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

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. Part I identifies the definitions of and prohibitions against CIDT and torture. It then describes the history

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4 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).
5 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 painlessly 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).
6 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).
7 See Aldana, 416 F.3d at 1247.
8 See id.
9 See infra Part III (arguing that CIDT is actionable under Act).
10 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. Part II describes Aldana’s factual basis, reasoning, and holding. Part III argues that the Aldana court erred in holding that CIDT is not actionable under the Act for three reasons. 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. Second, Aldana ignores the plain text of the Act. Finally, because the U.S. government defines torture narrowly, courts must permit CIDT suits under the Act to protect the victims of genuine abuse. Therefore, the Supreme Court should hold that CIDT is actionable under the Act.

I. BACKGROUND

The Eleventh Circuit’s decision in Aldana dealt with two major issues. The first issue concerns CIDT, a serious offense related to torture that both international and U.S. law prohibit. The second

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11 See infra Part I (describing history of Act and CIDT lawsuits brought under Act).
12 See infra Part II (describing Aldana).
13 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).
14 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).
15 See infra Part III.B (arguing that Aldana court ignored plain text of Act).
16 See infra Part III.C (arguing that because United States defines torture narrowly, courts must recognize CIDT to protect victims of genuine abuse).
17 See infra Conclusion (summarizing prior analysis and recommending that Supreme Court find CIDT actionable under Act).
18 See Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242, 1247 (11th Cir. 2005).
issue concerns the Alien Tort Claims Act, a U.S. statute granting federal courts jurisdiction over torts violating international law and U.S. treaties. Since 1980, multiple courts have decided whether CIDT is actionable under the Act and have usually held that it is. 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. 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. Therefore, understanding what actions constitute CIDT and how the international community prohibits these actions is essential to determining whether CIDT is actionable under Sosa.

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. First, the acts must be...
For example, U.S. courts have found CIDT when officials beat prisoners, grab prisoners’ genitals, or keep prisoners in filthy conditions. Second, public officials must participate in or consent to such acts. 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. As defined by the Torture Convention, acts of torture must meet five criteria. First, torture must cause severe pain or suffering, either physical or mental. Second, public officials must participate in or consent to the torture. Third, the torturer must intentionally inflict the suffering. Fourth, the torturer must inflict the suffering for a purpose such as
interrogation, punishment, coercion, or discrimination. Fifth, the victim's suffering must not be an inherent part of lawful sanctions.

Different countries and groups within the United States have debated how to apply the Torture Convention's definition of torture. The United States had argued for a narrow application of the first and third criteria, but has since retracted its argument following public outcry. 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. Finally, some critics argue that the fifth criterion permits countries to subvert the Torture Convention by classifying specific acts of torture as lawful sanctions.

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. 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). The Bybee Memo argued that severe suffering amounting to torture meant suffering equivalent to that involved in death or organ failure. The

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34 See sources cited supra note 30.
35 See sources cited supra note 30.
37 See Smith & Eggen, supra note 36, at A1; Bybee Memo, supra note 36, at 2-13; Levin Memo, supra note 36.
39 See BOULESBAAA, supra note 38, at 31-33; Miller, supra note 25, at 20-22; Nowak & McArthur, supra note 25, at 44-49.
40 See Bybee Memo, supra note 36, at 1-13.
41 See id.
42 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.\textsuperscript{43} For example, according to the Bybee Memo, a person who intended to cause moderate suffering, but actually caused severe suffering did not torture.\textsuperscript{44} Both the U.S. and international public reacted negatively to these arguments.\textsuperscript{45} Following this reaction, the U.S. government retracted these arguments in a subsequent memo written by Acting Assistant Attorney General Daniel Levin (“Levin Memo”).\textsuperscript{46} However, the Levin Memo confirmed the Bybee Memo’s ultimate finding that the United State’s treatment of War on Terror detainees did not constitute torture.\textsuperscript{47}

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.\textsuperscript{48} In a series of cases, deportees challenged their deportations, alleging that their home countries’ governments would imprison them in conditions amounting to torture.\textsuperscript{49} The Immigration Board and the courts held that, assuming the conditions detainees described caused severe suffering, their home countries’ conduct still did not constitute

\begin{footnotes}
\footnote{43 See id. at 3-5.}
\footnote{44 See id.}
\footnote{45 See Smith & Eggen, supra note 36, at A1.}
\footnote{46 See id. (discussing negative reaction to Bybee Memo); Levin Memo, supra note 36 (retracting arguments of Bybee Memo).}
\footnote{47 See Levin Memo, supra note 36, at n.8; see also Bybee Memo, supra note 36, at 1-2.}
\footnote{49 See sources cited supra note 48.}
\end{footnotes}
torture. The Immigration Board and the courts reasoned that the detainees’ home countries did not specifically intend to cause severe suffering. Therefore, the detainees’ home countries’ actions did not constitute torture under the U.S. government’s narrowed definition of the third criterion. Thus, the U.S. government’s narrowed definition of torture continues to affect deportees even after the U.S. government formally retracted this definition.

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

The Torture Convention’s fifth criterion of torture has provoked controversy. This criterion states that torture does not include punishment that is an inherent part of lawful sanctions. 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. Individual drafters within the Working Group proposed differing definitions of lawful sanctions to avoid this problem, but were unable to reach agreement. Thus, the final draft of

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50 See sources cited supra note 48.
51 See sources cited supra note 48.
52 See sources cited supra note 48.
53 See sources cited supra note 48.
54 See BOULESBAA, supra note 38, at 21-23; MILLER, supra note 25, at 15-17; NOWAK & MCARTHUR, supra note 25, at 39-41.
55 See Torture Convention, supra note 19, art. 1; see also sources cited supra note 54.
56 See sources cited supra note 54.
57 See sources cited supra note 54.
58 See sources cited supra note 54.
59 See BOULESBAA, supra note 38, at 31-33; MILLER, supra note 25, at 20-22; NOWAK & MCARTHUR, supra note 25, at 44-49.
60 See sources cited supra note 59.
61 See sources cited supra note 59.
62 See sources cited supra note 59.
the Torture Convention left the term undefined, potentially allowing states to subvert the Torture Convention.63

Although the international community disputes how to interpret the definitions of CIDT and torture, it agrees that international law prohibits both.64 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.65 Many foreign states’ domestic laws also pair prohibitions on torture with prohibitions on CIDT.66 Further, U.S. statutes prohibit CIDT and torture and restrict U.S. aid to countries that engage in either practice.67

International law’s prohibitions on torture and CIDT are serious prohibitions that countries cannot derogate.68 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).69 Further, almost all international human rights treaties that permit some derogation of international norms still prohibit

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63 See Torture Convention, supra note 19, art. 1; sources cited supra note 59.
64 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.
65 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; 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).
66 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).
68 See American Convention, supra note 19, art. 27; Political Covenant, supra note 19, art. 4; European Convention, supra note 19, art. 13; 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).
derogation from the norms against torture and CIDT.\textsuperscript{70} 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.\textsuperscript{71}

\section*{B. The Alien Tort Claims Act}

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

In 1980, plaintiffs began using the Act to sue human rights violators.\textsuperscript{75} Some plaintiffs used the Act to sue officials from oppressive governments or to sue corporations who encouraged governments to oppress the corporations' opponents.\textsuperscript{76} Victims of

\begin{itemize}
\item \textsuperscript{70} 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); \textit{Nowak & McArthur}, supra note 25, at 92-93 (describing lobbying efforts to prevent Torture Convention from explicitly prohibiting derogation); cf. \textit{Torture Declaration}, supra note 29, art. 3 (stating that exceptional circumstances do not justify CIDT or torture).
\item \textsuperscript{71} 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).
\item \textsuperscript{72} See Alien Tort Claims Act, 28 U.S.C. § 1350 (2006); \textit{cf. Aldana}, 416 F.3d at 1246 (further subdividing Act into three criteria: alien plaintiff, lawsuit for tort, and tort violating international law). \textit{See generally Sosa}, 542 U.S. at 712-33 (describing and analyzing history of Congress's revisions to Act).
\item \textsuperscript{73} See sources cited supra note 72.
\item \textsuperscript{74} See sources cited supra note 72.
terrorism have used the Act to sue sponsors of terrorism, while alleged terrorists have used the act to sue the U.S. government.\(^7\)

Despite these plaintiffs’ successful use of the Act, some critics argued that the Act did not permit aliens to sue.\(^7\) These critics argued that the Act was jurisdictional, permitting federal courts to hear only those torts Congress specifically designated.\(^9\) Accordingly, if Congress did not designate a tort, the Act on its own did not permit the courts to hear it.\(^8\) Critics based this argument on the placement and wording of the Act.\(^8\) First, critics noted that Congress passed the Act as part of a statute that otherwise dealt exclusively with jurisdiction.\(^8\) 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.”\(^8\) “Cognizance” is a synonym for (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).


\(^9\) 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.

\(^7\) See sources cited supra note 79.

\(^8\) See sources cited supra note 79.

\(^9\) See sources cited supra note 79.

\(^8\) See sources cited supra note 79.
Therefore, critics argued, Congress intended the Act to be solely jurisdictional.85 Congress responded to the argument that the Act was jurisdictional by passing the Torture Victims Protection Act (“Torture Act”).86 The Torture Act authorized aliens and U.S. citizens to sue foreign public officials and their agents for torture and extrajudicial execution.87 Congressional commentary regarding the Torture Act stated that Congress intended the Torture Act to serve as unambiguous enabling legislation.88 Further, this congressional commentary stated that the Torture Act should not replace the Act because the Act authorized lawsuits for torts other than torture.89 Conversely, the Torture Act only provided an unambiguous cause of action for torture and extrajudicial execution.90 Notably, critics continued to argue that the Act did not provide a cause of action for other torts, including CIDT.91

The Supreme Court addressed the critics’ argument that the Act was jurisdictional in Sosa v. Alvarez-Machain.92 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.93 Alvarez-Machain sued his kidnappers for arbitrary detention under the Act.94

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84 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).
85 See sources cited supra note 79.
87 See id.
89 See sources cited supra note 88.
91 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.
92 See Sosa, 542 U.S. at 713-14.
93 Id. at 697-98.
94 Id. at 698.
Before trial, the district court granted summary judgment in Alvarez-Machain’s favor. The Ninth Circuit Court of Appeals affirmed, as did the Ninth Circuit’s en banc panel following a further review. 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. Conversely, Alvarez-Machain argued that the Act was not solely jurisdictional and, thus, the Act permitted him to sue even absent enabling legislation.

The Supreme Court held that the Act was jurisdictional, but further held that aliens could still sue under the Act even absent enabling legislation. The Court noted that Congress had not provided legislative history for the Act. Thus, to determine Congress’s intent, the Court analyzed the Act’s structure and contemporary legislators’ attitudes towards international law. The Court agreed with the defendants that the placement and wording of the Act demonstrated that it was jurisdictional. 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. Therefore, the Court held that Congress intended to authorize immediate lawsuits for at least those torts.

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

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95 Id. at 699.
96 Id.
97 Id. at 713.
98 Id.
99 See id. at 714.
100 Id. at 713.
101 Id. at 713-25.
102 Id. at 713-14.
103 Id. at 715-20.
104 Id.
105 See id. at 724-25.
106 Id. at 730-01.
107 Id. at 725-28.
108 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. First, the tort must be as well accepted as the torts the Act originally prohibited. Second, it must be as well defined as the torts the Act originally prohibited. The Court held that courts may determine whether a tort meets these criteria by examining a variety of sources. These sources include treaties, controlling executive and legislative acts, controlling judicial decisions, and international law scholars’ writings.

In applying these criteria to Alvarez-Machain, the Court found that his arbitrary detention claim was not actionable under the Act. Alvarez-Machain argued that his arbitrary detention violated two U.S. treaties, including the Political Covenant. However, the Court found that neither instrument bound the United States. Alvarez-Machain also argued that his arbitrary detention violated international law. 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. The Court found that none of these sources supported, and some even contradicted, Alvarez-Machain’s claim that his arbitrary detention violated international law. Therefore, the Court concluded that Alvarez-Machain’s arbitrary detention had neither violated a treaty of the U.S. nor international law. Accordingly, the Court reversed the holdings of the district and appellate courts and dismissed Alvarez-Machain’s claim. However, subsequent torture and CIDT plaintiffs have been more successful than Alvarez-Machain. Courts applying the Sosa
criteria to CIDT and torture generally have found that the Act still provides a cause of action for both acts.123

C. Torture and CIDT Under the Act

In cases before and after Sosa, courts have generally agreed that torture is actionable under that Act.124 The paradigmatic torture case, and the first modern lawsuit under the Act, is Filartiga v. Pena-Irala.125 In Filartiga, a Paraguayan family sued a former Paraguayan official who had tortured and murdered the family’s seventeen-year-old son.126 The Second Circuit Court of Appeals concluded that torturers were enemies of all humankind, comparable to the pirates the Act originally targeted.127 Therefore, the Second Circuit held that the Act provided a cause of action for torture.128 Later courts have endorsed Filartiga, holding that international law prohibits torture strongly enough and defines torture clearly enough for torture to be actionable.129 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.130

Case law regarding CIDT’s status under the Act is less consistent, but generally still holds that CIDT is actionable.131 Courts, both before...
and after Sosa, have agreed that international law prohibits CIDT. However, a few courts have expressed concern that CIDT lacks the requisite characteristics to be actionable under the Act. Some of these courts have resolved this concern by deciding whether an act constitutes CIDT on a case-by-case basis. Doe v. Liu Qi synthesizes the modern case law on CIDT and provides an example of this case-by-case analysis. In Liu Qi, Falun Gong protestors sued Chinese officials for briefly detaining and physically and sexually assaulting them. The district court examined international treaties and U.S. judicial opinions and concluded that U.S. courts agree that international law prohibits CIDT. The court, however, noted a split over whether international law sufficiently defined CIDT to make it actionable under the Act. The court chose to follow another court that had examined whether an act was CIDT on a case-by-case basis. 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.


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.

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.

See Liu Qi, 349 F. Supp. 2d at 1320-25.

See id. at 1321-24.

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


\textsuperscript{142} See, e.g., \textit{Aldana, 452 F.3d at 1288 (Barkett, J., dissenting) (stating without rationale that being credibly threatened with death was CIDT); \textit{Aldana, 416 F.3d at 1253 (holding without rationale that pushing, shoving, and hair pulling were not torture); \textit{Chavez, 413 F. Supp. 2d at 901-02 (holding without rationale that being sexually assaulted, electrocuted, and burned with acid was torture); \textit{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); \textit{Abebe-Jira, 1993 WL 814304, at *4 (holding without rationale that severe beatings during months-long detentions were both CIDT and torture).}

\textsuperscript{143} See \textit{Abebe-Jira, 1993 WL 814304, at *4.}

\textsuperscript{144} See, e.g., \textit{Bowoto, 557 F. Supp. 2d at 1094-95 (holding that being shot and repeatedly beaten was comparable to other acts courts previously considered torture); \textit{Liu Qi, 349 F. Supp. 2d at 1320-25 (holding that being briefly beaten was not comparable to acts previously considered CIDT); \textit{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).}

\textsuperscript{145} See \textit{Liu Qi, 349 F. Supp. 2d at 1320-25.}

\textsuperscript{146} See id.
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Monte Produce, Inc., the court performed an identical, comparison-based analysis of whether brief beatings constituted torture. Unfortunately, however, the court's analysis of the plaintiffs' CIDT claims was far less searching.

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. In Aldana, Guatemalan union leaders sued Del Monte Fresh Produce (“Del Monte”) under the Act for various violations of international law. The plaintiffs alleged that Del Monte hired private security agents to kidnap them and hold them hostage at gunpoint. These agents hit the plaintiffs, threatened to kill them, and forced them to videotape last messages to their families. Then, the agents forced the plaintiffs to publicly denounce the union, resign from their jobs, and leave the country on threat of death. Upon release, the plaintiffs fled to the United States and sued Del Monte under the Act for various violations of international law, including CIDT. The district court dismissed the plaintiffs' CIDT claim on procedural grounds, as the plaintiffs had not alleged CIDT in their complaint.

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

147 See Villeda Aldana, 305 F. Supp. 2d at 1294-95.
148 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.
149 See Aldana, 416 F.3d at 1245-47.
150 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).
151 See Aldana, 416 F.3d at 1245.
152 See id.
153 See id.
154 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).
155 See Villeda Aldana, 305 F. Supp. 2d at 1295 n.5.
156 See Aldana, 416 F.3d at 1247.
157 See id.
CIDT was actionable under the Act. In distinguishing these holdings, the court noted that these lower courts based their opinions on the Political Covenant’s prohibition on CIDT. The court then cited Sosa, which held that the Political Covenant did not bind the United States. 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. The plaintiffs appealed, but a panel of Eleventh Circuit judges denied their request for a rehearing en banc. However, despite the Eleventh Circuit’s refusal to reverse Aldana, its holding that CIDT is not actionable under the Act remains open to doubt.

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. First, CIDT is not meaningfully different from torture under the Supreme Court’s interpretation of the Act in Sosa. Therefore, because torture is clearly actionable under the Act, CIDT is also actionable under the Act. Second, the Aldana court ignored the

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159 See id.
160 See id.
161 See id.
162 See Aldana v. Del Monte Fresh Produce, N.A., 452 F.3d 1284, 1284 (11th Cir. 2006).
163 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).
164 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).
165 See infra Part III.A (arguing that CIDT is not meaningfully different from torture under Act).
166 See infra Part III.A (arguing that because torture is actionable under Act, CIDT is also actionable under Act).
plain text of the Act. Third, because the U.S. government defines torture narrowly, courts must permit CIDT suits under the Act to protect victims of genuine abuse.

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. 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. As held by numerous cases, including Aldana itself, torture is actionable under the Act. Further, international law prohibits CIDT as strongly as it prohibits torture and arguably defines CIDT more clearly than it defines torture. Therefore, CIDT is actionable under the Act because CIDT, like torture, meets the Sosa criteria.

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167 See infra Part III.B (arguing that Aldana court improperly ignored plain text of Act).
168 See infra Part III.C (arguing that permitting CIDT suits is necessary to protect genuine abuse victims).
169 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. 1 (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).
172 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. 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. Courts agree that the international community prohibits and defines torture clearly enough to meet both criteria. Even courts which have found that torture is not actionable under the Act have not argued that torture does not meet the Sosa criteria.

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

Comparing the definitions of CIDT and torture reveals that, in practice, international law defines CIDT better than it defines 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).
torture.\textsuperscript{182} The first criterion of CIDT requires that the conduct be cruel, inhuman, or degrading.\textsuperscript{183} In contrast, the first criterion of torture requires that the conduct cause severe suffering.\textsuperscript{184} Although these criteria are different, in practice, courts usually apply them in the same way.\textsuperscript{185} The second criterion, involvement of a public official, is the same for both torture and CIDT.\textsuperscript{186} 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.\textsuperscript{187} 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.\textsuperscript{188} Prior to the Court's decision in Sosa, critics argued that torture and other torts were not actionable absent enabling legislation.\textsuperscript{189}
Congress responded to these critics by passing enabling legislation explicitly permitting suits for torture under the Torture Act.\(^{190}\) 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.\(^{191}\) However, because the Torture Act serves as enabling legislation for torture, torture is actionable even if it is not well accepted and well defined.\(^{192}\) Thus, critics might argue that torture is neither well accepted nor well defined, and is actionable only because of the Torture Act.\(^{193}\) 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.\(^{194}\) Therefore, because the prohibition on CIDT is virtually identical to the prohibition on torture, the prohibition on CIDT would also be insufficiently well accepted.\(^{195}\)

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.\(^{196}\) Although CIDT is arguably better defined than torture, critics


\(^{191}\) See sources cited supra note 174.

\(^{192}\) 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).

\(^{193}\) 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).


\(^{195}\) See sources cited supra notes 64-70.

\(^{196}\) 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.\(^{197}\) 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.\(^{198}\) Thus, even if CIDT is comparable to torture, critics might argue that it is not actionable under the Act.\(^{199}\)

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

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\(^{197}\) 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.


\(^{199}\) See cases cited supra note 197.


\(^{201}\) See sources cited supra note 200.

\(^{202}\) See *Tel-Oren*, 726 F.2d at 777 (Edwards, J., concurring); *Filartiga*, 630 F.2d at 890; *Forti*, 672 F. Supp. at 1539-41; *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).


\(^{204}\) See sources cited supra notes 202-03.
Torture Act should supplement, not replace, the Act.\footnote{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).} Congress explained that the Act was necessary to provide courts with jurisdiction over torts other than torture.\footnote{See sources cited supra note 205.} 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.\footnote{See sources cited supra note 206.} Thus, the Torture Act does not meaningfully distinguish CIDT from torture under the Sosa criteria.\footnote{See sources cited supra notes 200-07 and accompanying text.} 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.\footnote{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).} The Act’s plain text states that a tort is actionable if it violates either a U.S. treaty or international law.\footnote{See sources cited supra note 209.} Therefore, either alternative sufficiently supports a cause of action under the Act.\footnote{See sources cited supra notes 210-212.} The Aldana court’s only analysis determined that one treaty, the Political Covenant, was not binding on the United States.\footnote{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).} However, the Aldana court failed to consider whether CIDT violated international law, which is also sufficient to support a cause of action.\footnote{See sources cited supra note 209.} Numerous
international agreements prohibit CIDT under any circumstances. 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. 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. 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. Because torture is a particularly severe subcategory of CIDT, abuse that is severe enough to constitute torture is also severe enough to constitute CIDT. 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.

Some might argue that the Aldana court's failure to consider whether CIDT violated international law is irrelevant. Under Sosa,
the fact that international law prohibits a tort is not enough to make the tort actionable under the Act.\textsuperscript{221} International law must also clearly define the tort.\textsuperscript{222} Courts both before and after \textit{Sosa} have suggested that international law defines CIDT too vaguely for it to be actionable under the Act.\textsuperscript{223} Additionally, even the courts that have found that CIDT is actionable have acknowledged that its definition is vague.\textsuperscript{224} Therefore, the \textit{Aldana} court might have considered international law, but held that it defined CIDT too vaguely for CIDT to be actionable under the Act.\textsuperscript{225}

This argument fails because, if the \textit{Aldana} court had considered international law, it likely would have held that CIDT was actionable under the Act.\textsuperscript{226} 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.\textsuperscript{227} Notably, all prior decisions within the Eleventh Circuit that have considered whether CIDT violated international law have held that it did.\textsuperscript{228} Among these decisions were rulings by two district courts within the Eleventh Circuit that have considered whether CIDT violated international law have held that it did.\textsuperscript{228} Among these decisions were rulings by two district courts within the Eleventh

\textsuperscript{221} See sources cited supra note 170.
\textsuperscript{222} See sources cited supra note 170.
\textsuperscript{223} See \textit{Hilao}, 103 F.3d at 793; \textit{Chowdhury}, 588 F. Supp. 2d at 382-83; \textit{Forti}, 694 F. Supp. at 711-12.
\textsuperscript{225} See sources cited supra 223-24.
\textsuperscript{226} Cf. \textit{Abebe-Jira} v. Negewo, 72 F.3d 844, 845 (11th Cir. 1996) (holding that CIDT is actionable under Act); \textit{In re S. African Apartheid Litig.}, 617 F. Supp. 2d 228, 253 n.114 (S.D.N.Y. 2009) (same); \textit{Wiwa} v. Royal Dutch Petroleum Co., 626 F. Supp. 2d 377, 382 n.4 (S.D.N.Y. 2009) (same); \textit{Bowoto} v. Chevron Corp., 557 F. Supp. 2d 1080, 1093 (N.D. Cal. 2008) (same); \textit{Liu Qi}, 349 F. Supp. 2d at 1267-68 (same); \textit{Mehinovic}, 198 F. Supp. 2d at 1347-49 (same); \textit{Estate of Cabello} v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1361 (S.D. Fla. 2001) (same); \textit{Jama} v. INS, 22 F. Supp. 2d 393, 363-64 (D.N.J. 1998) (same); \textit{Xuncax}, 886 F. Supp. at 186 (same); \textit{cf. Hilao}, 103 F.3d at 793 (finding that district court's refusal to instruct jury on CIDT did not prejudice plaintiffs); \textit{Chowdhury}, 588 F. Supp. 2d at 382-83 (suggesting that international law defined CIDT too vaguely for CIDT to be actionable under \textit{Sosa}); \textit{Forti}, 694 F. Supp. at 711-12 (holding prior to \textit{Sosa} that international law defined CIDT too vaguely for CIDT to be actionable under Act).
\textsuperscript{227} See sources cited supra note 226.
\textsuperscript{228} See \textit{Abebe-Jira}, 72 F.3d at 845; \textit{Mehinovic}, 198 F. Supp. 2d at 1347-49; \textit{Estate of Cabello}, 157 F. Supp. 2d at 1361.
Circuit, holding that CIDT was actionable under the Act. 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. 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. 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. More significantly, Abebe-Jira's holding that CIDT is actionable under the Act might have bound the Aldana court. 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.

229 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).

230 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).


232 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).

233 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).

234 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. 235 The Bybee Memo argued that an act only constitutes torture if
the torturer specifically intended to cause suffering equivalent to
organ failure and death. 236 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. 237 Thus, courts might reject torture lawsuits under
the Act for similar reasons. 238

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. 239 CIDT does not require that victims experience
severe suffering or that the abuser specifically intend his or her actions
to inflict this harm. 240 Therefore, even if abuse victims cannot sue for

235 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.

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

237 See sources cited supra note 48.

238 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).

239 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).

240 See sources cited supra note 239.
torture under the U.S. government’s narrow definition, they could still sue for CIDT.\footnote{241}

Allowing abuse victims to sue for CIDT under the Act has two advantages.\footnote{242} First, allowing victims to sue would shield them from the U.S. government’s narrow definition of torture in the Bybee Memo.\footnote{243} 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.\footnote{244} However, if courts recognized CIDT, the victim would be able to sue for CIDT instead of torture because CIDT does not require severe suffering.\footnote{245} 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.\footnote{246} 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.\footnote{247} Recognizing CIDT would shield further anti-terrorist lawsuits from the U.S. government’s narrow definition of torture.\footnote{248}

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

\footnote{241 See sources cited supra note 239.}
\footnote{243 See Bybee Memo, supra note 36, at 2-13; see also Aldana v. Del Monte Fresh Produc, 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).}
\footnote{244 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).}
\footnote{245 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).}
\footnote{246 See sources cited supra note 77 (describing victims of terrorist abuse suing terrorists).}
\footnote{247 See sources cited supra note 77.}
\footnote{248 See Bybee Memo, supra note 36, at 2-13; see also sources cited supra note 77.}
Branch’s security decisions. However, assuming these detainees should not sue, statutes prohibiting detainees’ lawsuits are a more effective way to achieve this goal. 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. Second, refusing to recognize CIDT unfairly affects nondetainee abuse victims, including victims who are suing terrorists. A statute prohibiting detainees’ lawsuits would stop all detainees’ lawsuits, but permit nondetainees to sue for CIDT under the Act. Thus, permitting nondetainee CIDT victims to sue under the Act would harm terrorists and vindicate these victims’ right to justice.

CONCLUSION

The Eleventh Circuit’s holding in Aldana, that CIDT is not actionable under the Act, is legally incorrect and poor policy. First, the Aldana decision is incorrect because CIDT is not meaningfully different from torture, which is clearly actionable under the Act.

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250 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).


253 See sources cited supra notes 251-52 and accompanying text.

254 See sources cited supra notes 251-52 and accompanying text.

255 See supra Part III (arguing that Aldana’s holding was both legally incorrect and poor policy).

256 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.\textsuperscript{257} Third, the Aldana decision is poor policy because it could prevent abuse victims from suing under the Act.\textsuperscript{258} Fortunately, district courts outside of the Eleventh Circuit have ignored Aldana’s holding and have rightfully held that CIDT is actionable under the Act.\textsuperscript{259} To ensure justice for victims of abuse, the Supreme Court should extend the Act’s protection to allow suits for CIDT.\textsuperscript{260}

\textsuperscript{257} See supra Part III.B (arguing that Aldana court ignored plain text of Act, causing it to reach incorrect holding).

\textsuperscript{258} See supra Part III.C (arguing that Aldana is poor policy because it could prevent victims of genuine abuse from suing under Act).


\textsuperscript{260} See supra Part III.C (arguing that rejecting Aldana is necessary to protect abuse victims); cf. sources cited supra note 259 (rejecting Aldana).