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## NOTE

# *Aldana v. Del Monte Fresh Produce: Cruel, Inhuman, and Degrading Treatment After Sosa v. Alvarez-Machain*

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## INTRODUCTION

Country X arrests Anna, a political protestor.<sup>1</sup> For two days, officials confine Anna to a filthy room smelling of feces.<sup>2</sup> The officials choke and hit her, painfully grope her genitals, and force her to watch as they hack pieces from other prisoners' flesh.<sup>3</sup> Anna flees to the United States and sues these officials in federal court under the Alien Tort Claims Act ("Act").<sup>4</sup> The district court concludes that the officials' actions were not torture but, rather, constituted the lesser offense of cruel, inhuman, and degrading treatment ("CIDT").<sup>5</sup> May Anna's suit proceed?<sup>6</sup> In *Aldana v. Del Monte Fresh Produce*, the Eleventh Circuit Court of Appeals held that aliens could not sue for CIDT under the Act.<sup>7</sup> Thus, *Aldana's* holding effectively has blocked suits such as Anna's.<sup>8</sup>

This Note examines *Aldana* in light of prior and subsequent litigation, ultimately concluding that the Eleventh Circuit's decision is incorrect because CIDT is not meaningfully different from torture for purposes of the Act; because the Eleventh Circuit ignored the plain text of the Act; and because permitting CIDT suits is necessary to protect abuse victims.<sup>9</sup> Part I identifies the definitions of and prohibitions against CIDT and torture.<sup>10</sup> It then describes the history

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<sup>1</sup> See, e.g., *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1267-68 (N.D. Cal. 2004) (describing plaintiff's Chinese government arrested for protesting its persecution of Falun Gong).

<sup>2</sup> See *Jama v. INS*, 22 F. Supp. 2d 353, 358 (D.N.J. 1998) (describing asylum-seekers INS contractors held in room smelling of human waste).

<sup>3</sup> See, e.g., *Liu Qi*, 349 F. Supp. 2d at 1322 (describing Chinese officials who choked and hit plaintiffs); *Jama*, 22 F. Supp. 2d at 358 (describing INS contractors who painfully grabbed plaintiffs' genitals); *Xuncax v. Gramajo*, 886 F. Supp. 162, 170 (D. Mass. 1995) (describing Guatemalan soldiers who cut pieces from plaintiff's father's chest while plaintiff watched).

<sup>4</sup> See, e.g., *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1245-46 (11th Cir. 2005) (describing plaintiffs who fled to United States and filed suit under Act).

<sup>5</sup> See, e.g., *Liu Qi*, 349 F. Supp. 2d at 1322 (holding that Chinese guards who choked and hit plaintiffs during one-day detention did not commit CIDT or torture); *Jama*, 22 F. Supp. 2d at 363 (holding that INS contractors who painfully grabbed plaintiffs' genitals committed CIDT); *Xuncax*, 886 F. Supp. at 170, 187 (holding that Guatemalan soldiers who cut pieces from plaintiff's father's chest while plaintiff watched committed CIDT).

<sup>6</sup> See, e.g., *Aldana*, 416 F.3d at 1247 (considering whether CIDT claims may proceed); *Liu Qi*, 349 F. Supp. 2d at 1322 (same); *Xuncax*, 886 F. Supp. at 170, 187 (same).

<sup>7</sup> See *Aldana*, 416 F.3d at 1247.

<sup>8</sup> See *id.*

<sup>9</sup> See *infra* Part III (arguing that CIDT is actionable under Act).

<sup>10</sup> See *infra* Part I.A (defining torture and CIDT and identifying prohibitions against them).

of the Act, as well as the judicial history of CIDT and torture under the Act.<sup>11</sup> Part II describes *Aldana's* factual basis, reasoning, and holding.<sup>12</sup> Part III argues that the *Aldana* court erred in holding that CIDT is not actionable under the Act for three reasons.<sup>13</sup> First, CIDT is not meaningfully different from torture under the Supreme Court's interpretation of the Act; because torture is clearly actionable under the Act, CIDT should also be actionable.<sup>14</sup> Second, *Aldana* ignores the plain text of the Act.<sup>15</sup> Finally, because the U.S. government defines torture narrowly, courts must permit CIDT suits under the Act to protect the victims of genuine abuse.<sup>16</sup> Therefore, the Supreme Court should hold that CIDT is actionable under the Act.<sup>17</sup>

### I. BACKGROUND

The Eleventh Circuit's decision in *Aldana* dealt with two major issues.<sup>18</sup> The first issue concerns CIDT, a serious offense related to torture that both international and U.S. law prohibit.<sup>19</sup> The second

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<sup>11</sup> See *infra* Part I (describing history of Act and CIDT lawsuits brought under Act).

<sup>12</sup> See *infra* Part II (describing *Aldana*).

<sup>13</sup> See *infra* Part III (arguing that CIDT is not meaningfully different from torture for Act's purposes, *Aldana* ignored plain text of Act, and United States defines torture too narrowly).

<sup>14</sup> See *infra* Part III.A (arguing that because torture is actionable under Act and CIDT is not meaningfully different from torture, CIDT is also actionable under Act).

<sup>15</sup> See *infra* Part III.B (arguing that *Aldana* court ignored plain text of Act).

<sup>16</sup> See *infra* Part III.C (arguing that because United States defines torture narrowly, courts must recognize CIDT to protect victims of genuine abuse).

<sup>17</sup> See *infra* Conclusion (summarizing prior analysis and recommending that Supreme Court find CIDT actionable under Act).

<sup>18</sup> See *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247 (11th Cir. 2005).

<sup>19</sup> See 42 U.S.C. § 2000dd (2006); United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 1, 16, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85, available at <http://www2.ohchr.org/english/law/cat.htm> [hereinafter Torture Convention]; African Charter on Human and Peoples' Rights art. 5, June 27, 1981, 21 I.L.M. 58, available at <http://www1.umn.edu/humanrts/instree/z1afchar.htm> [hereinafter African Charter]; American Convention on Human Rights art. 5, July 8, 1978, 1144 U.N.T.S. 123, available at <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm> [hereinafter American Convention]; International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171, available at <http://www2.ohchr.org/english/law/ccpr.htm> [hereinafter Political Covenant]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222, available at <http://www.hri.org/docs/ECHR50.html> [hereinafter European Convention]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 2, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, available at <http://www.icrc.org/ihl.nsf/FULL/>

issue concerns the Alien Tort Claims Act, a U.S. statute granting federal courts jurisdiction over torts violating international law and U.S. treaties.<sup>20</sup> Since 1980, multiple courts have decided whether CIDT is actionable under the Act and have usually held that it is.<sup>21</sup> However, the Eleventh Circuit's decision in *Aldana* makes it the first circuit to resolve this question following the United States Supreme Court's most recent interpretation of the Act in *Sosa v. Alvarez-Machain*.<sup>22</sup> In *Sosa*, the Court held that torts were actionable under the Act if they were as well accepted and as well defined as the torts the Act originally prohibited.<sup>23</sup> Therefore, understanding what actions constitute CIDT and how the international community prohibits these actions is essential to determining whether CIDT is actionable under *Sosa*.<sup>24</sup>

#### A. Cruel, Inhuman, and Degrading Treatment and Torture

As defined by the United Nations Convention Against Torture ("Torture Convention"), acts constituting cruel, inhuman, and degrading treatment must meet two criteria.<sup>25</sup> First, the acts must be

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375?OpenDocument [hereinafter Geneva Convention]; Universal Declaration of Human Rights, G.A. Res. 217A, art. 5, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 at 71 (Dec. 12, 1948), available at <http://www.udhr.org/UDHR/default.htm> [hereinafter Universal Declaration].

<sup>20</sup> See Alien Tort Claims Act, 28 U.S.C. § 1350 (2006); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004); *Aldana*, 416 F.3d at 1246-47.

<sup>21</sup> See *Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996) (holding that CIDT is actionable under Act); *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 382 n.4 (S.D.N.Y. 2009) (following *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 253 n.114 (S.D.N.Y. 2009)) (same); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 253 n.114 (S.D.N.Y. 2009) (same); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1093 (N.D. Cal. 2008) (same); *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1320-23 (N.D. Cal. 2004) (same); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1347-49 (N.D. Ga. 2002) (same); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1361 (S.D. Fla. 2001) (same); *Jama v. INS*, 22 F. Supp. 2d 353, 363 (D.N.J. 1998) (same); *Xuncax v. Gramajo*, 886 F. Supp. 162, 186 (D. Mass. 1995) (same). *But see Aldana*, 416 F.3d at 1245 (holding that CIDT is not actionable under Act); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 711-12 (N.D. Cal. 1988) (same).

<sup>22</sup> See *Sosa*, 542 U.S. at 712-38; *Aldana*, 416 F.3d at 1247; Diane Marie Amann, *Cruelty Cognizant*, INTLAWGRRRLS (Oct. 19, 2009, 6:01 AM), <http://intlawgrrls.blogspot.com/2009/10/cruelty-cognizant.html>.

<sup>23</sup> See *Sosa*, 542 U.S. at 732.

<sup>24</sup> See *id.* at 713 (establishing that whether tort is actionable depends on how international community defines and prohibits tort); see also *Aldana*, 416 F.3d at 1246-47 (endorsing *Sosa* criteria); *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1278 (N.D. Cal. 2004) (same).

<sup>25</sup> See Torture Convention, *supra* note 19, art. 16; see also GAIL H. MILLER, DEFINING TORTURE 8-9, 17-20 (2005), available at <http://ranid.mc.yu.edu/cms/>

cruel, inhuman, or degrading.<sup>26</sup> For example, U.S. courts have found CIDT when officials beat prisoners, grab prisoners' genitals, or keep prisoners in filthy conditions.<sup>27</sup> Second, public officials must participate in or consent to such acts.<sup>28</sup>

Torture is a subcategory of CIDT that includes acts inflicting more severe suffering than ordinary CIDT and that are committed with specific intentions and purposes.<sup>29</sup> As defined by the Torture Convention, acts of torture must meet five criteria.<sup>30</sup> First, torture must cause severe pain or suffering, either physical or mental.<sup>31</sup> Second, public officials must participate in or consent to the torture.<sup>32</sup> Third, the torturer must intentionally inflict the suffering.<sup>33</sup> Fourth, the torturer must inflict the suffering for a purpose such as

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uploadedFiles/FLOERSHEIMER/Defining%20Torture.pdf; MANFRED NOWAK & ELIZABETH MCARTHUR, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY* 538-76 (2008).

<sup>26</sup> See Torture Convention, *supra* note 19, art. 16; *see also* MILLER, *supra* note 25, at 8-9; NOWAK & MCARTHUR, *supra* note 25, at 538-76.

<sup>27</sup> See *Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996) (finding CIDT when officials repeatedly beat prisoners); *Liu Qi*, 349 F. Supp. 2d at 1267-68, 1325 (finding CIDT when officials grabbed one prisoner's genitals, but finding no CIDT when officials briefly beat two prisoners); *Jama v. INS*, 22 F. Supp. 2d 353, 358, 363 (D.N.J. 1998) (finding CIDT when officials repeatedly beat prisoners, grabbed prisoners' genitals, and kept prisoners in filthy conditions); *cf. Liu Qi*, 349 F. Supp. 2d at 1322-24 (noting multiple international court cases holding that keeping prisoners in filthy conditions constituted CIDT).

<sup>28</sup> See Torture Convention, *supra* note 19, art. 16; *see also* MILLER, *supra* note 25, at 17-20; NOWAK & MCARTHUR, *supra* note 25, at 538-77.

<sup>29</sup> See Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, ¶ 2, U.N. GAOR, 30th Sess. Supp. No. 34, U.N. Doc. A/10034 at 71 (Dec. 9, 1975), available at <http://www.un-documents.net/dppticidt.htm> [hereinafter Torture Declaration] (defining torture as aggravated form of CIDT); MILLER, *supra* note 25, at 8-9 (synthesizing case law to determine that European Commission on Human Rights considers torture egregious form of CIDT); NOWAK & MCARTHUR, *supra* note 25, at 30-34 (noting that early drafts of Torture Convention defined torture as aggravated CIDT, and most Torture Convention drafters believed torture was aggravated CIDT).

<sup>30</sup> See Torture Convention, *supra* note 19, art. 1; *cf. MILLER*, *supra* note 25, at 6 (identifying seven criteria, listing physical or mental suffering as separate criterion, and debating whether act rather than omission is criterion); NOWAK & MCARTHUR, *supra* note 25, at 28 (identifying four criteria and excluding not inherent part of lawful sanctions from criteria).

<sup>31</sup> See sources cited *supra* note 30.

<sup>32</sup> See sources cited *supra* note 30.

<sup>33</sup> See sources cited *supra* note 30.

interrogation, punishment, coercion, or discrimination.<sup>34</sup> Fifth, the victim's suffering must not be an inherent part of lawful sanctions.<sup>35</sup>

Different countries and groups within the United States have debated how to apply the Torture Convention's definition of torture.<sup>36</sup> The United States had argued for a narrow application of the first and third criteria, but has since retracted its argument following public outcry.<sup>37</sup> Also, the drafters of the Torture Convention ("Working Group") have stated that the fourth criterion is not a comprehensive list of the purposes of torture.<sup>38</sup> Finally, some critics argue that the fifth criterion permits countries to subvert the Torture Convention by classifying specific acts of torture as lawful sanctions.<sup>39</sup>

In 2002, the U.S. government attempted to narrow the application of the first and third Torture Convention criteria to avoid accusations of torturing detainees.<sup>40</sup> A memo written by Assistant Attorney General Jay S. Bybee ("Bybee Memo") narrowly defined both severe suffering (the first criterion) and intent (the third criterion).<sup>41</sup> The Bybee Memo argued that severe suffering amounting to torture meant suffering equivalent to that involved in death or organ failure.<sup>42</sup> The

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<sup>34</sup> See sources cited *supra* note 30.

<sup>35</sup> See sources cited *supra* note 30.

<sup>36</sup> See MILLER, *supra* note 25, at 6-22 (describing various controversies over application of definition of torture); NOWAK & MCARTHUR, *supra* note 25, at 30-34 (describing countries' disagreements over application of definition of torture during and after drafting of United Nations Convention Against Torture); R. Jeffrey Smith & Dan Eggen, *Justice Expands 'Torture' Definition: Earlier Policy Drew Criticism*, WASH. POST, Dec. 31, 2004, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A37687-2004Dec30.html> (discussing controversy over Bush administration's definition of torture). Compare Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Att'y Gen. 2-13 (Aug. 1, 2002), available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf> [hereinafter Bybee Memo] (stating that torture must be specifically intended to cause pain and suffering equivalent to organ failure or death), with Memorandum from Daniel Levin, Acting Assistant Att'y Gen., to James B. Comey, Deputy Att'y Gen. (Dec. 30, 2004), available at <http://www.justice.gov/olc/18usc23402340a2.htm> [hereinafter Levin Memo] (stating that torture need not be specifically intended to cause pain and suffering equivalent to organ failure or death).

<sup>37</sup> See Smith & Eggen, *supra* note 36, at A1; Bybee Memo, *supra* note 36, at 2-13; Levin Memo, *supra* note 36.

<sup>38</sup> See AHCENE BOULESBAA, THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT 21-23 (1999); MILLER, *supra* note 25, at 15-17; NOWAK & MCARTHUR, *supra* note 25, at 39-41.

<sup>39</sup> See BOULESBAA, *supra* note 38, at 31-33; MILLER, *supra* note 25, at 20-22; NOWAK & MCARTHUR, *supra* note 25, at 44-49.

<sup>40</sup> See Bybee Memo, *supra* note 36, at 1-13.

<sup>41</sup> See *id.*

<sup>42</sup> See *id.* at 5-6.

Bybee Memo also argued that a person who intentionally inflicts severe suffering commits torture only if the person intends to inflict severe suffering.<sup>43</sup> For example, according to the Bybee Memo, a person who intended to cause moderate suffering, but actually caused severe suffering did not torture.<sup>44</sup> Both the U.S. and international public reacted negatively to these arguments.<sup>45</sup> Following this reaction, the U.S. government retracted these arguments in a subsequent memo written by Acting Assistant Attorney General Daniel Levin (“Levin Memo”).<sup>46</sup> However, the Levin Memo confirmed the Bybee Memo’s ultimate finding that the United States’s treatment of War on Terror detainees did not constitute torture.<sup>47</sup>

Despite this retraction, the Board of Immigration Appeals (“Immigration Board”) and U.S. courts have continued to apply the government’s narrow definition of the third criteria.<sup>48</sup> In a series of cases, deportees challenged their deportations, alleging that their home countries’ governments would imprison them in conditions amounting to torture.<sup>49</sup> The Immigration Board and the courts held that, assuming the conditions detainees described caused severe suffering, their home countries’ conduct still did not constitute

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<sup>43</sup> See *id.* at 3-5.

<sup>44</sup> See *id.*

<sup>45</sup> See Smith & Eggen, *supra* note 36, at A1.

<sup>46</sup> See *id.* (discussing negative reaction to Bybee Memo); Levin Memo, *supra* note 36 (retracting arguments of Bybee Memo).

<sup>47</sup> See Levin Memo, *supra* note 36, at n.8; see also Bybee Memo, *supra* note 36, at 1-2.

<sup>48</sup> See *Toussaint v. Att’y Gen.*, 455 F.3d 409, 414-17 (3d Cir. 2006); *Alemu v. Gonzales*, 403 F.3d 572, 576 (8th Cir. 2005); *Auguste v. Ridge*, 395 F.3d 123, 139-40, 152-54 (3d Cir. 2005); *Settenda v. Ashcroft*, 377 F.3d 89, 93-96 (1st Cir. 2004); *Bastien v. Dep’t of Homeland Sec.*, No. 03-CV-611F, 2005 WL 1140709, at \*9 (W.D.N.Y. Apr. 29, 2005); *Thelemaque v. Ashcroft*, 363 F. Supp. 2d 198, 208-09 (D. Conn. 2005); *Bankhole v. INS*, 306 F. Supp. 2d 185, 187 (D. Conn. 2003); *In re J-E-*, 23 I. & N. Dec. 291, 296-300 (B.I.A. 2002); cf. *Purveegiin v. Gonzalez*, 448 F.3d 684, 686 (3d Cir. 2006) (endorsing specifically intended standard but rejecting appeal of deportation on other grounds); *Theogene v. Gonzales*, 411 F.3d 1107, 1113 (9th Cir. 2005) (denying deportation relief based on *In re J-E-*, but not itself discussing intent issue); *Robert v. Ashcroft*, 114 F. App’x 615, 616-17 (5th Cir. 2004) (denying deportation relief based on *In re J-E-*, but not itself discussing intent issue); *Cadet v. Bulger*, 377 F.3d 1173, 1180-81, 1195 (11th Cir. 2004) (endorsing specifically intended standard, but rejecting appeal of deportation on other grounds); *Habtemicael v. Ashcroft*, 360 F.3d 820, 826-27 (8th Cir. 2004) (endorsing specifically intended standard, but remanding on other grounds). See generally Renee C. Redman, *Defining “Torture”: The Collateral Effect on Immigration Law of the Attorney General’s Narrow Interpretation of “Specifically Intended” When Applied to United States Interrogators*, 62 N.Y.U. ANN. SURV. AM. L. 465, 465-68 (2007) (describing how Bybee Memo’s definition of torture hurts immigrants fighting their deportation).

<sup>49</sup> See sources cited *supra* note 48.



torture.<sup>50</sup> The Immigration Board and the courts reasoned that the detainees' home countries did not specifically intend to cause severe suffering.<sup>51</sup> Therefore, the detainees' home countries' actions did not constitute torture under the U.S. government's narrowed definition of the third criterion.<sup>52</sup> Thus, the U.S. government's narrowed definition of torture continues to affect deportees even after the U.S. government formally retracted this definition.<sup>53</sup>

Although the fourth criterion is uncontroversial, the Working Group has stated that it is not comprehensive.<sup>54</sup> This criterion states that the torturer must inflict suffering for such purposes as interrogation, punishment, coercion, or discrimination.<sup>55</sup> The Torture Convention's drafting history indicates that the Working Group did not intend this list of purposes to be exhaustive.<sup>56</sup> Thus, other similar purposes theoretically also could establish torture under the Torture Convention's definition, although no country has specifically identified such a purpose.<sup>57</sup> Therefore, individual countries and the courts must determine whether alternative purposes, not listed in the fourth criterion, are sufficient to establish torture.<sup>58</sup>

The Torture Convention's fifth criterion of torture has provoked controversy.<sup>59</sup> This criterion states that torture does not include punishment that is an inherent part of lawful sanctions.<sup>60</sup> The Working Group expressed concern that this criterion may permit states to subvert the Torture Convention by classifying specific acts of torture as lawful sanctions.<sup>61</sup> Individual drafters within the Working Group proposed differing definitions of lawful sanctions to avoid this problem, but were unable to reach agreement.<sup>62</sup> Thus, the final draft of

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<sup>50</sup> See sources cited *supra* note 48.

<sup>51</sup> See sources cited *supra* note 48.

<sup>52</sup> See sources cited *supra* note 48.

<sup>53</sup> See sources cited *supra* note 48.

<sup>54</sup> See BOULESBAA, *supra* note 38, at 21-23; MILLER, *supra* note 25, at 15-17; NOWAK & MCARTHUR, *supra* note 25, at 39-41.

<sup>55</sup> See Torture Convention, *supra* note 19, art. 1; see also sources cited *supra* note 54.

<sup>56</sup> See sources cited *supra* note 54.

<sup>57</sup> See sources cited *supra* note 54.

<sup>58</sup> See sources cited *supra* note 54.

<sup>59</sup> See BOULESBAA, *supra* note 38, at 31-33; MILLER, *supra* note 25, at 20-22; NOWAK & MCARTHUR, *supra* note 25, at 44-49.

<sup>60</sup> See sources cited *supra* note 59.

<sup>61</sup> See sources cited *supra* note 59.

<sup>62</sup> See sources cited *supra* note 59.

the Torture Convention left the term undefined, potentially allowing states to subvert the Torture Convention.<sup>63</sup>

Although the international community disputes how to interpret the definitions of CIDT and torture, it agrees that international law prohibits both.<sup>64</sup> All major human rights treaties, including the Torture Convention and the International Covenant on Civil and Political Rights (“Political Covenant”), prohibit both torture and CIDT.<sup>65</sup> Many foreign states’ domestic laws also pair prohibitions on torture with prohibitions on CIDT.<sup>66</sup> Further, U.S. statutes prohibit CIDT and torture and restrict U.S. aid to countries that engage in either practice.<sup>67</sup>

International law’s prohibitions on torture and CIDT are serious prohibitions that countries cannot derogate.<sup>68</sup> The Comments to the Restatement of Foreign Relations identify both torture and CIDT as *jus cogens* norms (i.e., norms that countries cannot derogate for any reason).<sup>69</sup> Further, almost all international human rights treaties that permit some derogation of international norms still prohibit

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<sup>63</sup> See Torture Convention, *supra* note 19, art. 1; sources cited *supra* note 59.

<sup>64</sup> See Torture Convention, *supra* note 19, art. 1; African Charter, *supra* note 19, art. 5; American Convention, *supra* note 19, art. 5; Political Covenant, *supra* note 19, art. 7; European Convention, *supra* note 19, art. 3; Geneva Convention, *supra* note 19, art. 3; Universal Declaration, *supra* note 19, art. 5; Torture Declaration, *supra* note 29, art. 1.

<sup>65</sup> See Torture Convention, *supra* note 19, art. 1; African Charter, *supra* note 19, art. 5; American Convention, *supra* note 19, art. 5; Political Covenant, *supra* note 19, art. 7; European Convention, *supra* note 19, art. 3; Universal Declaration, *supra* note 19, art. 5; *cf.* Geneva Convention, *supra* note 19, art. 3 (prohibiting cruel treatment and torture); Torture Declaration, *supra* note 29, art. 1 (prohibiting CIDT and torture, U.N. resolution rather than treaty).

<sup>66</sup> See, e.g., CONSTITUTION art. 5 (Alb.) (prohibiting torture and cruel, inhuman, or degrading treatment); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.) (prohibiting torture and inhuman or degrading treatment). See generally MILLER, *supra* note 25, at A1-56 (surveying domestic laws prohibiting torture).

<sup>67</sup> See 7 U.S.C. § 1733(j) (2006) (restricting U.S. agricultural aid); 18 U.S.C. § 2340-2340A (2006) (prohibiting torture); 22 U.S.C. § 262d(a) (2006) (restricting U.S. financial aid); *id.* § 2151n(a) (restricting U.S. development aid); *id.* § 2304 (restricting U.S. security assistance); 42 U.S.C. § 2000dd (2006) (prohibiting CIDT).

<sup>68</sup> See American Convention, *supra* note 19, art. 27; Political Covenant, *supra* note 19, art. 4; European Convention, *supra* note 19, art. 15; *cf.* Torture Declaration, *supra* note 29, art. 3 (stating that exceptional circumstances do not justify CIDT or torture); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 702 cmt. n (1987) (stating that norms against CIDT and torture are nonderogable *jus cogens* norms).

<sup>69</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 702 cmt. n (identifying CIDT and torture as *jus cogens* norms); BLACK’S LAW DICTIONARY 937 (9th ed. 2009) (defining *jus cogens* norm as one from which states cannot derogate); *cf.* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 (2004) (using *Restatement of Foreign Relations* to establish what constitutes violation of international law for purposes of Act).

derogation from the norms against torture and CIDT.<sup>70</sup> Given the strong international and U.S. prohibitions on torture and CIDT, U.S. courts have understandably used the Alien Tort Claims Act to enforce these prohibitions.<sup>71</sup>

### B. *The Alien Tort Claims Act*

The Alien Torts Claim Act grants federal courts jurisdiction over tort lawsuits meeting two criteria.<sup>72</sup> First, an alien must bring the lawsuit.<sup>73</sup> Second, the alien must allege that the defendant committed a tort that violates either international law or a U.S. treaty.<sup>74</sup>

In 1980, plaintiffs began using the Act to sue human rights violators.<sup>75</sup> Some plaintiffs used the Act to sue officials from oppressive governments or to sue corporations who encouraged governments to oppress the corporations' opponents.<sup>76</sup> Victims of

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<sup>70</sup> See American Convention, *supra* note 19, art. 27; Political Covenant, *supra* note 19, art. 4; European Convention, *supra* note 19, art. 15; see also Torture Convention, *supra* note 19, arts. 2, 16 (incorporating implicit prohibition on derogation by stating that it does not reduce protection under existing law, which prohibited derogation); NOWAK & MCARTHUR, *supra* note 25, at 92-93 (describing lobbying efforts to prevent Torture Convention from explicitly prohibiting derogation); cf. Torture Declaration, *supra* note 29, art. 3 (stating that exceptional circumstances do not justify CIDT or torture).

<sup>71</sup> See, e.g., *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (using Act to enforce prohibition on torture); *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (using Act to enforce prohibition on torture); *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1267-68 (N.D. Cal. 2004) (using Act to enforce prohibitions on torture and CIDT).

<sup>72</sup> See Alien Tort Claims Act, 28 U.S.C. § 1350 (2006); cf. *Aldana*, 416 F.3d at 1246 (further subdividing Act into three criteria: alien plaintiff, lawsuit for tort, and tort violating international law). See generally *Sosa*, 542 U.S. at 712-33 (describing and analyzing history of Congress's revisions to Act).

<sup>73</sup> See sources cited *supra* note 72.

<sup>74</sup> See sources cited *supra* note 72.

<sup>75</sup> See *Filartiga*, 630 F.2d at 878; Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 105, 107 (2005); Ingrid Wuerth, *Wiwa v. Shell: The \$15.5 Million Settlement*, AM. SOC. INT'L L., Sept. 9, 2009, at 1-2, available at <http://www.asil.org/files/insight090909pdf>.

<sup>76</sup> See Ku, *supra* note 75, at 107-08; Wuerth, *supra* note 75, at 1-2. Compare *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (describing lawsuit against oppressive government), *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (same), *Liu Qi*, 349 F. Supp. 2d at 1258 (same), *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (same), *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002) (same), and *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (same), with *Aldana*, 416 F.3d at 1242 (describing corporation that encouraged government to oppress corporation's opponents), *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080 (N.D. Cal. 2008) (same), *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457

terrorism have used the Act to sue sponsors of terrorism, while alleged terrorists have used the act to sue the U.S. government.<sup>77</sup>

Despite these plaintiffs' successful use of the Act, some critics argued that the Act did not permit aliens to sue.<sup>78</sup> These critics argued that the Act was jurisdictional, permitting federal courts to hear only those torts Congress specifically designated.<sup>79</sup> Accordingly, if Congress did not designate a tort, the Act on its own did not permit the courts to hear it.<sup>80</sup> Critics based this argument on the placement and wording of the Act.<sup>81</sup> First, critics noted that Congress passed the Act as part of a statute that otherwise dealt exclusively with jurisdiction.<sup>82</sup> Second, critics noted that the original text of the Act, which Congress passed in 1789, stated that courts "shall also have cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."<sup>83</sup> "Cognizance" is a synonym for

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(S.D.N.Y. 2006) (same), *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (same), *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (same), *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999), *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (same), and *Nat'l Coalition Gov't of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997) (same).

<sup>77</sup> See *Ku*, *supra* note 75, at 111-14. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (describing lawsuit against state sponsor of terrorism), *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007) (describing lawsuit against terrorist-supporting bank), and *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86 (D.D.C. 2003) (describing September 11 victims' relatives' lawsuit against Al Qaeda supporters), with *Rasul v. Bush*, 542 U.S. 466 (2004) (describing detainees' lawsuits against U.S. government), *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009) (describing detainees' wives' lawsuits against U.S. government contractor), and *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008) (describing detainees' lawsuit against U.S. government contractor under Torture Act rather than main Act).

<sup>78</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004); *Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 479-80 (1986); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 689 (2002); cf. *Tel-Oren*, 726 F.2d at 798-827 (Bork, J., concurring) (arguing against finding cause of action under Act for other reasons); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816 (1997) (same); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 1-3 (1995) (same).

<sup>79</sup> See *Sosa*, 542 U.S. at 713; *Tel-Oren*, 726 F.2d at 812; Casto, *supra* note 78, at 479-80; Dodge, *supra* note 78, at 689.

<sup>80</sup> See sources cited *supra* note 79.

<sup>81</sup> See sources cited *supra* note 79.

<sup>82</sup> See sources cited *supra* note 79.

<sup>83</sup> See *Sosa*, 542 U.S. at 713.

jurisdiction.<sup>84</sup> Therefore, critics argued, Congress intended the Act to be solely jurisdictional.<sup>85</sup>

Congress responded to the argument that the Act was jurisdictional by passing the Torture Victims Protection Act (“Torture Act”).<sup>86</sup> The Torture Act authorized aliens and U.S. citizens to sue foreign public officials and their agents for torture and extrajudicial execution.<sup>87</sup> Congressional commentary regarding the Torture Act stated that Congress intended the Torture Act to serve as unambiguous enabling legislation.<sup>88</sup> Further, this congressional commentary stated that the Torture Act should not replace the Act because the Act authorized lawsuits for torts other than torture.<sup>89</sup> Conversely, the Torture Act only provided an unambiguous cause of action for torture and extrajudicial execution.<sup>90</sup> Notably, critics continued to argue that the Act did not provide a cause of action for other torts, including CIDT.<sup>91</sup>

The Supreme Court addressed the critics’ argument that the Act was jurisdictional in *Sosa v. Alvarez-Machain*.<sup>92</sup> In *Sosa*, the U.S. government hired several Mexican citizens to kidnap Humberto Alvarez-Machain, a Mexican citizen the U.S. government accused of torturing a C.I.A. agent to death.<sup>93</sup> Alvarez-Machain sued his kidnappers for arbitrary detention under the Act.<sup>94</sup>

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<sup>84</sup> See *id.*; BLACK’S LAW DICTIONARY, *supra* note 69, at 295 (listing “within the court’s jurisdiction” as one definition of cognizable); see, e.g., THE FEDERALIST NO. 81, at 369-73 (Alexander Hamilton) (Jim Manis ed., 2001), available at <http://www2.hn.psu.edu/faculty/jmanis/poldocs/fed-papers.pdf> (using cognizance and jurisdiction as synonyms).

<sup>85</sup> See sources cited *supra* note 79.

<sup>86</sup> See generally Torture Victim Protection Act of 1991, Pub. L. No. 102-256, §§ 2, 3, 106 Stat. 73, 73 (2008) (establishing unambiguous cause of action for torture and ensuring torture victims would not be denied right to sue because of argument Act was merely jurisdictional).

<sup>87</sup> See *id.*

<sup>88</sup> See S. REP. NO. 102-249, pt. II, at 3 (1991); H.R. REP. NO. 102-367, pt. I, at 85 (1991).

<sup>89</sup> See sources cited *supra* note 88.

<sup>90</sup> See §§ 2, 3, 106 Stat. at 73; S. REP. NO. 102-249, pt. II, at 3; H.R. REP. NO. 102-367, pt. I, at 85.

<sup>91</sup> See *Abebe-Jira v. Negewo*, 72 F.3d 844, 846 (11th Cir. 1996) (noting defendant’s argument that Act did not provide cause of action for CIDT); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713-14 (2004); Dodge, *supra* note 78, at 689.

<sup>92</sup> See *Sosa*, 542 U.S. at 713-14.

<sup>93</sup> *Id.* at 697-98.

<sup>94</sup> *Id.* at 698.

Before trial, the district court granted summary judgment in Alvarez-Machain's favor.<sup>95</sup> The Ninth Circuit Court of Appeals affirmed, as did the Ninth Circuit's en banc panel following a further review.<sup>96</sup> On appeal to the Supreme Court, the defendants argued that the Act was jurisdictional and did not permit Alvarez-Machain to sue absent specific enabling legislation.<sup>97</sup> Conversely, Alvarez-Machain argued that the Act was not solely jurisdictional and, thus, the Act permitted him to sue even absent enabling legislation.<sup>98</sup>

The Supreme Court held that the Act was jurisdictional, but further held that aliens could still sue under the Act even absent enabling legislation.<sup>99</sup> The Court noted that Congress had not provided legislative history for the Act.<sup>100</sup> Thus, to determine Congress's intent, the Court analyzed the Act's structure and contemporary legislators' attitudes towards international law.<sup>101</sup> The Court agreed with the defendants that the placement and wording of the Act demonstrated that it was jurisdictional.<sup>102</sup> However, the Court found that the legislators who passed the Act viewed attacks on ambassadors, piracy, and safe conduct violations as actionable international law violations.<sup>103</sup> Therefore, the Court held that Congress intended to authorize immediate lawsuits for at least those torts.<sup>104</sup>

Further, the Court held that courts may expand the range of torts actionable under the Act.<sup>105</sup> The Court found that, at the time Congress passed the Act, Congress believed that courts could identify new torts in violation of international law.<sup>106</sup> The Court noted that later cases have restricted the federal courts' ability to identify new torts.<sup>107</sup> However, the Court held that because Congress drafted the Act expecting judicial expansion, cautious, limited expansion of the Act was nevertheless appropriate.<sup>108</sup>

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<sup>95</sup> *Id.* at 699.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 713.

<sup>98</sup> *Id.*

<sup>99</sup> *See id.* at 714.

<sup>100</sup> *Id.* at 713.

<sup>101</sup> *Id.* at 713-25.

<sup>102</sup> *Id.* at 713-14.

<sup>103</sup> *Id.* at 715-20.

<sup>104</sup> *Id.*

<sup>105</sup> *See id.* at 724-25.

<sup>106</sup> *Id.* at 730-01.

<sup>107</sup> *Id.* at 725-28.

<sup>108</sup> *Id.* at 728-30.

Accordingly, the Court held that the Act provides a cause of action for a tort if the tort meets two criteria.<sup>109</sup> First, the tort must be as well accepted as the torts the Act originally prohibited.<sup>110</sup> Second, it must be as well defined as the torts the Act originally prohibited.<sup>111</sup> The Court held that courts may determine whether a tort meets these criteria by examining a variety of sources.<sup>112</sup> These sources include treaties, controlling executive and legislative acts, controlling judicial decisions, and international law scholars' writings.<sup>113</sup>

In applying these criteria to Alvarez-Machain, the Court found that his arbitrary detention claim was not actionable under the Act.<sup>114</sup> Alvarez-Machain argued that his arbitrary detention violated two U.S. treaties, including the Political Covenant.<sup>115</sup> However, the Court found that neither instrument bound the United States.<sup>116</sup> Alvarez-Machain also argued that his arbitrary detention violated international law.<sup>117</sup> To evaluate Alvarez-Machain's argument, the court examined international and U.S. judicial opinions, a survey of constitutions, and the Restatement of Foreign Relations.<sup>118</sup> The Court found that none of these sources supported, and some even contradicted, Alvarez-Machain's claim that his arbitrary detention violated international law.<sup>119</sup> Therefore, the Court concluded that Alvarez-Machain's arbitrary detention had neither violated a treaty of the U.S. nor international law.<sup>120</sup> Accordingly, the Court reversed the holdings of the district and appellate courts and dismissed Alvarez-Machain's claim.<sup>121</sup> However, subsequent torture and CIDT plaintiffs have been more successful than Alvarez-Machain.<sup>122</sup> Courts applying the *Sosa*

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<sup>109</sup> *Id.* at 732.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 733-34.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 734-38.

<sup>115</sup> *Id.* at 734.

<sup>116</sup> *Id.* at 734-35.

<sup>117</sup> *Id.* at 735.

<sup>118</sup> *Id.* at 737 & n.27.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 734, 738.

<sup>121</sup> *Id.* at 738.

<sup>122</sup> See *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1250-53 (11th Cir. 2005) (holding that torture is actionable under Act after *Sosa*); *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 382 n.4 (S.D.N.Y. 2009) (same); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 253 n.114 (S.D.N.Y. 2009) (holding that CIDT and torture are still actionable under Act after *Sosa*); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1093 (N.D. Cal. 2008) (same); *Doe v. Liu Qi*, 349 F.

criteria to CIDT and torture generally have found that the Act still provides a cause of action for both acts.<sup>123</sup>

### C. Torture and CIDT Under the Act

In cases before and after *Sosa*, courts have generally agreed that torture is actionable under that Act.<sup>124</sup> The paradigmatic torture case, and the first modern lawsuit under the Act, is *Filartiga v. Pena-Irala*.<sup>125</sup> In *Filartiga*, a Paraguayan family sued a former Paraguayan official who had tortured and murdered the family's seventeen-year-old son.<sup>126</sup> The Second Circuit Court of Appeals concluded that torturers were enemies of all humankind, comparable to the pirates the Act originally targeted.<sup>127</sup> Therefore, the Second Circuit held that the Act provided a cause of action for torture.<sup>128</sup> Later courts have endorsed *Filartiga*, holding that international law prohibits torture strongly enough and defines torture clearly enough for torture to be actionable.<sup>129</sup> Notably, the few courts that have held that torture is not actionable under the Act avoided stating that torture does not meet the *Sosa* criteria.<sup>130</sup>

Case law regarding CIDT's status under the Act is less consistent, but generally still holds that CIDT is actionable.<sup>131</sup> Courts, both before

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Supp. 2d 1258, 1321-22 (N.D. Cal. 2004) (same). *But see Aldana*, 416 F.3d at 1247 (holding that CIDT is not actionable under Act after *Sosa*); *Chowdhury v. WorldTel Bangl. Holding, Ltd.*, 588 F. Supp. 2d 375, 382 (E.D.N.Y. 2008) (suggesting but not holding that CIDT is not actionable under Act after *Sosa*).

<sup>123</sup> See sources cited *supra* note 122.

<sup>124</sup> See *Aldana*, 416 F.3d at 1250; *Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996); *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980); *Bowoto*, 557 F. Supp. 2d at 1084-87; *Chavez v. Carranza*, 413 F. Supp. 2d 891, 898-99 (W.D. Tenn. 2005); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179 (C.D. Cal. 2005); *Xuncax v. Gramajo*, 886 F. Supp. 162, 169-71 (D. Mass. 1995).

<sup>125</sup> See *Filartiga*, 630 F.2d at 876.

<sup>126</sup> See *id.* at 878.

<sup>127</sup> See *id.* at 890.

<sup>128</sup> See *id.*

<sup>129</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (establishing *Sosa* criteria); see, e.g., *Aldana*, 416 F.3d at 1250 (holding that torture meets *Sosa* criteria); *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1278 (N.D. Cal. 2004) (holding that CIDT meets *Sosa* criteria).

<sup>130</sup> See *Enahoro v. Abubakar*, 408 F.3d 877, 884-86 (7th Cir. 2005) (holding that Torture Act precludes cause of action for torture under Act); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J., concurring) (arguing that Act is merely jurisdictional); *id.* at 823 (Robb, J., concurring) (arguing that foreign government's torture of its own citizens is nonjusticiable political question).

<sup>131</sup> See *Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996); *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 382 n.4 (S.D.N.Y. 2009); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 253 n.114 (S.D.N.Y. 2009); *Bowoto v. Chevron*



and after *Sosa*, have agreed that international law prohibits CIDT.<sup>132</sup> However, a few courts have expressed concern that CIDT lacks the requisite characteristics to be actionable under the Act.<sup>133</sup> Some of these courts have resolved this concern by deciding whether an act constitutes CIDT on a case-by-case basis.<sup>134</sup> *Doe v. Liu Qi* synthesizes the modern case law on CIDT and provides an example of this case-by-case analysis.<sup>135</sup> In *Liu Qi*, Falun Gong protestors sued Chinese officials for briefly detaining and physically and sexually assaulting them.<sup>136</sup> The district court examined international treaties and U.S. judicial opinions and concluded that U.S. courts agree that international law prohibits CIDT.<sup>137</sup> The court, however, noted a split over whether international law sufficiently defined CIDT to make it actionable under the Act.<sup>138</sup> The court chose to follow another court that had examined whether an act was CIDT on a case-by-case basis.<sup>139</sup> Accordingly, the court held that one plaintiff who alleged sexual assault had stated a CIDT claim, but that plaintiffs who alleged physical assault had not.<sup>140</sup>

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Corp., 557 F. Supp. 2d 1080, 1093 (N.D. Cal. 2008); *Liu Qi*, 349 F. Supp. 2d at 1296; *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1347-49 (N.D. Ga. 2002); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1361 (S.D. Fla. 2001); *Jama v. INS*, 22 F. Supp. 2d 353, 358 (D.N.J. 1998); *Xuncax v. Gramajo*, 886 F. Supp. 162, 186 (D. Mass. 1995). *But see Aldana*, 416 F.3d at 1247; *Chowdhury v. WorldTel Bangl. Holding, Ltd.*, 588 F. Supp. 2d 375, 382 (E.D.N.Y. 2008); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 711-12 (N.D. Cal. 1988).

<sup>132</sup> See *Abebe-Jira*, 72 F.3d at 847; *Wiwa*, 626 F. Supp. 2d at 382 n.4 (following *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 253 n.114); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 253 n.114; *Chowdhury*, 588 F. Supp. 2d at 382; *Bowoto*, 557 F. Supp. 2d at 1093; *Liu Qi*, 349 F. Supp. 2d at 1267-68; *Mehinovic*, 198 F. Supp. 2d at 1347-49; *Estate of Cabello*, 157 F. Supp. 2d at 1361; *Jama*, 22 F. Supp. 2d at 358; *Xuncax*, 886 F. Supp. at 186; see also *Forti*, 694 F. Supp. at 711-12, *rev'g Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1543 (N.D. Cal. 1987) (finding that plaintiffs had failed to establish that CIDT violated international law).

<sup>133</sup> See *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 789, 793 (9th Cir. 1996); *Chowdhury*, 588 F. Supp. 2d at 382-83; *Liu Qi*, 349 F. Supp. 2d at 1321-23; *Xuncax*, 886 F. Supp. at 185-86; *Forti*, 694 F. Supp. at 711.

<sup>134</sup> See *Aldana v. Del Monte Fresh Produce, N.A.*, 452 F.3d 1284, 1288 (11th Cir. 2006) (Barkett, J., dissenting) (arguing that *Sosa* implicitly endorsed case-by-case analysis); *Liu Qi*, 349 F. Supp. 2d at 1321-23; *Xuncax*, 886 F. Supp. at 185-86.

<sup>135</sup> See *Liu Qi*, 349 F. Supp. 2d at 1320-25.

<sup>136</sup> See *id.* at 1321-24.

<sup>137</sup> See *id.*

<sup>138</sup> See *id.* (citing *Xuncax*, 886 F. Supp. at 187; *Forti*, 694 F. Supp. at 712).

<sup>139</sup> See *id.* (following *Xuncax*, 886 F. Supp. at 187).

<sup>140</sup> See *id.*

In practice, courts have used a case-by-case method to determine both what constitutes CIDT and what constitutes severe suffering.<sup>141</sup> Some courts have flatly stated that acts are or are not torture or CIDT, without providing a rationale.<sup>142</sup> For example, in *Abebe-Jira v. Negewo*, the court stated, without analysis, that an official who had beaten political prisoners had committed both CIDT and torture.<sup>143</sup> Other courts compare the acts in the particular case to the acts in prior cases where courts had found CIDT or torture.<sup>144</sup> For example, in *Liu Qi*, the court compared plaintiffs' allegations that officials had briefly beaten them with previous courts' holdings that repeated beatings constituted CIDT.<sup>145</sup> Thus, the *Liu Qi* court concluded that the plaintiffs' brief beating did not constitute CIDT.<sup>146</sup> In *Villeda Aldana v. Fresh Del*

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<sup>141</sup> See, e.g., *Abebe-Jira v. Negewo*, No. 1:90-CV-2010-GET, 1993 WL 814304, at \*4 (N.D. Ga. Aug. 20, 1993) (holding without rationale that plaintiffs' allegations established both CIDT and torture). Compare *Aldana v. Del Monte Fresh Produce, N.A.*, 452 F.3d 1284, 1288 (11th Cir. 2006) (Barkett, J., dissenting) (stating without rationale that plaintiffs' allegations established CIDT), with *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1253 (11th Cir. 2005) (holding without rationale that plaintiffs' allegations did not establish torture), *Chavez v. Carranza*, 413 F. Supp. 2d 891, 901-02 (W.D. Tenn. 2005) (holding without rationale that plaintiffs' allegations established torture), and *Eastman Kodak v. Kavlin*, 978 F. Supp. 1078, 1081, 1093 (S.D. Fla. 1997) (holding without rationale that plaintiffs' allegations did not establish torture). Compare *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1094-95 (N.D. Cal. 2008) (holding that plaintiffs' allegations were comparable to acts courts previously considered torture), and *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1294-95 (S.D. Fla. 2003) (holding that plaintiffs' allegations were not comparable to acts courts previously considered torture), with *Liu Qi*, 349 F. Supp. 2d at 1320-25 (holding that only one plaintiff's allegations were comparable to acts courts previously considered CIDT).

<sup>142</sup> See, e.g., *Aldana*, 452 F.3d at 1288 (Barkett, J., dissenting) (stating without rationale that being credibly threatened with death was CIDT); *Aldana*, 416 F.3d at 1253 (holding without rationale that pushing, shoving, and hair pulling were not torture); *Chavez*, 413 F. Supp. 2d at 901-02 (holding without rationale that being sexually assaulted, electrocuted, and burned with acid was torture); *Eastman Kodak*, 978 F. Supp. at 1081, 1094 (holding without rationale that being jailed without food, bed, blanket, or protection from murderers and drug dealers was not torture); *Abebe-Jira*, 1993 WL 814304, at \*4 (holding without rationale that severe beatings during months-long detentions were both CIDT and torture).

<sup>143</sup> See *Abebe-Jira*, 1993 WL 814304, at \*4.

<sup>144</sup> See, e.g., *Bowoto*, 557 F. Supp. 2d at 1094-95 (holding that being shot and repeatedly beaten was comparable to other acts courts previously considered torture); *Liu Qi*, 349 F. Supp. 2d at 1320-25 (holding that being briefly beaten was not comparable to acts previously courts considered CIDT); *Villeda Aldana*, 305 F. Supp. 2d at 1294-95 (holding that eight-hour detention with brief beating was not comparable to acts courts previously considered torture).

<sup>145</sup> See *Liu Qi*, 349 F. Supp. 2d at 1320-25.

<sup>146</sup> See *id.*

*Monte Produce, Inc.*, the court performed an identical, comparison-based analysis of whether brief beatings constituted torture.<sup>147</sup> Unfortunately, however, the court's analysis of the plaintiffs' CIDT claims was far less searching.<sup>148</sup>

## II. *ALDANA V. DEL MONTE FRESH PRODUCE*

In *Aldana v. Del Monte Fresh Produce*, the Eleventh Circuit Court of Appeals considered whether the *Sosa* criteria permitted lawsuits for CIDT under the Act.<sup>149</sup> In *Aldana*, Guatemalan union leaders sued Del Monte Fresh Produce ("Del Monte") under the Act for various violations of international law.<sup>150</sup> The plaintiffs alleged that Del Monte hired private security agents to kidnap them and hold them hostage at gunpoint.<sup>151</sup> These agents hit the plaintiffs, threatened to kill them, and forced them to videotape last messages to their families.<sup>152</sup> Then, the agents forced the plaintiffs to publicly denounce the union, resign from their jobs, and leave the country on threat of death.<sup>153</sup> Upon release, the plaintiffs fled to the United States and sued Del Monte under the Act for various violations of international law, including CIDT.<sup>154</sup> The district court dismissed the plaintiffs' CIDT claim on procedural grounds, as the plaintiffs had not alleged CIDT in their complaint.<sup>155</sup>

On appeal, the Eleventh Circuit affirmed the district court's dismissal of the plaintiffs' CIDT arguments in a one-paragraph analysis.<sup>156</sup> However, unlike the district court, the Eleventh Circuit examined the substance of the plaintiffs' CIDT claim, rather than simply dismissing it on procedural grounds.<sup>157</sup> The court acknowledged that two district courts within its circuit had found that

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<sup>147</sup> See *Villeda Aldana*, 305 F. Supp. 2d at 1294-95.

<sup>148</sup> See *Aldana v. Del Monte Fresh Produce, N.A.*, 452 F.3d 1284, 1284 (11th Cir. 2006); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1245-47 (11th Cir. 2005); *Villeda Aldana*, 305 F. Supp. 2d at 1294-95.

<sup>149</sup> See *Aldana*, 416 F.3d at 1245-47.

<sup>150</sup> See *Villeda Aldana*, 305 F. Supp. 2d at 1291, 1295 n.5 (alleging torture, kidnapping, unlawful detention, crimes against humanity, denial of freedom of association and organization, and CIDT in violation of international law).

<sup>151</sup> See *Aldana*, 416 F.3d at 1245.

<sup>152</sup> See *id.*

<sup>153</sup> See *id.*

<sup>154</sup> See *id.* at 1245-46 (noting plaintiffs' flight to United States and subsequent suit); *Villeda Aldana*, 305 F. Supp. 2d at 1291, 1295 n.5 (listing claims brought under Act).

<sup>155</sup> See *Villeda Aldana*, 305 F. Supp. 2d at 1295 n.5.

<sup>156</sup> See *Aldana*, 416 F.3d at 1247.

<sup>157</sup> See *id.*

CIDT was actionable under the Act.<sup>158</sup> In distinguishing these holdings, the court noted that these lower courts based their opinions on the Political Covenant's prohibition on CIDT.<sup>159</sup> The court then cited *Sosa*, which held that the Political Covenant did not bind the United States.<sup>160</sup> Therefore, the *Aldana* court held that the plaintiffs' CIDT claims had no substantive basis and affirmed the lower court's dismissal of the plaintiffs' CIDT claims.<sup>161</sup> The plaintiffs appealed, but a panel of Eleventh Circuit judges denied their request for a rehearing en banc.<sup>162</sup> However, despite the Eleventh Circuit's refusal to reverse *Aldana*, its holding that CIDT is not actionable under the Act remains open to doubt.<sup>163</sup>

III. THE ELEVENTH CIRCUIT ERRED IN *ALDANA V. DEL MONTE FRESH PRODUCE* BY FINDING THAT CIDT WAS NOT ACTIONABLE UNDER THE ACT

The Eleventh Circuit's holding in *Aldana v. Del Monte Fresh Produce*, that CIDT is not actionable under the Act, was erroneous for three reasons.<sup>164</sup> First, CIDT is not meaningfully different from torture under the Supreme Court's interpretation of the Act in *Sosa*.<sup>165</sup> Therefore, because torture is clearly actionable under the Act, CIDT is also actionable under the Act.<sup>166</sup> Second, the *Aldana* court ignored the

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<sup>158</sup> See *id.* (citing *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1347 (N.D. Ga. 2002); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1361 (S.D. Fla. 2001)).

<sup>159</sup> See *id.*

<sup>160</sup> See *id.*

<sup>161</sup> See *id.*

<sup>162</sup> See *Aldana v. Del Monte Fresh Produce, N.A.*, 452 F.3d 1284, 1284 (11th Cir. 2006).

<sup>163</sup> See *id.* (denying rehearing en banc); see also *id.* at 1284 (Barkett, J., dissenting) (arguing that *Aldana* court's holding was error of precedent setting importance and that Eleventh Circuit en banc should reverse it); *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 382 n.4 (S.D.N.Y. 2009) (following *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 253 n.114 (S.D.N.Y. 2009)); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 253 n.114 (S.D.N.Y. 2009) (rejecting *Aldana* court's holding and adopting Judge Barkett's dissent); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1093 (N.D. Cal. 2008) (adopting Judge Barkett's dissent).

<sup>164</sup> See *infra* Part III (arguing *Aldana* court erred because CIDT is comparable to torture, *Aldana* court ignored plain text of Act, and United States defines torture too narrowly).

<sup>165</sup> See *infra* Part III.A (arguing that CIDT is not meaningfully different from torture under Act).

<sup>166</sup> See *infra* Part III.A (arguing that because torture is actionable under Act, CIDT is also actionable under Act).

plain text of the Act.<sup>167</sup> Third, because the U.S. government defines torture narrowly, courts must permit CIDT suits under the Act to protect victims of genuine abuse.<sup>168</sup>

A. *CIDT Is Actionable Under the Act Because It Is Not Meaningfully Different from Torture Under the Sosa Criteria*

CIDT is actionable under the Act because CIDT is not meaningfully different from torture under the Supreme Court's interpretation of the Act in *Sosa*.<sup>169</sup> *Sosa's* criteria make a tort actionable under the Act if the norm against the tort is strong and the tort is sufficiently well defined.<sup>170</sup> As held by numerous cases, including *Aldana* itself, torture is actionable under the Act.<sup>171</sup> Further, international law prohibits CIDT as strongly as it prohibits torture and arguably defines CIDT more clearly than it defines torture.<sup>172</sup> Therefore, CIDT is actionable under the Act because CIDT, like torture, meets the *Sosa* criteria.

<sup>167</sup> See *infra* Part III.B (arguing that *Aldana* court improperly ignored plain text of Act).

<sup>168</sup> See *infra* Part III.C (arguing that permitting CIDT suits is necessary to protect genuine abuse victims).

<sup>169</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (interpreting Act to require that torts be as well accepted and well defined as torts Act originally prohibited); Torture Convention, *supra* note 19, arts. 1, 16 (pairing prohibition on torture with prohibition on CIDT); African Charter, *supra* note 19, art. 5 (same); American Convention, *supra* note 19, art. 5 (same); Political Covenant, *supra* note 19, art. 7 (same); European Convention, *supra* note 19, art. 3 (same); Torture Declaration, *supra* note 29, art. 1 (same); Universal Declaration, *supra* note 19, art. 5 (same); *cf.* Geneva Convention, *supra* note 19, art. 3 (pairing prohibition on torture with prohibition on cruel treatment). Compare Torture Convention, *supra* note 19, art. 1 (defining torture to include five disputed criteria), with Torture Convention, *supra* note 19, art. 16 (defining CIDT to include two disputed criteria).

<sup>170</sup> See *Sosa*, 542 U.S. at 732; *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1246-47 (11th Cir. 2005); *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1278 (N.D. Cal. 2004).

<sup>171</sup> See *Aldana*, 416 F.3d at 1250-51; *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1084-87 (N.D. Cal. 2008); *Chavez v. Carranza*, 413 F. Supp. 2d 891, 898 (W.D. Tenn. 2005); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179 (C.D. Cal. 2005); *Xuncax v. Gramajo*, 886 F. Supp. 162, 169-71 (D. Mass. 1995).

<sup>172</sup> See Torture Convention, *supra* note 19, art. 1 (prohibiting both CIDT and torture); African Charter, *supra* note 19, art. 5 (same); American Convention, *supra* note 19, art. 5 (same); Political Covenant, *supra* note 19, art. 7 (same); European Convention, *supra* note 19, art. 3 (same); Torture Declaration, *supra* note 29, art. 1 (same); Universal Declaration, *supra* note 19, art. 5 (same); see also MILLER, *supra* note 25, at 5-20 (same); NOWAK & McARTHUR, *supra* note 25, at 30-34 (describing debates over definition of torture); Smith & Eggen, *supra* note 36, at A1 (same). Compare Bybee Memo, *supra* note 36, at 2-13 (establishing heightened standards for intent and

Courts have repeatedly held that torture is actionable under the Act.<sup>173</sup> Under *Sosa*'s criteria, a tort is actionable if it is both as strongly prohibited and as well defined as the original torts actionable under the Act.<sup>174</sup> Courts agree that the international community prohibits and defines torture clearly enough to meet both criteria.<sup>175</sup> Even courts which have found that torture is not actionable under the Act have not argued that torture does not meet the *Sosa* criteria.<sup>176</sup>

The international norm against CIDT is comparable to the international norm against torture.<sup>177</sup> All major international treaties and many domestic laws that prohibit torture also prohibit CIDT.<sup>178</sup> The Restatement of Foreign Relations identifies both CIDT and torture as *jus cogens* norms, which states cannot derogate.<sup>179</sup> Further, human rights treaties either implicitly or explicitly identify CIDT as nonderogable, supporting the idea that CIDT is a *jus cogens* norm.<sup>180</sup> Therefore, the norm against CIDT is comparable to the norm against torture.<sup>181</sup>

Comparing the definitions of CIDT and torture reveals that, in practice, international law defines CIDT better than it defines

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severe suffering), with Levin Memo, *supra* note 36 (rejecting heightened standards for intent and severe suffering); compare Torture Convention, *supra* note 19, art. 1 (defining torture to include five criteria that international community disputes), with Torture Convention, *supra* note 19, art. 16 (defining CIDT to include two criteria that international community disputes).

<sup>173</sup> See sources cited *supra* note 171.

<sup>174</sup> See *Sosa*, 542 U.S. at 732; *Aldana*, 416 F.3d at 1246-47; *Liu Qi*, 349 F. Supp. 2d at 1278.

<sup>175</sup> See sources cited *supra* note 171.

<sup>176</sup> See sources cited *supra* note 130.

<sup>177</sup> See *Aldana v. Del Monte Fresh Produce, N.A.*, 452 F.3d 1284, 1287 (11th Cir. 2006) (noting *Xuncax* court's statement that international prohibition on CIDT is as strong as international prohibition on torture); *Xuncax v. Gramajo*, 886 F. Supp. 162, 186 (D. Mass. 1995) (noting that international prohibition on CIDT is as strong as international prohibition on torture); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 702 (a)-(f) & cmt. n (1987) (identifying both torture and CIDT as *jus cogens* norms).

<sup>178</sup> See sources cited *supra* notes 64 and 67. See generally MILLER, *supra* note 25, at A1-56 (surveying international and domestic prohibitions on CIDT and torture).

<sup>179</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 702 (a)-(f) & cmt. n; cf. *Sosa*, 542 U.S. at 737 (demonstrating use of *Restatement of Foreign Relations* to establish what Act prohibits); BLACK'S LAW DICTIONARY, *supra* note 69, at 937 (defining *jus cogens* norm as one from which countries cannot derogate).

<sup>180</sup> See sources cited *supra* note 70.

<sup>181</sup> Cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 702 (a)-(f) & cmt. n (identifying both torture and CIDT as *jus cogens* norms); MILLER, *supra* note 25, at A1-56 (identifying prohibitions against torture and CIDT); sources cited *supra* note 64.

torture.<sup>182</sup> The first criterion of CIDT requires that the conduct be cruel, inhuman, or degrading.<sup>183</sup> In contrast, the first criterion of torture requires that the conduct cause severe suffering.<sup>184</sup> Although these criteria are different, in practice, courts usually apply them in the same way.<sup>185</sup> The second criterion, involvement of a public official, is the same for both torture and CIDT.<sup>186</sup> Finally, torture has three additional criteria — intent to cause severe suffering, specified purpose for torturing, and absence of lawful sanctions — that are subject to dispute.<sup>187</sup> Thus, the first two criteria of CIDT and torture are effectively the same, but torture has additional, disputed criteria that CIDT does not. In practice, therefore, torture is arguably less well defined than CIDT.

Some critics might argue that torture is actionable under the Act only because the Torture Act explicitly authorizes torture victims to sue.<sup>188</sup> Prior to the Court's decision in *Sosa*, critics argued that torture and other torts were not actionable absent enabling legislation.<sup>189</sup>

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<sup>182</sup> See sources cited *supra* note 172.

<sup>183</sup> See Torture Convention, *supra* note 19, art. 16; see also MILLER, *supra* note 25, at 8-9; NOWAK & MCARTHUR, *supra* note 25, at 28.

<sup>184</sup> See Torture Convention, *supra* note 19, art. 1; see also MILLER, *supra* note 25, at 6; NOWAK & MCARTHUR, *supra* note 25, at 28.

<sup>185</sup> See *supra* notes 141-47 and accompanying text.

<sup>186</sup> Compare Torture Convention, *supra* note 19, art. 1 (requiring involvement of public official for act to constitute torture), with Torture Convention, *supra* note 19, art. 16 (requiring involvement of public official for act to constitute CIDT). See generally MILLER, *supra* note 25, at 17-20 (discussing application of public official requirement as it applies to both torture and CIDT).

<sup>187</sup> MILLER, *supra* note 25, at 6 (describing various controversies over severe suffering, purpose, and lawful sanctions criteria); NOWAK & MCARTHUR, *supra* note 25, at 30-34 (describing countries' disagreements over severe suffering, purpose, and lawful sanctions criteria during and after drafting of Torture Convention); Smith & Eggen, *supra* note 36, at A1 (discussing controversy over Bush administration's narrow definition of severe suffering and purpose). Compare Bybee Memo, *supra* note 36, at 1-13 (establishing narrow interpretation of severe suffering and purpose criteria), with Levin Memo, *supra* note 36 (retracting narrow interpretation of severe suffering and purpose).

<sup>188</sup> See Torture Victim Protection Act of 1991, Pub. L. No. 102-256, §§ 2, 3, 106 Stat. 73, 73 (2008); cf. *Aldana v. Del Monte Fresh Produce, N.A.*, 452 F.3d 1284, 1250 (11th Cir. 2006) (considering whether Act provides cause of action for torture independent of Torture Act); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1084-87 (N.D. Cal. 2008) (same); *Chavez v. Carranza*, 413 F. Supp. 2d 891, 898 (W.D. Tenn. 2005) (same); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179 (C.D. Cal. 2005) (same).

<sup>189</sup> See generally *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004) (describing arguments prior to decision in *Sosa* that Act does not on its own authorize suit); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798-827 (D.C. Cir. 1984) (Bork, J.,

Congress responded to these critics by passing enabling legislation explicitly permitting suits for torture under the Torture Act.<sup>190</sup> The Supreme Court also responded to these critics by holding that torts lacking enabling legislation were actionable if they were sufficiently well accepted and well defined.<sup>191</sup> However, because the Torture Act serves as enabling legislation for torture, torture is actionable even if it is not well accepted and well defined.<sup>192</sup> Thus, critics might argue that torture is neither well accepted nor well defined, and is actionable only because of the Torture Act.<sup>193</sup> For example, proponents of this theory might argue that because countries regularly commit torture, the prohibition on torture is not well accepted enough to pass the *Sosa* test.<sup>194</sup> Therefore, because the prohibition on CIDT is virtually identical to the prohibition on torture, the prohibition on CIDT would also be insufficiently well accepted.<sup>195</sup>

Similarly, critics might argue that the debates over the definition of torture indicate that it is not well defined enough to pass the *Sosa* test.<sup>196</sup> Although CIDT is arguably better defined than torture, critics

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concurring) (arguing Act does not authorize suit); Bradley & Goldsmith, *supra* note 78 (same); Weisburd, *supra* note 78 (same).

<sup>190</sup> See §§ 2, 3, 106 Stat. at 73; S. REP. NO. 102-249, pt. II, at 3 (1991); H.R. REP. NO. 102-367, pt. I, at 84-85 (1991).

<sup>191</sup> See sources cited *supra* note 174.

<sup>192</sup> See 106 Stat. at 73 (creating cause of action for torture separate from Act); *Sosa*, 542 U.S. at 732 (creating well-accepted and well-defined standard for suit under Act); *Tel-Oren*, 726 F.2d at 798-827 (arguing Act on its own does not provide cause of action for private lawsuits).

<sup>193</sup> See generally *Sosa*, 542 U.S. at 732 (establishing well-accepted and well-defined standards for actionability under Act); *Aldana*, 452 F.3d at 1250 (considering whether Act provides cause of action for torture independent of Torture Act); *Bowoto*, 557 F. Supp. 2d at 1084-87 (same); *Chavez*, 413 F. Supp. 2d at 898 (same); *Mujica*, 381 F. Supp. 2d at 1179 (same).

<sup>194</sup> Compare STEPHEN C. MCCAFFREY, UNDERSTANDING INTERNATIONAL LAW 46 (2006) (stating that if violations of prohibition in international law become general practice, prohibition no longer violates international law), with AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2009: STATE OF THE WORLD'S HUMAN RIGHTS (2009), <http://report2009.amnesty.org/en/facts-and-figures> (stating that seventy-nine percent of G-20 countries engage in torture). But see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 702 cmt. n (1987) (stating that prohibition on torture is *jus cogens* norm).

<sup>195</sup> See sources cited *supra* notes 64-70.

<sup>196</sup> See MILLER, *supra* note 25, at 5-20 (same); NOWAK & MCARTHUR, *supra* note 25, at 30-34 (describing debates over definition of torture); Smith & Eggen, *supra* note 36, at A1 (same). Compare Bybee Memo, *supra* note 36, at 2-13 (establishing heightened standards for intent and severe suffering), with Levin Memo, *supra* note 36 (rejecting heightened standards for intent and severe suffering); compare Torture Convention, *supra* note 19, art. 1 (defining torture to include five criteria that



might argue that it also is not well defined enough to pass the *Sosa* test.<sup>197</sup> Because CIDT lacks enabling legislation like the Torture Act, if it is not sufficiently well defined and well accepted, it is not actionable under the Act.<sup>198</sup> Thus, even if CIDT is comparable to torture, critics might argue that it is not actionable under the Act.<sup>199</sup>

This argument fails for two reasons.<sup>200</sup> First, courts have held that torture is actionable independent of the Torture Act.<sup>201</sup> Before Congress passed the Torture Act, courts had held that countries condemned torture so strongly that it was actionable under the Act.<sup>202</sup> Further, after the Supreme Court established the *Sosa* criteria, many courts held that torture was actionable under the Act, independently of the Torture Act.<sup>203</sup> These courts' holdings establish that torture is actionable under the Act even absent the Torture Act.<sup>204</sup> Second, in the Torture Act's congressional reports, Congress explicitly stated that the

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international community disputes), with Torture Convention, *supra* note 19, art. 16 (defining CIDT to include two criteria that international community disputes).

<sup>197</sup> See *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 789, 794 (9th Cir. 1996) (noting district courts' refusal to instruct jury to consider CIDT claim because definition of CIDT is too vague); *Chowdhury v. WorldTel Bangl. Holding, Ltd.*, 588 F. Supp. 2d 375, 382-83 (E.D.N.Y. 2008); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 711-12 (N.D. Cal. 1988); sources cited *supra* note 196.

<sup>198</sup> See Torture Victim Protection Act of 1991, Pub. L. No. 102-256, §§ 2, 3, 106 Stat. 73, 73 (2008); sources cited *supra* note 174.

<sup>199</sup> See cases cited *supra* note 197.

<sup>200</sup> See *Aldana v. Del Monte Fresh Produce, N.A.*, 452 F.3d 1284, 1250 (11th Cir. 2006) (undermining argument by finding torture actionable independent of Torture Act); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring) (same); *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (same); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1084-87 (N.D. Cal. 2008) (same); *Chavez v. Carranza*, 413 F. Supp. 2d 891, 898-99 (W.D. Tenn. 2005) (same); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179 (C.D. Cal. 2005) (same); *Xuncax v. Gramajo*, 886 F. Supp. 162, 178-84 (D. Mass. 1995) (same); *Forti v Suarez-Mason*, 672 F. Supp. 1531, 1539-41 (N.D. Cal. 1987) (same); see also S. REP. NO. 102-249, pt. II, at 3 (1991) (explaining that Torture Act is intended to supplement, not replace, Act); H.R. REP. NO. 102-367, pt. I, at 86 (1991) (same).

<sup>201</sup> See sources cited *supra* note 200.

<sup>202</sup> See *Tel-Oren*, 726 F.2d at 777 (Edwards, J., concurring); *Filartiga*, 630 F.2d at 890; *Forti*, 672 F. Supp. at 1539-41; cf. *de Sanchez v. Banco Cent. de Nicar.*, 770 F.2d 1385, 1397 (5th Cir. 1985) (approving *Filartiga's* holding that torture was actionable under Act, but declining to extend cause of action to expropriation of property); *Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209, 215 (N.D. Ill. 1982) (same).

<sup>203</sup> See *Aldana*, 416 F.3d at 1250; *Bowoto*, 557 F. Supp. 2d at 1084-87; *Chavez*, 413 F. Supp. 2d at 898-99; *Mujica*, 381 F. Supp. 2d at 1179; *Xuncax*, 886 F. Supp. at 178-84 (same); cf. *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1144-45 (E.D. Cal. 2004) (holding that Torture Act's prohibition on extrajudicial killing does not preclude separate claim for extrajudicial killing under Act).

<sup>204</sup> See sources cited *supra* notes 202-03.

Torture Act should supplement, not replace, the Act.<sup>205</sup> Congress explained that the Act was necessary to provide courts with jurisdiction over torts other than torture.<sup>206</sup> Therefore, *Aldana's* use of the Torture Act to narrow the range of torts actionable under the Act violates Congress's intent in passing the Torture Act.<sup>207</sup> Thus, the Torture Act does not meaningfully distinguish CIDT from torture under the *Sosa* criteria.<sup>208</sup> Because torture is actionable under the Act, CIDT is also actionable under the Act.

### B. *Aldana Ignored the Act's Plain Text*

In *Aldana*, the Eleventh Circuit ignored the Act's requirement that courts consider whether the CIDT at issue violated international law.<sup>209</sup> The Act's plain text states that a tort is actionable if it violates either a U.S. treaty or international law.<sup>210</sup> Therefore, either alternative sufficiently supports a cause of action under the Act.<sup>211</sup> The *Aldana* court's only analysis determined that one treaty, the Political Covenant, was not binding on the United States.<sup>212</sup> However, the *Aldana* court failed to consider whether CIDT violated international law, which is also sufficient to support a cause of action.<sup>213</sup> Numerous

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<sup>205</sup> See S. REP. NO. 102-249, pt. II, at 3 (1991); H.R. REP. NO. 102-367, pt. I, at 86 (1991); see also *Sarei v. Rio Tinto PLC*, 487 F.3d 1193, 1228 (9th Cir. 2007) (Bybee, J., dissenting); *Enahoro v. Abubakar*, 408 F.3d 877, 885 n.2 (7th Cir. 2005).

<sup>206</sup> See sources cited *supra* note 205.

<sup>207</sup> See sources cited *supra* note 205.

<sup>208</sup> See sources cited *supra* notes 200-07 and accompanying text.

<sup>209</sup> See Alien Tort Claims Act, 28 U.S.C. § 1350 (2006); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004); *Aldana v. Del Monte Fresh Produce, N.A.*, 452 F.3d 1284, 1285-86 (11th Cir. 2006) (Barkett, J., dissenting).

<sup>210</sup> See sources cited *supra* note 209.

<sup>211</sup> See *Brown v. Budget Rent-A-Car Sys., Inc.*, 119 F.3d 922, 924-25 (11th Cir. 1997) (holding that, under statute applying to one who offers credit or to whom debt is owed, it was sufficient that plaintiff owed defendant debt); *United States v. Garcia*, 718 F.2d 1528, 1532-33 (11th Cir. 1983) (holding that, under statute criminalizing robbing mail or postal official, it was sufficient that defendant had robbed postal official); see also *United States v. Arias*, 253 F.3d 453, 456-58 (9th Cir. 2001) (holding that, under statute criminalizing preventing or attempting to influence testimony, it was sufficient that defendant had attempted to influence testimony). *But see* *United States v. Fisk*, 70 U.S. (3 Wall.) 445, 447 (1865) (noting that court may construe disjunctive as conjunctive if necessary to implement Congress's clear intent).

<sup>212</sup> See *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1245 (11th Cir. 2005); cf. *Aldana*, 452 F.3d at 1285 (Barkett, J., dissenting) (criticizing *Aldana* court's lack of analysis); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 253 n.114 (S.D.N.Y. 2009) (finding *Aldana* unpersuasive and adopting Judge Barkett's dissent); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1093 (N.D. Cal. 2008) (same).

<sup>213</sup> See sources cited *supra* notes 211-12.

international agreements prohibit CIDT under any circumstances.<sup>214</sup> While no court has held that CIDT directly violates a U.S. treaty, the strength of the prohibition on CIDT indicates that CIDT violates international law.<sup>215</sup>

Significantly, if the *Aldana* court had held that CIDT violated international law, it would also have held that the defendants committed CIDT against the plaintiffs.<sup>216</sup> In *Aldana*, the court held that the defendants tortured the plaintiffs because the defendants threatened the plaintiffs' lives and forced them to record last messages.<sup>217</sup> Because torture is a particularly severe subcategory of CIDT, abuse that is severe enough to constitute torture is also severe enough to constitute CIDT.<sup>218</sup> By ignoring the Act's requirement to consider if the CIDT at issue violated international law, the *Aldana* court denied the plaintiffs the remedy they deserved.<sup>219</sup>

Some might argue that the *Aldana* court's failure to consider whether CIDT violated international law is irrelevant.<sup>220</sup> Under *Sosa*,

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<sup>214</sup> See sources cited *supra* note 64.

<sup>215</sup> See, e.g., *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1347-49 (N.D. Ga. 2002) (using treaties prohibiting CIDT as evidence that international law prohibits CIDT); *Abebe-Jira v. Negewo*, No. 1:90-CV-2010-GET, 1993 WL 814304, at \*4 (N.D. Ga. Aug. 20, 1993) (same); *Xuncax v. Gramajo*, 886 F. Supp. 162, 186 (D. Mass. 1995) (same); cf. *Xuncax*, 886 F. Supp. at 185-86 (noting that international legal scholars agree that CIDT violates international law); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 702 cmt. n (1987) (finding that CIDT violates international law).

<sup>216</sup> Compare *Aldana*, 416 F.3d at 1250 (holding that defendants tortured plaintiffs), with Torture Declaration, *supra* note 29, art. 1 (establishing that torture is type of CIDT), MILLER, *supra* note 25, at 8-9 (same), and NOWAK & MCARTHUR, *supra* note 25, at 30-34 (same).

<sup>217</sup> *Aldana*, 416 F.3d at 1250; cf. *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 45-46 (D.D.C. 2000) (finding that combination of threats and other abuse constituted torture, brought under Torture Act rather than main Act); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 65-69 (D.D.C. 1998) (same). See generally Torture Victim Protection Act of 1991, Pub. L. No. 102-256, §§ 2, 3, 106 Stat. 73, 73 (2008) (stating that, in U.S. law, severe mental suffering includes only suffering caused by administration of drugs or threats of death or severe physical suffering).

<sup>218</sup> See sources cited *supra* note 29; see, e.g., *Abebe-Jira*, 1993 WL 814304, at \*4 (finding that same acts stated cause of action for both CIDT and torture).

<sup>219</sup> See Alien Tort Claims Act, 28 U.S.C. § 1350 (2006); *Aldana*, 416 F.3d at 1245; cf. *Aldana v. Del Monte Fresh Produce, N.A.*, 452 F.3d 1284, 1286 (11th Cir. 2006) (Barkett, J., dissenting) (arguing that *Aldana* ignored *Sosa*'s requirement to consider whether CIDT violated international law).

<sup>220</sup> Cf. *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 789, 793 (9th Cir. 1996) (finding that district court's refusal to instruct jury on CIDT did not prejudice plaintiffs, but declining to consider how well international law defined CIDT); *Chowdhury v. WorldTel Bangl. Holding, Ltd.*, 588 F. Supp. 2d 375, 382-83 (E.D.N.Y.

the fact that international law prohibits a tort is not enough to make the tort actionable under the Act.<sup>221</sup> International law must also clearly define the tort.<sup>222</sup> Courts both before and after *Sosa* have suggested that international law defines CIDT too vaguely for it to be actionable under the Act.<sup>223</sup> Additionally, even the courts that have found that CIDT is actionable have acknowledged that its definition is vague.<sup>224</sup> Therefore, the *Aldana* court might have considered international law, but held that it defined CIDT too vaguely for CIDT to be actionable under the Act.<sup>225</sup>

This argument fails because, if the *Aldana* court had considered international law, it likely would have held that CIDT was actionable under the Act.<sup>226</sup> Despite a few exceptions, most courts examining international law have held that CIDT is sufficiently well accepted and well defined to be actionable under the Act.<sup>227</sup> Notably, all prior decisions within the Eleventh Circuit that have considered whether CIDT violated international law have held that it did.<sup>228</sup> Among these decisions were rulings by two district courts within the Eleventh

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2008) (suggesting but declining to hold that, although CIDT violated international law, international law defined CIDT too vaguely for CIDT to be actionable under Act); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 711-12 (N.D. Cal. 1988) (holding prior to *Sosa* that international law defined CIDT too vaguely for CIDT to be actionable under Act).

<sup>221</sup> See sources cited *supra* note 170.

<sup>222</sup> See sources cited *supra* note 170.

<sup>223</sup> See *Hilao*, 103 F.3d at 793; *Chowdhury*, 588 F. Supp. 2d at 382-83; *Forti*, 694 F. Supp. at 711-12.

<sup>224</sup> See *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1321-23 (N.D. Cal. 2004); *Xuncax v. Gramajo*, 886 F. Supp. 162, 185-86 (D. Mass. 1995); see also *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1347-49 (N.D. Ga. 2002) (endorsing *Xuncax's* analysis of whether CIDT was sufficiently well defined to be actionable under Act).

<sup>225</sup> See sources cited *supra* 223-24.

<sup>226</sup> Cf. *Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996) (holding that CIDT is actionable under Act); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 253 n.114 (S.D.N.Y. 2009) (same); *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 382 n.4 (S.D.N.Y. 2009) (same); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1093 (N.D. Cal. 2008) (same); *Liu Qi*, 349 F. Supp. 2d at 1267-68 (same); *Mehinovic*, 198 F. Supp. 2d at 1347-49 (same); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1361 (S.D. Fla. 2001) (same); *Jama v. INS*, 22 F. Supp. 2d 353, 363-64 (D.N.J. 1998) (same); *Xuncax*, 886 F. Supp. at 186 (same); cf. *Hilao*, 103 F.3d at 793 (finding that district court's refusal to instruct jury on CIDT did not prejudice plaintiffs); *Chowdhury*, 588 F. Supp. 2d at 382-83 (suggesting that international law defined CIDT too vaguely for CIDT to be actionable under *Sosa*); *Forti*, 694 F. Supp. at 711-12 (holding prior to *Sosa* that international law defined CIDT too vaguely for CIDT to be actionable under Act).

<sup>227</sup> See sources cited *supra* note 226.

<sup>228</sup> See *Abebe-Jira*, 72 F.3d at 845; *Mehinovic*, 198 F. Supp. 2d at 1347-49; *Estate of Cabello*, 157 F. Supp. 2d at 1361.

Circuit, holding that CIDT was actionable under the Act.<sup>229</sup> Although one court relied on the Political Covenant, the other relied on international law, as demonstrated by multiple treaties and the consensus of international scholars.<sup>230</sup> More importantly, in *Abebe-Jira v. Negewo*, the Eleventh Circuit itself held that CIDT was actionable under the Act based on international law demonstrated by multiple treaties.<sup>231</sup> If the *Aldana* court had considered international law, it would likely have considered the decisions of these courts, and may have found their analyses persuasive.<sup>232</sup> More significantly, *Abebe-Jira*'s holding that CIDT is actionable under the Act might have bound the *Aldana* court.<sup>233</sup> Therefore, if the *Aldana* court had considered whether CIDT violated international law, it also probably would have held that CIDT was actionable under the Act.<sup>234</sup>

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<sup>229</sup> See *Mehinovic*, 198 F. Supp. 2d at 1347-49; *Estate of Cabello*, 157 F. Supp. 2d at 1361; see also *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (citing *Mehinovic*, 198 F. Supp. 2d at 1347-49; *Estate of Cabello*, 157 F. Supp. 2d at 1361).

<sup>230</sup> See *Mehinovic*, 198 F. Supp. 2d at 1347-49 (citing three international treaties and *Xuncax*, 886 F. Supp. at 169-71); *Estate of Cabello*, 157 F. Supp. 2d at 1361 (citing Political Covenant, *supra* note 19, art. 7); *Xuncax*, 886 F. Supp. at 169-71 (citing multiple international treaties, affidavit by international legal scholars, and RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 702 (1987)); see also *Aldana*, 416 F.3d at 1245 (claiming incorrectly that both *Mehinovic* and *Estate of Cabello* based their holdings on Political Covenant).

<sup>231</sup> See *Abebe-Jira*, 72 F.3d at 845 (upholding *Abebe-Jira v. Negewo*, No. 1:90-CV-2010-GET, 1993 WL 814304, at \*4 (N.D. Ga. Aug. 20, 1993)); see also *Mehinovic*, 198 F. Supp. 2d at 1347-49 (noting Eleventh Circuit's holding that CIDT was actionable under Act); *Estate of Cabello*, 157 F. Supp. 2d at 1361 (same).

<sup>232</sup> See sources cited *supra* note 229; cf. *Aldana v. Del Monte Fresh Produce, N.A.*, 452 F.3d 1284, 1284 (11th Cir. 2006) (Barkett, J., dissenting) (arguing that *Aldana* should have considered *Abebe-Jira*).

<sup>233</sup> See *Aldana*, 416 F.3d at 1246, 1250 (finding that *Sosa* had not overruled *Abebe-Jira* on at least two points of law); see also *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1230 (11th Cir. 2007) (holding that decision by Eleventh Circuit is binding on Eleventh Circuit unless Supreme Court or Eleventh Circuit en banc overrules decision); *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292 (11th Cir. 2003) (same); *In re Provenzano*, 215 F.3d 1233, 1235 (11th Cir. 2000) (same); *Chambers v. Thompson*, 150 F.3d 1324, 1326 (11th Cir. 1998) (same); *Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997) (same).

<sup>234</sup> Cf. sources cited *supra* note 226 (demonstrating that most courts considering whether CIDT is actionable under Act have held that it is actionable).

C. *Because of the U.S. Government's Narrow Definition of Torture, Courts Must Recognize CIDT to Protect Abuse Victims*

The U.S. government's narrow definition of torture could prevent lawsuits alleging internationally recognized acts of torture under the Act.<sup>235</sup> The Bybee Memo argued that an act only constitutes torture if the torturer specifically intended to cause suffering equivalent to organ failure and death.<sup>236</sup> Although the Levin Memo retracted these arguments, the United States has subsequently deported asylum applicants whose home countries did not specifically intend to cause severe suffering.<sup>237</sup> Thus, courts might reject torture lawsuits under the Act for similar reasons.<sup>238</sup>

However, if courts recognize CIDT as a cause of action under the Act, abuse victims could sue despite the U.S. government's narrow torture definition.<sup>239</sup> CIDT does not require that victims experience severe suffering or that the abuser specifically intend his or her actions to inflict this harm.<sup>240</sup> Therefore, even if abuse victims cannot sue for

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<sup>235</sup> Compare Bybee Memo, *supra* note 36, at 2-13 (arguing that only acts intended to cause suffering equivalent to organ failure or death qualified as torture), with *Abebe-Jira*, 72 F.3d at 845-46 (finding torture based on abuse not causing organ failure, death, or suffering equivalent to organ failure or death), and *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1317-18 (N.D. Cal. 2004) (same).

<sup>236</sup> See Bybee Memo, *supra* note 36, at 2-13; see also Smith & Eggen, *supra* note 36, at A1; Levin Memo, *supra* note 36.

<sup>237</sup> See sources cited *supra* note 48.

<sup>238</sup> Compare Bybee Memo, *supra* note 36, at 2-13 (requiring suffering equivalent to organ failure or death to establish torture), with *Abebe-Jira*, 72 F.3d at 845 (finding that beatings constituted torture, despite absence of evidence that beatings caused death, organ failure, or equivalent suffering), *Chavez v. Carranza*, 413 F. Supp. 2d 891, 901-02 (W.D. Tenn. 2005) (finding that being sexually assaulted, shocked, and burned with acid was torture, despite absence of evidence that abuse caused death, organ failure, or equivalent suffering; finding that being threatened with rifle and forced to watch as attackers shot father was torture, despite absence of evidence that abuse caused death, organ failure, or equivalent suffering; finding that being shocked and beaten was torture, despite absence of evidence that abuse caused death, organ failure, or equivalent suffering), and *Xuncax v. Gramajo*, 886 F. Supp. 162, 169-71, 187 (D. Mass. 1995) (describing being stripped, beaten, and walked through village naked as torture, despite absence of evidence that abuse caused death, organ failure, or equivalent suffering).

<sup>239</sup> See Amann, *supra* note 22; see also NOWAK & MCARTHUR, *supra* note 25, at 66-74. Compare Torture Convention, *supra* note 19, art. 1 (requiring torture to be intentionally inflicted and to cause severe suffering), with Torture Convention, *supra* note 19, art. 16 (not requiring CIDT to be intentionally inflicted or to cause severe suffering).

<sup>240</sup> See sources cited *supra* note 239.

torture under the U.S. government's narrow definition, they could still sue for CIDT.<sup>241</sup>

Allowing abuse victims to sue for CIDT under the Act has two advantages.<sup>242</sup> First, allowing victims to sue would shield them from the U.S. government's narrow definition of torture in the Bybee Memo.<sup>243</sup> For example, the Bybee Memo's definition of severe suffering would prevent victims from suing if their abuser beat them without causing organ failure or death.<sup>244</sup> However, if courts recognized CIDT, the victim would be able to sue for CIDT instead of torture because CIDT does not require severe suffering.<sup>245</sup> Second, allowing victims to sue would aid the War on Terror by allowing victims to sue terrorists and state sponsors of terrorism for committing CIDT.<sup>246</sup> Victims of terrorism have used the Act and the Torture Act to sue terrorists, including the financial supporters of the terrorists who committed 9/11.<sup>247</sup> Recognizing CIDT would shield further anti-terrorist lawsuits from the U.S. government's narrow definition of torture.<sup>248</sup>

Some might argue that recognizing CIDT would also permit War on Terror detainees to sue and, therefore, interfere with the Executive

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<sup>241</sup> See sources cited *supra* note 239.

<sup>242</sup> See *Abebe-Jira*, 72 F.3d at 844, 845 (demonstrating use of Act by nondetainee abuse victims, which could be limited by U.S. government's narrow definition of torture); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1083 (N.D. Cal. 2008) (same); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1332-40 (N.D. Ga. 2002) (same); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1349 (S.D. Fla. 2001) (same); *Jama v. INS*, 22 F. Supp. 2d 353, 357-58 (D.N.J. 1998) (same); *Xuncax*, 886 F. Supp. at 169-71 (same); *Chowdhury v. WorldTel Bangl. Holding, Ltd.*, 588 F. Supp. 2d 375, 378 (E.D.N.Y. 2008) (same); see also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (demonstrating use of Act by victims of terrorists, which could be limited by U.S. government's narrow definition of torture); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 259-64 (E.D.N.Y. 2007) (same); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 91 (D.D.C. 2003) (same).

<sup>243</sup> See Bybee Memo, *supra* note 36, at 2-13; see also *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1245-46 (11th Cir. 2005) (describing suit by nondetainees for CIDT); *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1266-70 (N.D. Cal. 2004) (same).

<sup>244</sup> See *Smith & Eggen*, *supra* note 36, at A1, Bybee Memo, *supra* note 36, at 2-13; see, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844, 845, 848 (11th Cir. 1996) (finding that beating that did not result in organ failure or death constituted torture).

<sup>245</sup> See sources cited *supra* note 239; see, e.g., *Abebe-Jira*, 72 F.3d at 845, 848 (finding that beating which did not result in organ failure or death constituted CIDT as well as torture).

<sup>246</sup> See sources cited *supra* note 77 (describing victims of terrorist abuse suing terrorists).

<sup>247</sup> See sources cited *supra* note 77.

<sup>248</sup> See Bybee Memo, *supra* note 36, at 2-13; see also sources cited *supra* note 77.

Branch's security decisions.<sup>249</sup> However, assuming these detainees should not sue, statutes prohibiting detainees' lawsuits are a more effective way to achieve this goal.<sup>250</sup> First, even if courts do not recognize CIDT, some detainees might be able to show that the United States tortured them and sue for torture.<sup>251</sup> Second, refusing to recognize CIDT unfairly affects nondetainee abuse victims, including victims who are suing terrorists.<sup>252</sup> A statute prohibiting detainees' lawsuits would stop all detainees' lawsuits, but permit nondetainees to sue for CIDT under the Act.<sup>253</sup> Thus, permitting nondetainee CIDT victims to sue under the Act would harm terrorists and vindicate these victims' right to justice.<sup>254</sup>

#### CONCLUSION

The Eleventh Circuit's holding in *Aldana*, that CIDT is not actionable under the Act, is legally incorrect and poor policy.<sup>255</sup> First, the *Aldana* decision is incorrect because CIDT is not meaningfully different from torture, which is clearly actionable under the Act.<sup>256</sup>

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<sup>249</sup> Cf. *Hamdan v. Rumsfeld*, 548 U.S. 557, 678-79 (2006) (Thomas, J., dissenting) (arguing that permitting habeas petitions by detainees interferes with Executive's security decisions); *Hamdi v. Rumsfeld*, 542 U.S. 507, 581 (2004) (Thomas, J., dissenting) (same). But cf. Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085, 2098 (2005) (arguing that majority opinions in *Hamdan* and *Hamdi* confirmed obligation of Judiciary to review acts of Executive, even during war).

<sup>250</sup> See, e.g., Glenn Greenwald, *The Suppressed Fact: Deaths by U.S. Torture*, SALON.COM (June 30, 2009), <http://www.salon.com/opinion/greenwald/2009/06/30/accountability/> (demonstrating that some U.S. abuse reaches Bybee Memo's death or organ failure standard); see also sources cited *supra* note 242 (describing nonterrorist abuse victims who might be hurt by narrow torture standards).

<sup>251</sup> Compare Bybee Memo, *supra* note 36, at 2-13 (stating that abuse causing death constitutes torture), with Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html?ex=1274241600&en=4579c146cb14cfd6&ei=5088> (describing U.S. operatives' fatal torture of detainees), Press Release, Am. Civil Liberties Union, U.S. Operatives Killed Detainees During Interrogations in Afghanistan and Iraq, (Oct. 24, 2005), <http://www.aclu.org/human-rights/us-operatives-killed-detainees-during-interrogations-afghanistan-and-iraq> (same), and Greenwald, *supra* note 250 (same).

<sup>252</sup> See sources cited *supra* note 242 (describing abuse victims who U.S. government does not suspect of terrorism).

<sup>253</sup> See sources cited *supra* notes 251-52 and accompanying text.

<sup>254</sup> See sources cited *supra* notes 251-52 and accompanying text.

<sup>255</sup> See *supra* Part III (arguing that *Aldana's* holding was both legally incorrect and poor policy).

<sup>256</sup> See *supra* Part III.A (arguing that CIDT is comparable to torture for purposes of Act and, therefore, actionable).



Second, the *Aldana* decision is incorrect because it ignores the plain text of the Act, which requires courts to consider whether a tort violates international law, not just whether it violates a particular treaty.<sup>257</sup> Third, the *Aldana* decision is poor policy because it could prevent abuse victims from suing under the Act.<sup>258</sup> Fortunately, district courts outside of the Eleventh Circuit have ignored *Aldana*'s holding and have rightfully held that CIDT is actionable under the Act.<sup>259</sup> To ensure justice for victims of abuse, the Supreme Court should extend the Act's protection to allow suits for CIDT.<sup>260</sup>

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<sup>257</sup> See *supra* Part III.B (arguing that *Aldana* court ignored plain text of Act, causing it to reach incorrect holding).

<sup>258</sup> See *supra* Part III.C (arguing that *Aldana* is poor policy because it could prevent victims of genuine abuse from suing under Act).

<sup>259</sup> See *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 382 n.4 (S.D.N.Y. 2009) (following *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 253 n.114 (S.D.N.Y. 2009)); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 253 n.114 (S.D.N.Y. 2009); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1093 (N.D. Cal. 2008).

<sup>260</sup> See *supra* Part III.C (arguing that rejecting *Aldana* is necessary to protect abuse victims); cf. sources cited *supra* note 259 (rejecting *Aldana*).