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The Corruption and Human Rights Connection: Government Acquiescence in Torture

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Corruption has human rights consequences[1]. That was the conclusion of a 2009 study by the International Council on Human Rights Policy and Transparency International and it is a conclusion that the 9th Circuit implicitly reached in *Parada v. Sessions*[2], a review of a dismissal of asylum case decided on August 29th, 2018. Despite the fact that such a conclusion enjoys widespread support[3], courts have been slow to recognize the relationship between corruption and human rights abuses. *Parada v. Sessions* represents an effort by the 9th Circuit to give legal cognizance to the corruption-human rights link. The holding of the case creates a blueprint that could have broad application outside of 9th Circuit immigration law jurisprudence.

In *Parada v. Sessions*, the 9th Circuit found evidence of widespread corruption in El Salvador to be "highly probative" on the question of whether Mr. Parada would be tortured if he were returned to his home country. Moris Parada fled El Salvador in 1991 during the El Salvadorian civil war, after repeated threats and abuse at the hands of the Frente Farabundo Marti para la Liberacion Nacional (FMLN) guerillas[4]. Mr. Parada feared that members of FMLN, who have since become part of MS-13, would torture him if he returned to El Salvador. He argued that given the widespread corruption among public officials in El Salvador, the El Salvadorian government would not be able to protect him from MS-13. In remanding Parada's withholding of removal based on Article III of the Convention Against Torture treaty (often referred to as "CAT relief") the 9th Circuit accepted the position that widespread corruption is a strong indicator of a government's inability to protect its citizens from human rights abuses at the hands of private actors. This is a significant change from how government corruption had previously been interpreted by U.S. courts in CAT relief cases.

CAT relief, which Mr. Parada's lawyers argued for, is often a last ditch claim that immigrants in removal proceedings use, the kind of claim that lawyers argue for the sake of completeness. Statistics bear out the stark reality that such claims are often unsuccessful. In 2016, over 96%[5] of these claims were denied. In contrast, 43%[6] of all asylum claims, which are notoriously difficult to win[7], were granted in 2016. Either many frivolous CAT claims are submitted each year, or the legal hurdles to proving such claims are almost insurmountable. The latter explanation is much more plausible. Years of unfavorable legal precedents have essentially narrowed CAT relief to the point of legal insignificance.

One of the legal hurdles that individuals with CAT claims must overcome is the nexus between the torture they claim they would have to endure upon deportation, and state action. Essentially, if the defendant cannot prove that the torture would occur at the hands of government officials or individuals acting in an official capacity[8], then the defendant must prove that the government will acquiesce in the torture perpetrated by a private party. In order to prove acquiescence of a government official, a defendant must demonstrate that the public official, prior to the torture, "[have] awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity"[9]. Theoretically this legal standard requires a two-step analysis: awareness and breach of legal duty. In practice, however, circuit courts rarely perform a separate two-step analysis. In assessing a claim of future torture at the hands of a private actor, the courts will look for evidence that a particular government is aware and willfully blind to the kind of harm that will befall the defendant, or that the government is unable or unwilling to prevent that harm. Across the circuits, this has proven to be an exacting standard for defendants, as courts have often stressed that even ineffective action on the part of a government to quell the underlying cause of the torture is sufficient to defeat a

claim of acquiescence[10]. In recent years, immigrants from Latin American countries have borne the brunt of this challenging legal standard, as credible claims of torture at the hands of MS-13 and other gangs and cartels were defeated in U.S. courts by evidence that the foreign government in question has passed laws or is taking steps to combat the groups and ensure the safety of its citizens[11]. In analyzing government acquiescence based on broad national policies, a majority of U.S. courts seem to have accepted the assumption that local foreign government officials and local police officers will act according to those policies. Finally, courts have generally not allowed defendants to use evidence of widespread corruption as proof that some government officials will violate national policy and actually acquiesce in human rights abuses[12].

In contrast, the 9th Circuit has been more receptive to allowing defendants to use evidence of widespread corruption as part of their government acquiescence arguments. In *Madrigal v. Holder*[13], an earlier 9th Circuit decision that the *Parada* court cites, the 9th Circuit held that, when analyzing a foreign government's acquiescence, evidence of corruption is relevant in determining whether national level policy is actually enforced and applied by local government officials. Essentially, the *Madrigal* court held that when evidence of rampant corruption is introduced, an immigration judge and the BIA cannot simply look at national level policy when determining whether a government official would acquiesce in torture by a private party. Thus, the *Madrigal* court implicitly agreed with the proposition that rampant corruption negates an inference that all public officials act according to national policy, and therefore national policy, on its own, cannot be used as a shortcut for determining how the local police and local officials will behave.

The *Parada* court greatly expands the scope that evidence of widespread corruption plays in a government acquiescence analysis. In its opinion, the court summarily concludes that i) the Board of Immigration Appeals ("BIA") erred when it construed the government acquiescence standard too narrowly and ii) "the acquiescence standard is met where the record demonstrates that public officials at any level… would acquiesce in torture the petitioner is likely to suffer" and evidence of widespread torture is "highly probative" on the issue of government acquiescence. The *Parada* court devotes little analytical bandwidth to developing its government acquiescence framework and so the breadth of its conclusions can only be properly understood by analyzing the *Parada* language in conjunction with the immigration judge's decision.

The *Parada* court begins its CAT relief analysis by stating that the BIA[14] erred when it construed the government acquiescence standard too narrowly: "'In a similar case, we reversed and remanded where the agency 'erred by construing government acquiescence too narrowly,' noting that 'acquiescence does not require actual knowledge or willful acceptance of torture; awareness and willful blindness will suffice.'"'[15]. The court's conclusion could potentially be explained in two ways: 1) the immigration judge used the wrong government acquiescence standard or 2) the immigration judge failed to consider relevant evidence and thus, by default, has failed to use the proper government acquiescence standard. The latter analysis would be based on *Aguilar-Ramos*, a 9th Circuit precedent where the court found that the BIA and the immigration judge ignored a country conditions report which contained potentially relevant information. As to the former explanation, the immigration judge uses essentially the same legal definition of government acquiescence as the *Parada* court when he states that "acquiescence by government officials does not require actual knowledge or willful acceptance; 'awareness and willful blindness' by government officials is also sufficient"[16]. Thus, it is difficult to find support for *Parada's* conclusion that the BIA adopted a narrow government acquiescence standard when looking at the legal standard in isolation. The court's conclusion appears driven by the role it assigns to widespread corruption in government acquiescence.

The *Parada* court states that the immigration judge erred by ignoring pertinent evidence in the record[17] . The evidence that Mr. Parada introduced and the evidence that the 9th Circuit relies on are general assertions of widespread corruption, especially judicial corruption and extrajudicial killings by government security forces. The immigration judge, in his opinion, explicitly states that he considered all relevant evidence in the record, and he specifically cites the evidence of extrajudicial killings and widespread corruption from the 2007 El Salvador country conditions report. However, the immigration judge then denies CAT relief because "the respondent has not alleged that he fears torture inflicted by any governmental entities in El Salvador, nor by any other entity with the acquiescence of any government official"[18]. In addition, his analysis of the evidence correctly points out that Mr. Parada did not introduce specific evidence that a government official was aware that he would be tortured by MS-13[19]. The relevant country conditions report also notes that El Salvadorian government deployed anti-gang units and enforced, albeit inefficiently, anti-corruption laws. However, the *Parada* court finds that the immigration judge did not properly consider all the evidence before him based on a "significant and material disconnect" between the judge's conclusion regarding the lack of government acquiescence and the evidence of widespread corruption and extrajudicial killings that he quotes in his opinion. Based on the "material disconnect" the court then concludes, citing *Aguilar-Ramos*, that the immigration judge used a narrow government acquiescence standard. As noted above, in *Aguilar-Ramos*, the BIA and immigration judge simply ignored a country conditions report that was introduced in the record by the petitioner[1]. In contrast, the immigration judge in the *Parada* case explicitly quotes the relevant country conditions report. Thus, the "material disconnect" that the *Parada* court finds in the immigration judge's analysis appears to be based on the court's belief that the immigration judge should have assigned more relevance to evidence of widespread corruption. The question then becomes: According to the *Parada* court, what role should evidence of widespread corruption play in a government acquiescence analysis?

Citing *Madrigal*, the *Parada* court notes that evidence of widespread corruption is "highly probative" on the issue of whether any government official would acquiesce in the torture of an individual. However, there is nothing in the immigration judge's decision that would indicate that he did not attribute "highly probative" value to the evidence of widespread corruption. It is entirely fair to read his opinion as stating that evidence of widespread corruption is simply not enough when there is countervailing evidence in the record that the government is taking steps to combat corruption, and there is no additional evidence introduced that the El Salvadorian government will fail to protect Mr. Parada specifically. Such analysis would be perfectly correct under the legal standards adopted by other circuit courts, and under pre-*Parada* 9th Circuit precedent, including *Madrigal*[2]. Thus, when the *Parada* court holds that the immigration judge interpreted the government acquiescence standard too narrowly and that widespread corruption is "highly probative" to the issue of government acquiescence, what it is really stating is that there is not sufficient evidence in the record to overcome the presumption that a corrupt government will acquiesce in the torture of its citizens. The *Parada* court essentially creates a rebuttable presumption that widespread corruption is sufficient to prove government acquiescence.

Moving forward, it is unclear whether other circuits will follow *Parada*. The 6th Circuit for example reached the opposite conclusion in a 2015 opinion, stating that evidence of police corruption in El Salvador cannot prove government acquiescence when the El Salvadorian government is actively fighting corruption[20]. The 8th Circuit reached a similar conclusion[21]. In *Parada*, the immigration judge cited similar evidence of governmental efforts to

[1] In the opinion, the *Aguilar-Ramos* court stated that "evidence in the record that suggests that gangs and death squads operate in El Salvador, and that its government is aware of and willfully blind to their existence". Aguilar-Ramos v. Holder, 594 F.3d 701, 706 (9th Cir. 2010). It then remanded the cases so that the BIA could consider whether the government acquiescence standard was met in light of the evidence available in the country conditions report.

[2] As noted above, *Madrigal* simply asks immigration courts to look beyond national policy when evidence of widespread corruption creates an inference that local officials may fail to follow national policy and in so doing, acquiesce in torture.

quash corruption and the relevant country conditions report also noted the El Salvadorian's government's efforts to eradicate corruption, yet the 9th Circuit reached the opposite conclusion. The split between the circuits appears to revolve around whether evidence of corruption proves that a foreign government will be ineffective in its efforts to protect an individual or whether it proves that the government will be "unable or unwilling" to protect an individual. In an earlier decision, the 9th Circuit stated that "evidence that a government has been generally ineffective in preventing or investigating criminal activities [does not] raise an inference that public officials are likely to acquiesce in torture, absent evidence of corruption"[22]. Thus, while the 6th and 8th Circuits appear to equate corruption with other examples of government ineffectiveness, such as lack of resources or an inexperienced police force, the 9th Circuit conceptualizes corruption as a violation of a State's duties to its citizens. Stated another way, while the 6th and 8th Circuit treat corruption as an outside force that harms a State and for which a State is not blameworthy unless it completely fails to respond, the 9th Circuit appears to treat corruption as emerging from the State itself and to which the State is an active and blameworthy participant[23]. For the 9th Circuit, evidence of corruption is evidence that the State is "unable or unwilling" to act rather than ineffective. Thus, the difference in the circuits is centered on the level of culpability attributable to a corrupt state as a result of its corruption. The proliferation of *Parada* may thus come down to whether other circuits are willing to accept the idea that widespread public official corruption is harmful conduct that a State actively participates in.

Within the broader human rights context, *Parada v. Sessions* gives legal credence to the notion that corruption has human rights consequences[24]. The *Parada* court understood that it is reasonable to assume that a highly corrupt government will fail to protect its citizens and thus acquiesce in human rights abuses perpetrated against such citizens. Human rights groups could argue for the adoption of similar rebuttable presumptions in international treaties. Although distilling a causal directional relationship between corruption and human rights abuses may be difficult and controversial, adopting rebuttable presumptions similar to the one adopted by the *Parada* court should be straightforward and uncontroversial. At its core, the *Parada* presumption is just a burden shifting exercise. For example, in a post - *Parada* CAT claim case, the U.S. government could prove that a foreign government would not acquiesce by proving that corruption is not as widespread as the defendant claims, certain areas of the country are less corrupt (and thus defendant could simply re-locate to those areas), or the defendant will enjoy protections that might not be extended to the general population. Within the immigration law context, the *Parada* presumption simply allows for a more equitable playing field between defendants and the U.S. government. So too would be the case with similar presumptions within an international human rights framework. Evidence of widespread corruption could be treated by the international community as an early warning sign of a State's deteriorating ability to guarantee the protection of human rights within its borders. The State could then accept remedial measures available under an international human rights framework, or have the burden of proving that it could indeed protect the human rights of its citizens. Thus, even if the international community is not ready to accept that a State is culpable for widespread corruption within its borders, it should have no qualms accepting and implementing *Parada*-like presumptions. Such presumptions would allow governments within the international community to meet their global human rights responsibilities [3] while minimizing concerns regarding violations of a corrupt State's sovereignty and without necessitating the imposition of punitive measures on a corrupt State[4]. Of course, to the extent that the international community accepts the concept that a state is culpable for widespread corruption within its borders, it could create a

[3] For example, provisions similar to Article 3 of the CAT treaty (the non-refoulment provision) could explicitly forbid State from deporting asylum seekers to a State plagued by widespread corruption unless certain human rights safeguards are met.

[4] Such a regime should be preferable to current policies of imposing sanctions on States after they commit human rights violations. A collaborative environment between a State and the international community and set expectations should lead to less human rights abuses than the current ex-post system of sanctions. Finally, to the extent that an increase in corruption coincides with an assault on democratic institutions within a State, early intervention by the international community based on these corruption triggers could arrest the deterioration of such institutions and thus foster an environmental that is likely to produce less human rights abuses.

human rights framework that sanctions a state for non-governmental human rights violations within its borders if such violations are concomitant with widespread corruption.

In conclusion, corruption does have human rights consequences. *Parada v. Sessions* breaths legal significance into the corruption-human rights link and it could be the first step towards a future where such link is recognized and acted upon both domestically and internationally.

About:

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What is CAPI?
The Center for the Advancement of Public Integrity is a nonprofit resource center dedicated to improving the capacity of public offices, practitioners, policymakers, and engaged citizens to deter and combat corruption. Established as partnership between the New York City Department of Investigation and Columbia Law School in 2013, CAPI is unique in its city-level focus and emphasis on *practical* lessons and tools.

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This publication is part of an ongoing series of contributions from practitioners, policymakers, and civil society leaders in the public integrity community. If you have expertise you would like to share, please contact us at **CAPI@law.columbia.edu**.

Endnotes

[1] *Corruption and Human Rights: Making the Connection* (last visited Oct. 18, 2018), https://assets.publishing.service.gov.uk/media/57a08b6540f0b64974000b10/humanrights-corruption.pdf
[2] Parada v. Sessions, No. 13-73967, 2018 U.S. App. LEXIS 24535 (9th Cir. Aug. 28, 2018)
[3] For example, the UN identifies corruption as a "structural obstacle to the enjoyment of human rights". *Corruption and Human Right*, United Nations Human Rights Office of the High Commissioner (last visited Oct. 18, 2018), https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx
[4] Parada v. Sessions, No. 13-73967, 2018 U.S. App. LEXIS, at *5 (9th Cir. Aug. 28, 2018)
[5] U.S. Dep't. of Justice, Executive Office for Immigration Review, Office of Planning, Analysis, & Statistics. FY 2016 Statistics Yearbook, p. M1 (March 2017), *available at* https://www.justice.gov/eoir/page/file/fysb16/download
[6] *Id.* at K1
[7] Betsy Woodruff, *Want Asylum in America? Get Ready for Hell.*, The Daily Beast (April 5, 2018), https://www.thedailybeast.com/want-asylum-in-america-get-ready-for-hell
[8] Garcia-Milian v. Holder, 755 F.3d 1026, 1033 (9th Cir. 2014)
[9] 8 CFR § 208.18(a)(7) (2018)
[10] *See* Menijar v. Lynch, 812 F.3d 491, 502 (6th Cir. 2015); Fuentes-Erazo v. Sessions, 848 F.3d 847, 854 (8th Cir. 2017); Garcia-Milian v. Holder, 755 F.3d 1026, 1034 (9th Cir. 2014)
[11] *See* Saldana v. Lynch, 820 F.3d 970, 976 (8th Cir. 2016)
[12] De Rivas v. Sessions, No. 17-1123, 2018 U.S. App. LEXIS 22021, at *10 (8th Cir. Aug. 8, 2018)
[13] Madrigal v. Holder, 716 F.3d 499 (9th Cir. 2013)
[14] Since the BIA simply affirmed the immigration judge's CAT relief decision without analysis, the 9th Circuit imputes the immigration judge's CAT relief analysis to the BIA. Thus, the court is actually reviewing the immigration judge's CAT relief decision.
[15] Parada v. Sessions, No. 13-73967, 2018 U.S. App. LEXIS 24535, at *32 (9th Cir. Aug. 28, 2018) (internal quotations omitted, citing Aguilar-Ramos v. Holder, 594 F.3d 701, 705-06(9th Cir. 2010))
[16] Matter of Moris Quiroz-Parada, No. A#072-525-513, at *10 (Feb. 8, 2013)
[17] Parada v. Sessions, No. 13-73967, 2018 U.S. App. LEXIS 24535, at *28 (9th Cir. Aug. 28, 2018)
[18] Matter of Moris Quiroz-Parada, No. A#072-525-513, at *24 (Feb. 8, 2013)
[19] Id.
[20] *See* Menijar v. Lynch, 812 F.3d 491, 502 (6th Cir. 2015)
[21] S*ee* Aguinada-Lopez v. Lynch, 825 F.3d 407, 410 (8th Cir. 2016)
[22] Garcia-Milian v. Holder, 755 F.3d 1026, 1034 (9th Cir. 2014)
[23] In this sense, the 9th Circuit implicitly imputes public official corruption to the State just as it would impute other violations such torture practiced by its public officials. The State is then responsible for the widespread corruptness of its officials just like the State would be responsible for other widespread human rights violations that its public officials engaged in. There's no doubt that the rest of the U.S. circuits would agree with the latter position, and it has been shown above that the former position is not universally accepted. It can then be argued that 9th Circuit precedent has elevated corruption to the level of other harmful State conduct such as human rights abuses.
[24] As the 2009 study recognizes, *supra* Note 1, international law has been slow to recognize and punish the link.