LICENSE TO KILL: ASYLUM LAW AND THE PRINCIPLE OF LEGITIMATE GOVERNMENTAL AUTHORITY TO "INVESTIGATE ITS ENEMIES"

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I. INTRODUCTION

In 1980, the United States Congress enacted the Refugee Act.1 One of the major innovations of the Act was the provision directing the Attorney General to promulgate regulations and prescribe procedures for aliens seeking asylum in the United States.2 The Act specifically requires that, in order to establish eligibility for asylum, an applicant must demonstrate that he or she is a refugee—that is

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to say that he or she has a well-founded fear of persecution because of race, religion, nationality, membership in a particular social group or political opinion. Among many other important changes, the Act had the virtue of creating new statutory standards for asylum. However, it left unresolved a host of considerations that necessarily go into such determinations.

This Article focuses on one such consideration: the definition of persecution and the notion that if a government defends itself against sedition and revolution, its actions are non-persecutorial in nature. Not surprisingly, the Board of Immigration Appeals (BIA) has filled this vacuum by supplying its own understanding of the context in which alleged persecution occurs. The BIA contends that a legitimate government has a basic right to investigate indi-


4. One of these changes was the removal of ideology and geopolitical considerations from agency adjudications. See, e.g., President Jimmy Carter's Signing Statement, 19 WEEKLY COMP. PRES. DOC. 503 (Mar. 18, 1980) (Refugee Act "establishes a new admissions policy that will permit fair and equitable treatment of refugees in the United States, regardless of their country of origin."); see also INS v. Cardoza-Fonseca, 480 U.S. 421, 435 (1987) (Congress passed Refugee Act to eliminate "various unacceptable geographical and political distinctions" in asylum determinations).

5. The United States Supreme Court has definitively addressed one aspect of interpretation of the asylum provisions under the Refugee Act. In its decision in INS v. Cardoza-Fonseca, the Court held that the standard of proof for asylum determinations was "well-founded fear" of persecution. 480 U.S. at 449. The Court's most recent decision in INS v. Elias-Zacarias, 112 S. Ct. 812 (1992), was decided on narrow and legal fact-specific grounds. See Deborah Anker et al., The Supreme Court's Decision in INS v. Elias-Facanas: Is There Any "There" There?, 69 INT’L REL. 285-93 (Mar. 9, 1992). The Court interpreted the term "persecution on account of political opinion" to mean "persecution on account of the victim's political opinion" in the factual context of a case where the applicant who refused forcible recruitment by the Guatemalan guerrillas (no emphasis in original). See Elias-Facanas, 112 S. Ct. at 816.

6. The BIA is a creature of regulation, not statute. 8 C.F.R. § 3.1(a) (1990). It has jurisdiction to review deportation and exclusion orders of the immigration judges, including asylum and withholding of deportation decisions. 8 C.F.R. § 3.1(b) (1990). Select BIA decisions are designated by it as "precedents" for all proceedings involving the same issues and constitute binding authority for the administrative agency and the immigration courts throughout the United States, unless there is a contrary ruling by a higher federal court. 8 C.F.R. § 3.1(g) (1990). The BIA has been criticized for formally publishing only a small fraction of its decisions and for giving no indication as to the basis for determining the selection of cases for publication. See Abraham D. Sofaer, Judicial Control of Informal Discretionary Adjudication and Enforcement, 72 COLUM. L. REV. 1293, 1316-17 (1972); Deborah E. Anker, Determining Asylum Claims in the United States, Summary Report of an Empirical Study of the Adjudication of Asylum Claims Before the Immigration Court, 2 INT’L J. REFUGEE L. 252 (1990).
viduals and organizations that threaten it.\textsuperscript{7}

This Article argues that, by endorsing a government's right to investigate, the Board has created two problems for itself that have led to manifest injustices in its deliberations in specific cases. First, as the cases will demonstrate, the Board's broad interpretation of the right to investigate has legitimatized actions that are clearly persecutorial in nature. As a result, bona fide refugees have been denied asylum. Second, although the Board has recognized that the right to investigate may lead to persecution, the Board's exceptions to that right are inadequately theorized and inconsistently applied. Thus, the good news is that the Board has retreated, in some cases, from a blanket right to investigate; the bad news is that this retreat masks deeper conceptual problems in the Board's thinking. In practice, this still denies legitimate refugees their right to freedom from persecution.

This Article catalogues BIA decisions\textsuperscript{8} applying the governmental right to investigate asylum applicants from many countries. These cases demonstrate that the BIA permits the exercise of this authority, often in an arbitrary and brutal fashion, by governments against persons engaged in antigovernment activity. Within its ambit, the Board's position encompasses government action against persons suspected of antigovernment sympathies only because of family members' or friends' participation in the opposition;\textsuperscript{9} per-

\textsuperscript{7} This principle was first clearly articulated in the BIA's decision, \textit{In re Maldonado-Cruz}, Int. Dec. No. 3041 (1988).

\textsuperscript{8} See supra note 6. The BIA publishes very few of its decisions; thus, any inquiry is seriously handicapped by the "hidden" nature of BIA jurisprudence. Nonetheless, this Article draws on a broader group of BIA decisions from the period 1988-90, in addition to the published decisions. In all, over 200 cases were reviewed and summarized for this Article. The author obtained cases from the following sources: some 1990 cases were obtained at the BIA library; BIA Board Member Heilman furnished research assistance with all cases in which he had written an opinion; Chief Staff Attorney Holmes directed the author to some other cases in which there was more than one Board opinion; BIA Index opinions—those the Board finds helpful but that are not precedent—were published and obtained by the American Immigration Lawyers Association (AILA); some decisions were furnished by colleagues; some were found in the Appendix of Deborah Anker's book, \textit{supra} note 2. The author is extremely grateful to all those who supplied this critical information. While these cases do not represent a comprehensive survey of all relevant BIA decisions, they give the reader a fair sense of the BIA's thinking relevant to the subject at issue in this Article. All unpublished decisions are available through the author.

\textsuperscript{9} It must be emphasized that the fear of persecution is not of the "mere questioning" of friends or relatives of a suspected opponent of the government, which, under some circumstances, might be an acceptable police tactic, but of an investigation conducted by the government and its police against whom allegations of human rights abuses have been made.
sons who are under suspicion based on participation in humanitarian or church activity; or persons who are viewed as anti-government opponents because of participation in opposition political parties. This survey reveals that the BIA applies this principle even where the applicant has suffered severe mistreatment by the government or paramilitary groups associated with the government in the past or where the applicant alleges that he or she will suffer abusive treatment in the future.10 This examination reveals that this governmental right at best leads the BIA to incoherent results. At worst, this right leads to the dangerous result of clearly bona fide refugees being denied protection in the United States. This is of particular concern in an era during which courts are increasingly deferential to the Board's decisions.11

This Article next discusses the ways in which the Board itself has displayed discomfort with the consequences of the "right to investigate." Thus, the BIA has self-consciously not applied the right where: the political activities of the applicant are non-violent; there are no avenues for peaceful political change in the applicant's country of origin; the investigation is a pretext for persecution; the government has a poor human rights record; or there has been a change in government. The Board, however, appears to apply these limitations arbitrarily.

This Article also discusses several federal court decisions overruling the Board's application of the government's right to investigate.12 Finally, this Article considers the Board's decision in *In re Izatula,*13 where the Board thoroughly analyzed the limits of the right to investigate. This decision synthesizes the considerations that the Board should apply to assess whether an asylum claim is based on a fear of persecution or the government was conducting a legitimate investigation. However, this decision has not been applied in any other context. Until the framework alluded to in

10. *See infra* notes 21-43 and accompanying text.
12. For example, in *Blanco-Lopez v. INS,* the Ninth Circuit overruled the Board's application of the government's right to investigate. 858 F.2d 531 (9th Cir. 1988). This has lead the Board to reconsider the applicability of the government's right to investigate in a number of cases governed by *Blanco-Lopez.* Most recently, in its first post-Zacarias decision, the Board reaffirmed the government's right to investigate and narrowed and distinguished *Blanco-Lopez.* *In re R—O—,* Int. Dec. No. 3170, slip op. at 4-5 (BIA 1992).
Izatula is more broadly and consistently applied, the Board will continue on a path of result-oriented and arbitrary decision-making.

II. THE BROAD PRINCIPLE: THE RIGHT OF A RECOGNIZED GOVERNMENT TO DEFEND ITSELF

A. In re Maldonado-Cruz

In 1988, the Board of Immigration Appeals rendered a decision with a startling and disturbing rationale. In In re Maldonado-Cruz, the Board ruled that a government could legitimately investigate its enemies, and such acts would not constitute persecution. In that case, the Board addressed the asylum claim of a Salvadoran who had been forcibly recruited into military service by Salvadoran guerrillas. Maldonado-Cruz escaped from, but was thereafter sought by, the guerrillas and feared that they would kill him. He also claimed that the Salvadoran government would persecute him for having been allied with the guerrillas.

In rejecting his claim, the Board constructed its decision on two co-equal and, in their view, co-existing principles. First, individuals may take up arms against their governments. In doing so, they may raise an army to accomplish their goal and enforce discipline against those who desert their ranks. The Board considered these actions neither persecutorial in nature nor based on political opinion. The Board engaged in no analysis of the context, political justification, motivation or rationale for these actions.

Second, and critical to this discussion, the Board ruled that a government has the right to suppress a rebellion. All actions taken in pursuit of that goal are deemed legitimate. In essence, the Board determined that the government has the right to seek out and pun-

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15. Id. at 7.
16. Maldonado-Cruz's friend was also dragooned into service with him and was subsequently killed. Maldonado-Cruz feared the same fate awaited him. Id. at 4.
17. Id. at 13.
18. Id. at 8-13. Another consequence of the Board's view is that no person subject to forcible recruitment by guerrillas, forcible collaboration with guerrillas or potential targeting by guerrillas for past collaboration with the government would be the subject of persecution. See also In re Fuentes, Int. Dec. No. 3065 (BIA 1988) (former member of Salvadoran National Police not eligible for asylum because police are public servants embodying state authority; thus, any danger he faced from guerrillas was not because of his own personal characteristics or political beliefs). The Supreme Court concurred in the view that forcible recruitment is not per se persecution. Elias-Facanas, 112 S. Ct. at 816.
ish those who collaborate with its enemies in any manner, without evaluating the nature of the regime.¹⁹

There are operating in [El Salvador] armed guerrilla organizations whose avowed purpose is the overthrow of the Government of El Salvador, a government recognized by the Government of the United States. As this is so, and there is no evidence in the record or elsewhere to establish the Government of El Salvador is anything other than a duly constituted and functioning government of that country, it has the internationally recognized right to protect itself against the guerrillas who seek to overthrow it. The government of El Salvador, therefore, has a legitimate right to investigate and detain such individuals suspected of aiding or being a member of such an organization.²⁰

B. Subsequent Decisions

The Board of Immigration Appeals stressed that “a duly constituted and functioning government,” recognized as the country’s legitimate government, is at liberty to exercise its “internationally recognized right” to defend itself against antigovernment acts.²¹


²⁰. Id. (emphasis added). While the Board could have sought support for its position from the pronouncements of the Reagan Administration’s Ambassador to the United Nations, Jeane Kirkpatrick, see Tom J. Farer, Elections, Democracy, and Human Rights: Toward Union, 11 HUMAN RTS. Q. 504, 505 n.7 (1989) (quoting Ms. Kirkpatrick as criticizing human rights bodies for indicting governments whose crime, she alleges, “consisted of self-defense against subversion”), the Board cites only the UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979) [hereinafter UN HANDBOOK] for this basic, governing principle. The UN Handbook states that:

175. Applications for refugee status are frequently made by persons who have used force or committed acts of violence. Such conduct is frequently associated with, or claimed to be associated with, political activities or opinions. They may be the result of individual initiatives, or may have been committed within the framework of organized groups. The latter may either be clandestine groupings or political cum military organizations that are officially recognized or whose activities are widely acknowledged. Account should also be taken of the fact that the use of force is an aspect of the maintenance of law and order and may—by definition—be lawfully resorted to by the police and armed forces in the exercise of their functions. Maldonado-Cruz, Int. Dec. 3-41, at 41 (citing UN HANDBOOK ¶ 175).

However, this paragraph undercuts the Board’s analysis because it recognizes the potential legitimacy of the claims of persons in military or clandestine groupings. In fact, it notes in a footnote that a “number of liberation movements, which often include an armed wing, have been officially recognized by the General Assembly of the United Nations.” Id. at 41.

²¹. It appears that the only criterion the Board uses to determine if a government is a
The civil conflict in El Salvador has given rise to numerous decisions of the Board that apply this principle. The Board has almost universally held that the Salvadoran government has an internationally recognized right to protect itself against those who seek to overthrow it. The Board has rarely credited an applicant's claimed fear of persecution. Nor has it engaged in any serious investigation of widespread human rights abuses that might assist in evaluating an individual claim.\textsuperscript{22}

Some Board decisions illustrate how this principle unfolds in practice. When an applicant alleged that family members who collaborated with guerrillas were killed, and feared their political beliefs would be imputed to her, the Board nonetheless ruled that the government has the right to take action against the guerrillas and thereby against her.\textsuperscript{23}

In another case, the applicant was coerced into collaborating with guerrillas, some of whom were his boyhood friends.\textsuperscript{24} When the National Guard came to his store to search for weapons the guerrillas had stored there, the applicant was detained and repeatedly beaten. Soon after, his brother was also detained. In addition, friends of his were approached by men looking for him who the applicant believes were the Salvadoran death squad.\textsuperscript{25} The Board ruled that "the government has a legitimate interest in seeking out those it believes are involved in violent antigovernment activities."\textsuperscript{26} The Board ruled that "[h]iding arms for the guerrillas is a hostile act" that justified the government's actions against the

\textsuperscript{22} The widespread abuses of human rights in El Salvador throughout the 1980s were well documented. An excellent summary is AMERICAS WATCH, EL SALVADOR'S DECADE OF TERROR: HUMAN RIGHTS SINCE THE ASSASSINATION OF ARCHBISHOP ROMERO (1991).

\textsuperscript{23} \textit{In re} Seron-Mancia, A24 277 752 (BIA July 6, 1989). The Board's finding led to its ruling that the government sought her relatives only to control their violent acts and not for their political opinions; thus, the applicant could have no fear of political persecution because of her relationship to them. Similarly, in \textit{In re Ramirez-Rivas}, the applicant had many relatives who were affiliated with the guerrillas. Several had either been assassinated or killed in the course of combat, including her brother. Her father was shot and wounded by the army, allegedly for giving food to the guerrillas on occasion. The BIA held that the government had the legitimate right to take action against other members of the family. \textit{In re Ramirez-Rivas}, A24 868 155 (BIA Sept. 20, 1988), rev'd. Ramirez-Rivas v. INS, 889 F.2d 869 (9th Cir. 1990).

\textsuperscript{24} \textit{In re} Lucio Ceron, A24 343 632, slip op. at 3 (BIA July 20, 1989).

\textsuperscript{25} \textit{Id.} at 3.

\textsuperscript{26} \textit{Id.} at 5.
In another case, the applicant was a member of the Salvadoran military who deserted after being told by superior officers that he must participate in death squad missions. He feared persecution from the Salvadoran government because of his desertion. He believed the government would impute to him views supportive of the political opposition. The BIA ruled that the government has the right to investigate those it suspects of sympathizing with the opposition because such investigation would focus on criminal activity, not political opinions.

In In re Ayala-Martinez, the applicant was beaten and cut with a machete when government soldiers accused him of having a brother who was a guerrilla. National Guardsmen also murdered his brother-in-law when informants denounced him as a guerrilla. His father was also murdered by National Guardsmen. The day after his father's burial, he fled the area. He worked for the Salvadoran Green Cross, which provides first aid to all combatants in the Salvadoran civil war. After a mission to a hospital, death squad members interrogated and beat him. The BIA ruled that the government has the right to question a family member who may have knowledge regarding the whereabouts of a suspected guerrilla. The

27. Id. Similarly, in In re Renderos-Valladares, A26 754 413 (BIA July 20, 1988), the BIA ruled that actions by government forces against particular villages of peasants suspected of assisting the guerrillas would not be “to punish the peasants for one of the five grounds specified in the Act [but to] achieve a military objective of weakening the guerrillas.” Id. at 6.


29. The Ninth Circuit's reversal of the Board's decision focuses on Barraza-Rivera's refusal to carry out military orders "to murder others or be murdered himself." Barraza-Rivera v. INS, 913 F.2d 1443, 1453 (9th Cir. 1990). The court ruled that he was persecuted specifically for his refusal to participate in the assassinations, and any punishment he would suffer would be based on his objections to that participation; thus, under both Board and Ninth Circuit rulings, he would be eligible for asylum. Id. at 1454.

The BIA, in general, has recognized a government's right to require military service and to enforce that requirement with reasonable penalties. In re A—G—, Int. Dec. 3040 (BIA 1987), aff'd sub nom. M.A. v. INS, 899 F.2d 304 (4th Cir. 1990) (en banc). In that case, the BIA relied on the UN HANDBOOK, supra note 20, at ¶¶ 169, 171, to carve out two exceptions to this requirement: where disproportionately severe punishment would result because of one of five enumerated grounds, or where an alien, as a result of military service, would be required to engage in inhumane conduct condemned by the international community as contrary to the basic rules of human conduct. In re A—G—, Int. Dec. 3040 at 6.


31. Id. at 2-3.
Board emphasized the government's legitimate right to investigate and question relatives of suspected guerrillas and did not discuss the fact that two of the applicant's relatives were assassinated by the security forces.\footnote{32} 

In another case, the applicant was active in a church catechismal group that helped support the armed opposition by raising money and food, distributing literature and suggesting possible members for recruitment. The BIA ruled that the group was "an active integral support unit of the guerrillas," and thus any action against members of the group would not be persecution but punishment for attempting to overthrow the government by force.\footnote{33}

The Board has also applied this rationale to applicants from countries other than El Salvador. For example, an applicant from Guatemala alleged that government security forces tortured and beat him in 1981. In 1983, he was pressured to join a left-wing armed opposition group, ORPA.\footnote{34} He joined on the condition that he not be required to carry weapons. He did, however, distribute leaflets and posters. He was questioned by an undercover agent who sought him. He told ORPA he wanted to quit, but they said he had too much information about their organization. The night he fled Guatemala, persons came to his home, knocked loudly on his door and then started to break it down. He fled out the back door and left the country. He was not certain whether the intruders were members of ORPA or the government. According to his sister's later report, people continued to seek him after he left the country. The Board concluded that the Guatemalan government

\footnote{32} Id. at 4-5. In addition, the Board characterized the applicant's work with the Green Cross as "the equivalent of assisting a criminal enterprise" because the Green Cross has a policy not to turn over injured guerrillas to the government. Id. at 6. The Ninth Circuit's reversal systematically addresses each of the specific bases of the BIA's adverse decision. Ayala-Martinez v. INS, No. 89-70032 (9th Cir. Sept. 25, 1990). In a tone of clear dissatisfaction with the Board's evaluation of the facts, the Ninth Circuit stated that "under no stretch of the imagination is coercing statements at knife point an acceptable prosecutorial measure" (referring to applicant's encounter with soldiers who beat him and cut him with machete). Ayala-Martinez, slip op. at 8. The Court ruled that the Board's "conclusion is based on the [mistaken] premise that El Salvador is a country in which punishment is carried out in a rational manner and in full accordance with due process." Id. at 9. The court underscored the Salvadoran government's use of torture, arbitrary imprisonment and unequal treatment as part of their terror campaign. The court noted, in particular, the extrajudicial execution or torture of Green Cross members. Id. at 10.


\footnote{34} Revolutionary Organization of the People in Arms.
has the legitimate right to protect itself by seeking out the applicant and determining whether he was involved with opposition groups. Although ORPA members had been killed after being discovered by government informants, the Board stated that this applicant's contact with an undercover agent was merely to gain information.\textsuperscript{35}

In another case, an Indian applicant stated that he was active in the All India Sikh Students' Federation (AISSF), a group seeking an independent Sikh state.\textsuperscript{36} Police warned the group not to hold demonstrations. Nonetheless, the applicant organized demonstrations at which police often wounded and killed the demonstrators. The government enacted a law prohibiting the demonstrations and jailed AISFF members who demonstrated. The applicant was sought by the police. After he fled India, he was informed by his parents that the police had a warrant for his arrest. The Board concluded that possessing a contrary "political opinion" does not give him carte blanche authority to break the laws of India by demonstrating, finding that such laws were enacted as emergency measures to stem the tide of escalating violence. Thus, the Board concluded that any arrest of the applicant would be for illegal activities and not persecution.\textsuperscript{37}

Similarly, in \textit{In re Aritar Singh}, police twice arrested the appli-

\textsuperscript{35} \textit{In re Garmes-Mijango}, A24 344 189 (BIA May 30, 1989); \textit{see also In re Mendez-Salazar}, A27 000 157 (BIA Apr. 29, 1988). In that case, a Guatemalan applicant was a member of a radical student group and participated with others in painting slogans on walls, distributing political literature and promoting the group's views. He alleged that weapons were used by the group only in self defense. He began to receive threats directly from the authorities, who stopped at his house; thereafter, he quit school and moved several times until he fled to the United States. The BIA ruled that the government was exercising its "legitimate right to seek out the [applicant] to determine the extent of his involvement with that organization; the government's actions in this regard would not be presumed to be politically motivated." \textit{Id.}

\textsuperscript{36} \textit{In re Klair}, A28 528 018 slip op. at 4 (BIA Feb. 28, 1989).

\textsuperscript{37} \textit{Id.} at 5. Board Member Heilman's concurrence concludes that "a government faced with violence does not gain the right to act without limit against its citizens . . . . [I]t does not gain the right to stifle or punish [peacefully-expressed] political views because it finds them disagreeable under the rationale of public peace or [state] security," even if "police officers or government officials [believe] they are [acting in the public interest]." \textit{Id.} at 5 (Heilman, concurring). However, given the applicant's association with the AISSF, an organization that he concludes espouses violence, Heilman concludes that the police may have had information justifying his arrest. In contrast, in \textit{In re Manjit Singh}, A29 458 101 (BIA Feb. 8, 1989), the Board remanded a case to the immigration judge where the applicant had been a member of the same organization (AISSF) and had frequently been subject to attacks, detention, interrogation and torture by Indian police. The Board sought further information regarding the nature of AISSF to determine whether it is a "terrorist" organization.
cant for participating in demonstrations in the Punjab as a member of the Khalistan Party. The applicant denied police accusations of participating in violent activities. The State Department issued an advisory opinion finding that the Khalistan Party had been banned by the Government of India for its antinational activities. Based on this opinion, the Board held that the government "was using its lawful police powers in arresting the [applicant] and his fellow demonstrators in an effort to quell the escalation of violence in the region."38

In a very recent ruling, the BIA reaffirmed its tortured reasoning in another Indian asylum case.39 In In Re Jagraj Singh, the BIA considered the application of a Sikh from the Punjab region. He testified that Sikh militants visited his home to demand food and the use of his vehicle. One of those visits was reported to police who subsequently arrested him. During his three-day period of detention, he was interrogated about the militants, brutalized, shot and threatened with death.40 After his release, militants continued to harass him. He was arrested again and subjected to brutal treatment for two days.41 He went into hiding shortly thereafter and then fled. The BIA clearly acknowledged that "individuals are frequently beaten and abused during custodial interrogation or detention."42 Nonetheless, the BIA ruled that because of the applicant's contact with Sikh militants, the authorities had a right to investigate and seek information from him, even by illegitimate methods of interrogation.43

40. Id. slip op. at 2. The applicant was released only after the payment of a bribe.
41. Id. The militants had rejected his pleas to leave him alone and beat him for failing to give them support, but he testified that he was afraid to seek police protection. He had to pay a bribe to secure his second release as well.
42. Id. at 5.
43. Id. at 7. The BIA decision recently was reversed and remanded in Singh v. INS, C-92-1826 MHP (N.D.Cal. June 19, 1992). In determining Singh was eligible for asylum, the federal district court decision strongly differed with the BIA's assessment of the legitimacy of police conduct towards Singh. The court particularly emphasized that the BIA misconceived the law of the circuit, and that "[The Ninth Circuit] has repeatedly distinguished legitimate police efforts to arrest and prosecute individuals suspected of criminal conduct from punishment imposed without any judicial process." Slip op. at 9 (citing Blanco-Lopez). In this case, the court found that the petitioner was never charged with a crime but instead was threatened, shot, beaten and tortured, actions that "cannot constitute lawful government action." Slip op. at 10, 21 n.3.
In another case, the Board evaluated the claim of a Tamil from Sri Lanka who was active in the Tamil Eelam Liberation Organization (TELO) and was arrested and beaten after he admitted his membership. The Board again concluded that the government actions were the result of a “legitimate investigation into the terrorist and violent activities of that group.” The BIA emphasized the government’s right to “seek him out to determine the extent of his involvement in that organization.”

In *In re Gopalakrishnan*, the applicant operated a business in Jaffna, Sri Lanka. Militant Tamil groups extorted money from him with death threats. From 1984 to 1987, the army often searched his home and questioned him about weapons, membership in militant Tamil organizations and whether his employees belonged to such groups. In October 1987, the Indian Peacekeeping Force (IPKF) arrested him and 150 other businessmen. The group was taken to a camp, interrogated and severely beaten. Following that incident, the IPKF continually harassed them, occasionally inflicting beatings. The applicant was aware that a member of this business association had been arrested and never returned. The applicant left the area after receiving a warning and moved to Colombo. His wife reported that IPKF members were looking for him, and another business associate was killed. He left Sri Lanka after six Tamil businessmen in Colombo, where he had moved, were arrested and the IPKF came to his shop looking for him by name. The BIA focused on the applicant’s having lived in an area of substantial militant antigovernment activity and the government suspicions that he financially supported the Tamil militants, although involuntarily. The BIA concluded that “under these circumstances, the authorities had the legitimate right to investigate to determine the extent of respondent’s involvement with Tamil militants.”

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44. *In re Uthatakumar*, A28 426 315 slip op. at 4 (BIA Jan. 28, 1988) (index decision). In another case, *In re Ramathevan*, A29 060 826 (BIA Sept. 20, 1989), the Board emphasized the fact that the frequency of terrorist acts in that country necessitates the government’s concern with Tamil militants. See also *In re Selladurai*, A28 906 249 (BIA Sept. 1, 1988).

45. *In re Uthata kumar*, slip op. at 4.

46. *In re Gopalakrishnan*, A29 067 075 (BIA Mar. 14, 1990). This decision contrasts sharply with the Board’s decision in *In re Tu*, A29 060 924 (BIA Oct. 31, 1989). There, an Afghan had collaborated with the rebel Mujahidin by secretly posting flyers on mosques. His father had been arrested and disappeared when Mujahidin literature was found at his home. He also frequently visited his grandfather who lived in a village controlled by the Mujahidin. He was arrested and interrogated, beaten and tortured by the
On occasion, in evaluating asylum applications of Nicaraguans, the BIA even considered their involvement with antigovernment organizations as dispositive of their claims. For example, where the applicant was a member of the Nicaraguan Democratic Coordination, an organization seeking violently to overthrow the Sandinista government, the BIA ruled that the government may investigate and detain persons suspected of belonging to an organization seeking its overthrow.47

In another case,48 the applicant was a member of the National Democratic Movement and participated openly and actively in anti-Sandinista activity, including giving speeches, distributing leaflets and recruiting others into the movement. In assessing whether the applicant's detention and repeated interrogation in Nicaragua constituted persecution, the BIA ruled that the government's actions were a legitimate investigation into his connection with possibly violent or counterrevolutionary groups.49 In contradistinction to the other cases discussed here, the BIA denied asylum only because the Nicaraguan applicant was personally involved in violent activities or organizations.50

C. Summary

The Board has articulated a broad principle allowing recognized governments wide latitude to pursue the investigation of persons suspected of subversive or antigovernment activity. Generally, the Board will not consider these actions by the government to be persecution.

In rendering these decisions, the Board has disregarded specific allegations that the government's prior "investigative" techniques included harassment, severe beatings, torture, disappearances or assassinations despite the fact that these are not controlled and reasoned attempts by a government to determine whether the victim is involved in guerilla activities. The Board also ignored allegations that paramilitary groups associated with the

Secret Police. The Board's decision does not discuss the government's right to investigate or the nature of the Mujahidin, but merely concludes that the applicant's arrest and abuse arose from the perception of his persecutors that the applicant supported the Mujahidin.

Id.

49. Id. at 4.
50. Id. at 2, 4.
government, such as death squads, are the perpetrators of the feared acts of persecution. The Board fails to recognize that a government’s abusive actions toward the applicant or those familiar to the applicant prevents that person from seeking the government’s protection. Nonetheless, the Board continues broadly to apply the principle that subversion can be investigated by the government.

The BIA has also ruled that the government has a right to seek out the applicant when members of the applicant’s family have been politically active but the applicant has not. Even in circumstances of coerced antigovernment collaboration or participation in purely nonviolent political activity, the BIA has denied that the government’s actions would constitute persecution.

These cases, taken together, indicate the BIA’s willingness to accept overlybroad authority on the part of a government to commit acts of terror and mistreatment against its own population. It will not recognize those acts as persecutorial in nature. It is clear that bona fide refugees—persons with a well-founded fear of future persecution—are adversely affected by these rulings.

III. LIMITATIONS ON THE BROAD PRINCIPLE

While the Board broadly applies the right of governments to investigate subversive activities, it also has expressed a pointed discomfort with the right by carving out five important exceptions. In some circumstances, the Board has not applied the principle when: 1) the applicant engaged in nonpolitical activity; 2) there was no opportunity for peaceful political change in the country; 3) the investigation was a pretext to persecution; 4) the human rights record of the country was abysmal; or 5) there was a change in the government. Thus, the Board recognizes that there are limits on the actions a government can take against its citizens. A survey of the Board’s decisions reveals that, although these exceptions are meant to have an ameliorative effect, the Board applies them arbitrarily and inconsistently.

To some extent, federal courts have functioned as a check on the Board’s application of the right to investigate by overruling the Board or expressing disfavor with the Board’s analysis.

In In re Izatula, the Board attempted to develop a more clearly articulated conceptual framework to distinguish government investigation of subversion from state-sanctioned persecution.

However, that decision has not been applied in other cases. Nonetheless, it does presage some important lessons for eliminating the arbitrariness of the adjudicative enterprise.

A. Board-Developed Standards

1. Nonviolent Activities

In *In re Bhajan Singh*, 52 for example, the Board examined the application of an Indian who was active in the All India Sikh Students' Federation (AISSF). 53 The applicant was arrested five times between 1981 and 1988. He was tortured while in custody but was never charged with a crime. The applicant denied membership in any organization involved in violent activities, although there was evidence, including a State Department report, that terrorist groups existed among Sikhs in India. 54

After noting the documented widespread abuses by national, state and local security forces in India, including arbitrary arrest, prolonged detention and torture, 55 the Board ruled that:

A government faced with violations does not gain the right to act without limit against its citizens . . . . It does not gain the right to stifle and punish political views which are expressed peacefully, because it finds them disagreeable, under the rationale of preserving the public peace or security of the state, even if it is the sincere belief of the police officers or government officials that they are doing a public service when they act in this manner. 56

The Board emphasized that there was no evidence indicating that the applicant had ever personally engaged in violence or that the applicant's group was terrorist or was a banned organization. 57

The Board relied on a similar analysis in granting asylum to an applicant from Bangladesh who belonged to the Bangladesh National Party and opposed the martial law government. 58 He was arrested twice and detained for demonstrating in favor of a national election and for protesting when it was cancelled. He was beaten

53. *Id.* at 1.
54. *Id.* at 1-3.
55. *Id.* at 9.
56. *Id.* at 10. The Board added that: “Even given the violent nature of certain organizations in India that have targeted the police as well as the general population, such lawlessness by the police and security forces cannot be condoned.” *Id.* at 11.
57. *Id.*
and kicked while in jail and was forced to sign a statement that he would no longer engage in political activity. He continued his activities in secret. The police continued to seek him at his home and took his father into custody for questioning and to warn the father that his son should desist from political activities.\(^5\)

The Board found nothing in the record that indicated which applicant or members of his group engaged in unlawful activity or that either had sought violently to overthrow the government. Further, the Board held that the detentions and interrogations were not routine matters of investigation and law enforcement but instead were targeted acts of political persecution.\(^6\)

In adjudicating the application of a Chinese citizen who participated in the prodemocracy movement with his brother, a student and active leader who disappeared after being arrested, the Board ruled that Chinese officials did not seek to arrest the applicant for a violation of law but to repress his political opinion.\(^6\)

2. Nonavailability of Peaceful Change

In *In re Dwomoh*,\(^6\) the applicant participated in a coup attempt in Ghana for which he was arrested by the authorities. He was interrogated, beaten and imprisoned for more than a year. He escaped to the United States. The majority of the Board again relied on the principle that Ghana has the right to use its laws that

\(^{59}\) Id. at 3-21.

\(^{60}\) Id. at 4-5. See also *In re P-E*, A26 781 702 (BIA Apr. 22, 1988) (participation in free syndicate in Nicaragua is political struggle; threats based on those activities support finding of well-founded fear of persecution).

\(^{61}\) *In re ———*, A29 463 765 (BIA 1991) (index decision). The Board also relied on the human rights record of China, in particular its brutal crackdown in June, 1989, to support its ruling that the applicant's case should be remanded for a new hearing. See also *In re Castillo*, A29 955 687 (BIA Jan. 2, 1990) (in case of Nicaraguan applicant who was former member of Somoza's National Guard and then had fought Sandinistas, Board ruled that his detention by government was punishment for his political beliefs, not legitimate security measure).

\(^{62}\) *In re Dwomoh*, A26 805 822 (BIA Aug. 1, 1988) (index decision), *rev'd*, Dwomoh v. Sava, 696 F. Supp. 790 (S.D.N.Y. 1988). One of the more confounding aspects of this case is that in an earlier Ghanian case, *In re Shariff*, A26 805 884 (BIA Jan. 26, 1988), the Board granted asylum to an applicant who had participated in an attempted coup. There, Board Member Heilman's concurrence questioned why the applicant should receive asylum when he committed an act of sedition, universally recognized as a criminal act (Heilman, concurring). Seven months later, in *In re Dwomoh*, supra, at 3-5, the Board appeared to have completely reversed itself. See also *In re Trejo-Mendoza*, A26 373 648 (BIA Feb. 19, 1988) (Heilman, dissenting) (raising issue, in context of Salvadoran asylum case, that there may be exception to universal principle allowing governments to deem acts of rebellion as criminal acts where "there [is] no protected outlet for peaceful political change").
forbid treason and insurrection against those seeking to overthrow it.

However, Board Member Heilman raised an important distinction in his dissent:

It would appear to me that the right of a government to defend itself against armed opposition is contingent on that government's treatment of its citizens. If one pays no attention to the context in which the right of governmental self-defense is asserted, then it would appear one would never distinguish among types of governments. . . . [This approach] ignores the fact, at least in American political history, that the right of a government to defend itself has always been considered as part of a reciprocal agreement between the governed and the government in which the government for its part has agreed to respect the political freedoms of its citizens.63

The Board as a whole applied a similar analysis to the asylum claim of an applicant from Gambia who participated in a coup attempt in his home country.64 He fled the country after the failed coup attempt. Thereafter, both his parents were arrested and tortured in prison. His father died there, and his mother was released four years later only upon revealing her son's whereabouts in Senegal. He was arrested and returned to Gambia. He was later released on bail and fled the country.

The Board ruled that any prosecution for the applicant's participation in the coup would not constitute persecution because there were peaceful means to reform his country's government. The Board noted that Gambia is a parliamentary democracy with a functioning multiparty system.65 The Board emphasized that a state of emergency had been lifted in 1985 and that the government had observed legal procedures in its handling of all the cases of those involved in the attempted coup. While prison conditions were severe, there were no current allegations of torture. For these reasons, the Board held that the applicant should not be given pro-

63. Id. at 1 (Heilman, dissenting). In applying this analysis to the situation in Ghana, Heilman emphasized that: citizens cannot politically participate in Ghana; the government was run exclusively by Chairman Rawlings; and there were no elections or procedures by which citizens can peacefully effect political change. He concluded that a citizen of Ghana would have a right to overthrow his or her government. Id. at 2.
64. In re Bonner, A29 511 505 (BIA July 14, 1989).
65. The State Department Country Report, relied on by the Board, noted that the current ruling faction had been in power since independence. It also noted that, despite some allegations of fraud in the 1987 national elections, most observers felt they were free and fair. Id. at 6-7.
tection from return to the country that sought to punish him for his participation in the coup attempt.\textsuperscript{66}

3. \textit{Pretext}

The application of an asylum seeker from Nicaragua provided one of the few occasions in which the Board squarely held that pretextual political charges are not a "legitimate basis for governmental action."\textsuperscript{67} The applicant was forced to join the Sandinista Youth Movement while in public school and to participate in a mob action against the Catholic church, including a physical attack on his younger brothers. He was beaten and expelled when he refused to participate. After receiving threatening phone calls, he fled the country with a passport. Within days of his departure, he was charged with "actions against the revolution."\textsuperscript{68} The Board ruled that because these charges were a result of his student activism, his political quarrels with the Sandinista regime and his refusal to join the mob action, it is reasonable to assume they were politically motivated.\textsuperscript{69}

4. \textit{Human Rights Record}

It is an established principle that conditions in the country of origin, its laws and the experience of others are relevant factors to consider in adjudicating asylum cases.\textsuperscript{70} The Board has treated

\textsuperscript{66} \textit{Id.} at 6-8. \textit{See also In re} ------, A26 907 251 (BIA Jan. 8, 1991) (index decision) (two Ugandans sought asylum based on their relationship to their brother who participated in coup attempt; BIA denied claim, relying in part on Bureau of Human Rights and Humanitarian Affairs (BHRHA) opinion, finding that while present government is prosecuting members of former government for crimes committed, all prosecutions comport with due process).

\textsuperscript{67} \textit{In re} Centeno-Sequeira, A26 448 706 slip op. at 6 (BIA Feb. 13, 1989) (citing Hernandez-Ortiz v. INS, 777 F.2d 509, 516-17 (9th Cir. 1985)).

\textsuperscript{68} \textit{Id.} at 1-2.

\textsuperscript{69} \textit{Id.} at 5-6.

\textsuperscript{70} As the Board said in its seminal ruling, \textit{In re} Mogharrabi, Int. Dec. No. 3028 (BIA 1987), "Where the country at issue in an asylum case has a history of persecuting people in circumstances similar to the asylum applicant's, careful consideration should be given to that fact in assessing the applicant's claim." \textit{Id.} at 10. \textit{See 8 C.F.R.} § 208.12 (recognizing use of evidence from credible sources regarding human rights conditions); Castenada-Hernandez v. INS, 826 F.2d 1526, 1530-31 (6th Cir. 1987) (remand to Board for consideration of affidavits); Del Valle v. INS, 776 F.2d 1407, 1413 (9th Cir. 1985) (documentary evidence of human rights abuses); Carcamo-Flores v. INS, 805 F.2d 60, 64 (2d Cir. 1986) (journalistic accounts of human rights abuses); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286 (9th Cir. 1984) (newspaper articles concerning human rights situation in El Salvador). \textit{See generally}, ANKER, supra note 2, at 107-09. The Board has often concluded that evidence of widespread persecution of citizens with prior political involvements
some select claims favorably when it discerns a consistent history of human rights abuses by the applicant’s home government. Unfortunately, the Board tends not to elaborate in detail its factual findings regarding the home government’s abuses, or it tends unduly to rely on the findings of the Department of State regarding conditions in the home country.71

For example, an Iranian applicant, who worked in an American hospital, had ties with United States Embassy employees and was seen in photographs with her Embassy friends. She was granted asylum in reliance on State Department Country Reports warning that Iranian citizens suspected of antirevolutionary beliefs were subject to arbitrary detention and inhumane treatment.72 In another Iranian case, the Board relied on the “well-known history and tactics of the Iranian regime” to support an asylum grant to a former member of the Shah’s army, who became active in the opposition Mujahidin.73 In the Board’s published decision, In re Mogharrabi,74 the Board ruled that “opponents of Ayatollah Khomeini are often persecuted for their opposition.”75 Therefore, the Board granted asylum to the applicant who had clearly expressed his anti-Khomeini views to officials at the Iranian interests section of the Algerian Embassy.76

Similar reasoning governed the case of an applicant from Somalia. Although the applicant had never been active in any or-

undercuts, rather than enhances, an individual’s claim. See Melendez v. U.S. Dep’t of Justice, 926 F.2d 211, 219 (2d Cir. 1991). The court of appeals castigated the Board’s conclusion as turning “logic on its head. Under its reasoning, if everybody in the country is being persecuted for their political beliefs, then no one may seek asylum on account of persecution. Such a view contravenes Congress’ purpose in the Act.” Id.

71. The Department of State is involved in the asylum adjudication process in two distinct ways. First, by regulation, the Bureau of Human Rights and Humanitarian Affairs (BHRHA) is afforded the opportunity to render an “advisory opinion” in an individual case. 8 C.F.R. § 208.11 (1990). The BHRHA may comment on all aspects of the application, including the specific assertions about the conditions in the applicant’s country of origin or his or her own experience. 8 C.F.R. § 208.11(a)(1)-(5) (1990). Second, the State Department also annually prepares a document known as the COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES for submission to the Committee on Foreign Affairs, U.S. House of Representatives and the Committees on Foreign Relations, U.S. Senate, in accordance with §§ 116(d) and 502B(b) of the Foreign Assistance Act of 1961, as amended. The annual report for the applicant’s country of nationality is often made part of the record of the proceedings by one of the parties.

72. In re Asayesh, A26 724 001 slip op. at 3 (BIA Aug. 2, 1988).
75. Id. at 14.
76. Id. at 12.
ganization, his brother belonged to an opposition group. Consequently, he and his father were falsely accused of collaborating with the group.\textsuperscript{77} He and other family members were arrested and mistreated on several occasions. The Board reasoned: "[W]here the country at issue in an asylum case has a history of persecuting people in circumstances similar to the asylum applicant's, careful consideration should be given to that fact in assessing the applicant's claims."\textsuperscript{78}

The Board also granted asylum to a Libyan student. The applicant was active in anti-Qadhafi activities in the United States and submitted evidence of Libyan persecution of students, including his friends, who had studied in the United States.\textsuperscript{79} The Board relied in part on information from the State Department Country Reports that the Libyan government had a policy of jailing and liquidating its enemies, including the public execution of political opponents.\textsuperscript{80}

In the case of a Nicaraguan who had been active in Somoza Youth and whose mother was active in Somoza's Liberal Party, the Board emphasized the Sandinistas' record of widespread arbitrary arrest, imprisonment and murder of its political opponents in granting the asylum request.\textsuperscript{81}

In the one published case of a Salvadoran granted asylum, the Board found that the applicant had proven that he and his family

\textsuperscript{77} In re Ahmed, A24 798 181 (BIA June 10, 1988).
\textsuperscript{78} Id. at 6, citing UN HANDBOOK, supra note 20, at ¶ 43. See also In re Ghele, A24 798 184 (BIA June 24, 1988) (asylum granted where incidents of past persecution consistent with expert testimony and evidence regarding human rights abuses by Somali government).
\textsuperscript{79} In re Buazza, A24 598 839 (BIA Feb. 15, 1989).
\textsuperscript{80} Interestingly, even where the State Department advisory opinion letter evaluated a claim of a Sikh from India active in the AISSF and stated that India was basically democratic, the Board nonetheless held that India's domestic problems continue to generate significant human rights abuses, including torture of prisoners and preventive detention. Accordingly, the Board granted the asylum request. In that case, the applicant had been arrested and tortured by police. In re Kamboj, A27 887 288 (BIA Nov. 18, 1988).
\textsuperscript{81} In re Castillo-Bartlett, A26 438 968 (BIA Jan. 14, 1988); see also In re Gonzalez-Carranza de Barquero, A27 250 635 (BIA Jan. 11, 1990) (Sandinista government intimidated and harassed persons active in church). But see In re Valle-Cano, A26 003 136 (BIA Nov. 18, 1986) (future detention by Sandinista authorities would be temporary; Board had no reason to believe applicant would not be released after convincing authorities that she was not counter-revolutionary); contra In re Valle-Cano, slip op. at 4-6 (Heilman, dissenting) ("the crux of the matter lies in the purpose and method of detention and interrogation that the respondent may reasonably expect"); dissent then describes, based on credible State Department and human rights report, horrendous nature of detention in Nicaragua and concludes that such treatment is not normal investigative function but rather is brutal security measure meted out without regard to innocence or guilt).
were singled out and threatened by the death squads because of his political involvement with an activist student organization. The Board noted that the organization was not communist and was involved in peaceful political protest. Thus, the Board ruled that the Salvadoran government, at a minimum, appears unable to control the actions of paramilitary death squads that seek to execute political opponents.

In a case involving a member of the Salvadoran National Guard and its investigative unit, section 2, the Board seized the opportunity to distinguish its previous statements regarding the scope of the government's legitimate right to act in its own defense. The Board clearly stated: "[W]e have never held that the summary execution of an individual, after that individual has been taken into custody and is no longer a direct combatant or threat to human life, is a legitimate or internationally-recognized right of self-defense." The government of El Salvador was obligated to use its military tribunals to try detained guerrillas because there is no conceivable rationale for the summary execution of such persons. Consequently, the Board ruled that the applicant had participated in the persecution of others by his actions in section 2 investigations and assassinations.

One very unusual case involved a Kanjobal Indian from Guatemala whose father was decapitated by the army and whose mother was abducted and killed by the guerrillas. In that case, the Board relied on evidence that the government views the spouses and children of those killed as subversives. The Board further relied on evidence of widespread past human rights abuses, including reports of torture, killing and other gross human rights violations against Kanjobal Indians and certain other indigenous people.

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83. Id. at 7. In this case, the Board did not consider evidence of the applicant's direct involvement with the guerrillas, thus it never analyzed whether the applicant's association with the guerrillas would lead to a "legitimate investigation" of his activities. See supra text accompanying notes 21-33. One can only speculate that this was because the evidence clearly indicated the work of the paramilitary death squads. Id. at 3-4.
84. The applicant testified at his hearing that the Intelligence and Security section (section 2) of the Salvadoran National Guard "was responsible for arresting, detaining and executing those persons who were guerrillas or suspected guerrillas." Id. at 2.
86. Id. at 12.
88. Id. at 10. Board Member Heilman wrote a sharp dissent in this case. He casti-
5. **Change in Government**

In the past several years, governments throughout the world have undergone radical transformations. These changes have had direct impact on the asylum claims from countries that have experienced such change. It is likely that this will continue to be a central concern to the Board in considering future requests.

In cases of asylum seekers from Poland who were actively involved in Solidarity, the Board ruled that the change in government precluded a finding that they had a continued fear of persecution. Similarly, a refugee from Hungary, who left in 1969 and feared persecution because of his anticommunist views, was not eligible for asylum because of that country's change in government. The Board noted that Hungary has become a "western-style parliamentary democracy." The Board further noted that elections were held in 1990 in which the Communists were successfully ousted from power.

Changes in the Turkish government also led the Board to reject an application for asylum. The applicant was involved in political activity in 1980 for which he was arrested, beaten and held incommunicado. He continued his activities until 1982. Since the civilian government came into power in 1983, free elections have been held at least twice. The Board characterized this applicant's political involvement as minimal and, based on that fact and the changes in the government, denied the asylum request.

Changes in Bangladesh, including the lifting of a ban on political parties, led the Board to reject the application of an asylum seeker whose older brother had been active in a political party and had been arrested and killed by the army.

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90. *In re ——*, A17 629 177, slip op. at 3 (BIA Feb. 8, 1991) (index decision).

91. *Id.*


93. *In re Khan*, A26 223 935 (BIA Apr. 29, 1988). *See also In re Chaudhary*, A26 639 909 (BIA Aug. 11, 1988), *aff’d*, Chaudhary v. INS, No. 88-7311 (9th Cir. June 20,
Given the dramatic shifts in government in Haiti, the Board’s decisions paint a confused and erratic picture for assessing asylum claims. For example, the Board rejected the claim of an applicant whose sister and brother were killed by a member of the Ton Ton Macoutes and who was threatened by the Macoutes. After a series of moves, he settled in the capital and began working with prisoners, some of whom had been severely beaten by the Ton Ton Macoutes. He recounted this information to people at the prison hospital, including Ton Ton Macoutes who threatened to kill him. He fled the country after this incident. The Board relied on other grounds for its ruling, but noted that President Duvalier was no longer in power in Haiti and that the provisional government had ordered the Ton Ton Macoutes disbanded.

The Board took a contrary position in another Haitian case. The applicant feared persecution because of his political activities with the Haitian Christian Democratic Party (PDCH). On the day of the 1987 elections, he was assigned to watch polls. The military disrupted the polling place. A few days later, he was arrested at his home, interrogated by the police regarding his activities with PDCH and released. Two months later, he was again sought at home. A cousin who resembled him was there. The police shot and killed the cousin when he fled the police. The applicant went into hiding and then fled to the United States. In that case, the Board relied on an Amnesty International report showing that there has been “no serious disarming of the Ton Ton Macoutes,” who allegedly were heavily involved in disrupting the 1987 elections. The Board said that the INS did not satisfy its burden of showing that the current military government in Haiti was a sufficient change of circumstances to influence whether the applicant

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94. It should be noted that the Board did not publish as precedent any cases dealing with substantive issues of asylum for Haitian applicants during the three-year period in which this work is concentrated. In fact, this author was unable to find any published decisions dealing with Haitian claims since the end of the Duvalier reign.
96. Board Member Heilman dissented. He relied on background evidence regarding the Ton Ton Macoutes to support a finding that the applicant had a continuing fear of persecution from the Ton Ton Macoutes. Id., slip op. at 2 (Heilman, dissenting). See also In re Devariste, A26 677 543 (BIA Jan. 21, 1988) (Heilman, dissenting).
98. Id. at 8.
had a continuing well-founded fear of persecution. 99

In cases concerning applicants from China, the Board disagreed with the immigration judge’s finding that conditions had changed in that country. 100 The Board ruled that the record indicated the applicants whose families were from social classes harassed during the Cultural Revolution continued to be at risk in China. The Board ruled that “conditions in China have clearly not changed sufficiently since the time the [applicants] were persecuted. The basic form of government there has not changed, and human rights are still abused.” 101

B. Judicial Review

The Board’s analysis of the right to investigate has also been profoundly affected by the Ninth Circuit’s decision in Blanco-Lopez v. INS. 102 In that case, the applicant had been a member of the Salvadoran Treasury Police and had criticized the brutality of authorities in conversations with co-workers and friends, an action that he considered put him at great risk. Because of the problems he encountered, he was forced to leave his job and became a fisherman. He encountered an individual named Gallos who disliked him because he objected when Gallos hit one of his employees. Gallos falsely denounced Blanco-Lopez to the authorities, alleging that he and others were guerrillas who used fishing boats to import arms from Nicaragua. On the basis of this accusation, police apprehended, blindfolded and tied up Blanco-Lopez for three days. Police released him only because his brother intervened. 103

Two weeks later, Gallos attacked the applicant at his home. Gallos reported to the police that Blano-Lopez tried to rob and kill

99. Id. at 9.
100. See In re Chang, A24 299 677 (BIA 1989); In re Zheng, A24 741 995 (BIA June 27, 1989).
101. See In re Chang, A24 299 677 (BIA 1989); In re Zheng, A24 741 995 (BIA June 27, 1989). The Board also noted that recent events increased the likelihood of persecution of the applicants. See also In re Bacha, A28 582 472 (BIA July 5, 1989) (asylum granted to Maronite Christian from Lebanon; several times he was arrested and questioned. This was done first by PLO, then by group associated with Iranian government, then he was tortured by Syrian agents; Board ruled the absence of a stable government capable of protecting the applicant and the absence of evidence of changed circumstances support his claim for asylum).
102. 858 F.2d 531 (9th Cir. 1988). While this is not the only decision overruling the Board, see, e.g., supra notes 13, 28, 30, it most directly addresses a government’s right to investigate its enemies.
103. 858 F.2d at 532.
him. When the authorities swarmed the area trying to find the applicant, he fled to his father's house. His brother told him to leave the country because he could no longer be sure he could intervene on his behalf. Moments after the applicant left his father's home, the authorities arrived and told his parents that they were going to kill him. He hid for two weeks and then fled the country.\textsuperscript{104}

After a cursory review of the facts,\textsuperscript{105} the Board found, once again, that because El Salvador faced a civil war with communist guerrillas it had an internationally recognized right to investigate persons suspected of crimes such as supplying arms to the guerrillas.\textsuperscript{106} The government's investigation of such charges, whether true or false, did not constitute political persecution.\textsuperscript{107}

The Ninth Circuit reversed the Board's decision.\textsuperscript{108} That court emphasized that, whatever the origin of the initial allegations, the security forces "believed him to be a guerrilla and attempted to persecute him for it."\textsuperscript{109} More importantly, the Court found:

no evidence in the record, however, that an actual, legitimate, criminal prosecution was initiated against Blanco-Lopez \ldots

We can hardly characterize [his treatment] as an example of legitimate prosecution. Blanco-Lopez also testified that, had the security forces found him a second time, they would have killed him without undertaking any formal prosecutorial measures. We conclude that the incident described by Blanco-Lopez was not in furtherance of a criminal prosecution, but rather was one of governmental persecution \ldots\textsuperscript{110}

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\textsuperscript{104} Id. at 532-33.

\textsuperscript{105} In re Blanco-Lopez, A27 093 352 slip op. at 1 (BIA Aug. 12, 1987). The case was presented on a motion to reconsider. In its earlier decision, the Board had ruled that Blanco-Lopez had been cleared of all charges against him and was not being pursued by the Salvadoran authorities at the time he fled El Salvador.

\textsuperscript{106} Id. at 2.

\textsuperscript{107} Id. at 2-3 (citing Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985)). In the cited case, the applicant was charged with deportability under section 241(a)(19) for employment and activities with the Latvian Political Police from 1941-43 in Riga, Latvia. On appeal, the court ruled that the investigation and arrest of Soviet sympathizers and activists during World War II was not persecution because Latvia was a war-torn nation with reason to fear spies, saboteurs and pro-Soviet conspirators during the war. Laipenieks, 750 F.2d at 1429, 1436.

\textsuperscript{108} Blanco-Lopez v. INS, 858 F.2d 531 (9th Cir. 1988).

\textsuperscript{109} Id. at 533-34.

\textsuperscript{110} Id. at 534. While not specifically cited in the court's opinion, the Ninth Circuit's decision certainly evolved from that court's earlier, seminal ruling in Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985). There, the court stated that:

When a government exerts its military strength against an individual or a group within its population, and there is no reason to believe that the individual or
The court willingly looked behind the surface "investigation" and determined that the Salvadoran government's actions could not be deemed legitimate.\footnote{111}

The Board was forced to apply the standards adopted in \textit{Blanco-Lopez} to several cases arising in the Ninth Circuit.\footnote{112} For example, in \textit{In re Ravienthira},\footnote{113} the Board applied the holding of \textit{Blanco-Lopez} to a Sri Lankan applicant who was a member of the Tamil ethnic minority and supporter of the Tamil United Liberation Front (TULF), a nonviolent political party. He and three others actively assisted persons displaced by conflicts between the Tamil guerrillas and the Sri Lankan Army. He was arrested and, while in custody, interrogated and tortured. A week later, soldiers came to his home and advised him to go to the local military camp. He went into hiding instead. Soon after, his fellow fishermen were killed. He left the country, believing that their deaths resulted from their community activities.\footnote{114} The applicant's documentary materials indicated that TULF participated in parliamentary elections and other nonviolent activities.\footnote{115} He also submitted documents regarding the murders of the fishermen.\footnote{116}

Analogizing the situation to \textit{Blanco-Lopez}, the Board noted that the applicant had never engaged in criminal or subversive activity, although the authorities had the mistaken impression that he

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\textit{Id.} at 516.  
\footnote{111}{\textit{But see In re R—O—, Int. Dec. No. 3170 (BIA 1992) (where applicant was coerced into participation with guerrillas and now alleges fear of persecution by government because of his involvement with them, government has right to investigate applicant regarding his activities; \textit{Blanco-Lopez} does not control in absence of evidence of threats or awareness by government of applicant's activities); see also In re Jagraj Singh, A71 789 167 (BIA May 14, 1992) (\textit{Blanco-Lopez} distinguishable where applicant was sought not because of mistaken belief he is Sikh militant but solely to obtain information about Sikh militants with whom he had contact), rev'd, Singh v. INS, C-92-1826 MHP (N.D. Ca. 1992) (ruling that \textit{Blanco-Lopez} controls and disputing BIA's interpretation of that case). See supra note 5.}

\footnote{112}{The mandate for an administrative agency to apply the law of the circuit within which the case originates can be found in the rationale of \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 178 (1803) (judiciary is ultimate interpreter of law).}

\footnote{113}{A28 529 351 (BIA June 29, 1989).}

\footnote{114}{\textit{Id.} at 2-4. The applicant spent some time in India but departed that country when he learned that the Indian government intended to repatriate Sri Lankans.}

\footnote{115}{His documents included A.S. BANKIS, \textit{POLITICAL HANDBOOK OF THE WORLD} and the \textit{COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES}.}

\footnote{116}{\textit{Ravienthira, A28 529 351, slip op. at 5.}}
had. He was clearly sought for his community activities and for activities on behalf of TULF. The Board similarly characterized the conduct of the military forces as not pursuing legitimate investigations but punishing suspected political activists. The Board emphasized that the authorities beat and tortured him and destroyed his home. Even after his departure, authorities beat his father and assassinated others involved in similar community service work. Although the Board made known in no uncertain terms its disagreement with Blanco-Lopez, it ruled that the Blanco-Lopez decision controlled in that case and granted the applicant asylum.

Dwomoh v. Sava, a federal district court decision, has had less impact on the Board’s legal reasoning. In Dwomoh, the Board ruled that the applicant faced legitimate government prosecution and incarceration in Ghana for his participation in a coup attempt. The District Court disagreed with the Board, premising its decision on several factors. First, the court stressed that the definition of refugee was intended to encompass protection for persons who have engaged in resistance activities against totalitarian governments. Second, the court examined the structure of the Refugee Act and concluded that a person who has committed a politically-motivated crime may be considered a refugee because the statute excludes from protection one who “has committed a serious non-political crime.” Third, the court stated that “an ac-

\footnotesize{117. Id. at 8.} 
\footnotesize{118. Id.} 
\footnotesize{119. Id.} 
\footnotesize{120. 696 F. Supp. 970 (S.D.N.Y. 1988).} 
\footnotesize{121. In re Dwomoh, A26 805 882 slip op. at 1-2 (BIA May 1, 1988).} 
\footnotesize{122. Dwomoh, 696 F. Supp. at 976. The court relied on its evaluation of the history of the definition from the Refugee Act of 1980 through the treaty on which it is based, the UN Convention, and back to the pre-existing instrument, the 1946 Constitution of the International Refugee Organization. Id.} 
\footnotesize{123. INA § 243(h)(2)(C), 8 U.S.C. § 1253(h)(2)(C). The court raised an interesting point here that has never been addressed by the Board. If the Board is concerned that}
accurate assessment of the political conditions existing in the particular country at the time the political crime is committed is central to the determination of whether prosecution for a political crime constitutes persecution . . . ."124 The court's analysis led inevitably to the legal conclusion that:

[I]n countries where there is no procedure by which citizens can freely and peacefully change their laws, officials or form of government and where some individuals who express views critical of the government are arrested and held incommunicado for long periods without due process, a coup attempt is a form of expression of political opinion the prosecution of which can qualify as "persecution" within the statutory definition of "refugee." When a participant in an attempted coup has been beaten or tortured during detention, there is no doubt that he is being persecuted on account of his political opinion.125

C. A Synthesis: In re Izatula

In In re Izatula,126 the Board clearly delineated the view that the internationally recognized right to suppress rebellion is subject to explicit limits. In that case, the applicant was from Afghanistan. He avoided representatives of the Soviet-supported army and the secret police in order to avoid being forcibly conscripted. He actively assisted the rebel Mujahidin for three years. His brother disappeared after being arrested at the family's store. He hid after his brother's arrest. Agents came to look for him and, when he was not at home, beat his father. He and his father then moved to a

persons who have participated in criminal activity in their home countries will receive refuge here, the statute lays out a clear and specific basis to prohibit such persons being granted relief as long as their crimes are not political in character. See also In re Rodríguez-Majano, Int. Dec. 3088 (BIA 1988) (BIA considers and rejects "persecution of other" exclusion for applicant who was forcibly recruited into and then participated with Salvadorean guerrillas).

124. 696 F. Supp. at 979. The court relied heavily on guidelines set forth in the UN HANDBOOK. See supra note 20. In making this type of factual evaluation for Ghana, the court looked at whether a coup was the only means to achieve political change in the country and the specific procedural protections Dwomoh would receive if sent back to Ghana. The court noted that the evidence indicated: "There are no elections to governing organizations and no current procedure by which citizens can freely and peacefully change their laws, officials or form of government." 696 F. Supp. at 978 n.11 (citing COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, supra note 66, at 130). Further, the court noted that if Dwomoh is returned "he might be executed without ever having been charged, no less tried." Id. at 978.

village under rebel control. He thereafter fled to Pakistan and then to the United States.\textsuperscript{127}

The Board disagreed with the immigration judge's conclusion that any punishment the applicant would face in Afghanistan because of his support for the Mujahidin would be a legitimate exercise of governmental authority. The Board emphasized two factors which it drew from the State Department Country Reports. First, it cited Country Reports that indicated widespread human rights abuses in Afghanistan, including the incarceration and physical and psychological torture of political prisoners.\textsuperscript{128} Second, it emphasized the portion stating that Afghanistan is a totalitarian country where the people have no right or ability peacefully to change the government.\textsuperscript{129} Thus, the Board concluded that any punishment the Afghan government imposed would not be an act of self-defense by a legitimate and internationally recognized government.\textsuperscript{130}

While the Izatula decision more precisely and carefully incorporates elements elaborated by the BIA in other decisions, its analysis has never been applied outside the specific factual context in which it arose.\textsuperscript{131} Thus, the decision is idiosyncratic and contributes to persistent concerns about the continued arbitrary application of the asylum laws.\textsuperscript{132} Nonetheless, the decision has the seeds

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{127} Id. at 3-4.
\item\textsuperscript{128} Id. at 5-6 (citing Country Reports on Human Rights Practices (1988)).
\item\textsuperscript{129} Izatula, Int. Dec. 3127 slip op. at 6. The Board also cites with approval Dwomoh \textit{v. Sava} for the principle that the general rule regarding prosecution for the attempted overthrow of a duly constituted government will not apply where a coup is the only means to change the political regime. 696 F. Supp. at 970.
\item\textsuperscript{130} Izatula, Int. Dec. 3127 slip op. at 6. The concurrence adamantly takes issue, not with the majority's holding, but with the majority's rationale. The concurrence argues that the majority "in effect finds that the Afghan government is illegitimate and therefore incapable of imposing a lawful punishment." The concurrence is concerned that the majority is "wading in dangerous waters when it presumes to make judgments as to the legitimacy of sovereign nations." \textit{Id.} at 10 (Vacca, concurring). The concurrence states that only the President and the Secretary of State have such authority and that the Board, as delegates of the Attorney General, have no such authority. The concurrence argues that all nations, even totalitarian states, have the right to punish their enemies within or without its borders and subject them to the country's criminal laws. The concurrence allows that prosecution may be converted into persecution only where the prosecution is a "pretext for punishing an individual" and if the punishment is disproportionate to the crime. \textit{Id.} at 11-12 (Vacca, concurring).
\item\textsuperscript{131} In the course of my research for this Article, I reviewed no cases citing Izatula for the principle discussed, nor have I seen references to it in later BIA decisions.
\item\textsuperscript{132} See the excellent discussion of these concerns in Johnson, \textit{supra} note 11, at 335-
\end{enumerate}
\end{footnotesize}
of a conceptual framework that could assist in the creation of a more fair and evenhanded adjudication process.

D. Summary

The Board has carved out specific exceptions that limit a government's right to investigate. If any of these exceptions apply, a government's actions constitute persecution, not legitimate investigation or prosecution. The Board has ruled, in some instances, that persons who participate only in nonviolent activities have a well-founded fear of persecution. Further, the Board has examined whether there is an opportunity for peaceful political change in the country as well as the country's overall human rights record. The Board has noted instances in which the investigation was a pretext to persecution. The Board has also taken into consideration changes in the government. A review of the cases, however, indicates inconsistency in the application of these exceptions, raising serious concerns about the evenhandedness of the process.

The federal courts have corrected several key Board decisions. As a result, the BIA has changed course on some decisions. In addition, the Board's decision in *Izatula* indicates the potential to develop a framework that could be applied fairly and nonarbitrarily. Unfortunately, the Board has not yet done so.

IV. Conclusion

In *In re Maldonado-Cruz*, the Board articulated the principle that governments recognized by the United States have an "internationally recognized right" to protect themselves against their internal enemies.133 If this principle is applicable, the Board would not view the government's actions as persecution of the asylum applicant. The Board subsequently applied this principle to applicants from many different countries. Based on the logic of *Maldonado-Cruz*, the Board has concluded that persons who have never personally engaged in oppositional political activity, or whose activity is nonviolent, can still be subject to "investigation" by their government. Even where past investigation involved torture, beatings or other forms of abuse, or the applicant alleged fear of such mistreatment in the future, the Board nonetheless has applied this

54. Johnson cites much of the literature attributing this arbitrariness to continued foreign policy bias in the application of the asylum laws. *Id.*

133. *See supra* text accompanying notes 13-20.
principle. Unfortunately, as this Article demonstrates, the application of this principle has prevented bona fide refugees from obtaining protection in the United States.

Yet, since the Board first articulated this view, its own decisions have reflected serious concerns that the right to investigate may amount to a license to kill. As a consequence, the Board has increasingly carved out exceptions that influence whether the Maldonado-Cruz principle applies. These generally fall into one or more of five categories: the political activities of the applicant are non-violent; there are no avenues for peaceful political change; the investigation is a pretext for persecution; if the government has a poor human rights record; or there has been a change in government. In addition, federal court decisions overruling the Board have forced it to further reevaluate its working principles.

However, these exceptions raise two problems that go to the heart of the Board's thinking. First, these exceptions appear arbitrary and finite, which raises several unresolved questions. Why these and not others? How has the Board arrived at these choices and by what criteria? The exceptions themselves seem unduly subjective and arbitrary. Second, as this Article has demonstrated, the Board has not consistently applied these exceptions. For example, similar forms of evidence are considered dispositive in one setting and ignored in another, or similar facts lead to diametrically opposed results.

These exceptions reveal the deeper dilemma of the Board's thinking. The exceptions are treated as corollaries to the primary principle of the government's right to investigate subversives. The Board should begin by assessing the legitimacy of the sending government, rather than beginning with the right to investigate and then finding exceptions. The Board attempted this enterprise in In re Izatula but then failed to follow through on its application, allowing that decision to remain a fact-specific anomaly.

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134. For example, human rights accounts are broadly credited for one nationality, see supra text accompanying note 68, and barely mentioned in another, see supra text accompanying note 100.

135. The Board's decisions applying the principle of the right to investigate almost universally accept the legitimacy of the government conducting the investigation. The idea that the agency needed to grapple with this question was first suggested in Note, Political Legitimacy in the Law of Political Asylum, 99 HARV. L. REV. 450 (1985). The theme was reasserted by this author and my colleague Deborah Anker in New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in INS v. Cardoza-Fonseca, 1 INT'L L. REFUGEE L. 67, 80 (Jan. 1989).
This Article's survey of the Board's rulings reveals that the Board has, of necessity, begun to fumble with the underlying political values and rights that constitute a legitimate government. Although the exceptions point us in helpful directions, the BIA's thinking develops in ad hoc and seemingly arbitrary ways. Such thinking is a response to a principle (the government's right to investigate) that is not buttressed by a thoughtful and systematic understanding of what makes it legitimate for a government to perform such an investigation.

This Article does not outline a full theory of what constitutes a legitimate government. However, the strengths and weaknesses of the Board's approach are revealed by review of the cases containing the exceptions to the right to investigate. These exceptions reflect an awareness that the legitimacy of a government is relevant in determining the rights of its people to oppose it and the government's corresponding right to protect itself. The weakness of this approach, however, is manifest in the exceptions being subsets of the right to investigate. The right to investigate, however, needs to be placed in the larger context of legitimacy. Until the horse gets placed before the cart—or is it, the dog that needs to start wagging the tail?—the BIA will find itself improvising exceptions that are result-oriented, arbitrary, inadequate and inconsistently applied.

136. This author concurs with the many commentators who already have argued persuasively that foreign policy and national self-interest continue to be key factors in shaping asylum policy and lead to discriminatory and result-oriented decisionmaking. See Johnson, supra note 11 (and authors cited therein). This Article does not intend to suggest that the BIA is completely insulated from similar criticism. See also, Derek Smith, Note, A Refugee By Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases, 75 VA. L. REV. 681 (1989). However, that critique is not the focus here. The concern of this Article is to illuminate more fully the legal construct that currently guides decisionmaking and to suggest the need for a new and coherent theory for the future. The task of that full reconstruction is left for another day.

137. For an introduction to the author's views on this subject, see Carolyn Blum, Political Assumptions in Asylum Decision-Making: The Example of Refugees from Armed Conflict, Refugee Policy: Canada and the United States (H. Adelman ed., 1991). The author has recently completed a more thorough study of the subject under the auspices of the Ford Foundation.