner of violating women. After raping a woman, certain groups of soldiers shoot a gun into her vagina. Other groups of soldiers rape with bayonets, sometimes causing fistulas, or holes between a woman's vagina and one or more of her internal organs. These fistulas can leak urine or feces, causing other health issues.[2] In developing countries, a woman's virtue is prized, whether through virginity or fidelity to her husband. These brutal rapes result in shaming of the victim and their husbands, families, and communities oftentimes shun raped women. Degradation of the women may also be viewed as degrading the family and community. These tactics have proved more destabilizing than traditional warfare, as these soldiers have managed to humiliate, infect, and disperse their victims.

While the circumstances of sexual violence are horrifying, the aftermath is arguably more shock-

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Editor's comments

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As we frequently mention, there are a substantial number of opportunities in Illinois for making contacts and learning about resources available for your clients, or potential clients, who are interested in international trade or business.

The United States Small Business Administration and its SBA Illinois District Office has announced a webinar on SBA Export Loan Programs. On May 28, 2014 at 10:00 a.m., John Nevell, Regional Manager of SBA International Trade Programs, will be presenting information on the Export Assistance Programs offered by the United States Government through the Small Business Administration. Specifically, he will discuss the three trade finance products of SBA, the SBA Export Express, International Trade Loan and Export Working Capital Program.

There is no cost for this webinar. Visit <http://events.sba.gov> to register.

The announcement points out that, which you might mention to your business clients and potential clients, that 96% of the consumers in the world live outside the United States and two-thirds of the world's purchasing power is in foreign countries. International does provide your clients an opportunity to increase sales and profits and diversify their markets.

As always, thank you to all of our contributors.

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Women in conflict—A UN response

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ing. In 2013 study by the World Health Organization, "women who had been physically or sexually abused were 1.5 times more likely to have a sexually transmitted infection."[3] In the Congo, roughly 30% of raped women now have the HIV virus.[4] This statistic is alarming, particularly in Africa, where the AIDS/HIV epidemic continues to take the lives of millions. AIDS/HIV in third world countries often is a death sentence. Women infected through rape and sexual violence quite literally die as a result of infection by rape.

These reports and statistics alarmed the United Nations Security Council (UNSC), and in 2000, the UNSC took its first stance on the rights of women in armed conflicts. That first step led to the adoption of no less than six additional resolutions on women in conflict. Over the last decade, the theme of women, peace and security has resulted in more resolutions than any other theme area addressed by the United Nations Security Council. While these resolutions are certainly steps in the right direction, much more work needs to be done to protect women in conflict.

Resolution 1325 (2000)

Resolution 1325 was the UNSC's first response to issues facing women in armed conflict.[5] This resolution was groundbreaking because it urged women to take an active role in the prevention of conflicts, resolution of conflicts, peace negotiations, peace-building, peacekeeping, and humanitarian response. Additionally, the resolution stressed the equality of women in the efforts to maintain international peace and security.

This resolution brought to light many alarming statistics about issues facing women in conflict. First, the resolution expressed concern that women and children account for the majority of displaced persons and refugees during times of armed conflict. Additionally, as violence against women has become a war tool, particularly in African countries such as the Congo, this resolution addressed sexual abuse in armed conflict. Specifically, violence against women includes "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[6] Resolution 1325 called on member states to take the necessary measures to ensure women and girls are free from gender-based violence in times of conflict.

Not only did Resolution 1325 offer insight into the key issues facing women in conflict, but it also offered some suggested solutions on how to address these issues. First, the resolution urged member states to incorporate women into the decision-making process, particularly regarding the "prevention, management, and resolution of conflict."[7] Additionally, the resolution urged the Secretary General of the United Nations to appoint more women as representatives in order to "expand the role and contribution of women in the United Nations."[8]

Resolution 1820 (2008)

Security Council Resolution 1820 expanded on Resolution 1325, but this resolution emphasized the important issues surrounding rape and gender violence against women.[9] The Security Council noted that civilians are most affected by armed conflict. Among those civilians are women and girls, who are targeted through use of gender-based sexual violence.[10] In conflicts, rape and other forms of sexual violence have been employed as "a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group; and that sexual violence perpetrated in this manner may in some instances persist after the cessation of hostilities."[11]

The Security Council expressed its deep concern that, despite the illegality of such acts of violence, rape and sexual violence continue to occur, becoming "systematic and widespread, reaching appalling levels of brutality."[12] Given such acts of violence were occurring at this time, the Security Council demanded the "immediate and complete cessation" of acts of sexual violence.[13] The Security Council further noted that those engaging in sexual violence are engaging in war crimes, crimes against humanity, and/or a consecutive act with respect to genocide.

As such, the Security Council demanded that member states prosecute those engaging in such acts of sexual violence to ensure that women have equal protection under international law. The Security Council further requested a zero tolerance policy with regards to rape as a war tool and encouraged militaries to educate their troops about issues facing women in armed conflict.

Resolution 1888 (2009)

On September 30, 2009, the Security Council passed resolution 1888.[14] Essentially, this resolution expounded on previous resolutions regarding women in conflict, because the Security Council remained "deeply concerned over the lack of progress on the issue of sexual violence in situations of armed conflict in particular against women and children, notably girls."[15]

The Security Council reminded all member states of their duty to prosecute those responsible for "genocide, crimes against humanity, war crimes and other egregious crimes perpetrated against civilians, and in this regard, noting with concern that only limited numbers of perpetrators of sexual violence have been brought to justice, while recognizing that in conflict and in post conflict situations national justice systems may be significantly weakened."[16] To hold perpetrators responsible, the Security Council suggested the use of international criminal courts.

While much of the resolution recounts data and suggestions made in the previous resolutions on sexual violence, it is clear in this resolution that the Security Council is extremely alarmed about the growing issue of sexual violence in armed conflict. To address the issue, the Security Council uses strong language, *demanding* that parties to armed conflicts take *immediate* action to protect women and children.

Resolution 1889 (2009)

Shortly after Resolution 1888, on October 5, 2009, the Security Council passed Resolution 1889.[17] In contrast to the earlier resolutions, this one focused on the lack of women in leadership positions in member states and the United Nations itself. The Security Council noted the need for women leadership in order to end issues women face, particularly issues of sexual violence. In expressing its concern about the lack of women in leadership roles, the United Nations Security Council noted that these issues continue in post-conflict times.

Without the involvement of women in post-conflict life, women may face more "violence and intimidation, lack of security and lack of rule of law, cultural discrimination and stigmatization, including the rise of extremist or fanatical views on women, and socio-economic factors including the lack of access to education."[18] Additionally, the Security Council noted that women should not be viewed as *victims* but rather should be *empowered* by giving women active roles in peace building.[19] The Security Council continued to condemn sexual violence against women, but the main message of this resolution centered on the need for female leadership around the world. To ensure women are treated fairly, the Security Council noted its intention to include provisions promoting gender equality in all mandates of the United Nations.

Resolution 2106 (2013)

On June 24, 2013, the Security Council passed Resolution 2106, which prohibits sexual violence in armed conflict and post-conflict situations.[20] This resolution recognized the Declaration on Preventing Sexual Violence, which was adopted during the London G8 conference in April 2013. In this resolution, the Security Council sought to affirm women's political, social, and economic empowerment. The Security Council reaffirmed that rape and other acts of sexual violence in armed conflict are war crimes, and Member States should prosecute violators.

Resolution 2106 noted that systematic monitoring of acts of sexual violence was essential. It urged member states to encourage timely, objective and accurate information as a basis for prevention of sexual violence.

The resolution also called for the deployment of Women Protection Advisors (WPA) in accordance with Resolution 1888.[21] These WPA's will contribute to the monitoring and reporting of sexual violence in order to comply with the UN's requirements of data collection regarding sexual violence. WPA's additionally will prepare reports on investigations of human rights violations so the UN and member states understand patterns and trends of sexual violence. In working closely with peacekeepers and injured persons, WPA's are asked to be professional and empathetic while working to gather information about sexual violence in conflict areas.

The Security Council emphasized the important role members of society—particularly women's organizations—play in raising awareness about the importance of preventing sexual violence during armed conflicts.

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To prevent these situations, a zero tolerance policy will ensure full accountability by Member States if conduct by their nationals violates this resolution.

Resolution 2122 (2013)

Most recently, on October 18, 2013, the UNSC reaffirmed its commitments to the previously stated resolutions and urged all states to ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW currently has 187 state parties, not including the United States.[22] Resolution 2122 further emphasized "persisting barriers to full implementation of Resolution 1325 (2000) will only be dismantled through dedicated commitment to women's empowerment, participation, and human rights, and through concerted leadership, consistent information and action, and support, to build women's engagement in all levels of decision-making."[23]

Like prior resolutions, Resolution 2122 expressed deep concern about the human rights violations against women in armed conflict. Women and girls are particularly vulnerable during conflicts, and the international community must do more to ensure that differentiated impacts on women are limited. The Security Council additionally condemned all violations of international law, but particularly violations including women and girls involving rape, sexual and gender based violence, killing and maiming, obstructions to humanitarian aid, and mass forced displacement.

"Stop Rape Now"

In addition to adopting the above resolutions, the United Nations took action against sexual violence in armed conflict through its campaign "Stop Rape Now."[24] This campaign works to prevent all forms of gender-based violence, including sexual violence in conflict. The goal of "Stop Rape Now" is to "generate public awareness on the growing use of sexual violence as a weapon of warfare, and how to prevent it; end impunity for perpetrators of sexual violence in conflict; improve and scale up services for survivors; address the longer- term impacts of sexual violence on communities and national development."[25]

Although sexual violence in conflict areas is still prevalent, the "Stop Rape Now" campaign has given women in war-torn countries a voice they lacked before. Women were often ignored or hurt for speaking out against the violence they faced. Now, women are telling their stories and bringing awareness to the terrible situations they face. As women continue to tell their stories, awareness will continue spread throughout the international community. Such awareness may bring relief to women worldwide.

Conclusion

According to Pablo Castillo Diaz of UN Women, these resolutions addressing women, peace and security have changed the normative landscape and practice at the United Nations.[26] Soldiers and other high-ranking officials who commit rape are being put on trial.[27] Peacebuilding funds have significantly increased in the last three years, as has the number of women serving on important commissions. Women now hold positions of leadership in the UN, such as Navi Pillay, the UN High Commissioner for Human Rights. And the participation of women is changing the conversation, bringing more focus to issues such the need for access to clean drinking water and childcare.[28] Former Under-Secretary General of the UN, Special Representative on Children and Armed Conflict Radhika Coomaraswamy is also encouraged by these UN resolutions, prosecutions of perpetrators in international criminal tribunals, and the robust monitoring and reporting requirements that have been adopted with respect to women in conflict, which are the most extensive requirements as compared to any other issue.[29] As a result of these measures, she asserts, there has been "a sea change in attitude" in the international community. Thus, progress is being made.

But that progress is slow. Female peacekeepers have only increased from 1% in 1993 to 4% in 2014.[30] Enforcement and implementation by states of many aspects of these UN resolutions and treaty obligations designed to protect women remain limited.[31] For example, some of the posts created to monitor sexual violence remain unfilled and funds are lacking to carry out the mission. Thus, much more work remains to be done, both to protect women during conflict and to ensure gender equity in post-conflict goals set forth in these UN resolutions are achieved. ■

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17. S.C. Res. 1889, U.N. Doc. S/RES/1889 (Oct. 5, 2009).
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Recent decisions clarifying the "particular social group" requirement make it easier for former gang members to get asylum

By Tania Linares Garcia

The sharp rise of gang violence in Central America and other parts of the world has forced many people to seek refuge outside of their home countries. Some of these refugees, young men particularly, have been coerced into joining a gang. These former gang members who, given the opportunity, disavow their membership in the gang and its violent practices, encounter significant obstacles in their journey to escape gang violence, however.

In recent years, asylum claims brought by former gang members have failed because of the development of strict judicially-imposed requirements to asylum and withholding of removal.[1] To qualify for these kinds of relief, the INA requires that "the alien's life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[2] Further, when an asylum or withholding of removal claim is based on the noncitizen's membership in a particular social group, the BIA requires this social group to meet three criteria: "(1) its members share common, immutable characteristics, (2) the common characteristics give its members social visibility, and (3) the group is defined with sufficient particularity to delimit its membership."[3] These requirements have resulted in a complex circuit split, with some circuits applying all or some of these requirements to different extents.[4] Yet, two recent decisions from the Fourth Circuit Court of Appeals and the BIA provide some headway for former gang member seeking asylum.

Immutability after *Martinez v. Holder*[5]

In *Martinez v. Holder*, the Fourth Circuit Court of Appeals reviewed the BIA's decision to deny withholding of removal to a former member of the Salvadorian gang MS-13. Martinez, a Salvadorian citizen, first became involved with MS-13 at the age of 14 when his group of friends was "incorporated" into the gang.[6] Although he agreed to go through the initiation process and to get tattoos indicating his membership in the gang, Martinez refused to participate in extortions and was beaten weekly as a result.[7] Later, when he tried to leave the gang, other members repeatedly tried to kill him until he left El Salvador and entered the United States without inspection in 2000.[8] After being placed in removal proceedings as a result of his illegal entry, Martinez brought a claim *inter alia* for withholding of removal.[9] On appeal, the BIA affirmed the IJ's decision and denied Martinez withholding of removal because he failed to show that members of the social group of "former members of a gang in El Salvador" shared an immutable characteristic since the characteristic shared by the members resulted from their "voluntary association with the gang."[10]

The Fourth Circuit Appellate Court, which has adopted both the particularity and immutability requirements for particular social groups but has declined to decide whether the social visibility requirement is a valid statutory interpretation, disagreed with the BIA's decision. First, the court found that Martinez's social group meets the immutability criteria, which only requires that members "share a characteristic that they 'either cannot change or should not be required to change because it is fundamental to their identities and consciousness.'"[11] Since former gang members cannot change their status as such without rejoining the gang, and thus violating the "fundamental precepts of [their] conscience" is proof, the court reasoned, that they share an immutable characteristic.[12]

Moreover, the court disagreed with the BIA's rationale that, because the immutable characteristic shared by the group was the result of the members' voluntary association with a gang, it should not be protected by refugee laws since it amounts to past anti-social behavior.[13] The court here pointed to the INA which explicitly sets out a subset of "anti-social" behaviors which can bar a noncitizen from immigration relief.[14] Since this list excludes past membership in a gang, it is not a bar to asylum relief. Further, the court reasoned that barring noncitizens from relief based on their past membership in a gang would ignore the noncitizen's current "membership in a group defined by gang apostasy and opposition to violence."[15]

This decision opens the door to former gang members seeking asylum and is a positive stride in protection those fleeing from the violence overtaking Central America. Although other circuits may, and should, follow the Fourth Circuit's rationale on immutability, many circuits would still have another obstacle standing in the way of asylum relief for former gang members: the social visibility requirement. Yet, a recent BIA decision may represent a further stride in this worthy cause.

Social Visibility after *Matter of W-G-R*[16]

The recent BIA decision in *Matter of W-G-R-* involves another Salvadorian ex-gang-member's withholding of removal claim. Although petitioner's claim ultimately failed to meet the "particular social group" standard, this decision presents a shift in the BIA's review of asylum claims based on membership in a particular social group.

As a result of the circuit splits and different interpretations of the "social visibility" requirement for particular social groups, the BIA has decided to rename the requirement "social distinction."[17] This change, the BIA reasoned, will help clarify that it does not mandate "ocular" visibility but rather social perception of the existence of the group.[18] Thus, social distinction can exist when society acknowledges the existence of the group, even if it cannot identify the members by sight.[19] The BIA went further in providing guidance on this newly defined requirement by explaining that it can be met through "evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group" such as evidence of the "sociopolitical conditions of the country."[20]

Although this decision may cause the circuit courts, such as the Seventh Circuit Court, which had rejected the social visibility requirement[21] to adopt social distinction, its overall impact will be positive. Having abandoned the ocular visibility interpretation, former gang members and other asylum seekers will be able to present country conditions evidence to show that, although their membership in the social group is not vis-

ibly identifiable, the society in that country recognizes that the group exists. In the Seventh Circuit particularly, where the court's rationale for rejecting the social visibility requirement is similar to the BIA's rationale in adopting the social distinction requirement, it is likely that the Court of Appeals will adopt the new social distinction requirement.[22] ■

Tania Linares Garcia is a second-year law student at Southern Illinois University School of Law. She received her undergraduate degrees in Finance and Business Economics from SIU. While in law school, she has focused her studies on immigration and constitutional law. She was a summer intern for the National Immigrant Justice Center in Chicago, IL.

1. *See* Lisa Frydman & Neha Desai, *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs*, 12-10 Immigr. Briefings 1 (2012).

2. 8 U.S.C. § 1231(b)(3)(A) (2006).

3. Lizama v. Holder, 629 F.3d 440, 447 (4th Cir. 2011) (citing Matter of E-A-G-, 24 I. & N. Dec. 591, 594 (BIA 2008)).

4. *See* Frydman *supra* note 1. See also *Gatimi v. Holder*, 578 F.3d 611, 614-16 (7th Cir. 2009) (rejecting the "social visibility" requirement and holding that former gang members meet the "particular social group" standard).

5. 740 F.3d 902 (4th Cir. 2014).

6. *Id.* at 905-07.

7. *Id*. at 907.

8. *Id.* at 907-08.

9. *Id.* at 908.

10. *Id.*

11. *Id.* at 910.

12. *Id.* at 912.

13. *Id.* at 911-12.

14. *Id.* at 912.

15. *Id.*

16. 26 I. & N. Dec. 208 (BIA 2014).

17. *Id.* at 210-11 (citing the Circuit Court decisions leading to the split in the adoption of the "social visibility" requirement).

18. *Id.* at 216.

19. *Id.* at 217.

20. *Id.*

21. *See Valdiviezo-Galdamez v. Att'y Gen. of U.S.*, 663 F.3d 582, 603-09 (3d Cir. 2011); *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009) (rejecting the social visibility requirement).

22. *See Gatimi*, 578 F.3d at 615 ("If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be 'seen' by other people in the society 'as a segment of the population.'"); *see also Matter of W-G-R-*, 26 I. & N. Dec. at 217 ("[T]he fact that members of a particular social group may make efforts to hide their membership to avoid persecution does not deprive the group of its protected status as a particular social group.").

Prosecutorial discretion and administrative closure in immigration law: A new adjudicatory rule

By Patrick M. Kinnally

At first blush, it may seem curious that the concept of prosecutorial discretion has any pertinence to immigration cases. As we know, prosecutors have unmitigated powers in charging individuals with crimes, opting not to bring a charge at all, or making recommendations concerning plea bargains, sentencing, or conferring immunity to the accused, as well as witnesses. See, *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

Yet, removal proceedings are not criminal affairs, but civil ones. They are administrative trials brought by the federal executive branch of government. Their outcomes are determined by administrative law judges who are employed by the Executive Office of Immigration Review (EOIR), another federal agency whose appellate tribunal is called the Board of Immigration Appeals (BIA). Our federal judges only get involved in this process on an appeal from the BIA to our Circuit Courts of Appeal. So why would prosecutorial discretion have anything to do with these types of proceedings? See, *Arizona v. United* States, 567 U.S. ––––, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012), sl. op. at 18 ("Arizona"), citing *Reno v. American Arab Anti Discrimination Committee*, 525 U.S. 471, 483 (1999).

In *Arizona*, the Supreme Court held the decision to initiate a removal hearing is for federal government discretion, not a state actor. This result is based on the fact whether a foreign national is allowed to reside in the United States must be made with a single voice, not fifty different ones. Because such a decision necessarily relates to foreign relations, its province is exclusively federal. Furthermore, the complexities in fathoming whether a person is removable in the first instance are not only legally intricate, but also the outcome of a removal proceeding is telling; perhaps resulting in the permanent separation of families who share undocumented parents and United States or lawful permanent resident children. *Padilla v. Kentucky*, 559 U.S. 356 (2010), sl.op. at 4. The Supreme Court has opined for over 125 years such a call belongs within the realm of federal sovereignty. *Chy Lung v. Freeman* 92 U.S. 275 (1876). Immigration rules should not be a political popularity contest for state politicians.

Much akin to criminal cases, a federal executive agency's decision, like DHS, not to entertain or enforce a civil action is a determination which is committed to that agency's near outright discretion. *Heckler v. Cheney*, 470 U.S. 821 (1985). How do civil immigration prosecutors decide when or when not to commence a removal proceeding?

It is a question, the answer to which, has a great deal of currency. The federal executive branch of our government, the Department of Homeland Security (DHS) has taken the lead on this issue. See, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, Manuel and Garvey, Congressional Research Service (2013). The article is well-researched; read it.

In 2011, at the urging of President Barack Obama, DHS started a program called Deferred Action for Childhood Arrivals (DACA). In short, this regime, by executive action, told DHS prosecutors that those children, many of whom were unaware of their illegal status, were "low priority" for removal. This seems apt.

DHS put in place a protocol whereby these children, now adults and high school graduates, can apply for "consideration of deferred action." In short, this is a request to DHS *not* to commence removal proceedings. DHS pronounced rules of how prosecutorial discretion should be implemented. Even a form has been created to ask for this type of prosecutorial discretion. (I-821D). A peculiar twist for telling immigration prosecutors what they should do. Maybe, as advocates, we might ask why should such a program come from the top, down? We have many able immigration prosecutors who understand the equities involved in whether a removal proceeding should commence. Has their administrative leash, unfortunately, been too short? Also, the applicants, if they meet the criteria, receive the right to work in the United States. A cherished right we should not discount.

The statistics on this program have been salutary. They include:

* * *

The latest case-by-case Immigration Court records reveal that during the first quarter (October-December 2013) of fiscal year 2014, a total of 2,993 cases were officially closed due to the exercise of prosecutorial discretion (PD). This represents 7.0 percent of all Immigration Court cases closed so far this fiscal year.

Fiscal Year	Number of Cases Closed		Percent Closed via PD
	PD Closures	All Closures	
2012	9,684	206,330	4.7%
2013	16,306	191,803	8.5%
2014*	2,993	42,816	7.0%
Total	28,993	440,949	6.6%

* * *

Transactional Records Access Clearing House, Syr.Edu., TRAC Reports (March 14, 2014).

And, recent anecdotal statements have emerged which indicate prosecutorial discretion might expand. The Obama administration through Jeh Johnson, DHS Secretary, may limit removal of undocumented persons who have little or no criminal record but may have repeated immigration violations. Instead, the focus for prosecutors in removal cases would exclusively be on public safety and national security concerns. *Chicago Daily Law Bulletin*, "DHS Deportation Review Could Allow More to Stay", April 23, 2014, p. 6. This new executive fiat may include parents of DACA eligible children. I guess we will see what results from such a critique.

EOIR made an announcement in 2012 which adhered to the enforcement philosophy of how prosecutorial discretion should apply in our immigration courts. (AILA *Infonet* No. 12080250, 8/20/12). It observed that in many cases, "administrative closure" would hold in abeyance many removal proceedings. What does this mean to immigration practitioners trying to advocate for those who need our help most?

In removal proceedings, the issue of prosecutorial discretion is addressed where a court procedurally halts the prosecution of

a case for the court's convenience. See, *Matter of Avetisyan,* 25 I&N Dec. 688 (BIA, 2012) ("Avetisyan").

Administrative closure means just that. The case is removed from the immigration court's docket. It is not just a tool for administrative law courts, but is utilized in the federal court system. *St. Marks Place Housing Co. v. Department of Housing and Urban Development*, 610 F.3d 75 (D.C. Cir. 2010). In immigration tribunals, however, the BIA had consistently held that it did not have authority to administratively close a case where either party objected. *Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996). *Avetisyan* changed that perspective.

Bavakan Avetisyan entered the United States as a J-1 immigrant exchange student from Armenia. Her studies ended in 2003. She was placed in removal proceedings in 2004 for failing to maintain her non-immigrant status. She admitted being removable at a hearing in 2004. Two years later, she advised the immigration judge that she had married a lawful permanent resident who had applied for United States citizenship and they had a United States citizen child. She informed the court her husband was filing a visa petition for her so she could gain lawful permanent resident status. In 2007, she informed the court that her husband had become a United States citizen and both had been interviewed in connection with the visa petition. Between that date and June 2009, no less than five continuances were permitted by an immigration judge because the visa petition had not been finalized. On that date, Ms. Avetisyan asked the immigration court to administratively close the case. The DHS attorney objected. The court administratively closed the case. DHS appealed on an interlocutory basis.

The BIA affirmed the immigration court and dismissed DHS's appeal. In so doing, it noted that immigration judges, as well as the BIA, must exercise independent judgment and discretion in adjudicating cases. It held that no party to a proceeding may exercise "absolute veto power" over the authority of an Immigration Judge. Usually, this was the government through its DHS prosecutors. It then went on to fashion a rule for administrative closure which was much akin to the factors it utilized as to the protocol for granting a continuance in removal cases. *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). These are: (1) the reason administrative closure is sought; (2) the basis for an opposition to closure; (3) the likelihood the respondent will succeed in any petition, application or other action she/he is pursuing outside removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings.

Finally, the BIA observed that such a regime would not in any way interfere with the exercise of prosecutorial discretion by DHS. This is because such an order is not final, and at any time, DHS can move to recalendar the case before the immigration Judge or an appeal before the Board of Immigration Appeals. (*Avetisyan* at p. 695). Frankly, that may not be accurate, although legally complacent. This is so, since no longer will administrative closure occur at the behest of an immigration prosecutor.

What this adjudicatory rule does opine is that immigration courts have a voice in what the exercise of discretion really denotes. Let us not forget that Ms. Avetisyan's appeal was interlocutory (which is rarely granted by the BIA) and she appeared *pro se*. That speaks with a voluminous timbre, which, in short, makes real for our clients not just a method for what prosecutorial discretion should be, but more importantly, what the exercise of judicial discretion will be for the cadre of a truly independent immigration court judiciary. This is a welcome polemic which, frankly, is long overdue. ■

Patrick Kinnally concentrates in general and commercial litigation, immigration and citizenship and administrative, environmental and local government law. Pat, currently a member of the International and Immigration Law Section Council, can be reached at Kinnally, Flaherty, Krentz & Loran, PC by phone at (630) 907-0909 or by email to pkinnally@kfkllaw.com.

Meet the Section Council

The members of the International and Immigration Law Section Council bring to the ISBA and the Council a wide range of experiences and interests. Below is an introduction to Section Council member Glen L. Bower.

Glen L. Bower

Glen Bower is a retired U. S. Immigration Judge who continues his active interest in immigration law.

Bower has long been active in the Illinois State Bar Association, having previously served on four Section Councils, including: Employee Benefits (1991-1999); and State & Local Taxation (1984-1991), serving as Chair, Vice Chair and Secretary. Over the years he has participated in numerous ISBA sponsored meetings as a panel member and speaker. He served on the ISBA/CBA Joint Committee on the Unauthorized Practice of Law in the Tax Area (1989-1990). In 1999 Bower received the ISBA Board of Governor's Award for "truly exemplary service to the legal profession". He is a Life Fellow of the Illinois Bar Foundation.

Bower began the practice of law in Effingham, Illinois in 1974. He served as the elected State's Attorney of Effingham County (1976-1979) and as an elected Member of the Illinois House of Representatives (1979-1983).

Bower served as Chairman of the U. S. Railroad Retirement Board (1990-1997) by appointment and re-appointment of the President of the United States, with confirmation by the U. S. Senate.

Bower served as Director (1999-2003) and Assistant Director (1983-1990) of the Illinois Department of Revenue, by appointment of two Illinois Governors, with confirmation by the Illinois State Senate.

Bower served on "The Committee of Fifty," a legislatively created committee charged with the responsibility of reviewing the need for an Illinois Constitutional Convention (1986-1988); the U.S. Economic Advisory Board (1982-1985), by appointment of the U.S. Secretary of Commerce; and the National Advisory Committee for Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice (1976-1980), by appointment of the President of the United States.

Bower was commissioned as an Officer in

the U.S. Air Force in 1971. He retired from the Air Force Reserve in July 1999, with the rank of Lieutenant Colonel. His last assignment was with the General Law Division, Office of The Judge Advocate General, at the Pentagon, where he was recognized for "wise counsel, exemplary officership and sterling service."

Bower has been the recipient of numerous awards from various local, state and national organizations for his leadership and contributions to civic affairs, including: Outstanding Freshman Legislator Award from the Illinois Education Association; twice received the Legislator of the Year Award from the Illinois Association of Rehabilitation Facilities; the Leadership Award for National Security from the Coalition for Peace Through Strength and Presidential Citation from the Navy League of the United States. In 2003 he received the Department of the Army's Outstanding Civilian Service Medal. He served as Chair of the Illinois Organ and Tissue Donor Advisory Board from 1993-1998.

In 1993, Bower was awarded the Professional Achievement Award by IIT/Chicago-Kent College of Law. In 1994, he received the Outstanding Alumni Award from Southern Illinois University at Carbondale. In 2000, he was honored as a Distinguished Alumnus of the College of Liberal Arts at Southern Illinois University. He served on the Board of Directors of the Southern Illinois University Foundation from 1993 to 2002.

Bower graduated from Southern Illinois University at Carbondale (B.A. in Government, 1971, President's Scholar) and the Illinois Institute of Technology/Chicago-Kent College of Law (J.D. with honors, 1974). ■

Recent cases

The following case summaries appeared in recent issues of the ISBA E-Clips:

***R.R.D. v. Holder,* No. 13-2141 (March 19, 2014) Petition for Review, Order of Bd. Of Immigration Appeals Petition granted**

Record failed to support IJ's denial of asylum request by alien (native of Mexico), where alien asserted that he suffered from persecution by various drug organizations due to fact that alien had arrested hundreds of suspected drug traffickers in his capacity as police official. IJ and Bd. erroneously concluded that "effective honest police officer" was not protected social group, and remand was required to allow Bd. to consider whether Mexican govt. was willing and able to protect alien from threats made to him by drug organizations.

***Patel v. Holder*, No. 13-2442 (April 1, 2014) Petition for Review, Order of Bd. of Immigration Appeals Petition denied**

Bd. did not abuse its discretion in denying aliens' motion to reopen removal proceedings, where said motion was filed approximately nine years after Bd. had originally denied their asylum applications and ordered them to leave U.S. within 30 days. Motions to reopen must be filed within 90 days of Bd.'s disposition, and aliens did not assert that they fell within any exception to 90-day deadline and did not establish any extraordinary situation that would warrant reopening proceeding sua sponte. Moreover, reopening of instant proceeding would be pointless, where: (1) aliens' motive for reopening was to seek govt. consent to have removal proceedings administratively closed; and (2) govt. indicated that it would not agree to requested administrative closure.

***Ruiz-Cabrera v. Holder*, No. 13-2939 (April 8, 2014) Petition for Review, Order of Bd. of Immigration Appeals Petition denied**

Bd. did not err in denying alien's application for withholding of removal based on his protected social group of "persons who face persecution by corrupt governmental and law enforcement authorities instigated by a politically connected spouse." Alien's proposed social group was not valid within meaning of statutes authorizing asylum and withholding of removal, since proposed social group needed to be linked by something more than individuals being persecuted. Moreover, record showed that alien's wife hurt alien only out of personal animosity. Also, record did not support alien's claim that he would be persecuted if forced to return to Mexico for imputed political opinion in opposition to or in support of his wife's political party.

***Singh v. Holder*, No. 13-2552 (April 16, 2014) Petition for Review, Order of Bd. of Immigration Appeals Petition denied**

Bd. did not err in finding that alien (native of India) was removable, where record showed that alien had entered into U.S. illegally at some point between 1994 and 1997. While alien alleged that he was denied due process because, as 15-year-old at time he received Notice to Appear, said Notice was inadequate because it was not written in his native language, applicable INS regulations did not require service of Notice in alien's native language for any minor over age 14. Moreover, alien could not establish that he was 15 at time he allegedly received Notice, where alien had other documents (and other identities) indicating that he was actually 19 years old at time he received Notice. Also, Bd. could properly reject alien's claim that he established his lawful inspection and admission into U.S., where alien could not specifically remember passing through customs after having entered into U.S. via commercial airline. ■

Upcoming CLE programs

To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.

July

Tuesday, 7/1/14- Webinar—Introduction to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3:00.

Tuesday, 7/1/14- Teleseminar—Picking the Right Trust: Alphabet Soup of Alternatives. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 7/8/14- Teleseminar—Asset Based Finance- Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 7/9/14- Teleseminar—Asset Based Finance- Part 2. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 7/9/14- Webinar—Advanced Tips to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3:00.

Thursday, 7/10/14- Webinar—Boolean (Keyword) Searches on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3:00.

Tuesday, 7/15/14- Teleseminar—Employment Taxes Across Entities. Presented by the Illinois State Bar Association. 12-1.

Thursday, 7/17/14- Teleseminar—Estate Planning for Real Estate- Part 1. Presented by the Illinois State Bar Association. 12-1.

Friday, 7/18/14- Teleseminar—Estate Planning for Real Estate- Part 2. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 7/22/14- Teleseminar—Opinion Letters in Transactions Involving LLCs and S Corps. Presented by the Illinois State Bar Association. 12-1.

Friday, 7/25/14- Teleseminar—Ethics and Lateral Transfers of Lawyers Among Law Firms. Presented by the Illinois State Bar Association. 12-1.

Monday, 7/28/14- Teleseminar—Small Commercial Leases: Negotiating and Drafting Issues. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 7/29/14- Teleseminar—Structuring For-Profit/Non-Profit Joint Ventures. Presented by the Illinois State Bar Association. 12-1.

August

Friday, 8/1/14- Teleseminar—Choice of Entity Considerations for Nonprofits. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 8/5/14- Teleseminar—Selling to Consumers: Sales, Finance, Warranty & Collection Law- Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 8/6/14- Teleseminar—Selling to Consumers: Sales, Finance, Warranty & Collection Law- Part 2. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 8/6/14- Webinar—Introduction to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 11:00.

Thursday, 8/7/14- Webinar—Advanced Tips to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 11:00.

Monday, 8/11/14- Webinar—Boolean (Keyword) Searches on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 11:00.

Monday, 8/11/14- Teleseminar—Ethics of Beginning and Ending an Attorney-Client Relationship. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 8/12/14- Teleseminar—Defending Business Audits- Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 8/13/14- Teleseminar—Defending Business Audits-Part 1. Presented by the Illinois State Bar Association. 12-1.

Thursday, 8/14/14- Teleseminar—Alternatives to Trusts. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 8/19/14- Teleseminar—Planning in Charitable Giving- Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 8/20/14- Teleseminar—Planning in Charitable Giving- Part 2. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 8/20-Thursday, 8/21/14- Oakbrook, Oak Brook Hills Resort. Adult Protection and Advocacy Conference. Presented by the Illinois Department of Aging; Co-sponsored by the ISBA Elder Law Section. 10:45-4:30; 8:30-10.

Tuesday, 8/26/14- Teleseminar—Early Stage Capital for Growing Businesses: Venture Capital and Angel Investing- Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 8/27/14- Teleseminar—Early Stage Capital for Growing Businesses: Venture Capital and Angel Investing- Part 2. Presented by the Illinois State Bar Association. 12-1.

Thursday, 8/28/14- Teleseminar—Planning with Special Needs Trusts. Presented by the Illinois State Bar Association. 12-1.

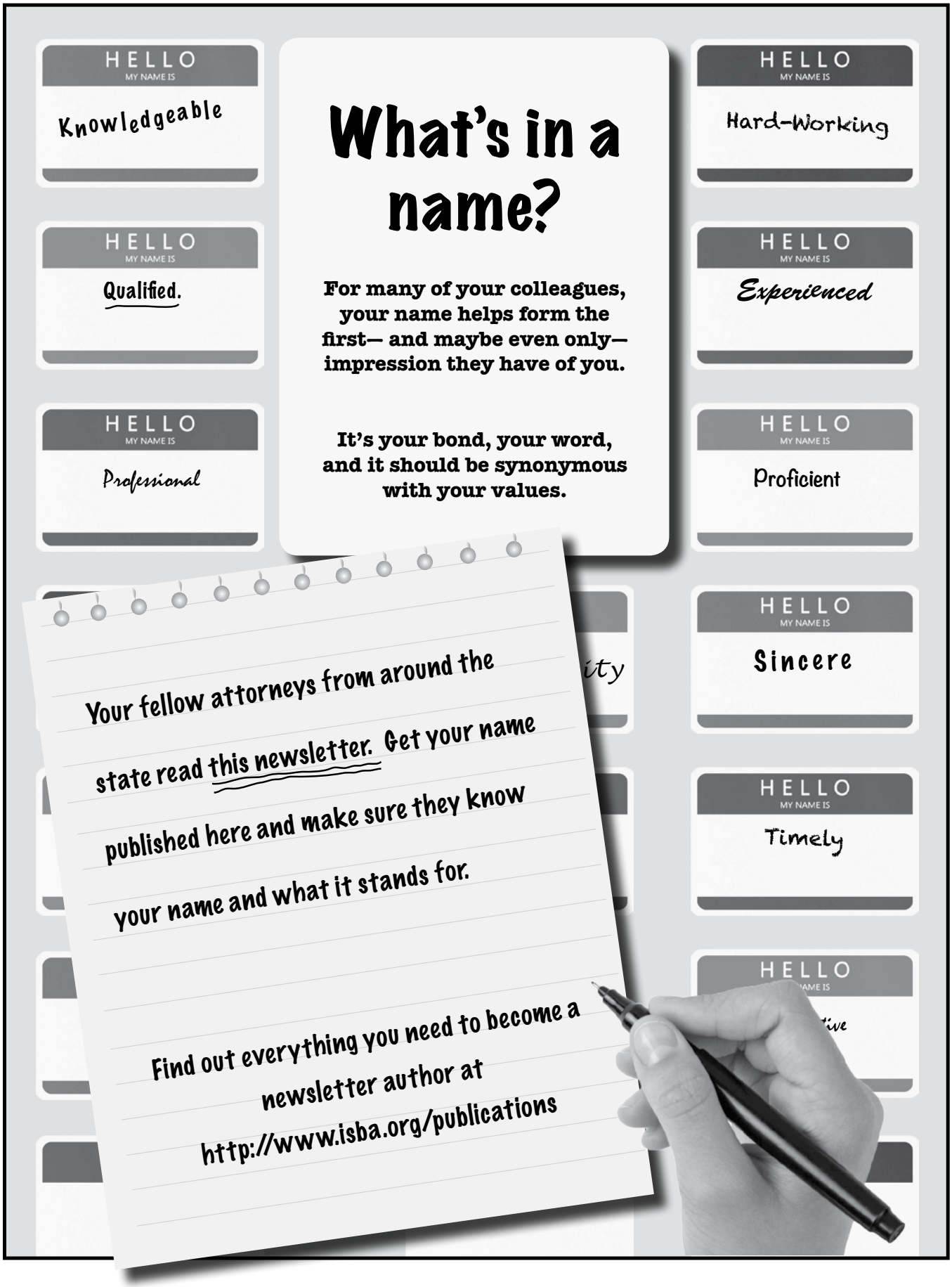
September

Thursday, 9/4/14- Teleseminar—Employment Agreements- Part 1. Presented by the Illinois State Bar Association. 12-1

Friday, 9/5/14- Teleseminar—Employment Agreements- Part 2. Presented by the Illinois State Bar Association. 12-1.

Monday, 9/8/14- Webinar—Introduction to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:00.

Tuesday, 9/9/14- Teleseminar—UCC Toolkit: Promissory Notes. Presented by the Illinois State Bar Association. 12-1. ■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