CASE NOTE

ADRIFT: THE HIGH COURT OF AUSTRALIA DECIDES *SZTAL v MINISTER FOR IMMIGRATION AND BORDER PROTECTION*

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CONTENTS

I INTRODUCTION

The High Court of Australia's decision in the joined cases of *SZTAL v Minister for Immigration and Border Protection* and *SZTGM v Minister for Immigration and Border Protection* ('*SZTAL*') marks the first substantive engagement of the newly constituted bench with issues of international law,[1] and reveals a certain judicial readiness to engage with the interpretation and application of international law. The cases arose in the context of a claim for complementary protection under the *Migration Act 1958* (Cth) ('*Migration Act*'). Introduced by way of the *Migration Amendment (Complementary Protection) Act 2011* (Cth), the complementary protection regime made a number of changes to the *Migration Act* to provide for protection against refoulement additional —

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1 Save for a passing reference in *Plaintiff S195/2016* to the effect that 'neither the legislative nor the executive power of the Commonwealth is constitutionally limited by any need to conform to international law': *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (2017) 91 ALJR 857, 861 [20]. The Court in *Commissioner of Taxation v Jayasinghe* did tangentially concern application of the *Convention on the Privileges and Immunities of the United Nations*: *Commissioner of Taxation v Jayasinghe* (2017) 260 CLR 400; *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, [1949] 1 UNTS 15 (entered into force 17 September 1946). However, unlike (indeed, because of) the High Court's earlier decision in *Macoun v Federal Commissioner of Taxation*, it was unnecessary for the Court to engage substantively with issues of international law. See *Macoun v Federal Commissioner of Taxation* (2015) 257 CLR 519.

complementary — to that provided by the *Convention relating to the Status of Refugees* ('*Refugees Convention*').[2] The legislation aligns closely with Australia's international human rights obligation not to return people to a place where they will face torture and other serious forms of harm pursuant to a range of international instruments, but most relevantly in this case the *Convention against Torture* ('*CAT*') and the *International Covenant on Civil and Political Rights* ('*ICCPR*').[3]

But close alignment is not identity, and Parliament's statutory definition of the term 'cruel, inhuman or degrading treatment or punishment' does not accord with the international law understanding of that phrase.[4] In particular, Parliament inserted into the definition the requirement that the treatment or punishment be 'intentionally inflicted',[5] whereas the requirement of intention is ordinarily used to distinguish such conduct from the more heinous torture.[6] Hindered by this parliamentary redrafting, the cases demonstrate how the High Court will grapple with interpreting a statutory provision with clear international legal antecedents, but which does not accord in terms with international law.

II FACTS AND PROCEDURAL HISTORY

In May 2009, the Government of Sri Lanka officially declared an end to the 27 year civil war with the Liberation Tigers of Tamil Eelam, known as the Tamil Tigers ('Tamil Tigers'). But notwithstanding the official end to the conflict, the situation in Sri Lanka remained unstable. Human rights abuses, including arbitrary detention, torture and sexual violence, reportedly increased in the five

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2 *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 33 ('*Refugees Convention*'); *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

3 *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*'); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991). See also *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). And, although Australia is not a state party, see also *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*ECHR*'). For a detailed analysis of the legislation, see Jane McAdam, 'Australian Complementary Protection: A Step-By-Step Approach' (2011) 33 *Sydney Law Review* 687.

4 See below, Part II.

5 *Migration Act 1958* (Cth) s 5 ('*Migration Act*').

6 For an excellent summary, see McAdam, above n 3, 698–701. See also Michelle Foster and Jason Pobjoy, Submission No 9 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, 28 September 2009, 20–1.

years following the war.[7] Individuals fleeing such persecution contributed to a significant increase in the numbers of unauthorised Sri Lankan emigrants; in 2012 more than 6500 Sri Lankan 'boat people' arrived in Australia.[8]

The two appellants, known as SZTAL and SZTGM, were members of this diaspora. The cases were argued and decided on the basis that any factual differences amongst the appellants were immaterial; the same approach will be adopted here. Sri Lankan nationals of Tamil ethnicity, they arrived in Australia by boat without passports or official travel documentation and subsequently made a claim for protection as refugees.[9] That claim was rejected, so the appellants instead made an application for a complementary protection visa under ss 36(2)(a) and 36(2)(aa) of the *Migration Act*. At the time, s 36 relevantly provided:

> (1) There is a class of visas to be known as protection visas.
> …
> (2) A criterion for a protection visa is that the applicant for the visa is:
> (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the *Refugees Convention* as amended by the *Refugees Protocol*; or
> (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm;
> …
> (2A) A non-citizen will suffer *significant harm* if:
> …
> (c) the non-citizen will be subjected to torture; or
> (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
> (e) the non-citizen will be subjected to degrading treatment or punishment.

Each of the categories of treatment — cruel or inhuman treatment or punishment, degrading treatment or punishment and torture — are in turn defined in s 5 of the *Migration Act*, as follows:

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[7] Yasmin Sooka, 'An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009–2014' (Report, Bar Human Rights Committee of England and Wales and International Truth & Justice Project, March 2014). See also Manfred Nowak, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment — Addendum: Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, Including an Assessment of Conditions of Detention*, UN GAOR, 13th sess, Agenda Item 3, UN Doc A/HRC/13/39/Add.5 (5 February 2010) ('*Report of the Special Rapporteur*').

[8] Paul Komesaroff, Paul James and Suresh Sundram, 'After the War: Why Sri Lankan Refugees Continue to Come to Australia' on *The Conversation* (10 June 2013) <https://theconversation.com/after-the-war-why-sri-lankan-refugees-continue-to-come-to-australia-14638>; Niro Kandasamy, 'Not "All is Forgiven" for Asylum Seekers Returned to Sri Lanka' on *The Conversation* (10 March 2017) <https://theconversation.com/not-all-is-forgiven-for-asylum-seekers-returned-to-sri-lanka-73361>.

[9] *SZTAL v Minister for Immigration and Border Protection* [2015] FCCA 64 (24 February 2015) 1 [2] ('*Circuit Court*').

> *cruel or inhuman treatment or punishment* means an act or omission by which:
>
> (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
>
> (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;
>
> but does not include an act or omission:
>
> (c) that is not inconsistent with Article 7 of the *Covenant*; or
>
> (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the *Covenant*.
>
> …
>
> *degrading treatment or punishment* means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:
>
> (a) that is not inconsistent with Article 7 of the *Covenant*; or
>
> (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the *Covenant*.
>
> …
>
> *torture* means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:
>
> (a) for the purpose of obtaining from the person or from a third person information or a confession; or
>
> (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
>
> (c) for the purpose of intimidating or coercing the person or a third person; or
>
> (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
>
> (e) for any reason based on discrimination that is inconsistent with the Articles of the *Covenant*;
>
> but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the *Covenant*.

The basis for the appellants' claims to a protection visa was that by departing Sri Lanka illegally, they had committed an offence pursuant to ss 34 and 35 of the *Immigrants and Emigrants Act 1949* (Sri Lanka),[10] and would, if they were returned to Sri Lanka, face a penalty of mandatory imprisonment for a period of between one and five years. This, it was argued, in itself constituted grounds for a protection visa because conditions of detention in Sri Lanka were, and continue to be, so deplorable as to constitute cruel or inhuman treatment or punishment, or degrading treatment or punishment.[11] As such, a real risk of significant harm was a necessary and foreseeable consequence of the appellants' being returned to Sri Lanka.[12]

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[10] *Immigrants and Emigrants Act 1949* (Sri Lanka) ss 34, 35.

[11] The Special Rapporteur on Torture has found that the conditions of detention in Sri Lanka 'constitute in themselves a form of cruel, inhuman and degrading treatment': *Report of the Special Rapporteur*, UN Doc A/HRC/13/39/Add.5, 28 [96], 60 [222].

[12] For a detailed summary of the facts, see generally *Circuit Court* [2015] FCCA 64 (24 February 2015). See also *SZTAL v Minister for Immigration and Border Protection* (2016) 243 FCR 556, 559–60 [7]–[8] (Kenny and Nicholas JJ) ('*Federal Court*').

A *The* Migration Amendment (Complementary Protection) Act 2011 *(Cth)*

The complementary protection regime was, at the time the appellants made their claims, only a very recent development in Australian law. Individuals are protected from refoulement in two circumstances: expressly, when they face the prospect of torture, pursuant to art 3 of the *CAT* or impliedly, [13] pursuant to the joint operation of arts 2 and 7 of the *ICCPR*[14] where they may face either torture or inhuman or degrading treatment.[15] Submitting the Bill that would become the

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[13] Which reads as follows:

> 1 No State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
> 2 For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Torture is defined in art 1 of the *CAT* as follows:

> 1. For the purposes of this *Convention*, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
> 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

[14] Article 2 states:

> 1. Each State Party to the present *Covenant* undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present *Covenant*, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present *Covenant* undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present *Covenant*, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present *Covenant*.
> 3. Each State Party to the present *Covenant* undertakes:
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 7 states:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

[15] See David Weissbrodt and Isabel Hörtreiter, 'The Principle of Non-Refoulement: Article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties' (1999) 5 *Buffalo Human Rights Law Review* 1.

Migration Amendment (Complementary Protection) Act 2011 (Cth) before Parliament, the Minister for Immigration and Citizenship, Chris Bowen, emphasised that the statutory definitions of torture and inhuman or degrading treatment were intended 'to assist assessing officers to interpret and implement [Australia's] international obligations', and that '[t]hese definitions will enable Australia to meet its non-refoulement obligations, without expanding the relevant concepts in a way that goes beyond current international interpretations'.[16] Later, the Minister noted that '[u]nlike obligations under the *refugees convention*, Australia's non-refoulement obligations under the *ICCPR*, the *CAT* and the *CROC* are absolute and cannot be derogated from'.[17]

But the Explanatory Memorandum accompanying the Bill was rather more definitive. It stated that:

> This item inserts the new defined term of '*cruel or inhuman treatment or punishment*' in subsection 5(1) of the *Act*. The effect of this item is that the term '*cruel or inhuman treatment or punishment*' is exhaustively defined and means the acts or omissions as provided for in the definition.
>
> This new defined term provides that *cruel or inhuman treatment or punishment* means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. This is 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 (see item 9).
>
> This new defined term also provides that *cruel or inhuman treatment or punishment* means an act or omission by which pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature.
>
> However, this defined term does not include an act or omission that is not inconsistent with Article 7 of the *Covenant*. It also does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the *Covenant*.
>
> The purpose of expressly stating *what cruel or inhuman treatment or punishment* does not include is to confine the meaning of *cruel or inhuman treatment or punishment* to circumstances that engage a *non-refoulement* obligation.
>
> This definition derives from the *non-refoulement* obligation implied under Articles 2 and 7 of the *Covenant*. This term is relevant when considering under new paragraph 36(2A)(d) (see item 14) whether a non-citizen will be subjected to cruel or inhuman treatment or punishment.[18]

As such, the legislation does not accord in identical terms with the international legal instruments to which it was intended to give effect. The consequences of this misalignment, both in respect of the application of the

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16 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2011, 1358 (Chris Bowen, Minister for Immigration and Citizenship).

17 Ibid.

18 Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) 5.

complementary protection regime and in the role to be played by international materials in the interpretation of the statute, lay at the heart of the dispute in *SZTAL*.

B *The Cases Below*

The Minister declined to grant the protection visas, and the appellants applied to the Refugee Review Tribunal (now the Administrative Appeals Tribunal) for review.[19] The Tribunal held that there were not substantial grounds for believing that there existed a real risk of significant harm.[20] The Tribunal found that the applicants would 'be remanded for a short period of time, between one night to several nights or possibly up to 2 weeks'[21] and that such a short period of remand, even in the poor conditions described, did not amount 'to an act or omission by which severe physical or mental pain or suffering is intentionally inflicted on the applicant or amounts to an act which could reasonably be regarded as cruel or inhuman'.[22]

The Tribunal concluded that there was no 'intention by the Sri Lankan government to inflict cruel or inhuman treatment or punishment or cause extreme humiliation'[23] and that the 'consequence of being imprisoned in poor prison conditions … was not intended by the Sri Lankan authorities'.[24]

The appeals from this decision — to the Federal Circuit Court, Full Court of the Federal Court, and finally, High Court — would be decided on this issue of 'intention'. The appellants' primary contention at each phase of the appeals was that the relevant statutory definitions of cruel or inhuman treatment or punishment, or degrading treatment or punishment, had been misconstrued or misapplied.

The appellants' argument turned on the meaning of the words 'intentionally inflicted' in the definition for 'cruel or inhuman treatment or punishment' and the slightly different but nevertheless equivalent phrase 'intended to cause' in the definition of degrading treatment or punishment. For ease of reading, the two will henceforth be referred to jointly as 'inhuman or degrading treatment', but the conceptual distinction between them remains.

The appellants' key contention throughout the appeals was that the language used by Parliament was 'capable of bearing the meaning that sees the intent established where the actor performs an act knowing that the act will, in the ordinary course of events, inflict pain, suffering or humiliation'.[25] Their arguments in favour of this interpretation were threefold:

1 First, that the language of intent was drawn from the definition of 'torture' in art 3 of the *CAT* and art 7 of the *ICCPR*, and should bear the same meaning in respect of inhuman or degrading treatment. That

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19 See *Federal Court* (2016) 243 FCR 556, 560 [9] (Kenny and Nicholas JJ).

20 Cited in ibid 560 [9] (Kenny and Nicholas JJ).

21 Quoted in ibid 584 [92] (Buchanan J).

22 Quoted in ibid.

23 Quoted in ibid 562 [11] (Kenny and Nicholas JJ).

24 Quoted in ibid 564 [16] (Kenny and Nicholas JJ).

25 Transcript of Proceedings, *SZTAL v Minister for Immigration and Border Protection* [2017] HCATrans 068 (5 April 2017) 4, [85]–[90].

meaning should be derived from or in light of international jurisprudence arising under those provisions;

2 Secondly, that the context of the complementary protection regime, including Parliament's response to Australia's international non-refoulement obligations, told against taking a narrow view of the meaning of 'intention'; and

3 Thirdly, that the *Migration Act* definition of torture or inhuman or degrading treatment, including the intent element, should be interpreted so as to align with the criminal offence of torture found in the *Criminal Code Act 1995* (Cth) ('*Criminal Code*'). The *Criminal Code* relevantly defines intention as a person who means to bring about a particular result 'or is aware that it will occur in the ordinary course of events'.[26]

Both the Federal Circuit Court and Full Court of the Federal Court rejected the appellants' case, and held that the phrase 'intentionally inflicted' used in the statutory definitions of torture and inhuman or degrading treatment required the appellants to establish 'the existence of an actual, subjective, intention on the part of a person to bring about the suffering by his or her conduct'.[27] Because the Sri Lankan authorities did not subjectively aim to cause harm by way of imprisonment in appalling conditions, the claim for protection necessarily failed.

Justice Driver of the Federal Circuit Court, while accepting that s 36(2)(aa) of the *Migration Act* did not directly incorporate any international treaty into domestic law, indicated that he considered the proper approach to construction should be 'informed by Australia's international obligations under the *CAT* and the *ICCPR*',[28] and that while the text of the statute 'ultimately controls its construction',[29] this should not 'deny that the meaning of the text may legitimately be informed by the international obligations to which it gives effect'.[30] Despite this, his Honour rejected the appellants' interpretation of intention because he was 'bound by the proposition that what is required is an actual, subjective, intention to cause harm',[31] due to an earlier decision of the

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26 *Criminal Code Act 1995* (Cth) s 5.2(3) ('*Criminal Code*'). Torture is defined in s 274.2(1)(a) as 'conduct that inflicts severe physical or mental pain or suffering on a person', for particular purposes. As the offence does not specify a fault element, s 5.6(2) states that '[i]f the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element'. That being so, s 5.4(4) states '[i]f recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element'. The full definition of 'intention' in s 5.2 then reads:

> (1) A person has intention with respect to conduct if he or she means to engage in that conduct.
> (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
> (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

27 *Circuit Court* [2015] FCCA 64 (24 February 2015) 17 [49].

28 Ibid 8 [20].

29 Ibid.

30 Ibid.

31 Ibid 20 [57].

Federal Court in *SZSPE v Minister for Immigration and Border Protection* to that effect.[32]

The Full Court was rather less sympathetic to the appellants' arguments, and held, per Kenny and Nicholas JJ, that:

> The general principle of construction that courts construe statutory provisions implementing Australia's obligations under a treaty consistently with that treaty is … of limited application in the context of the complementary protection provisions of the *Migration Act*. In particular, that principle cannot assist in the construction of the intention element in the relevant definitions in s 5(1) since that element does not exist in the *ICCPR* concepts of 'cruel, inhuman or degrading treatment or punishment'.[33]

This approach in turn harks back to an earlier decision of the Full Court in *Minister for Immigration and Citizenship v MZYYL*,[34] a decision expressly approved in both the joint judgment of Kenny and Nicholas JJ, and the judgment of Buchanan J.[35] *MZYYL* also concerned the complementary protection regime, in respect of which the Court relevantly stated:

> The Complementary Protection Regime provides criteria for the grant of a protection visa in circumstances where the Minister is not satisfied that Australia has protection obligations to that non-citizen under the *Refugees Convention*. The regime establishes criteria 'that engage' Australia's express and implied non-refoulement obligations … The Complementary Protection Regime is a code in the sense that the relevant criteria and obligations are defined in it and it contains its own definitions: see, by way of example, the definitions in s 5 of the *Act* of 'torture' and 'cruel or inhuman treatment or punishment'. Unlike s 36(2)(a), the criteria and obligations are not defined by reference to a relevant international law. Moreover, the Complementary Protection Regime uses definitions and tests different from those referred to in the International Human Rights Treaties and the commentaries on those International Human Rights Treaties …
>
> It is therefore neither necessary nor useful to ask how the *CAT* or any of the international law treaties would apply to the circumstances of this case. The circumstances of this case are governed by the applicable provisions of the *Act*, namely s 36(2)(aa) and (2B), construed in the way that has been indicated.[36]

Adopting and applying the same reasoning, the Full Court concluded that they did not accept the appellants' contention that the jurisprudence concerning art 7 of the *ICCPR*, or the equivalent art 3 of the *European Convention on Human Rights*,[37] could assist in 'resolving the meaning of the contested expressions in the relevant definitions in s 5(1) of the *Migration Act*'.[38]

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32 [2014] FCA 267 (27 March 2014) 10 [41] (Yates J).

33 *Federal Court* (2016) 243 FCR 556, 579 [63] (Kenny and Nicholas JJ). To similar effect, see also the judgment of Buchanan J: at [101]–[102] (Buchanan J).

34 (2012) 207 FCR 211, 219 [40] ('*MZYYL*').

35 *Federal Court* (2016) 243 FCR 556, 579 [64] (Kenny and Nicholas JJ); 590–1 [101]–[102] (Buchanan J).

36 *MZYYL* (2012) 207 FCR 211, 214 [18]–[20].

37 *ECHR* art 3.

38 *Federal Court* (2016) 243 FCR 556, 578 [60] (Kenny and Nicholas JJ). See also at 591 [102] (Buchanan J).

Being then left with only the common law construction of intention, the Full Court rejected the appellants' submission relating to proof of intention in the criminal law context,[39] and also rejected the argument that it was sufficient to prove that the consequence was the result of particular acts and that those acts were deliberate.[40] Rather, having been persuaded by the approach adopted by the Queensland Court of Appeal in *R v Ping*,[41] Kenny and Nicholas JJ found that '[t]he natural and ordinary meaning of intentional infliction is actual subjective intention by the actor to bring about the victims' pain and suffering by the actor's conduct'.[42] The appeals were dismissed.

III APPEAL TO THE HIGH COURT

Special leave to appeal to the High Court was granted in the cases of *SZTAL* and *SZTGM* in November 2016.[43] The cases were but two of a significant number of claims that had been brought since 2012 concerning Sri Lankan applicants for complementary protection arguing that they would face inhuman or degrading treatment should they be returned to Sri Lanka. The result of the appeal, particularly if the appellants were to be successful, would impact directly on a number of pending claims.[44] Moreover, the difficult nature of interpreting abstract terms such as intent, particularly in the context of human rights, is so notorious as to have inspired at least one linguistics thesis.[45] It is clear to see why

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39 Ibid 576 [53] (Kenny and Nicholas JJ), 589 [97] (Buchanan J).

40 Ibid 576–8 [54]–[59] (Kenny and Nicholas JJ), 591–2 [103]–[105] (Buchanan J).

41 [2006] 2 QD R 69, 76 [27] (Chesterman J).

42 *Federal Court* (2016) 243 FCR 556, 578 [59] (Kenny and Nicholas JJ).

43 High Court of Australia, *Results of Special Leave Heard at Sydney* (16 November 2016) <http://www.hcourt.gov.au/assets/registry/special-leave-results/2016/16-11-2016SydResults.pdf>.

44 See, eg, *CVJ16 v Minister for Immigration and Border Protection* [2018] FCA 52 (8 February 2018); *ABZ15 v Minister for Immigration and Border Protection* [2018] FCCA 116 (5 February 2018); *AVR15 v Minister for Immigration and Border Protection* [2017] FCCA 3137 (20 December 2017); *CGV15 v Minister for Immigration and Border Protection* [2017] FCA 1610 (12 December 2017); *AKQ17 v Minister for Immigration and Border Protection* [2017] FCA 1454 (6 December 2017); *BKX15 v Minister for Immigration and Border Protection* [2017] FCCA 2972 (4 December 2017); *AQN16 v Minister for Immigration and Border Protection* [2017] FCA 1360 (27 November 2017); *ADX17 v Minister for Immigration and Border Protection* [2017] FCCA 2768 (24 November 2017); *AFZ15 v Minister for Immigration and Border Protection* [2017] FCCA 2864 (23 November 2017); *BHU15 v Minister for Immigration and Border Protection* [2017] FCCA 2866 (23 November 2017); *ABJ16 v Minister for Immigration and Border Protection* [2017] FCA 1371 (22 November 2017); *BZS15 v Minister for Immigration and Border Protection* [2017] FCA 1349 (17 November 2017); *CQQ15 v Minister for Immigration and Border Protection* [2017] FCA 1353 (17 November 2017); *AIS15 v Minister for Immigration and Border Protection* [2016] FCA 978 (16 August 2016); *SZWDK v Minister for Immigration and Border Protection* [2016] FCA 979 (16 August 2016); *AGK15 v Minister for Immigration and Border Protection* [2016] FCA 1012 (24 August 2016); *EAU16 v Minister for Immigration and Border Protection* [2017] FCCA 2196 (11 September 2017); *AGC16 v Minister for Immigration and Border Protection* [2017] FCCA 2407 (3 October 2017); *SZUOL v Minister for Immigration and Border Protection* [2017] FCA 179 (22 February 2017). Cf *BZAFM v Minister for Immigration and Border Protection* [2015] FCAFC 41 (24 March 2015) and *SZTEQ v Minister for Immigration and Border Protection* (2015) 229 FCR 497, 507 [30]–[31]. These cases concerned a similar pattern of facts but were argued on the basis that the resultant imprisonment upon return to Sri Lanka would amount to a threat to liberty sufficient to constitute serious harm under s 91R of the *Migration Act*.

45 Michaela Everett, *Ambiguous Intent: An Evaluation of Ordinary Meaning in the Language of Anti-Torture Statutes* (Masters Thesis, Hofstra University, 2017).

the cases were considered of sufficient importance to merit a High Court opinion.

But unusually, *SZTAL* was not the only case in recent years to raise the question of the proper interpretation of the word 'intend'. In the High Court's 2016 decision in *Zaburoni v The Queen*,[46] the issue on appeal was what it means to 'intend' to transmit HIV/AIDS to another person under s 317(b) of the *Criminal Code Act 1899* (Qld), which makes it an offence to transmit a serious disease 'with intent'. The concept of intention is not defined in the legislation, and it is left to the common law (or 'common sense') to provide the meaning of intention.[47] The majority in that case — Kiefel, Bell and Keane JJ — held that 'knowledge or foresight of result, whether possible, probable or certain, is not a substitute in law for proof of a specific intent'.[48] Approving Connolly J's explanation of 'intent' *in R v Willmot [No 2]*,[49] the majority agreed that 'the directing of the mind, having a purpose or design' was essential to establishing 'intent',[50] such that '[t]he ordinary and natural meaning of the word "intends" is to mean, to have in mind'.[51]

In argument, the Minister relied heavily upon the reasoning of the plurality in *Zaburoni*,[52] to the effect that for the purposes of ss 5 and 36 of the *Migration Act* it was not enough that the Sri Lankan authorities could foresee that imprisonment would in the ordinary course of events result in pain, suffering or extreme humiliation; it was necessary that the aim of the authorities in imprisoning the appellants was to cause such.

The majority, comprising Kiefel CJ, Nettle and Gordon JJ, agreed, finding that intention, as 'ordinarily understood' and as adopted in *Zaburoni*, refers only to 'a person's actual, subjective, intention'.[53] Likewise, Edelman J considered the judgment to be 'illustrative' of 'what the ordinary and natural meaning of intention has always been',[54] although he rejected *Zaburoni* as a direct authority

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46 (2016) 256 CLR 482, 496 [39] ('*Zaburoni*').

47 'The general legal opinion is that "intention" cannot be satisfactorily defined and does not need a definition, since everybody knows what it means': Glanville Williams, *Textbook of Criminal Law* (Stevens & Sons, 1978) 51.

48 *Zaburoni* (2016) 256 CLR 482, 490 [14].

49 [1985] 2 Qd R 413, 418.

50 Ibid.

51 Ibid. This was approved in *Zaburoni*. See *Zaburoni* (2016) 256 CLR 482 488–91 [6]–[19].

52 Transcript of Proceedings, *SZTAL v Minister for Immigration and Border Protection* [2017] HCATrans 068 (5 April 2017) 66–80.

53 *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936, 940 [8]–[9], 941 [15] ('*SZTAL*'). As an intriguing aside, the joint judgment (of which Nettle J was a member) also contains an explicit rejection of the reasoning of Nettle J in *Zaburoni*. 'Nettle J reasoned in a way different from the plurality. In his Honour's view, it logically followed that an accused could be said to intend to bring about a result where he or she foresaw that his or her actions would have an inevitable or certain consequence. The plurality in *Zaburoni* acknowledged that evidence that a person understood that a particular result was an inevitable consequence may go a long way towards proving intent, but held that it was not to be equated with it. Given that conclusion, the manner in which Nettle J reasoned in *Zaburoni* now stands rejected': at 941 [16]. Whether Nettle J himself conceded to this rejection, or proposed it, or disagreed with it, will forever remain a mystery.

54 Ibid 957 [102]. I am paraphrasing, as Edelman J actually used the words 'an illustration of what the ordinary and natural meaning of intention has always been'.

in so far as it could not be held to 'affect the construction of different legislation enacted years earlier'.[55]

Having opined on the 'ordinary meaning' of the word 'intention', [56] the joint judgment went on to find that there was nothing underlying the context of the *Migration Act* which told against this interpretation.[57] In particular, there was no 'settled meaning of "intentionally" to be derived from any international law sources'.[58] Rather, their Honours considered the situation quite to the contrary:

> the fact that the element of intention is contained in the definition of 'torture', from which the definitions in question are derived, tends to confirm [the ordinary meaning]. A perpetrator of torture, clearly enough, means to inflict suffering because it is part of his or her ultimate purpose or design to subject the victim to pain and suffering in order, for example, to obtain a confession.[59]

Their Honours observed that '[t]he *ICCPR* did not provide a definition'[60] of inhuman or degrading treatment, that 'pain or suffering of the requisite degree' under the *ICCPR* need not 'be intentionally inflicted',[61] and likewise that the *Convention* 'does not expressly require that humiliation of the requisite degree be intentionally caused'.[62] Neither had art 7 'subsequently been interpreted as importing such a requirement'.[63]

In reaching this conclusion, Kiefel CJ, Nettle and Gordon JJ deferred to the more lengthy exposition of Edelman J. His Honour reached essentially the same conclusion that '[n]o established, consistent definition of intention emerges from the international jurisprudence which the relevant provisions of the *Migration Act* could be thought to have adopted when they were inserted'.[64] Edelman J reasoned that unlike the definition of torture, which had been derived closely from the *CAT*, the definition of inhuman or degrading treatment 'departed significantly from the *ICCPR*'.[65] In particular,

> [t]he *ICCPR* did not define 'cruel, inhuman or degrading treatment or punishment'. But s 5(1) of the *Migration Act* did define 'cruel or inhuman treatment or punishment'. It included a requirement of intention which was not present in the *ICCPR*. The s 5(1) definition of 'cruel or inhuman treatment or punishment' is essentially an extension of the definition of torture where the pain or suffering was not inflicted for one of the purposes or reasons stipulated under the definition of torture …
>
> The consequence of this approach to 'cruel or inhuman treatment or punishment' in the *Migration Act* is that the concept operates as an extension of the provisions

55 Ibid.
56 Ibid 941 [17].
57 Ibid.
58 Ibid 941 [18].
59 Ibid 941 [17].
60 Ibid 939 [4].
61 Ibid.
62 Ibid 939 [5].
63 Ibid 939 [4].
64 Ibid 949 [66].
65 Ibid 951 [78].

> in relation to torture rather than to implement any particular international obligation.[66]

Nevertheless, Edelman J accepted the proposition that because the definition of inhuman or degrading treatment was 'essentially an extended application of the definition of torture',[67] the meaning of 'intention' in the two concepts should be the same.[68] Likewise, his Honour accepted that

> where particular words are consciously imported from an international instrument into municipal law then it will generally be the case that the words in municipal law are used in the same way as an established international law meaning of those words …[69]

Implicitly rejecting the approach adopted by the Full Court, Edelman J stated that 'the definitions in s 5(1) should not automatically be treated as a "code" to be interpreted without reference to any international materials'.[70]

But in Edelman J's opinion, the appellants' submission failed because 'there is no established international law meaning of intention against which the use of that word in the *Migration Act* should be construed'.[71] And moreover, notwithstanding that it had been enacted to give effect to Australia's obligations under the *CAT* to criminalise torture,[72] that the fault elements of the criminal offence of torture in the *Criminal Code*, which includes mere awareness that a particular result 'will occur in the ordinary course of events,'[73] should not be adopted because it did not represent a 'uniform international model' and departed from the 'ordinary meaning of intention'.[74]

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66 Ibid 951–2 [78]–[79].

67 Ibid 952 [80].

68 Ibid 952 [80]–[81].

69 Ibid 952 [83].

70 Ibid.

71 Ibid 952 [84].

72 *CAT* art 4(1).

73 *Criminal Code* s 5.2(3). Torture is defined in s 274.2(1)(a) as 'conduct that inflicts severe physical or mental pain or suffering on a person', for particular purposes. As the offence does not specify a fault element, s 5.6(2) states that '[i]f the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element'. That being so, s 5.4(4) states '[i]f recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element'. The full definition of 'intention' in s 5.2 then reads:

> (1) A person has intention with respect to conduct if he or she means to engage in that conduct.
> (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
> (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

74 *SZTAL* (2017) 91 ALJR 936, 949 [66]. As a brief aside, it is necessary to mention the concept of 'oblique' or 'indirect' intention, as it formed such a significant basis for most of Edelman J's reasoning. Edelman J defines oblique intention as 'arising where a result "was in contemplation, and appeared likely to ensue in case of the act's being performed"': at 948 [61]. Although he expressly rejects the notion as alien to Australian law, the joint judgment declined to enter into the debate, as no detailed submissions had been made by the parties: at 940 [10]. As such the law remains unsettled.

In dissent, Gageler J adopted a different and, it will be argued, preferable methodology for dealing with the international material before the Court. Rather than confining the issue to a question of whether the word 'intention' had a settled meaning in international law, in an approach redolent of his Honour's 2014 speech on legislative intention,[75] Gageler J emphasised that 'no amount of contemplating the abstract meaning of "intend" will supply the answer'.[76] Rather, it was necessary to construe the statutory definition of inhuman or degrading treatment, including the phrase 'intentionally inflicted' in light of the statutory context. In particular, the 'purpose for which the complementary protection regime was introduced'.[77]

His Honour observed that the choice before the Court was not simply a binary application of either the 'ordinary' usage of the word intention, or a special 'international law' meaning. Rather, that the ordinary meaning of intention can encompass either 'the purpose or design of bringing about the result', or 'willingness to act with awareness of the likelihood of the result',[78] and citing from his joint judgment with Keane J in *Taylor*,[79] that the choice before the Court was to adopt one meaning from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural', in which case the choice should turn 'less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies'.[80] His Honour observed that 'neither common sense nor conceptual analysis can be expected to yield a single answer … irrespective of why the question is asked'.[81]

Turning then to the issue of the context and purpose of the complementary protection legislation, Gageler J gives two reasons why the appellants' submission should be preferred and the interpretation adopted by the majority is too narrow.

First, Gageler J observes that the interpretation of intention that would best achieve the legislature's purpose; that is, compliance with Australia's international human rights obligations, is that 'which would more closely align the statutory criterion for the grant of a protection visa to Australia's obligations under Art 7 of the *ICCPR* and Art 3 of the *CAT*'.[82] In a position directly at odds with that adopted by Edelman J,[83] Gageler J argues that the approach to intention

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75 Justice Stephen Gageler, 'Legislative Intention' (2015) 41 *Monash University Law Review* 1, 16. In the interpretation of words that are indistinct, fidelity on the part of the interpreter to the interpretative task is not inconsistent with an assumption on the part of the interpreter of fidelity on the part of the speaker to precepts fairly assumed by the interpreter to be shared by both of them by reason not simply of their common language but also of their common culture and adherence to some basic common values and aspirations. That such an assumption on the part of the interpreter might sometimes be based on an idealised conception of the speaker is not necessarily a sign of ill-health in the relationship. Where the interpreter is a court and the speaker is a legislature, it is unlikely to be detrimental to the polity which both arms of government exist ultimately to serve.

76 *SZTAL* (2017) 91 ALJR 936, 943 [32].

77 Ibid 944 [37], 945 [43].

78 Ibid 945 [42].

79 *Taylor v Owners — Strata Plan No 11564* (2014) 253 CLR 531, 557 [66].

80 *SZTAL* (2017) 91 ALJR 936, 944 [38].

81 Ibid 945 [41].

82 Ibid 945–6 [43].

83 Ibid 949 [66].

adopted in the *Criminal Code* is very apt to inform the interpretation of intention under the *Migration Act* complementary protection regime, because both ultimately are intending to give effect to Australia's international legal obligations:

> Whilst it might be open to Parliament to adopt one approach to the definition of torture in Art 1 of the *CAT* in the legislative implementation of Australia's obligation under Art 3 of the *CAT* and another approach to the same definition in the legislative implementation of Australia's obligation under Art 4 of the *CAT*, for Parliament actually to do so would be strangely inconsistent. No reason appears for thinking that Parliament would have done so. In particular, no reason appears for attributing to Parliament a legislative 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.[84]

Thus, the two concepts are clearly and closely related. Notwithstanding that 'crimes are different from human rights',[85] it is not as simple as saying one statute deals in crimes, the other is addressed to immigration, and those two topics are unrelated.[86] The underlying *purpose* of both schemes is to ensure Australia's compliance with its international human rights obligations, particularly under the *CAT*. And if intention, for the purposes of criminalising the commission of torture, can include awareness that a particular harm will occur in the ordinary course of events, so too should that interpretation suffice for the meaning of 'intention' across all three definitions in the *Migration Act*.[87]

Indeed, on this point Edelman J was quite wrong to suggest that '[t]here is no evidence that the definitions in … the *Criminal Code* were enacted to pick up the definition in the *Convention against Torture*'.[88] Quite to the contrary, torture was criminalised under the *Criminal Code* precisely in order to give better effect to

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84 Ibid 947 [49]. Gageler J had in fact asked exactly this question of the Solicitor-General during the hearing, stating: 'If you had the *Criminal Code* in one hand and the *Migration Act* in the other, is it the result of your submission that the torturer can be criminally liable in circumstances where the victim is not entitled to protection?' See Transcript of Proceedings, *SZTAL v Minister for Immigration and Border Protection* [2017] HCATrans 068 (5 April 2017) 3085. It was the Solicitor-General's response that

> Australia's non-refoulement obligations would extend to benefit the victim, but the victim would not be entitled to a protection visa. That is the consequence of my submission — not that we send the person back to be tortured by the torturer, who could then be prosecuted, but that the inclusion of the 'intention' requirement has the consequence that follows.

At 3091–6. The response is one that in the author's opinion ultimately defeats the administrative goal of the legislation, to save applicants from having to go through a protracted 'process of applying, failing, seeking review and failing again, just so they are then able to apply to the minister for personal intervention': at 1356–9. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2011, 1356–1359 (Mr Bowen, Minister for Immigration and Citizenship).

85 Olivier de Frouville, 'The Influence of the European Court of Human Rights' Case Law on International Criminal Law of Torture and Inhuman or Degrading Treatment' (2011) 9 *Journal of International Criminal Justice* 645, 646. See also Michelle Farrell, 'Just How Ill-Treated Were You? An Investigation of Cross-Fertilisation in the Interpretative Approaches to Torture at the European Court of Human Rights and in International Criminal Law' (2015) 84 *Nordic Journal of International Law* 482.

86 *SZTAL* (2017) 91 ALJR 936, 942–3 [23]–[25].

87 Ibid 947 [50].

88 Ibid 954 [89].

Australia's obligation under art 2 of the *CAT* to prevent torture. In implementing the legislation,[89] the Attorney-General observed that the 'new offence is intended to fulfil more clearly Australia's obligations under the *convention against torture*'[90] and John Murphy MP observed that 'the definition contained in the legislation is based on the definition contained in the *United Nations convention on torture*'.[91]

Secondly, there is what Gageler J describes as the 'broader contextual reason' to support a more generous interpretation of intention, and that is the scope of art 7 of the *ICCPR*, which prohibits inhuman or degrading treatment but does not define the term,[92] and which had in the international cases before the Court been applied in such a way as to indicate that a 'positive intention on the part of the perpetrator to bring about cruel, inhuman or degrading treatment or punishment is not essential to the occurrence of a violation' of art 7.[93] Gageler J observed — quite the contrary to the conclusions of the majority — that while international law did not incorporate intention as part of the definition of inhuman or degrading treatment, and thus the statutory definition of inhuman or degrading treatment was clearly narrower than the international law version:

> the introduction of the concept of intention narrows the scope of complementary protection provides no reason for treating the particular notion of intention that is incorporated into the definitions as a narrow one. To the contrary, it confirms the appropriateness of understanding the sense in which intention has been invoked to be a wide one.[94]

Gageler J concluded by reasoning that:

> to understand the underlying notion of intention in each of the three statutory definitions as met where a perpetrator acts with awareness that the consequence to the victim will occur in the ordinary course of events is to adopt a construction which allows the statutory criterion for the grant of a protection visa better to meet Australia's obligation under Art 7 of the *ICCPR*, and which for that reason best achieves the purpose for which the complementary protection regime was introduced.[95]

Nevertheless, it is worth noting that despite Gageler J's broader interpretation of the statutory language of intention, in obiter his Honour observed that while it was not open to him to make a finding on the issue, he was sympathetic to the views of Buchanan J in the Full Court, who had indicated he would have found against the appellants regardless of the definition of intention. The Tribunal's apparent finding of fact that the harm constituted by being held on remand for a

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89 Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2009 (Cth).

90 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 November 2009, 12198 (Mr McClelland, Attorney General).

91 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 February 2010, 1345 (Mr Murphy).

92 *SZTAL* (2017) 91 ALJR 936, 947 [51]–[52].

93 Ibid 947 [53]. To be more precise, because art 3 of the *ECHR* is essentially in equivalent terms to art 7 of the *ICCPR*, Gageler J considered the jurisprudence in respect of *ECHR* art 3 transferable to *ICCPR* art 7. See also *Kalashnikov v Russia (Just Satisfaction)* [2002] Eur Court HR 596.

94 *SZTAL* (2017) 91 ALJR 936, 947 [53].

95 Ibid 947 [54].

short time in poor prison conditions was not of sufficient seriousness to constitute inhuman or degrading treatment.[96] As will become clear from the analysis below, this would have been the best resolution for the case at hand.

IV INTERPRETING INTERNATIONAL LAW

So what then to make of the High Court's use of the international materials before it, and its attitude to the application or relevance of international law? This Part will be divided into two sections. The first looks at whether the Court was right to conclude that there is no settled international law understanding of 'intention'. The second will look to the methodology adopted by the judges in dealing with the international case law.

A *Intention and Torture in International Law*

Torture is an international crime;[97] the prohibition of torture is a rule of customary international law with the status of *jus cogens*.[98] The torturer is considered '*hostis humani generis*, an enemy of all mankind'.[99] So too is the infliction of inhuman or degrading treatment prohibited by international law.[100] But while each may be conduct sitting on the same spectrum of unlawful activity, and are to some extent overlapping and largely congruent,[101] there is nevertheless an important distinction between them. As was made clear in the submissions before the High Court,[102] inhuman or degrading treatment in international law does not require intent.

Quite to the contrary, 'purpose or intent often will affect whether conduct is deemed torture or cruel, inhuman, or degrading conduct'.[103] The requirement of 'intent' has been relied on by the Special Rapporteur of the United Nations

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96 Ibid 947–8 [55]–[57]. See also *SZTAL v Minister for Immigration and Border Protection* [2016] FCAFC 69 (20 May 2016) [94]–[95], [99] ('*Full Court*').

97 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) arts 7(1)(f), 8(2)(a)(ii); *Report of the Assembly of State Parties to the* Rome Statute of the International Criminal Court, 1st sess, UN Doc ICC-ASP/1/3 (3–10 September 2002) 119.

98 *Prosecutor v Furundžija (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [153]–[157]. See also Erika de Wet, 'The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law' (2004) 15 *European Journal of International Law* 97.

99 *Filartiga v Pena-Irala* 630 F 2d 876, 890 (2nd Cir, 1980).

100 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 5; *ICCPR* art 7; *ECHR* art 3. Some argue that the prohibition of inhuman or degrading treatment has also acquired the status of a norm *jus cogens*, but this is open to debate. See Antônio Augusto Cançado Trindade, 'Jus Cogens: The Determination and the Gradual Expansion of its Material Content in Contemporary International Case-Law' (Speech delivered at the OAS Inter-American Juridical Committee XXXV Course of International Law, Rio de Janeiro, August 2008) 14–16 <http://www.oas.org/dil/esp/3%20-%20cancado.lr.cv.3-30.pdf>; Matthew Saul, 'Identifying *Jus Cogens* Norms: The Interaction of Scholars and International Judges' (2014) *Asian Journal of International Law* 1.

101 UN Committee against Torture, *General Comment 2: Implementation of Article 2 by States Parties*, UN Doc CAT/C/GC/2 (24 January 2008) [3] ('*UNCAT General Comment 2*').

102 *SZTAL* (2017) 91 ALJR 936, 939 [4]–[5].

103 David Weissbrodt and Cheryl Heilman, 'Defining Torture and Cruel, Inhuman, and Degrading Treatment' (2011) 29 *Law and Inequality: A Journal of Theory and Practice* 343, 386.

Commission on Human Rights,[104] the UN Committee against Torture,[105] the UN General Assembly[106] and in extensive case law at the European Court of Human Rights[107] to distinguish torture from inhuman or degrading treatment.[108]

In order to constitute torture, the act must have been committed both deliberately *and* for one of the prohibited purposes listed in art 1 of the *CAT* (although the list is not exhaustive) such as for the purpose of obtaining a confession.[109] In situations 'where the evidence fails to show that an act was committed to achieve any particular purpose', the act may be deemed inhuman or degrading treatment, but will not constitute torture.[110] For many, intent is the 'dominant element distinguishing torture' from inhuman or degrading treatment.[111] The Special Rapporteur considers that the

> systematic and historical interpretation of articles 1 and 16 *CAT* suggest that the decisive criteria for distinguishing [inhuman or degrading treatment] from torture are the purpose of the conduct, the intention of the perpetrator and the powerlessness of the victim.[112]

B *Intention (Noun): 1. A Thing Intended*[113]

Be all that as it may, the High Court could not avoid the fact that the words 'intentionally inflicted' had been inserted into the statutory definition of inhuman or degrading treatment. How then should the Court go about interpreting the term, given that it was not possible to adopt the orthodox international law interpretative methodology, that where:

> [i]f a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative

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104 *Report of the Special Rapporteur*, UN Doc A/HRC/13/39/Add.5, 13–14 [34].

105 *UNCAT General Comment 2*, UN Doc CAT/C/GC/2, [10]: 'In comparison to torture, ill treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes'.

106 *Declaration on the Protections of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 3452, UN GAOR, 30th sess, Agenda Item 74, UN Doc A/RES/30/3452 (9 December 1975). Article 1(2) of the *Declaration* states that torture 'constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment'.

107 *Ireland v United Kingdom* (1979–80) 2 EHRR 25; *D v United Kingdom* (1997) 24 EHRR 423; *N v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 26565/05, 27 May 2008) [42]–[43]; *Peers v Greece* (2001) 33 EHRR 1192; *Labita v Italy* (European Court of Human Rights, Grand Chamber, Application No 26772/95, 6 April 2000).

108 McAdam, above n 3, 698–701.

109 Weissbrodt and Hortreiter, above n 15, 9–10; Weissbrodt and Heilman, above n 103.

110 Weissbrodt and Heilman, above n 103, 387, citing *Prosecutor v Krnojelac (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-25-T, 15 March 2002). In that case, the ICTY held that beatings and abuse that were 'purely arbitrary' constituted cruel and inhumane treatment, but did not amount to torture: at [252].

111 See Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford University Press, 3rd ed, 2009) 83, 123; Manfred Nowak and Elizabeth McArthur, *The United Nations* Convention against Torture*: A Commentary* (Oxford University Press, 2008) 74–7.

112 *Report of the Special Rapporteur*, UN Doc A/HRC/13/39/Add.5, 50 [188].

113 Google Dictionary <https://www.google.com.au/search?safe=active&q=Dictionary#dobs=intention>.

> intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty.[114]

As a result of the terminological disjunction between the relevant treaty law and the statute, the proper use, if any, to be made of international materials in the interpretation of the intention element in the definition of inhuman or degrading treatment became very much a central issue for the Court. The Court as a whole demonstrated a certain willingness to engage with the international legal materials before it,[115] and all of the judges agreed that if an accepted 'international law' definition of intention could be ascertained, it should apply to the legislation.[116] Likewise, each concurred that it was appropriate to look to the meaning of intention in the definition of torture, and to import that meaning across to the statutory definitions of inhuman or degrading treatment.[117]

But the unanimous conclusion of the Court, that 'there is no established international law meaning of intention against which the use of that word in the *Migration Act* should be construed',[118] falls short of the mark. Precisely *because* intent is a necessary element of torture as defined in the *CAT*, there is in fact a significant amount of material addressed to that very issue, to which the Court — through inexperience or inattention — was not directed.

To begin with a matter of some infamy, the question of 'intention' was at issue in one of the notorious 'Torture Memos' issued by the United States Office of Legal Counsel. The purpose of the Memorandum was to advise on standards of conduct under the *CAT*, and the conclusion reached by Assistant Attorney-General Jay S Bybee was that 'a defendant [must] act with the specific intent to inflict severe pain', and that to satisfy this mens rea requirement, 'the infliction of such pain must be the defendant's precise objective'.[119] Consequently, 'even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith'.[120]

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114 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, [2] (Brennan CJ). See also at [20] (Dawson J):

> Deciding that question involves the construction of a domestic statute which incorporates a definition found in an international treaty. Such a provision, whether it is a definition or otherwise, should ordinarily be construed in accordance with the meaning to be attributed to the treaty provision in international law. By transposing the provision of the treaty, the legislature discloses the prima facie intention that it have the same meaning in the statute as it does in the treaty. Absent a contrary intention, and there is none in this case, such a statutory provision is to be construed according to the method applicable to the construction of the corresponding words in the treaty.

115 Certainly, appearing much more willing than in earlier judgments such as: *Maloney v Queen* [2013] HCA 28. See Patrick Wall, 'The High Court of Australia's Approach to the Interpretation of International Law and Its Use of International Legal Materials in *Maloney v The Queen* [2013] HCA 28' (2014) 15 *Melbourne Journal of International Law* 228.

116 *SZTAL* (2017) 91 ALJR 936, 939 [4], 941 [17]–[18] (Kiefel CJ, Nettle and Bell JJ), 944 [34] (Gageler), 952–3 [81]–[84] (Edelman J).

117 Ibid.

118 Ibid 952–3 [84].

119 Jay S Bybee, 'Memorandum for Alberto R Gonzales, Counsel to the President' (Memorandum, US Department of Justice, Office of legal Counsel, 1 August 2002) 3 <https://nsarchive2.gwu.edu//NSAEBB/NSAEBB127/02.08.01.pdf>.

120 Ibid 4.

That the High Court reached essentially the same conclusion is in itself perhaps troubling. But it is particularly so because, following the declassification of the Torture Memos in 2009,[121] there was a general clamour of international law specialists seeking to establish that Bybee's advice was simply wrong. The UN Committee against Torture, the treaty body tasked with overseeing the implementation of the *CAT* and with its authoritative interpretation, in its *General Comment 2* emphasised that the 'elements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances'.[122]

The Special Rapporteur likewise stated in a 2010 report that the intent threshold means 'torture can never be inflicted by negligence',[123] but that the mental element of intention is directed to ascertaining the purpose of the ill-treatment. He provides the following illustrative example:

> A detainee who is forgotten by the prison officials and suffers from severe pain due to the lack of food is without doubt the victim of a severe human rights violation. However, this treatment does not amount to torture given the lack of intent by the authorities. On the other hand, if the detainee is deprived of food for the purpose of extracting certain information, that ordeal, in accordance with article 1, would qualify as torture.[124]

As the comprehensive study conducted by Oona Hathaway, Aileen Nowlan and Julia Spiegel of international courts and tribunals, US courts, and the Committee against Torture's jurisprudence demonstrates, there is in fact a remarkably consistent interpretation of intention in respect of torture.[125] The authors state that:

> it is evident that torture under the *Convention Against Torture is* a specific intent crime — for both the act and state of mind are essential elements of the crime. The very definition of torture in the *Convention Against Torture* supplies the additional mens rea requirement: The accused must not only intend to inflict pain and suffering, but he must do so *for a purpose* prohibited by the *Convention* (for example, to extract a confession). To satisfy this requirement, however, causing such harm need not be the accused's objective or purpose. Rather, the specific intent standard for torture is met by evidence that the accused intentionally inflicted severe pain or suffering on a person *for a prohibited purpose,* as provided by the *Convention* (for example, in order to extract information).[126]

Thus, it is reasonably clear that at international law, the intention requirement under the *CAT* is linked not to the conduct but to the purpose of the conduct. It is not *on* purpose, but *for* a purpose. By contrast, inhuman or degrading treatment

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121 Ewan McAskill, 'Obama Releases Bush Torture Memos', *The Guardian* (online), 17 April 2009 <https://www.theguardian.com/world/2009/apr/16/torture-memos-bush-administration>.

122 *UNCAT General Comment 2*, UN Doc CAT/C/GC/2, [9] (emphasis added).

123 *Report of the Special Rapporteur*, UN Doc A/HRC/13/39/Add.5, 13 [34].

124 Ibid 13–14 (emphasis added).

125 Oona A Hathaway, Aileen Nowlan and Julia Spiegel, 'Tortured Reasoning: The Intent to Torture Under International and Domestic Law' (2012) 52 *Virginia Journal of International Law* 791.

126 Ibid 801 (emphasis added).

'means the infliction of pain or suffering without purpose or intention'.[127] Torture requires 'a particular motive, objective or goal — hence, it requires a mens rea (a proscribed purpose) that goes beyond the actus reus'.[128]

As such, the conclusions of the majority are wrong in two key respects. First, and this was an error made by the entire Court, that there is not an accepted international law definition of 'intention'.[129] In the context of the crime of torture, there is in fact quite a settled definition. Secondly, and perhaps more importantly, the majority failed to appreciate that intention must relate to the purpose of the act, not the doing of the act, and does not require direct evidence of mental state.[130] It is not, as suggested by Edelman J, 'that the act be "aimed at" causing severe pain or suffering'.[131] The majority are a little closer but still fall short of the mark when they suggest that a 'perpetrator of torture, clearly enough, means to inflict suffering because it is part of his or her ultimate purpose or design to subject the victim to pain and suffering in order, for example, to obtain a confession'.[132] Inhuman or degrading treatment by contrast does not require intention, because it need not be directed to fulfilling a purpose.

C *A Bastion of Strident Dualism?*

So, while there is a clear meaning of intention in respect of the definition of torture under the *CAT*, that meaning relates to the intention of the perpetrator to fulfil a proscribed purpose, not the intention to do the act. Had the Court fully appreciated this point — and in fairness to their Honours, the materials were not before them in evidence — it would have become apparent that the definition of intent in respect of torture cannot assist in defining that term in the *Migration Act* definition of inhuman or degrading treatment, because at international law those acts need not be done with any particular purpose in mind. As such, the Court reached what is arguably the right conclusion, but for the wrong reason.

Presently, it will be argued that the approach of Gageler J to the interpretation of the definition of inhuman or degrading treatment should be preferred. For once it becomes apparent that the definition of intent cannot be brought over from its usage in respect of torture, the Court should not have retreated to an 'ordinary meaning' analysis that fails to give due weight to the context of the complementary protection regime and the human rights purpose of non-refoulement protections.

One of the long-accepted canons of statutory interpretation is the presumption that parliament intends to give effect to Australia's international legal obligations, and as such courts should adopt interpretations that best meet that end.[133] As expressed by Gleeson CJ in *Plaintiff S157/2002 v Commonwealth*, a

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127 Ibid 800. See also *Report of the Special Rapporteur*, UN Doc A/HRC/13/39/Add.5, 51 [188].

128 Hathaway, Nowlan and Spiegel, above n 125, 804.

129 As noted above, Gageler J joined the majority in reaching this first conclusion.

130 Hathaway, Nowlan and Spiegel, above n 125, 836.

131 *SZTAL* (2017) 91 ALJR 936, 953 [87].

132 Ibid 941 [17].

133 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J): 'every Statute is to be so interpreted and applied as far as its language admits as to not be inconsistent with the comity of nations or with the established rules of international law'; *Polites v Commonwealth* (1945) 70 CLR 60, 68–9.

court should favour a construction that accords with Australia's obligations when interpreting legislation 'enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention'.[134]

In addition to this common law rule of interpretation, the *Acts Interpretation Act 1901* (Cth) in s 15AB authorises the use of 'any treaty or other international agreement that is referred to in the *Act*'[135] in order to determine the meaning of a provision when it is 'ambiguous or obscure';[136] or 'to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the *Act* and the purpose or object underlying the *Act*'.[137] The narrowest reading of s 15AB would see only reference to a treaty overtly referenced in the legislation,[138] but Donald K Rothwell and Emily Crawford have suggested that it may be 'sufficient that the treaties have been referred to in the second reading speech'.[139]

There also remains some debate about 'the level of uncertainty required before courts can have recourse to international law' as an interpretative aid;[140] in *Minister of Foreign Affairs v Magno*, Gummow J noted that in cases where an international obligation is referred to in legislation, international law may be used 'not only to determine provisions which are ambiguous or obscure, but for the wider purposes spelled out in sub-s 15AB(1)'.[141] But in *Western Australia v Ward*, Callinan J rejected a broad approach, stating that 'where legislation is not genuinely ambiguous, there is no warrant for adopting an artificial presumption as the basis for, in effect, rewriting it'.[142] In the present case, the term in question was ambiguous; and the relevant treaty regime to which the *Act* purported to give effect was referenced in the legislation, second reading speech and Explanatory Memorandum. But while the majority were willing to import a direct international law analogue, should one exist, they failed to properly address the context and purpose of the legislation in the manner of Gageler J; instead retreating to the High Court's traditional stronghold of clear-cut dualism.

As observed by Michelle Foster and Jason Pobjoy, 'it is somewhat disingenuous to claim to incorporate Australia's non-refoulement obligations and then, via legislative drafting, to narrow the scope of the obligations assumed

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134 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [29].

135 *Acts Interpretation Act 1901* (Cth) s 15AB(2)(d).

136 Ibid s 15AB(1)(b)(i).

137 Ibid s 15AB(1)(b)(ii).

138 Emily Crawford, 'Monism and Dualism — An Australian Perspective' (Legal Studies Research Paper No 12/87, Sydney Law School, November 2012) 15. See, eg, *Yager v The Queen* (1977) 139 CLR 28, 43–4 (Mason J): 'There is no basis on which the provisions of an international convention can control or influence the meaning of words or expressions used in a statute, unless it appears that the statute was intended to give effect to the convention, in which event it is legitimate to resort to the convention to resolve an ambiguity in the statute'.

139 Donald R Rothwell and Emily Crawford, *International Law in Australia* (Thompson Reuters, 3rd ed, 2017) 41, citing *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298, 305 ('*Magno*'); *ICI Australia Operations Pty Ltd v Fraser* (1992) 34 FCR 564, 569–70.

140 Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 424, 458.

141 *Magno* (1992) 37 FCR 298, 305.

142 *Western Australia v Ward* (2002) 191 ALR 1, 273.

under those instruments'.[143] While '[l]egislative history and extrinsic materials cannot displace the meaning of the statutory text',[144] that text does not exist in a vacuum. Notwithstanding that the *Migration Act* does not import the same definition of inhuman or degrading treatment word for word from the *CAT* or *ICCPR*, to say that the terminology adopted by Parliament has no international legal origins would be misleading. It is a domestic 'interpretation' or restatement of the law; a rather literal instance of what Anthea Roberts, in the context of judicial interpretation, has designated a 'hybrid international/national norm'.[145] It is for this reason that the approach of Gageler J is to be generally preferred. His broader contextual interpretation gives greater respect to the international law ancestry of the complementary protection regime. To do so is not to invert the lawmaking procedure of the Australian federation, but rather to pay adequate due to the role of the High Court as the third arm of government; an entity equally bound by the content of the treaty obligations to which Australia has agreed to uphold.[146]

V CONCLUSION

One cannot help but have some sympathy for the High Court. Faced with a Frankenstein's monster of a statutory provision, the judges were prepared to engage with international law and perceived it as relevant to the determination of the issue in the cases, but were not well-equipped to answer the questions asked. One matter that is perhaps revealed by the decision in *SZTAL* is that international law is of ample complexity sufficient to require that parties present expert evidence to the High Court.[147] Particularly where, as here, the Court is required to decide on the content of an international law norm before deciding on the role that norm has to play in informing the interpretation of Australian law. The

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143 Foster and Pobjoy, above n 6, 13. Showing prescience, the authors go on to state that 'the separate definitions of 'cruel or inhuman treatment of punishment' and 'degrading treatment of punishment' are likely to cause difficulties for decision-makers'.

144 *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39].

145 Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57, 60, 70. See also Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Politics* 501, 505–6; Reem Bahdi, 'Truth and Method in Domestic Application of International Law' (2002) 15 *Canadian Journal of Law and Jurisprudence* 255.

146 Michael Kirby, 'The Growing Impact of International Law on the Common Law' (2012) 33 *Adelaide Law Review* 7, 35. See also Michael Kirby, 'Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges' (2008) 9 *Melbourne Journal of International Law* 171, 181. One may go so far as suggesting that the High Court is under an obligation to ensure that Parliament is not afforded the last word in the interpretation of statutes that are derived from international legal concepts. Strictly speaking, as a state organ the High Court is required to conform to binding international norms as a failure to do so may impose international responsibility on the state under the *Articles on the Responsibility of States for Internationally Wrongful Acts*: *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, Agenda Item 162, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex ('*Responsibility of States for Internationally Wrongful Acts*').

147 See, eg, the evidence received in respect of foreign citizenship laws in the recent 'Citizenship Seven' cases: *Re Canavan* [2017] HCA 45 (27 October 2017). See also *R v Tang*, in which expert evidence on international law was presented by interveners: *R v Tang* (2008) 237 CLR 1.

incorrect foundations of the Court's reasoning in *SZTAL* would not have changed the result of the decision; being held on remand for a short time in poor prison conditions is unlikely to be considered sufficiently serious to constitute inhuman or degrading treatment.[148] But the Court's reasoning does have the effect of polluting the otherwise clear role of intention in respect of torture, and creating an uncomfortable double standard under which a person may be held criminally liable for inhuman or degrading treatment, yet the same course of conduct will not suffice to afford protection to the victim of that conduct.

The decision in *SZTAL* demonstrates that the High Court continues to approach international law with a conservative mindset, wary of wading too far into that vast ocean lest the 'essentially different' Australian legal system be drowned.[149] But at the same time, the Court seems unwilling to permit 'uncontested interpretation by executive fiat',[150] and is resistant to Parliament's attempt to cast Australian law entirely adrift from international law.[151]

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148 *SZTAL* (2017) 91 ALJR 936, 947–8 [55]. See also *Full Court* [2016] FCAFC 69 (20 May 2016) [94]–[95], [99].

149 Michael Kirby, 'Domestic Implementation of International Human Rights Norms' (1999) 5 *Australian Journal of Human Rights* 109, 109.

150 Andrew Bymes, 'The Meanings of International Law: Government Monopoly, Expert Precinct or Peoples' Law' (2014) 32 *Australian Yearbook of International Law* 11, 28.

151 *SZTAL* (2017) 91 ALJR 936, 952 [83].