A PURPOSIVE APPROACH TO INTERPRETING AUSTRALIA'S COMPLEMENTARY PROTECTION REGIME

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Under international human rights law, states have an obligation to protect individuals who would otherwise be returned to a place where they would suffer significant harm. This obligation sits alongside, and is 'complementary' to, a state's obligations to refugees under the Refugee Convention. *By virtue of legislation enacted in 2011, the international obligation to provide 'complementary protection' has been codified to form part of Australian domestic law. While designed to align Australia's protection visa system with international standards, the drafting of s 36(2)(aa) of the* Migration Act 1958 *(Cth) has left open a degree of uncertainty as to its application. This article examines how the addition of a single word, 'intend', has left a gap in the system, through which many applicants — entitled to protection under Australia's international non-refoulement obligations — may slip. This raises a unique interpretative dilemma: how should the judiciary interpret legislative provisions that are professed to comply with international law, yet stray from the terminology of their corresponding international provisions? This article advocates for the use of the modern purposive approach to interpretation, which requires selection of the interpretation that best aligns with the purpose and context of the statute. It is argued that the High Court case of* SZTAL v Minister for Immigration and Border Protection *(2017) 262 CLR 362 failed to properly apply the purposive approach in interpreting the intention requirement of Australia's complementary protection regime.*

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I Introduction

Consider the facts of *Kalashnikov v Russia*,[1] a case that came before the European Court of Human Rights ('ECtHR'). A man is charged with a crime and placed in detention pending a hearing before the city court. For the duration of his incarceration, he is kept in a small cell with no ventilation. There are eight beds in the cell, but it usually holds 24 prisoners. The inmates take turns to sleep, but sleeping is difficult because the lights are always on, and the television always playing. A single toilet is located in the corner of the cell, with no screen to offer privacy to the inmates. Meals are eaten at a dining table a metre away. The cell is overrun with cockroaches and ants. The man endures these conditions for four years and 10 months.

There is no doubt that the government and local authorities are well aware of the substandard conditions of the facility.[2] Can it be said that they *intend* to subject the man to these conditions? The answer is not immediately clear. It depends on '*why the question is asked*'.[3]

Domestic complementary protection legislation was enacted in 2011 to enhance Australia's compliance with its international non-refoulement obligations.[4] Specifically, the legislation sought to widen the scope of protection visa legislation to cover applicants who would be subjected to torture or cruel, inhuman or degrading treatment or punishment ('CIDTP') in the country that receives them.[5] Buried within the new provisions was, however, a definitional requirement at odds with the understanding of CIDTP in international law.[6] In this article, I examine the domestic requirement that, for the purpose of meeting protection visa criteria, the CIDTP an applicant would

[1] [2002] VI Eur Court HR 94 ('*Kalashnikov*'). See at 101–2 [12]–[20] for the facts outlined in this paragraph.

[2] Ibid 115 [94].

[3] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 373 [32] (Gageler J) (emphasis added) ('*SZTAL*').

[4] *Migration Amendment (Complementary Protection) Act 2011* (Cth).

[5] Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2009 (Cth) 1–2 ('Complementary Protection Bill Explanatory Memorandum'); *Migration Act 1958* (Cth) ss 36(2)(aa), 36(2A) ('*Migration Act*').

[6] See, eg, Michelle Foster and Jason Pobjoy, Submission No 9 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Complementary Protection) Bill 2009* (28 September 2009) 20–1; Jane McAdam, 'Australian Complementary Protection: A Step-by-Step Approach' (2011) 33(4) *Sydney Law Review* 687, 698–706 ('Australian Complementary Protection').

face upon return to another state be *intentionally* inflicted.[7] I do not seek to mount a challenge to the CIDTP definitions in the enacted complementary protection legislation. Rather, I take the law as it stands, focusing upon the role of the judiciary in its interpretation.

In three parts, I make the argument that the meaning of the intention requirement in the complementary protection regime cannot be given a textual interpretation isolated from the context and purpose of the statute. Recourse to the statute's purpose — compliance with Australia's international non-refoulement obligations[8] — is required to inform the correct interpretation of intention. I argue that an understanding of intention that sees known consequences of an act as intended should be adopted. This is on the basis that it best aligns the domestic complementary protection regime with the international complementary protection obligations that Australia has sought to implement.

In Part II of this article, I discuss the 2017 case of *SZTAL v Minister for Immigration and Border Protection* ('*SZTAL*'),[9] in which the High Court of Australia upheld the rejection of two protection visa applications by the Refugee Review Tribunal ('RRT') on the basis of the intention requirement. The applicants were two Sri Lankan men who credibly claimed that upon return to Sri Lanka they would be imprisoned in 'shocking conditions'.[10] The Court confirmed the RRT's finding that the Sri Lankan authorities did not intend — in the actual, subjective sense of the word — to subject the applicants to these conditions.[11] Following an analysis of the case, I argue that the appropriate meaning of intention cannot be ascertained in the abstract, because intention is capable of multiple meanings. One possible meaning of intention encompasses knowledge of practically certain consequences, which can be described as 'oblique intention'.[12] The correct interpretation of the intention requirement in the complementary protection regime is dependent on the statute's context and purpose.

On this basis, I then proceed in Part III to advocate for a 'purposive approach' to interpreting the intention requirement. I use the term 'purposive approach' to refer to purposive theory, which calls for judicial consideration

[7] See *Migration Act* (n 5) s 5(1) (definitions of 'cruel or inhuman treatment or punishment', 'degrading treatment or punishment').

[8] Complementary Protection Bill Explanatory Memorandum (n 5) 1–2.

[9] *SZTAL* (n 3).

[10] Ibid 382–3 [63] (Edelman J).

[11] Ibid 372 [29] (Kiefel CJ, Nettle and Gordon JJ). See also at 400–1 [114] (Edelman J).

[12] Glanville Williams, 'Oblique Intention' (1987) 46(3) *Cambridge Law Journal* 417.

of a statute's purpose *and* context in interpretation, as compared to a strictly literalist approach.[13] The argument for a purposive approach builds on the dissenting judgment of Gageler J in *SZTAL*, who interpreted the intention requirement in light of the expressed purpose of the Australian complementary protection regime: alignment with Australia's international non-refoulement obligations.[14] In contrast, the majority paid only lip-service to international law, finding that the absence of a settled meaning of intention in the international context marked the end of its relevance.[15] As distinct from existing academic discussion, I focus specifically on the implications of the purposive approach for judicial engagement with international human rights law.[16] I argue that the proposed approach ensures that the judiciary has regard to international law when interpreting the complementary protection regime — a statute that purports to implement international obligations but deviates in its terms from those obligations. My argument is reinforced by a second proposition, founded in the normative understanding of the principle of legality and the presumption of legislative consistency with international law. I propose that the judiciary should only accept legislative interference with the right to non-refoulement where clear statutory language to this effect is discernible.[17]

Finally, in Part IV of this article, I apply the purposive approach to ascertain the correct meaning of the intention requirement, informed by the international human rights law context of the complementary protection regime. Firstly, I argue that regardless of whether a settled meaning of *intention* exists under international law, the international context of Australia's complementary protection regime is central to its interpretation, and necessitates a broad understanding of intention. Secondly, I argue that the Australian judiciary should seek to uphold the international 'autonomous' meaning of the CIDTP prohibition at the core of Australia's complementary

[13] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381–2 [69]–[71], 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').

[14] *SZTAL* (n 3) 376–7 [43].

[15] Ibid 369 [18] (Kiefel CJ, Nettle and Gordon JJ), 389–91 [84]–[89] (Edelman J).

[16] Cf Dan Meagher, 'The "Modern Approach" to Statutory Interpretation and the Principle of Legality: An Issue of Coherence?' (2018) 46(3) *Federal Law Review* 397, 405 ('The "Modern Approach" to Statutory Interpretation'); Gordon Brysland and Suna Rizalar, 'Statutory Interpretation: Constructional Choice' (2018) 92(2) *Australian Law Journal* 81, which discusses *SZTAL* as part of a more general analysis of the High Court's engagement with the purposive approach.

[17] See Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372, 378.

protection obligations. I unpack the nature of this autonomous meaning, before proposing a reading of intention that does not detract from it. A normative facet to this argument is developed by drawing upon Jeremy Waldron's theory that the international CIDTP prohibition is 'archetypal' of the international human rights law regime,[18] providing strong reason not to diminish its integrity in domestic law. I conclude that a broad interpretation of intention, which better facilitates the purpose of the complementary protection regime, is available on the text. This interpretation should be preferred to a narrow one that causes the legislation to depart significantly from the international human rights obligations it is designed to implement.

II *SZTAL* AND INTENTION

A *The 2011 Complementary Protection Amendments*

1 *Background and Enactment*

Section 36(2)(aa) of the *Migration Act* was introduced by the *Migration Amendment (Complementary Protection) Act 2011* (Cth) to 'align' Australia's protection visa process with its complementary protection obligations under international law.[19] 'Complementary protection' is a technical term of international law referring to a state's obligations not to return an individual to another state where they will suffer significant harm.[20] The complementary protection principle extends beyond, and is complementary to, the obligation for a state to protect those who meet the legal status of 'refugee' pursuant to the 1951 *Convention Relating to the Status of Refugees* ('*Refugee Convention*') and the 1967 *Protocol Relating to the Status of Refugees*.[21] This expanded set of non-refoulement obligations is inferred from a number of international agreements that prohibit the subjection of a person to torture or CIDTP,

[18] Jeremy Waldron, 'Torture and Positive Law: Jurisprudence for the White House' (2005) 105(6) *Columbia Law Review* 1681 ('Torture and Positive Law').

[19] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2011, 1356–7 (Chris Bowen, Minister for Immigration and Border Protection) ('*Parliamentary Debates (2011)*').

[20] Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 2–3.

[21] Ibid. See generally *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954); *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

including the *International Covenant on Civil and Political Rights* ('*ICCPR*')[22] and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*CAT*').[23]

Australia's complementary protection legislation seeks to address the inadequacies of Australia's previous mechanism for compliance with its complementary protection obligations.[24] Australia ratified the *ICCPR* in 1980, and the *CAT* in 1989.[25] Prior to 2011, however, the expanded obligations of non-refoulement arising from these instruments were not incorporated into domestic law, setting Australia apart from comparable industrialised jurisdictions.[26] Under domestic protection legislation at the time, only applicants capable of demonstrating refugee status were eligible to obtain a protection visa.[27] Individuals fleeing harm not covered by the refugee definition would receive a negative determination at first instance.[28] Upon receiving a negative determination, the only option was to petition the Minister to substitute the unfavourable decision for a favourable one, pursuant to the Minister's non-compellable and non-reviewable discretion under s 417 of the *Migration Act*.[29]

[22] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7 ('*ICCPR*').

[23] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*CAT*'). See also Human Rights Committee, 'General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.9 (27 May 2008) vol 1, 200, 201 [9] ('General Comment No 20'): 'States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'.

[24] See Complementary Protection Bill Explanatory Memorandum (n 5) 1–2.

[25] 'UN Treaty Body Database', *Office of the United Nations High Commissioner for Human Rights* (Web Page) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9>, archived at <https://perma.cc/2668-G5EX>.

[26] Including the European Union, Canada, the United States and New Zealand: Jane McAdam, 'From Humanitarian Discretion to Complementary Protection: Reflections on the Emergence of Human Rights-Based Refugee Protection in Australia' (2011) 18 *Australian International Law Journal* 53, 53–5 ('From Humanitarian Discretion to Complementary Protection').

[27] See *Migration Act* (n 5) s 36(2)(a), as at 27 January 2012.

[28] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 September 2009, 8988–90 (Laurie Ferguson, Parliamentary Secretary for Multicultural Affairs and Settlement Services).

[29] Udara Jayasinghe and Sasha Baglay, 'Protecting Victims of Human Trafficking within a "Non-Refoulement" Framework: Is Complementary Protection an Effective Alternative in Canada and Australia?' (2011) 23(3) *International Journal of Refugee Law* 489, 507.

Concerns regarding this process were voiced in a number of domestic[30] and international reports.[31] The excessive use of the s 417 mechanism, which was intended simply as a check on the system, and the process's inherent lack of transparency caused the then Minister for Immigration and Citizenship to express concern that he was 'playing God'.[32] Addressing mounting domestic and international pressure, the Migration Amendment (Complementary Protection) Bill 2009 (Cth) ('Complementary Protection Bill') proposed amendments to the *Migration Act* to permit protection visa claims to be made by those who, whilst not qualifying for refugee status, faced return to 'irreparabl[e]' harm.[33]

2 *The Intention Requirement*

(a) A Deviation from the International Definitions

Of specific focus in this article, the Complementary Protection Bill proposed the (now enacted) definition of 'cruel or inhuman treatment or punishment' as 'an act or omission by which severe pain or suffering, whether physical or mental, is *intentionally* inflicted on a person'; and 'degrading treatment or punishment' as 'an act or omission that causes, and is *intended* to cause, extreme humiliation which is unreasonable'.[34] These definitions will be collectively referred to as the 'intention requirement' of the 'CIDTP definitions'.

Intention is not an essential element of CIDTP under international law; it does not appear as an express requirement in any of the implemented provisions.[35] Torture is defined in the *CAT* as an act or omission that is

[30] Complementary Protection Bill Explanatory Memorandum (n 5) 2.

[31] See, eg, Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding Observations of the Committee against Torture*, UN Doc CAT/C/AUS/CO/3 (22 May 2008) 4–5 [15]; Human Rights Committee, *Report of the Human Rights Committee*, UN Doc A/55/40 (24 July 2000) vol 1, 71–4 [498]–[528]. For a more comprehensive list, see McAdam, 'From Humanitarian Discretion to Complementary Protection' (n 26) 54 n 3.

[32] Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 19 February 2008, 31 (Chris Evans, Minister for Immigration and Citizenship).

[33] Migration Amendment (Complementary Protection) Bill 2009 (Cth) sch 1 items 11, 13–14.

[34] Ibid sch 1 items 2–3 (emphasis added).

[35] See Yutaka Arai-Yokoi, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR' (2003) 21(3) *Netherlands Quarterly of Human Rights* 385, 390.

intentionally inflicted for a certain purpose.[36] In contrast, CIDTP is undefined in the *CAT* and the *ICCPR*.[37] Article 16 of the *ICCPR* prohibits 'other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture'. Application of the CIDTP prohibition in international case law indicates that CIDTP can be 'both intentional or negligent, with or without a particular purpose'.[38] The Human Rights Committee ('HRC') has never indicated that intention is required for CIDTP.[39] The ECtHR has only sporadically referred to intention as a potential, and not decisive, element of the CIDTP prohibition in art 3 of the European Convention on Human Rights ('ECHR').[40]

It is therefore unclear why the intention requirement was included in the Australian definition of CIDTP. Secondary materials to the Complementary Protection Bill offer little by way of clarification.[41] Perhaps the addition of the 'intention' requirement was simply part of an effort to clarify the meaning of CIDTP, in response to the lack of an exhaustive definition of the term under international law.[42] The Explanatory Memorandum to the Complementary Protection Bill explains that the Bill's definition of 'cruel or inhuman treatment or punishment' is intended to cover 'an act or omission that would normally constitute an act of torture but which is not inflicted for one of the purposes or reasons stipulated under the definition of torture'.[43] The Explanatory Memorandum further states that this definition 'derive[s] from the *non-refoulement* obligation implied under Articles 2 and 7 of the [*ICCPR*]'.[44] Similarly, the Explanatory Memorandum contemplates that the Bill's defini-

[36] *CAT* (n 23) art 1.

[37] Ibid art 16; *ICCPR* (n 22) art 7.

[38] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (Oxford University Press, 2008) 558. See also Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 3rd ed, 2013) 234 [9.35].

[39] Foster and Pobjoy (n 6) 20.

[40] Arai-Yokoi (n 35) 390. See, eg, *Labita v Italy* [2000] IV Eur Court HR 99, 131 [120].

[41] Complementary Protection Bill Explanatory Memorandum (n 5); *Parliamentary Debates (2011)* (n 19) 1356–9 (Chris Bowen, Minister for Immigration and Citizenship).

[42] A stated purpose of the Complementary Protection Bill was to 'provide relevant tests and definitions' for identifying whether a non-citizen is 'eligible for a protection visa on complementary protection grounds': Complementary Protection Bill Explanatory Memorandum (n 5) 1.

[43] Ibid 4 [16].

[44] Ibid 4 [20].

tion of 'degrading treatment or punishment' would cover 'acts or omissions which, when carried out, would violate Article 7 of the [*ICCPR*]'.[45]

Against the backdrop of this expressed intention for the CIDTP definitions to carry their meaning under the *ICCPR*, a number of submissions to the Senate Legal and Constitutional Affairs Committee's inquiry into the Complementary Protection Bill noted the apparent inconsistency of the intention requirement with international law, and recommended that it be removed from the definitions.[46] However, in the Department of Immigration and Citizenship's submission to the Committee's final report on the Complementary Protection Bill in 2009, the Department asserted that the intention requirement was 'consistent with current international law'.[47] Due to time constraints, the Committee did not investigate the issue further.[48] The proposed definitions of CIDTP were consequently enacted, unaltered, into the *Migration Act* as categories of significant harm.[49]

(b) Early Consideration of the Intention Requirement

Initially, the intention requirement in the domestic CIDTP definitions did not appear to inhibit the success of complementary protection cases. In four early cases, the RRT determined that prison conditions in a country of origin posed significant harm under s 36(2)(aa).[50] Two of these successful applications were made by Sri Lankan Tamils at risk of facing 'appalling conditions' in imprisonment upon their return to Sri Lanka.[51] In one of these cases, the Tribunal found that by establishing a policy of imprisonment of returnees in full knowledge of these prison conditions, the Sri Lankan government could be

[45] Ibid 5 [22].

[46] See, eg, Foster and Pobjoy (n 6) 20–1; Jane McAdam, Submission No 21 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Complementary Protection) Bill 2009* (28 September 2009) 21–3 [59]–[64] ('Submission No 21').

[47] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration Amendment (Complementary Protection) Bill 2009 [Provisions]* (Report, 19 October 2009) 19 [3.36].

[48] Ibid.

[49] *Migration Act* (n 5) ss 5(1) (definitions of 'cruel or inhuman treatment or punishment', 'degrading treatment or punishment'), 36(2)(aa), 36(2A).

[50] Jane McAdam and Fiona Chong, 'Complementary Protection in Australia Two Years On: An Emerging Human Rights Jurisprudence' (2014) 42(3) *Federal Law Review* 441, 477.

[51] *1301683* [2013] RRTA 765, [66] (Member Moore). See also *1305331* [2013] RRTA 877, [72]–[79] (Member Hunt).

'imputed' with intent, satisfying the s 5(1) definition.[52] These earlier decisions aligned with comparative international jurisprudence, in which poor prison conditions have been held to amount to degrading treatment giving rise to non-refoulement obligations.[53]

In later cases, however, the RRT (and, subsequently, the Administrative Appeals Tribunal) was less inclined to accept that intention could be imputed to authorities in respect of an applicant's imprisonment.[54] The facts of these cases did not less clearly support a finding of intention than they did in the earlier cases. Rather, the decision-makers' adopted understanding of the intention requirement varied — influenced, perhaps, by the perceived severity of each case. For instance, in *1301683*,[55] the RRT focused upon the youth and innocence of the applicant, characteristics which rendered him particularly vulnerable to degrading treatment in prison.[56] In the later cases, where exacerbating factors such as these were lacking, the relevant state authorities were not similarly imputed with intention.[57]

B SZTAL v Minister for Immigration and Border Protection

The question of the correct interpretation of 'intention' for the purposes of the complementary protection regime came before the High Court for consideration in 2017, in the case of *SZTAL*.

1 *Summary of Case and Earlier Decisions*

SZTAL concerned two separate rejections of applications by Sri Lankan citizens for protection visas under s 36(2)(aa) of the *Migration Act*. It was not contentious that illegal departure from Sri Lanka was an offence for which the applicants would likely be imprisoned for up to two weeks.[58] Country information indicating that Sri Lankan prison conditions were 'poor and

[52] *1301683* (n 51) [66] (Member Moore).

[53] McAdam and Chong (n 50) 478–9. See, eg, *MSS v Belgium* [2011] I Eur Court HR 255 ('*MSS*'); *Kilic v Canada (Minister of Citizenship and Immigration)* (2004) 245 FTR 52 (Federal Court of Canada).

[54] See, eg, *1313807* [2015] RRTA 269, [58] (Member Syme); *1319179* [2015] RRTA 252, [91] (Member Grau); *1311316* [2015] RRTA 142, [36]–[38] (Member Moustafine); *1608294 (Refugee)* [2016] AATA 4819, [58]–[59] (Member Burns).

[55] *1301683* (n 51).

[56] Ibid [64] (Member Moore).

[57] See above n 54.

[58] *SZTAL v Minister for Immigration and Border Protection* (2016) 243 FCR 556, 561–2 [10]–[11] (Kenny and Nicholas JJ) ('*SZTAL (Full Court)*').

overcrowded'[59] and 'may not meet international standards' had been accepted by the RRT.[60] However, in decisions upheld by the Federal Circuit Court and a majority of the Full Federal Court, the Tribunal found that in neither case could the Sri Lankan authorities be said to *intend* to cause severe harm or suffering, or to cause extreme humiliation for the purposes of satisfying the s 5(1) CIDTP definitions.[61] The substandard conditions of Sri Lankan prisons were found to be due to a lack of resources, which the Sri Lankan government had acknowledged and was seeking to address.[62] It was held that the authorities did not possess the 'actual, subjective intent' required.[63]

The applicants' cases could conceivably have been rejected for lack of severity or the limited duration of the conditions they would face. Indeed, Buchanan J in the Full Federal Court would have dismissed the appeals on the basis that the conditions the applicants faced were not sufficiently extreme to amount to CIDTP.[64] However, the applicants' cases were determined by the Federal Circuit Court and the majority in the Full Federal Court to turn on the intention requirement, and it was on this point that the matter was appealed to the High Court.[65]

2 *The High Court Decision*

In a joint majority judgment, Kiefel CJ, Nettle and Gordon JJ upheld the decision of the Full Federal Court, finding that 'intention' should be given its 'ordinary' meaning: actual, subjective intention.[66] Rejecting the broader understanding of intention advocated for by the appellants, their Honours cited the Court's earlier decision in *Zaburoni v The Queen* ('*Zaburoni*'),[67] a domestic criminal law matter, to hold that a person intends a result if they '[mean] to produce that result'.[68] The Court held that foresight of a certain

[59] Ibid 562 [11], quoting the reasons of the RRT.

[60] Ibid 561 [10].

[61] Ibid 561–2 [11], 578 [59], 582 [79]–[81]. See also *SZTAL v Minister for Immigration* [2015] FCCA 64, [45]–[51] (Driver J) ('*SZTAL (Federal Circuit Court)*'); *SZTGM v Minister for Immigration* [2015] FCCA 87, [28]–[29] (Driver J).

[62] *SZTAL (Full Court)* (n 58) 561 [10] (Kenny and Nicholas JJ).

[63] *SZTAL (Federal Circuit Court)* (n 61) [45], [57] (Driver J); ibid 578 [59].

[64] *SZTAL (Full Court)* (n 58) 589–90 [94]–[99], cited in *SZTAL* (n 3) 380 [55] (Gageler J).

[65] *SZTAL* (n 3) 381–2 [60] (Edelman J); Juliette McIntyre, 'Adrift: The High Court of Australia Decides *SZTAL v Minister for Immigration and Border Protection*' (2018) 19(1) *Melbourne Journal of International Law* 389, 395.

[66] *SZTAL* (n 3) 367 [8], 372 [26]–[27].

[67] (2016) 256 CLR 482 ('*Zaburoni*').

[68] *SZTAL* (n 3) 368–9 [15], citing ibid 489 [11] (Kiefel, Bell and Keane JJ).

result should not be equated with intention.[69] Their Honours considered that the context of the complementary protection regime did not negate this meaning, particularly in the absence of a 'settled' meaning of 'intentionally' under international law.[70] It was held that the Sri Lankan authorities did not possess actual, subjective intention.[71]

C *Interpreting 'Intention'*

1 *A Lack of Judicial Consensus*

As Sir Anthony Mason has noted, 'intention' is an imprecise term for which an ordinary meaning is difficult to ascertain,[72] a fact evidenced by two separate cases on the meaning of intention reaching the High Court in the space of two years.[73] The majority decision in *SZTAL* follows a line of Australian authorities that have held 'intention' to refer only to 'direct' intention, in the sense that a person has the particular result in mind.[74] These cases, however, vie with another line of authorities in English[75] and Australian law,[76] which consider intention to cover knowledge of virtually certain consequences of an act. Indeed, Nettle J, dissenting in *Zaburoni*, adopted this understanding of intention, finding that 'where it is proved that an accused foresaw that his or her actions would have an inevitable or certain consequence, it logically follows that the accused intended to bring about that consequence'.[77] The majority in *SZTAL*, however, including Nettle J, considered his Honour's

[69] *SZTAL* (n 3) 369 [16], citing *Zaburoni* (n 67) 490 [15] (Kiefel, Bell and Keane JJ).

[70] *SZTAL* (n 3) 369 [17]–[18].

[71] Ibid 372 [29].

[72] Sir Anthony Mason, 'Intention in the Law of Murder' in Ngaire Naffine, Rosemary Owens and John Williams (eds), *Intention in Law and Philosophy* (Ashgate, 2001) 107, 109–10. See also *He Kaw Teh v The Queen* (1985) 157 CLR 523, 568 (Brennan J) ('*He Kaw Teh*').

[73] *Zaburoni* (n 67); *SZTAL* (n 3).

[74] *Zaburoni* (n 67) 488 [8] (Kiefel, Bell and Keane JJ), citing *R v Willmot [No 2]* [1985] 2 Qd R 413, 418 (Connolly J) (Court of Criminal Appeal). See also *R v Ping* [2006] 2 Qd R 69, 76 [27] (Chesterman J) (Court of Appeal).

[75] *R v Matthews* [2003] 2 Cr App R 30, 476–7 [45] (Rix LJ for the Court); *R v Hyam* [1975] AC 55, 79 (Lord Hailsham). See also *R v Moloney* [1985] 1 AC 905, 929 (Lord Bridge): a 'natural consequence of a defendant's voluntary act', if foreseen by the defendant, can infer intention.

[76] See, eg, *He Kaw Teh* (n 72) 569 (Brennan J); *Peters v The Queen* (1998) 192 CLR 493, 522 [68] (McHugh J); *R v Crabbe* (1985) 156 CLR 464, 469 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ); *Vallance v The Queen* (1961) 108 CLR 56, 73 (Menzies J).

[77] *Zaburoni* (n 67) 504 [66].

reasoning to stand rejected by the majority decision of *Zaburoni*.[78] The lack of consistent judicial interpretation of intention supports my contention that a single meaning of the term cannot be ascertained in the abstract.

2 *Multiple Potential Meanings: Considering Oblique Intention*

Intention is capable of a 'range of potential meanings'.[79] One such alternative meaning is the broad conception of intention, drawn upon in the second line of authorities above, that encompasses 'oblique' or 'indirect' intention. This article argues that adopting this broad understanding of intention is justified in particular circumstances.

Scholarship on oblique intention considers that in certain contexts, a foreseen and virtually certain consequence of an act should be seen as intended for the purpose of law.[80] Famously, Bennett gives the example of the Terror Bomber and the Strategic Bomber.[81] The Terror Bomber plans to bomb the enemy's school, to terrorise the civilian population and force the enemy to surrender. The Strategic Bomber plans to bomb the enemy's munitions plant to undermine its war effort. The munitions plant is next to the school, and the children inside the school will therefore be killed. Bennett queries whether the Strategic Bomber, knowing this, can be said to intend the children's deaths, seeing as he does not desire this result, and has not acted in order to achieve it.[82]

Drawing upon hypotheticals such as this one, Glanville Williams, a prominent advocate for the inclusion of oblique intention within the concept of intention, submits that a legal understanding of intention should encompass the dual consequences of an act or omission: that which is desired, and that which is 'inseparably bound up with the desired consequence'.[83] Sir Anthony Mason, among others, endorses this view.[84] He adds that the extent to which oblique intention should be included within a legal understanding of inten-

[78] *SZTAL* (n 3) 369 [16].

[79] Ibid 375 [38] (Gageler J), quoting *Taylor v Owners — Strata Plan No 11564* (2014) 253 CLR 531, 557 [66] (Gageler and Keane JJ).

[80] Predominantly discussed in the criminal law context: see Williams (n 12) 420–1; Mason (n 72) 123; AP Simester, 'Moral Certainty and the Boundaries of Intention' (1996) 16(3) *Oxford Journal of Legal Studies* 445, 445.

[81] Jonathan Bennett, 'Morality and Consequences' in Sterling M McMurrin (ed), *The Tanner Lectures on Human Values* (University of Utah Press, 1980–) vol 2, 45, 95–105, cited in Mason (n 72) 123.

[82] Bennett (n 81) 95–105.

[83] Williams (n 12) 420.

[84] Mason (n 72) 123–7. See also Simester (n 80).

tion depends upon the 'degree of connection' between the act and its consequences, and is therefore context-dependent.[85]

The poor prison conditions in *SZTAL* can certainly be said to have been *obliquely* intended by the Sri Lankan government and authorities. The Sri Lankan government has acknowledged the poor conditions of its prisons, and in placing an individual into prison it is aware that, as a practically certain consequence of imprisoning that individual, they will be subject to those conditions. While this result is not necessarily desired, it is 'inseparably bound up with' the desired result of imprisonment.[86]

For the Court to have accepted this conception of intention would therefore have changed the outcome of the appellants' case. In their written submissions, counsel for the appellants cited Williams' concept of oblique intention.[87] The majority, however, found it unnecessary to consider the relevance of oblique intention, since submissions on the point were only made briefly.[88] In a separate judgment, Edelman J engaged with the concept of oblique intention.[89] Nonetheless, his Honour held that the ordinary meaning of intention did not include oblique intention, considering that such an interpretation would be to adopt an 'unnatural or fictitious' sense of the word.[90]

The true fallacy is that the correct meaning of intention can be ascertained in isolation from the term's context.[91] In the next part of this article, I argue that the judiciary should consider the range of possible meanings of intention, before deciding which is most coherent with the context and purpose of the statute.[92]

[85] Mason (n 72) 127.

[86] Williams (n 12) 420.

[87] Ibid 420–1, cited in SZTAL, 'Appellants' Submissions', Submission in *SZTAL v Minister for Immigration and Border Protection* (High Court, S272/2016, 21 December 2016) 6 [29] n 9 ('Appellants' Submissions').

[88] *SZTAL* (n 3) 367–8 [10].

[89] Ibid 382 [61].

[90] Ibid 383–4 [67]–[68].

[91] See Johan Steyn, 'Dynamic Interpretation amidst an Orgy of Statutes' (2004) 35(2) *Ottawa Law Review* 163, 166.

[92] *SZTAL* (n 3) 377 [44] (Gageler J).

III The Need for a Purposive Approach to Interpreting Intention

The majority's decision to apply the 'ordinary' meaning of intention in *SZTAL* eschewed substantive engagement with the context and purpose of the complementary protection regime. In contrast, Gageler J considered that the word's meaning could not be determined in the abstract, but that '[t]he answer depends on why the question is asked'.[93] This echoed Sir Anthony Mason's observations regarding the difficulty in ascertaining an ordinary meaning of 'intention'.[94] Indeed, Gageler J cited Mason J's judgment in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*,[95] in which his Honour held:

> Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.[96]

Gageler J therefore interpreted the intention requirement with reference to the context of the complementary protection regime and its purpose: to align Australia's domestic complementary protection regime with its international non-refoulement obligations.[97] This article argues that the approach to interpretation adopted by Gageler J, best described as a purposive approach, is persuasive.[98]

A *The Primacy of Context and Purpose in Interpretation*

1 *The 'Modern' Approach*

To propose an interpretative approach that takes into account a statute's context and purpose in the first instance is not novel. Rather, this method has been approved by the High Court as the 'modern' approach to statutory

[93] Ibid 373 [32].

[94] Mason (n 72) 109–10.

[95] (1985) 157 CLR 309 ('*K & S Lake City Freighters*').

[96] Ibid 315, cited in *SZTAL* (n 3) 374 [35].

[97] *SZTAL* (n 3) 376–7 [43].

[98] Brysland and Rizalar (n 16) 83–4.

interpretation.[99] It is also prescribed by legislation: s 15AA of the *Acts Interpretation Act 1901* (Cth) states that 'the interpretation that would best achieve the purpose or object of the Act … is to be preferred to each other interpretation'. It is therefore well-established that 'the choice between competing constructions is driven by purpose'.[100] Gageler J's interpretative approach in *SZTAL* is in keeping with the modern 'rise of purposivism' in judicial interpretation, and the corresponding fall of excessive literalism.[101] It is also consistent with his Honour's previously voiced support for 'dynamic' judicial interpretation of legislative intention,[102] and the need for recognition of the 'broader structural and temporal context' of legislation.[103]

While the plurality in *SZTAL* acknowledged the modern approach to interpretation, stating that 'context should be regarded at [the] first stage and not at some later stage and … in its widest sense',[104] the judges' reasoning reflected a different application of the approach.[105] Stating that the ordinary meaning of a word should be rejected where that meaning is not consistent with the identified context and purpose,[106] the majority's approach thereby prioritised the discernment of an 'ordinary meaning' prior to consideration of the statute's purpose and context. The plurality's approach in *SZTAL* has been described as an 'emphatic' affirmation of the modern approach to interpretation,[107] and has been drawn upon in more recent case law as concise guidance

[99] See *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) ('*CIC Insurance*'); *K & S Lake City Freighters* (n 95) 315 (Mason J); *Project Blue Sky* (n 13) 384 [78] (McHugh, Gummow, Kirby and Hayne JJ). See also Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 37–40.

[100] Brysland and Rizalar (n 16) 81. See also Steyn (n 91) 166–7.

[101] Brysland and Rizalar (n 16) 82, 84. See generally Justice John Middleton, 'Statutory Interpretation: Mostly Common Sense?' (2016) 40(2) *Melbourne University Law Review* 626.

[102] Justice Stephen Gageler, 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1, 14.

[103] Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) *Monash University Law Review* 1, 1.

[104] *SZTAL* (n 3) 368 [14] (Kiefel CJ, Gordon and Nettle JJ), citing *CIC Insurance* (n 99) 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

[105] The Hon JJ Spigelman observes that 'the basic principles [of the modern approach to interpretation] do not appear to be in dispute. It is in the application of these principles that differences emerge': Chief Justice JJ Spigelman, 'The Intolerable Wrestle: Developments in Statutory Interpretation' (2010) 84(12) *Australian Law Journal* 822, 831.

[106] *SZTAL* (n 3) 368 [14] (Kiefel CJ, Gordon and Nettle JJ).

[107] Meagher, 'The "Modern Approach" to Statutory Interpretation' (n 16) 405.

on how to apply the purposive approach.[108] Yet a closer analysis of the plurality's reasoning reveals a reticence to fully engage with the implications of the modern approach. While on their Honours' reading, the context of the complementary protection regime did not '*tell against* the ordinary meaning of intention',[109] a true purposive approach requires that context and purpose *inform* the construction, rather than simply confirm or disallow it.[110]

2 *The Context and Purpose of the Complementary Protection Regime*

As established above, the modern approach to interpretation requires consideration, in the first instance, of the context and purpose of legislation. The purpose of the complementary protection regime is indisputably to achieve domestic compliance with Australia's international non-refoulement obligations. In the Second Reading Speech for the Complementary Protection Bill, Minister for Immigration and Citizenship Chris Bowen acknowledged the inadequacy of Australia's protection visa process for applicants falling outside the legal status of refugee but nonetheless owed protection pursuant to Australia's international non-refoulement obligations.[111] The proposed amendments to the *Migration Act*, he submitted, would 'eliminate a significant administrative hole' in the protection visa application process, and 'align' it with Australia's international obligations.[112] The explanatory memorandum to the Complementary Protection Bill similarly stated that its purpose was to

> introduce complementary protection arrangements to allow *all claims that may engage Australia's non-refoulement obligations* to be considered under a single

[108] See, eg, *SAS Trustee Corporation v Miles* (2018) 361 ALR 206, 215 [20] (Kiefel CJ, Bell and Nettle JJ) ('*SAS Trustee Corporation*'); *Liu v Stephen Grubits & Associates* (2019) 284 IR 475, 478 [8] (Reeves, Kerr and Lee JJ) (Full Federal Court); *DBB16 v Minister for Immigration and Border Protection* (2018) 260 FCR 447, 456 [34] (Perram, Wigney and Lee JJ).

[109] *SZTAL* (n 3) 369 [17] (Kiefel CJ, Gordon and Nettle JJ) (emphasis added).

[110] Ibid 374 [37] (Gageler J). See also *SAS Trustee Corporation* (n 108) 221 [41] (Gageler J) (citations omitted): 'The statutory text must be considered from the outset in context and attribution of meaning to the text in context must be guided so far as possible by statutory purpose on the understanding that a legislature ordinarily intends to pursue its purposes by coherent means.' See also *Saraswati v The Queen* (1991) 172 CLR 1, 21 (McHugh J):

> In many cases, the grammatical or literal meaning of a statutory provision will give effect to the purpose of the legislation. Consequently, it will constitute the 'ordinary meaning' to be applied. If, however, the literal or grammatical meaning of a provision does not give effect to that purpose, that meaning cannot be regarded as 'the ordinary meaning' and cannot prevail. It must give way to the construction which will promote the underlying purpose or object of an Act …

[111] *Parliamentary Debates (2011)* (n 19) 1356.

[112] Ibid 1356–7.

> protection visa application process, with access to the *same transparent, reviewable and procedurally robust decision-making framework* as is currently available to applicants who make claims that may engage Australia's obligations under the [*Refugee Convention*].[113]

Moreover, as outlined in Part II of this article, the Explanatory Memorandum to the Complementary Protection Bill specifically indicated that the CIDTP definitions were drafted to cover acts or omissions that would violate art 7 of the *ICCPR*.[114]

While the purpose of the amendments therefore appears clear on its face, counsel for the Minister in *SZTAL* submitted that these extrinsic statements could not be read to indicate an intention that the complementary protection regime be 'fully congruent' with Australia's non-refoulement obligations.[115] This submission led to the outcome, as noted by Edelman J, that '[t]he amendments that were intended to close the gap still left a gap'.[116] In response, counsel for the Minister submitted that Parliament intended for those not covered by the regime's provisions, but still entitled to non-refoulement under Australia's international obligations, to be protected by other mechanisms, such as the s 417 ministerial discretion.[117]

Counsel for the Minister's submission that only partial implementation of Australia's non-refoulement obligations was intended contradicts the express statement in the Explanatory Memorandum that '*all* claims that may engage Australia's *non-refoulement* obligations' should be covered by a single transparent and reviewable process.[118] To contemplate that a large number of people entitled to protection would fall outside the new regime defeats the intention not to submit applicants to the discretionary s 417 process. It is therefore clearly established that the purpose of the complementary protection regime is to achieve compliance with Australia's international non-refoulement obligations, and that the intention requirement was not drafted as a departure from those obligations. Indeed, Gageler J noted of the respondents' submissions: 'You nail your colours to the mast of a fixed ordinary

[113] Complementary Protection Bill Explanatory Memorandum (n 5) 1 (emphasis added).

[114] Ibid 4 [18].

[115] Minister for Immigration and Border Protection, 'First Respondent's Submissions', Submission in *SZTAL v Minister for Immigration and Border Protection* (High Court, S272/2016, 25 January 2017) 9 [29] ('First Respondent's Submissions').

[116] Transcript of Proceedings, *SZTAL v Minister for Immigration and Border Protection* [2017] HCATrans 68, 2283–4 ('*SZTAL (Transcript)*').

[117] See ibid 2365–70 (Donaghue QC).

[118] Complementary Protection Bill Explanatory Memorandum (n 5) 1 (emphasis added).

meaning. If you started with contextual meaning you are in a bit of trouble, are you not?'[119]

3 *Addressing the Addition of the Intention Requirement*

This article argues that a purposive approach to interpretation overcomes some of the inherent limitations of the Australian dualist system, and facilitates legitimate regard to international law when interpreting Australian law. It has been feared that the incongruity of the domestic complementary protection regime with its international counterparts will limit the circumstances in which decision-makers may look to international jurisprudence on CIDTP, forcing them to instead 'reinvent the wheel' in interpreting the Australian provisions.[120] A purposive approach to the complementary protection regime resolves this concern, requiring an internationally informed understanding of the intention requirement, even though it is not directly transposed from international law.

(a) The Limitations Posed by the Dualist System

The Australian dualist approach to international law dictates that international instruments generally only have effect as domestic law once enacted by statute.[121] The Australian Parliament has strictly controlled the reception of international law into the domestic legal system, demonstrating a widely observed Australian 'anxiety' toward international law.[122] Indeed, neither the *ICCPR* nor the *CAT* have been transposed into domestic legislation, preventing these treaties from providing a direct source of protection.[123] The decision to draft the domestic complementary protection regime from scratch, rather

[119] *SZTAL (Transcript)* (n 116) 2901–3.

[120] McAdam, 'Australian Complementary Protection' (n 6) 690–1.

[121] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7 (Mason CJ and Deane J) ('*Teoh*').

[122] Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25(4) *Sydney Law Review* 423, 424; Hilary Charlesworth et al, *No Country Is an Island: Australia and International Law* (UNSW Press, 2006) 2.

[123] Alice de Jonge, 'Australia' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press, 2011) 23, 26. The *ICCPR* is appended to sch 2 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) but has not been made law. Note, however, that certain elements of the *ICCPR* have been incorporated into domestic law: see, eg, *Disability Discrimination Act 1992* (Cth) s 12(8)(b); *Sex Discrimination Act 1984* (Cth) ss 3(a), 4 (definition of 'relevant international instrument' para (b)).

than directly transpose the relevant international obligations,[124] is in keeping with Parliament's cautious approach to implementing Australia's international obligations.

As a consequence of Australia's dualist system, the judiciary is not permitted to incorporate international law through the 'back door' in the course of statutory interpretation.[125] There are, however, certain permissible reasons for referring to international law when interpreting a domestic statute. Firstly, there is a presumption that the legislature does not legislate incompatibly with international obligations,[126] particularly those in ratified treaties.[127] Therefore, where there is *ambiguity* in a statute, Australian courts will favour an interpretation that accords with Australia's treaty obligations.[128] There is also clear authority that when international law is transposed directly into domestic legislation, the domestic law is to be read in accordance with the meaning of the corresponding international provision, absent contrary intention.[129] It is less clear, however, whether this 'internationalist' interpretative approach ought to be taken where, as in the case of the complementary protection regime, legislation implements international law in *substance* rather than by express reference.[130]

[124] Cf *Immigration Act 2009* (NZ) ss 130–1, cited in McAdam, 'Australian Complementary Protection' (n 6) 694.

[125] Michael Kirby, 'The Common Law and International Law: A Dynamic Contemporary Dialogue' (2010) 30(1) *Legal Studies* 30, 54.

[126] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363–4 (O'Connor J).

[127] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 40–3 (Brennan J); *Teoh* (n 121) 287 (Mason CJ and Deane J).

[128] *Polites v Commonwealth* (1945) 70 CLR 60, 69 (Latham CJ) ('*Polites*'); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [28]–[29] (Gleeson CJ) ('*Plaintiff S157*'); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ). In *Teoh* (n 121), Mason CJ and Deane J noted that 'there are strong reasons for rejecting a narrow conception of ambiguity': at 287.

[129] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 239–40 (Dawson J), 253 (McHugh J) ('*Applicant A*'); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 265 (Brennan J). Courts will read the treaty term in accordance with the requirements of arts 31–2 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

[130] Christopher Ward, '*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331: Principles of Interpretation Applicable to Legislation Adopting Treaties' (1998) 26(1) *Federal Law Review* 207, 209.

(b) A Purposive Approach to Interpreting 'in Substance' Implementation of International Obligations

Where, as in the case of the complementary protection regime, the *Migration Act* implements international law in *substance* rather than by express reference, the High Court has historically been reticent to adopt a purposive approach to interpretation.[131] In the concurrently decided cases of *NBGM v Minister for Immigration and Multicultural Affairs*[132] and *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*,[133] the High Court was required to interpret s 36(2)(a) of the *Migration Act*, which indirectly incorporated the *Refugee Convention* by stating that an applicant was entitled to a protection visa if they were a non-citizen to whom 'Australia has protection obligations under the Refugees Convention'.[134] In interpreting s 36(2)(a), the Court took a narrow view of the role of the *Refugee Convention*, finding that the correct approach to interpretation of a domestic statute is first 'to ascertain … how much of an international instrument Australian law requires to be implemented', and then to import only as much of the international instrument as the domestic law requires.[135] A similar approach was taken to interpreting the complementary protection regime in *Minister for Immigration and Citizenship v MZYYL*,[136] in which the Full Federal Court considered the regime to be an internally sufficient code for which it was 'neither necessary nor useful to ask how the CAT or any of the international law treaties would apply'.[137] The majority decision in *SZTAL* is therefore in

[131] John Azzi, 'Domestic Legislation and Australia's International Obligations' (2015) 131 (October) *Law Quarterly Review* 524, 525. See *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1, 14–16 [33]–[34] (Gummow ACJ, Callinan, Heydon and Crennan JJ) ('*QAAH*'); *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52, 71–2 [61] (Callinan, Heydon and Crennan JJ) ('*NBGM*'). Cf *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 522, 553 [121]–[122] (Stone J) ('*NBGM (Full Court)*').

[132] *NBGM* (n 131).

[133] *QAAH* (n 131).

[134] Section 36(2)(a) has since been amended by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014* (Cth) sch 2 item 10 to remove the reference to the *Refugee Convention*.

[135] *NBGM* (n 131) 71–2 [61] (Callinan, Heydon and Crennan JJ).

[136] (2012) 207 FCR 211.

[137] Ibid 215 [20] (Lander, Jessup and Gordon JJ), quoted in *SZTAL (Full Court)* (n 58) 579 [64] (Kenny and Nicholas JJ).

keeping with earlier authority that international law 'does not provide any of the framework for the operation of the [*Migration Act*]'.[138]

This article rejects the view that international law is precluded from operating as a framework for understanding the intention requirement of the *Migration Act*'s complementary protection regime. Rather, consistently with the approach taken by Gageler J in *SZTAL*, the purposive approach not only allows the judiciary legitimate recourse to international context as a tool for interpreting the intention requirement, but *requires* that the international context be considered in the first instance. This is because, as established above, the intention requirement was not drafted to depart from Australia's international human rights obligations. The implications of this approach are neatly summarised by Ward:

> Where it is clear that parliament has intended to implement international obligations through legislation, whether that intention is determined on the face of the legislation or by analysis of the various reading speeches in parliament, Australian courts should endeavour to give the resulting legislation a meaning that is in conformity with the underlying international obligation.[139]

B *An Alternate Justification: Consistency with Common Law Rules of Interpretation*

As established above, there is no question that the purposive approach to interpretation is the correct and modern method of interpretation. It has also been established that its application requires the judiciary to consider the international context and purpose of the complementary protection regime. This section provides an alternate justification for judicial reference to Australia's international non-refoulement obligations in interpreting the intention requirement.

1 *The Principle of Legality and the Presumption of Consistency with International Law*

Two common law principles of interpretation provide support for adopting a purposive approach to interpreting domestic law that implements international human rights obligations in substance, particularly when read in tandem.

[138] *NBGM* (n 131) 73 [69] (Callinan, Heydon and Crennan JJ).

[139] Ward (n 130) 217.

The first of these principles is the presumption of consistency with international law.[140] This presumption was used in support of a purposive approach in the High Court's decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* ('*Plaintiff M70*').[141] In interpreting the provision of the *Migration Act* in question, the majority in *Plaintiff M70* recognised that implementation of Australia's obligations under the *Refugee Convention* was at least *a* legislative purpose of the *Migration Act*.[142] Indeed, Kiefel J supported the Court's construction of the provision on the basis that it most closely aligned it with Australia's *Refugee Convention* obligations.[143] This mechanism for reference to international law was built upon the presumption of consistency as applied in *Polites v Commonwealth*[144] and subsequently *Minister for Immigration and Ethnic Affairs v Teoh*,[145] both of which were cited by Kiefel J with approval in *Plaintiff M70*.[146]

The second related common law principle is the 'principle of legality', first espoused by Lord Steyn in the United Kingdom House of Lords,[147] and later approved by the High Court of Australia, which presumes that Parliament does not intend to interfere with certain rights and principles unless this presumption is expressly refuted.[148] Where, as is the case with interpretation of the intention requirement, a constructional choice is open, the application

[140] See above nn 126–30 and accompanying text.

[141] (2011) 244 CLR 144 ('*Plaintiff M70*'). See also *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.

[142] *Plaintiff M70* (n 141) 195–7 [117]–[119] (Gummow, Hayne, Crennan and Bell JJ). See also Tamara Wood and Jane McAdam, 'Australian Asylum Policy All at Sea: An Analysis of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* and the Australia–Malaysia Arrangement' (2012) 61(1) *International and Comparative Law Quarterly* 274, 289; Kate Ogg, 'A Sometimes Dangerous Convergence: Refugee Law, Human Rights Law and the Meaning of "Effective Protection"' (2013) 12 *Macquarie Law Journal* 109, 118.

[143] *Plaintiff M70* (n 141) 234 [246], cited in Wood and McAdam (n 142) 288–9.

[144] *Polites* (n 128).

[145] *Teoh* (n 121).

[146] *Plaintiff M70* (n 141) 234 [247], citing *Polites* (n 128) 68–9 (Latham CJ), *Teoh* (n 121) 287–8 (Mason CJ and Deane J).

[147] *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 587–90. See also *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 130 (Lord Steyn), 131–2 (Lord Hoffmann) ('*Simms*').

[148] *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ), quoted in *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [20] (Gleeson CJ). See also *Al-Kateb v Goodwin* (2004) 219 CLR 562, 577 [19]–[20] (Gleeson CJ).

of the principle of legality dictates that a construction should be chosen that minimises encroachment upon the right in question.[149]

There are competing rationales for the principle of legality. The first and orthodox rationale for the principle, which dates back to 1908, is a presumption that '[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness'.[150] The High Court has not retreated from this rationale.[151] Yet, as Brendan Lim observes, it is now 'simply untrue that there is any improbability at all in legislatures interfering with the common law'.[152] Lim therefore considers an alternative rationale for the persistence of the principle of legality, which he describes as the 'normative' justification.[153] The normative justification considers the role of the judiciary as being to insist on clear statutory language in relation to rights that are 'vulnerable', in the sense that they are insufficiently protected by the political process.[154] This understanding of the principle of legality rejects any idea of searching for an 'authentic' legislative intention to depart from the relevant right.[155] Lim's alternative rationale remains contentious; Jeffrey Goldsworthy, for instance, argues that legislative intention is essential to the principle of legality and rejects the normative rationale on this basis.[156] He points to recent case law that appears to reinforce the traditional

149 *Tajjour v New South Wales* (2014) 254 CLR 508, 545 [28] (French CJ).

150 *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

151 Bruce Chen, 'The French Court and the Principle of Legality' (2018) 41(2) *University of New South Wales Law Journal* 401, 405–11.

152 Brendan Lim, 'The Rationales for the Principle of Legality' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 2, 5.

153 Lim, 'The Normativity of the Principle of Legality' (n 17) 389–94, discussed in ibid 6–7. The early origins of this justification are evident in Lord Hoffmann's discussion of the principle of legality in *Simms* (n 147) 131.

154 Lim, 'The Normativity of the Principle of Legality' (n 17) 398–409. See also Lim, 'The Rationales for the Principle of Legality' (n 152) 9–12.

155 Lim, 'The Normativity of the Principle of Legality' (n 17) 377–8. Authentic legislative intention is a notoriously illusive concept, variously described by members of the High Court as a 'fiction': *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); and as a 'phantom': *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429, 443 (French J).

156 Jeffrey Goldsworthy, 'The Principle of Legality and Legislative Intention' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 46, 56–7.

rationale for the principle.[157] There is, however, increasing scholarship that refers with approval to Lim's normative justification, or variations thereof.[158]

It is proposed that the principle of legality, operating in conjunction with the presumption of consistency with international law, should apply to statutes purporting to implement the international human right of non-refoulement.[159] While the principle has historically been reserved for application to fundamental common law rights, the argument for its extension to human rights under international law is supported by the normative justification for the principle of legality. The merging of these principles is 'not just academic speculation'; Pearce and Geddes refer with approval to Meagher's suggestion of a convergence between international human rights law and the common law principle of legality.[160] The possibility has also been contemplated extra-curially by Chief Justice Robert French:

> One area which awaits further exploration is the interface between human rights norms in Conventions to which Australia is a party or in customary international law and the presumption against statutory displacement of fundamental rights and freedoms of the common law. If the former can inform the latter through developmental processes of the kind mentioned in *Mabo* then the content of the so-called principle of legality may be deepened.[161]

[157] Ibid 57–8, citing *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 283 [231] (Kiefel J, Hayne J agreeing at 231 [58]), 310 [313]–[314] (Gageler and Keane JJ). See also *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 581 [11] (French CJ, Kiefel and Bell JJ).

[158] Writing extra-curially, Justice Basten considers that 'the normative justification carries weight, but could be differently expressed', and perhaps directed only to instances where legislation has 'inadvertent or supposedly unforeseen consequences': Justice John Basten, 'The Principle of Legality: An Unhelpful Label?' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 74, 78–9. See also Matthew Groves and Dan Meagher, 'The Principle of Legality in Australian and New Zealand Law: Final Observations' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 258, 259.

[159] Meagher contemplates the potential for this convergence: see Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35(2) *Melbourne University Law Review* 449, 451, 466, discussing *Zaoui v A-G [No 2]* [2006] 1 NZLR 289, in which the New Zealand Supreme Court applied this approach (despite a lack of ambiguity in the domestic legislation): at 321–2 [90]–[91] (Keith J for the Court). The authoritative text of Pearce and Geddes (n 99) refers with approval to Meagher's 'excellent discussion of the principle [of legality] and its future direction': at 213. See also Bryan Horrigan, 'Reforming Rights-Based Scrutiny and Interpretation of Legislation' (2012) 37(4) *Alternative Law Journal* 228, 229–30.

[160] Pearce and Geddes (n 99) 250.

[161] Chief Justice RS French, 'Oil and Water? International Law and Domestic Law in Australia' (Brennan Lecture, Bond University, 26 June 2009) 20 [37], quoted in ibid.

The harmonious application of these common law principles obviates the need to identify ambiguity in the statute before looking to international law, because the principle of legality operates irrespective of textual ambiguity.[162]

The application of the principle of legality to the right of non-refoulement reinforces the need for judicial regard to Australia's international obligations in interpreting our domestic complementary protection regime. Authentic legislative intention is not considered; therefore, counsel for the Minister's assertions that full alignment with international law was not intended by Parliament are irrelevant.[163] Rather, the judiciary should interpret the provision in a manner that best complies with Australia's non-refoulement obligations where no clear statement of departure from these obligations is present. Clear language departing from Australia's non-refoulement obligations is present in other provisions of the *Migration Act*. Section 197C of the Act, for instance, clearly states that, for the purpose of the power to remove unlawful citizens, 'it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen'.[164] In the absence of equivalent language in the complementary protection regime, the judiciary should interpret the legislation on the presumption that it is in compliance with the international provisions prohibiting refoulement to CIDTP.

2 *Responding to 'Counter-Majoritarian' Arguments and Concerns for the Dualist System*

The normative understanding of the principle of legality also provides a strong basis for refuting the view that judicial reference to international law undermines the dualist system and threatens the proper function of the democratic majoritarian process.[165] Pastore argues that the decision in *Plaintiff M70* was a 'monist' approach to interpretation, which was poorly disguised by an attempt to 'wrap the result in the text of the statute'.[166] He submits that conflicts between domestic and international law should not be

[162] See Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41(2) *Monash University Law Review* 329, 340–1, citing *Plaintiff S157* (n 128) 492 [30] (Gleeson CJ).

[163] See 'First Respondent's Submissions' (n 115) 9 [29].

[164] *Migration Act* (n 5) ss 197C, 198.

[165] See Anthony Pastore, 'Why Judges Should Not Make Refugee Law: Australia's Malaysia Solution and the Refugee Convention' (2013) 13(2) *Chicago Journal of International Law* 615. See also Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 305, cited in Lim, 'The Normativity of the Principle of Legality' (n 17) 399. See generally at 398–409.

[166] Pastore (n 165) 639.

resolved by a democratically unaccountable judiciary.[167] This view fails to recognise that judicial insistence on legislative consistency has the potential to *strengthen* our system of responsible and representative government.[168] Parliament has implemented legislation purporting to align with Australia's non-refoulement obligations under international law.[169] If it did not intend complete alignment with those obligations, then the application of the principle of legality to the right of non-refoulement means that Parliament must 'squarely confront what it is doing and accept the political cost'.[170] Judicial insistence that a parliamentary intention to abrogate the right of non-refoulement should be clearly stated would ensure the accountability of the elected in legislating over a domain that is typically vulnerable to the political process.[171] Further, it offers the potential for 'limited recognition and application of international law' from within the confines of the dualist system.[172]

In line with the modern approach to interpretation, the intention requirement should be interpreted in a way that most effectively achieves its purpose of alignment with international non-refoulement obligations. The next part of this article examines the meaning of intention that arises upon consideration of the international origins of the complementary protection regime.

IV Applying the Purposive Approach

The international context of the complementary protection regime is relevant to ascertaining the meaning of intention, irrespective of whether there is a settled international meaning of the term. I offer a theory-based rationale for a broad understanding of intention, achieved by reference to the nature of the international prohibition against CIDTP. As a result, I propose an understanding of intention that is most coherent with the international meaning of

[167] Ibid 644–7.

[168] Lim, 'The Normativity of the Principle of Legality' (n 17) 374; Meagher, 'The "Modern Approach" to Statutory Interpretation' (n 16) 421.

[169] *Parliamentary Debates (2011)* (n 19) 1356–7 (Chris Bowen, Minister for Immigration and Citizenship).

[170] *Simms* (n 147) 131 (Lord Hoffmann), quoted in *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 66 [148] (Heydon J). See also Gabrielle Appleby and Alexander Reilly, 'Unveiling the Public Interest: The Parameters of Executive Discretion in Australian Migration Legislation' (2017) 28(4) *Public Law Review* 293, 304.

[171] Lim, 'The Rationales for the Principle of Legality' (n 152) 4–5; Lim, 'The Normativity of the Principle of Legality' (n 17) 398–409.

[172] Wood and McAdam (n 142) 288, discussing *Plaintiff M70* (n 141).

CIDTP, and therefore comes closer to fulfilling Australia's complementary protection obligations.

A *The Meaning of Intention Arising from Consideration of the International Context*

1 *A Settled International Meaning of Intention?*

The majority in *SZTAL* did not engage in an internationally informed interpretation of the intention requirement on the basis that there 'is no settled meaning of "intentionally" to be derived from any international law sources'.[173] The appellants relied upon a number of international sources, including decisions of the International Criminal Tribunal for the Former Yugoslavia, and the text of the *Rome Statute of the International Criminal Court* ('*Rome Statute*'),[174] to demonstrate an international meaning of intention.[175] In reasoning with which the plurality agreed, Edelman J considered that these sources were 'limited, … conflicting, and [did] not demonstrate any established or consistent meaning of intention'.[176] Gageler J agreed that a settled meaning of intention at international law was not evident.[177]

Given that no intention requirement exists for the CIDTP prohibition under international law, it is unsurprisingly difficult to discern a clear-cut definition of intention in this context. There is good authority, however, that 'intention' in the torture prohibition, when read in isolation from purpose, *does* cover knowledge of possible consequences of an act, while not extending to negligence: Joseph and Castan observe that 'it seems that the relevant intention is to cause, or at least to be recklessly indifferent to the possibility of causing, that pain and suffering'.[178] This broad meaning of intention could feasibly be argued to constitute an international meaning of intention, to be applied in the context of CIDTP. This article proceeds, however, on the basis of a contextual reason for adopting this understanding of intention.

[173] *SZTAL* (n 3) 369 [18] (Kiefel CJ, Nettle and Gordon JJ), 389–91 [84]–[89] (Edelman J).

[174] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

[175] 'Appellants' Submissions' (n 87) 7–9 [34]–[43].

[176] *SZTAL* (n 3) 389 [84].

[177] Ibid 373–4 [34].

[178] See Joseph and Castan (n 38) 217–18 [9.06]. See also Nowak and McArthur (n 38) 73–4 [106]–[107].

2 *The Contextual Reason to Adopt a Broad Understanding of Intention*

Irrespective of the existence of a settled meaning of intention under international law, the international context of Australia's complementary protection regime remains pertinent to its interpretation, necessitating a broad understanding of the intention requirement. While the majority of the High Court in *SZTAL* may have 'demonstrated a certain willingness to engage with the international legal materials before it',[179] this willingness was limited to identifying whether a clear alternative meaning of intention could be found in international law. Gageler J, in adopting a purposive approach to interpreting the statute, was alone on the Bench in recognising the ongoing relevance of international law.[180]

In recognition of the relevance of international law, Gageler J considered that a broad interpretation of intention was required for two key reasons. Firstly, he referred to the broad understanding of intention used in relation to the torture prohibition of the *Criminal Code Act 1995* (Cth) ('*Criminal Code*'), implemented pursuant to Australia's obligation to *criminalise* torture under the *CAT*.[181] In this context, a person has the necessary intention where they are 'aware that [the result] will occur in the ordinary course of events'.[182] This definition corresponds with the required mental element for the crime of torture under the *Rome Statute*.[183] Considering this meaning of intention in the parallel criminal law statute, his Honour found no reason to attribute Parliament with an intention to 'take a narrower view of torture for the purpose of protecting the victim than the view of torture it has expressly spelt out for the purpose of punishing the perpetrator'.[184] Gageler J therefore found that the *Criminal Code* meaning of intention should apply to the s 5(1) definition of torture, and similarly, to the CIDTP definitions.[185] This accords with the 'fundamental rule of construction' that words are presumed to have a consistent meaning throughout a statute.[186]

[179] McIntyre (n 65) 407.

[180] *SZTAL* (n 3) 373–4 [34].

[181] Ibid 377–8 [46]; *Criminal Code Act 1995* (Cth) div 274 ('*Criminal Code*').

[182] *Criminal Code* (n 181) s 5.2(3), cited in *SZTAL* (n 3) 378 [47] (Gageler J).

[183] *Rome Statute* (n 174) arts 7(1)(f), 2(e), 30(2)(b); *SZTAL* (n 3) 378 [48] (Gageler J).

[184] *SZTAL* (n 3) 379 [49].

[185] Ibid 379 [50].

[186] Pearce and Geddes (n 99) 150–1, quoting *Craig, Williamson Pty Ltd v Barrowcliff* [1915] VLR 450, 452 (Hodges J).

Gageler J's second reason for adopting a broad conception of intention was the contextual reason that this interpretation was more capable of meeting Australia's international complementary protection obligations.[187] His Honour's judgment considered jurisprudence of the ECtHR indicating that a perpetrator's positive intention is not an integral element of ill-treatment under art 3 of the ECHR.[188] His Honour concluded that the intention requirement should be read broadly so as to best align Australia's complementary protection regime with the approach taken to complementary protection in international jurisprudence.[189] This broad understanding encompassed a situation where an individual is aware that adverse consequences will occur from their actions in the ordinary course of events.[190] His Honour considered that this form of intention could be attributed to the Sri Lankan authorities to satisfy the CIDTP definitions.[191]

B *A Theory-Based Rationale for a Broad Interpretation of Intention*

Gageler J's interpretative approach in *SZTAL* has been cited with approval in other academic work.[192] This article is unique in building upon his Honour's approach to offer a theory-based rationale for a broad interpretation of the intention requirement that encompasses oblique intention. This is achieved by examining the underlying normative considerations of the international CIDTP prohibition, which is at the core of Australia's complementary protection obligations. This argument is reinforced by drawing upon Waldron's conception of CIDTP as an archetype of international law.

Understanding the normative facet of the CIDTP prohibition is important, particularly because the prohibition is not precisely or exhaustively defined.[193] Rodley and Pollard, recognising this, do not give a complete account of the CIDTP prohibition in their text, but rather strive 'to elucidate the *nature* of the prohibition'.[194] This is in keeping with the intention of the drafters of art 7 of the *ICCPR*, who, by opting not to include a definition of CIDTP, sought to

[187] *SZTAL* (n 3) 380 [54].

[188] Ibid 379–80 [53], citing *Kalashnikov* (n 1) 96, 119 [101].

[189] *SZTAL* (n 3) 380 [54].

[190] Ibid 381 [58].

[191] Ibid 381 [58]–[59].

[192] Brysland and Rizalar (n 16) 83–4; McIntyre (n 65) 409–11.

[193] 'General Comment No 20', UN Doc HRI/GEN/1/Rev.9 (n 23) 200 [4].

[194] Sir Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford University Press, 3rd ed, 2009) 143 (emphasis added).

encourage an 'I know it when I see it' approach in states' interpretation of the prohibition.[195] As Waldron observes of clearly defined rules, 'the cost of diminishing vagueness is an increase in arbitrariness'.[196] In contrast, the open-ended drafting of the international provisions prohibiting CIDTP permits decision-makers flexibility in decision-making.[197]

1 *The Autonomous Meaning of the International Prohibition against Cruel, Inhuman or Degrading Treatment or Punishment*

The CIDTP prohibition holds an 'autonomous' meaning in international law.[198] It was famously held by Lord Steyn in *R v Secretary of State for the Home Department; Ex parte Adan*[199] that there can only be 'one true interpretation' of a treaty, which should remain 'untrammelled by notions of … national legal culture' in domestic interpretation.[200] While Australia's domestic complementary protection regime varies in its terms from the international obligations it implements, I argue that the judiciary should nonetheless seek — to the extent that the domestic statute permits — to interpret the regime in a manner that best upholds the international autonomous meaning of CIDTP.

Transnational judicial dialogue is described by Hathaway and Foster as 'critical' to understanding the *Refugee Convention*, and '[t]he most important bulwark against [its] fragmented interpretation'.[201] Transnational dialogue is equally important in the context of the complementary protection regime, operating as a way of ensuring that the autonomous meaning of the CIDTP prohibition is upheld. Admittedly, this may be aspirational; Ogg observes that

[195] Erin Huntington, 'Torture and Cruel, Inhuman or Degrading Treatment: A Definitional Approach' (2015) 21(2) *UC Davis Journal of International Law and Policy* 279, 293–4.

[196] Waldron, 'Torture and Positive Law' (n 18) 1699.

[197] See Arai-Yokoi (n 35) 421.

[198] See *R v Secretary of State for the Home Department; Ex parte Adan* [2001] 2 AC 477, 515–17 (Lord Steyn) ('*Adan*'), discussed in Guy S Goodwin-Gill, 'The Search for the One, True Meaning …' in Guy S Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press, 2010) 204, 222–6.

[199] *Adan* (n 198).

[200] Ibid 516–17.

[201] James C Hathaway and Michelle Foster (eds), *The Law of Refugee Status* (Cambridge University Press, 2014) 4. See generally Goodwin-Gill (n 198); Hélène Lambert, 'Transnational Law, Judges and Refugees in the European Union' in Guy S Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press, 2010) 1; *NBGM (Full Court)* (n 131) 562–3 [158] (Allsop J).

despite the objective for a harmonised approach to interpretation of the *Refugee Convention*, the international reality is one of significant divergence in the approaches of member states.[202] Moreover, the 'margin of appreciation' doctrine permits states a degree of discretion in the implementation and interpretation of international obligations.[203] I nonetheless contend that the judiciary must look to international law to ensure that Australian law develops in light of the autonomous meaning of the CIDTP prohibition, rather than from within an echo chamber of domestic law. This is particularly important given the absolute nature of the CIDTP prohibition, generally understood not to permit discretion in its implementation by states.[204]

2 *The Content of the Prohibition against Cruel, Inhuman or Degrading Treatment or Punishment*

(a) Dignity-Focused

Central to the autonomous meaning of the CIDTP prohibition is a respect for human dignity.[205] While 'cruel', 'inhuman' and 'degrading' treatment each carry slightly different connotations, all share a common inconsistency with 'basic human dignity'.[206] Treatment considered 'antithetical' to the protection of dignity has therefore been held to breach the CIDTP prohibition.[207]

Conditions in imprisonment are among the circumstances that have been held to violate an individual's dignity, breaching the art 3 ECHR prohibition of CIDTP.[208] In *Peers v Greece* ('*Peers*'),[209] the ECtHR held that poor prison

[202] Ogg (n 142) 125.

[203] See Bill Campbell, 'The Implementation of Treaties in Australia' in Brian R Opeskin and Donald R Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 132, 134.

[204] Janneke Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (2018) 18(3) *Human Rights Law Review* 495, 501.

[205] 'General Comment No 20', UN Doc HRI/GEN/1/Rev.9 (n 23) 200 [2]. See also William Vidal, 'Isolationism Exposed: The Evolution of the Cruel, Inhuman, and Degrading Treatment Standard in the United States since 2001' (2007) 2(1) *Interdisciplinary Journal of Human Rights Law* 1, 10.

[206] Kevin J Murtagh, 'What Is Inhuman Treatment?' (2012) 6(1) *Criminal Law and Philosophy* 21, 23–4.

[207] Elaine Webster, 'Interpretation of the Prohibition of Torture: Making Sense of "Dignity" Talk' (2016) 17(3) *Human Rights Review* 371, 373, 379.

[208] *Peers v Greece* [2001] III Eur Court HR 275, 278, 298 [75] ('*Peers*'); *Kalashnikov* (n 1) 96, 119 [101]; *Dougoz v Greece* [2001] II Eur Court HR 255, 258, 267 [48]–[49]; *Yakovenko v Ukraine* (European Court of Human Rights, Chamber, Application No 15825/06, 25 October 2007) [89]. These cases are cited in Rodley and Pollard (n 194) 394–5.

[209] *Peers* (n 208).

conditions — cramped, overheated and unventilated with unsanitary toilet facilities — 'diminished the applicant's human dignity and aroused in him feelings of anguish and inferiority capable of humiliating and debasing him'.[210] These conditions were held to violate art 3 despite the authorities' lack of 'a positive intention of humiliating or debasing the applicant'.[211] Another case, *Kalashnikov*, concerned an individual's subjection to similar treatment in a Russian detention facility.[212] Invoking arguments analogous to those concerning the Sri Lankan prison conditions in *SZTAL*, the Russian government argued that it did not intend to inflict harm on the applicant.[213] It acknowledged the unsatisfactory conditions of the detention facility, but submitted that this was due to economic constraints, and that it was doing its best to improve the conditions.[214] Citing *Peers*, the ECtHR accepted the absence of a positive intention to humiliate or debase the applicant, but nonetheless held that the applicant's conditions of detention, which he endured for four years and 10 months, 'undermin[ed] his human dignity' and amounted to a violation of art 3.[215]

The HRC has similarly found that poor prison conditions can violate an individual's dignity, constituting a contravention of art 7 of the *ICCPR*.[216] In *Portorreal v Dominican Republic*,[217] the HRC considered that the applicant's confinement for 50 hours in 'a cell measuring 20 by 5 metres, where approximately 125 persons … were being held, and where, owing to lack of space, some detainees had to sit on excrement', demonstrated 'a lack of respect for his inherent human dignity during his detention'.[218] In *Mukong v Cameroon*,[219] the conditions of the applicant's imprisonment were also held to violate his dignity and breach art 7. Importantly, in this case the HRC considered that 'certain minimum standards regarding the conditions of

[210] Ibid 298 [75].

[211] Ibid 297 [74].

[212] *Kalashnikov* (n 1) 101 [13]. The facts of this case are outlined at the outset of this article.

[213] Ibid 115 [93].

[214] Ibid 115–16 [93]–[94].

[215] Ibid 119 [101]. See also *MSS* (n 53) 312 [233], where the effect that conditions of detention had on the applicant's dignity were considered to be 'accentuated' by the vulnerability inherent in his situation as an asylum seeker.

[216] Joseph and Castan (n 38) 278–80 [9.131]–[9.135].

[217] Human Rights Committee, *Views: Communication No 188/1984*, UN Doc CCPR/C/31/D/188/1984 (5 November 1987) ('*Portorreal v Dominican Republic*').

[218] Ibid [9.2], [11].

[219] Human Rights Committee, *Views: Communication No 458/1991*, UN Doc CCPR/C/51/D/458/1991 (10 August 1994, adopted 21 July 1994) ('*Mukong v Cameroon*').

detention must be observed regardless of a State party's level of development … even if economic or budgetary considerations may make compliance with these obligations difficult'.[220]

(b) Victim-Centred

The other defining characteristic of the autonomous meaning of the CIDTP prohibition is that it is focused on the victim. This represents a crucial difference between protective regimes that seek to protect victims from torture and CIDTP, and their criminal counterparts that seek to prosecute those who commit the abuses.[221] For the purpose of prosecuting the abusers, intent understandably plays a central role, determining the 'moral culpability' of the offender.[222] In contrast, the human rights context of the CIDTP prohibition requires consideration of the potential for harm to the victim, as opposed to what the violation 'does to or says of the agent'.[223] This victim-centred understanding of CIDTP is particularly logical in the non-refoulement context, where there is no perpetrator facing prosecution.[224]

3 *The Archetypal Status of the Prohibition against Cruel, Inhuman or Degrading Treatment or Punishment*

The CIDTP prohibition should be seen to hold an archetypal status in international human rights law, providing a strong reason not to intrude upon its autonomous meaning in the course of domestic interpretation.[225] In the aftermath of 9/11 and in response to proposals in politics and scholarship for encroachment upon the United States' absolute prohibition of torture, Waldron made the proposition that the prohibition against torture occupies the status of a '*legal archetype*'.[226] He contemplated that the international CIDTP prohibition may be similarly inviolable and deserving of archetypal status, because 'we must not become so jaded that the phrase "cruel, inhu-

[220] Ibid 11 [9.3], quoted in Rodley and Pollard (n 194) 386. See generally *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015).

[221] McAdam, Submission No 21 (n 46) 22 [60].

[222] 'Appellants' Submissions' (n 87) 5 [23], citing *Miller v The Queen* (2016) 259 CLR 380, 420 [116] (Gageler J).

[223] Murtagh (n 206) 23 (emphasis omitted).

[224] Aditi Bagchi, 'Intention, Torture, and the Concept of State Crime' (2009) 114(1) *Penn State Law Review* 1, 47.

[225] See Waldron, 'Torture and Positive Law' (n 18).

[226] Ibid 1681 (emphasis added).

man, and degrading treatment" simply trips off the tongue as something much less taboo than torture'.[227]

Waldron theorises that a legal archetype is one rule within a larger body of law which 'by virtue of its force, clarity, and vividness expresses the spirit that animates the whole area of law'.[228] The prohibition against torture, he proposes, is one such archetype, embodying the 'enduring connection between the spirit of law and respect for human dignity', and law's fundamental opposition to savagery and brutality.[229] Undermine the prohibition against torture, Waldron argues, and it loses its 'gravitational force', weakening the certainty of other, less strongly held commitments of the law that depend upon its integrity.[230] Similarly, repudiation of the CIDTP prohibition would have implications for other rules of international law: consider for example, art 10 of the *ICCPR*, which states that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. The strength of this rule would inevitably be diluted as a result of weakening the normative force of the art 7 prohibition.

Other scholars share Waldron's view that there is something particularly significant about the CIDTP prohibition. Vidal states that the prohibition 'protects the concept of human dignity',[231] and Huntington views it as carrying 'the weight of humanity's basic sense of morality'.[232] The unassailable nature of the prohibition is further emphasised by its absolute, non-derogable status in international law.[233] There is therefore a general consensus that, in comparison to other international norms, the content of the CIDTP prohibition holds something of the essence of human rights law. Recognising this, the CIDTP prohibition should be considered an archetype of international human rights law, providing further support for the argument that its meaning should not be violated in the domestic context.

227 Ibid 1745.

228 Ibid 1722–3.

229 Ibid 1727.

230 Ibid 1748.

231 Vidal (n 205) 10.

232 Huntington (n 195) 298.

233 'General Comment No 20', UN Doc HRI/GEN/1/Rev.9 (n 23) 200 [3].

C *A Proposal for Interpreting the Intention Requirement*

This part has examined Gageler J's dissent in *SZTAL* in conjunction with international jurisprudence to conclude that the interpretation of the CIDTP prohibition in international law should inform the interpretation of the domestic complementary protection regime. The international, autonomous meaning of CIDTP is defined by the prohibition's core respect for victims and their dignity. To the extent that the complementary protection regime can bear an interpretation consistent with this autonomous meaning, that interpretation should be adopted.[234]

As established above, the international CIDTP prohibition strives to preserve an individual's dignity.[235] In international jurisprudence, overcrowded, poorly ventilated and unsanitary conditions in imprisonment are deemed capable of harming an individual's dignity.[236] As *SZTAL* illustrates, however, interpreting the domestic CIDTP definitions as requiring 'actual, subjective' intention means the prospect of return to such conditions falls outside the purview of the Australian complementary protection regime.[237] In contrast, a broad, oblique conception of intention would enable a greater proportion of applicants facing such conditions to be granted protection under Australia's complementary protection legislation. This interpretation is therefore more consistent with the meaning of CIDTP in analogous areas of international human rights law.

An interpretation of the intention requirement that does not detract unnecessarily from the centrality of the victim is also required. A focus upon the victim eliminates any need to read intention as requiring a highly specific mental state, as compared to a criminal law case like *Zaburoni*, where establishing intention determined the culpability of the perpetrator. Nonetheless, it must be remembered that, as with torture, CIDTP is 'something *persons* do to persons'.[238] A broad conception of intention, which extends to the known consequences of an act, makes it clear that the offending action is theoretically

[234] See Goodwin-Gill (n 198) 237–41. See also George Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15(2) *European Journal of International Law* 279, 295–305.

[235] Webster (n 207) 386–7. See also Jeremy Waldron, 'How Law Protects Dignity' (2012) 71(1) *Cambridge Law Journal* 200.

[236] Rodley and Pollard (n 194) 394–5. See above n 208.

[237] *SZTAL* (n 3) 372 [28] (Kiefel CJ, Nettle and Gordon JJ).

[238] Andreas Maier, 'Torture: How Denying Moral Standing Violates Human Dignity' in Paulus Kaufmann et al (eds), *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Springer, 2011) 101, 107 (emphasis in original).

attributable to someone, without requiring that the offender subjectively intends to inflict CIDTP. This understanding of intention remains faithful to the text of the complementary protection regime, without detracting unnecessarily from the CIDTP prohibition's central focus on the victim.

A broader understanding of the intention requirement — one which encompasses oblique intention — is therefore most capable of upholding the autonomous international meaning of the CIDTP prohibition and fulfilling Australia's complementary protection obligations. To interpret the intention requirement in this way does not read it into effective inexistence.[239] Instead, it affords it a meaning which is open on the text and comes closer to complying with the international obligations that Australia has sought to implement. As stated by Gageler J, '[t]hat the introduction of the concept of intention narrows the scope of complementary protection provides no reason for treating the particular notion of intention … as a narrow one'.[240]

V Conclusion

It is helpful to revisit once more the facts of the ECtHR case of *Kalashnikov*, introduced at the outset of this article, which concerned a man imprisoned for over four years in crowded and unsanitary conditions. This time, however, envision those same facts as a *prospective* harm, to be submitted in support of an application for an Australian protection visa pursuant to s 36(2)(aa) of the *Migration Act*.

Why the question is asked is now clear. It is for the purpose of deciding whether the man should be afforded protection pursuant to a domestic scheme that is designed to implement Australia's international complementary protection obligations. I have sought to demonstrate that in this context, intention should be interpreted broadly, to encompass the known consequences of an act.

This argument was made in three parts. I began by establishing that the majority's adoption of the ordinary meaning of intention in *SZTAL* ignores the various interpretations of the intention requirement available on the text, including a conception of intention that encompasses oblique intention. I argued that the correct meaning of intention is dependent on the purpose and context of the statute. In the next part of this article, I built upon this argument, advocating for a purposive approach to interpretation of the comple-

[239] An interpretation of a statute must give it 'work to do': *Plaintiff M70* (n 141) 192 [97] (Gummow, Hayne, Crennan and Bell JJ).

[240] *SZTAL* (n 3) 380 [53] (Gageler J).

mentary protection regime. This approach is in conformity with dynamic principles of statutory interpretation and ensures greater respect for and compliance with international human rights obligations that have been implemented into domestic law. Finally, I argued that the autonomous meaning of the CIDTP prohibition in international law focuses upon the dignity of victims, rather than the intention of perpetrators. Judicial fidelity to the autonomous meaning of CIDTP is required to preserve the prohibition's archetypal status. I concluded that a broad conception of intention that includes oblique intention is most capable of aligning Australia's complementary protection regime with the international autonomous meaning of CIDTP.

In *Kalashnikov*, the absence of a positive intention to subject the applicant to CIDTP was not fatal to a successful finding. Under the Australian regime, however, an application not to be returned to the type of prison conditions described in *Kalashnikov* would be rejected on the basis of an absence of 'actual, subjective' intention. Instead, the applicant would be forced to revert to the non-compellable, discretionary s 417 mechanism, as conceded by counsel for the Minister in the hearing before the High Court:

> Gageler J: And Mr Kalashnikov would not get protection under this regime — under our regime on - - -
>
> Donaghue SC: He could not be refouled under our regime.
>
> Gageler J: Well, he would not face cruel or inhuman treatment or punishment, according to the statutory definition as you read it?
>
> Donaghue SC: Yes, but he would have the protection of Australia's international obligations under Article 7 of the ICCPR because we accept that that is an accurate statement of those international obligations, so he is in the category of person who would need ministerial intervention in order to obtain a visa …[241]

As demonstrated in this article, an outcome that refers a number of applicants entitled to complementary protection back to the s 417 mechanism defeats the expressed purpose of Australia's complementary protection regime: to bring all non-refoulement claims within the scope of the *Migration Act* and thereby limit recourse to ministerial discretion. Admittedly, the intention requirement of the complementary protection regime may prevent the administrative gap in Australian law from being closed completely.[242] Nonetheless, a purposive

[241] *SZTAL (Transcript)* (n 116) 3387–99.

[242] Even though closing this administrative gap was the envisioned goal: *Parliamentary Debates (2011)* (n 19) 1356 (Chris Bowen, Minister for Immigration and Citizenship).

approach to interpretation of the intention requirement can substantially *narrow* the gap, enhancing Australia's compliance with its international complementary protection obligations.