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Melissa Curley
University of Queensland

Elizabeth Stanley
University of Queensland

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Keywords

prosecution, moral obligations, victims, abuse

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MELISSA CURLEY* AND ELIZABETH STANLEY**

Abstract

Scholars have noted an increased reliance on extraterritorial criminal jurisdiction as a response to transnational criminal activity, the rise in treaty law, and the resultant moral obligations. Meanwhile, existing international legal commentary notes that there are difficulties attached to using extraterritorial offences as the primary tool to deter and combat Child Sex Tourism ('CST'). While extraterritorial offences are recognised as one (albeit important) part of a spectrum of legal and socio-political sanctions against CST, serious obstacles remain to their effective implementation. Various scholars and commentators have identified the challenges involved in bringing charges related to extraterritorial CST offenses within the jurisdiction of the offender's citizenship. Frederick Martens is an Australian citizen who was prosecuted under s 50BA of the Crimes Act 1914 (Cth), a provision inserted into the Act to prevent and punish CST. Martens' experience exemplifies some of the common difficulties arising in prosecuting extraterritorial CST offences. He was convicted of having sex with a minor outside of Australia and sentenced to a term of imprisonment. It later emerged that there was additional evidence that cast significant doubt upon his guilt, and as a result of this fresh evidence, Martens was granted a pardon and released. The case serves as a warning regarding the difficulties of these trials and the dangers of ill-considered prosecutions. Concerns raised by the case are canvassed in the conclusion, including evidentiary concerns, issues inherent to relying on child witnesses, the time delay often involved in prosecuting CST offenders, fair trial concerns, and the problematic application of extraterritorial jurisdiction. This article aims to contribute to the existing body of research on the application of Australian CST laws and the wider international debate concerning the utility of extraterritorial CST offences, and will address certain related controversies regarding the extraterritorial application of criminal laws, including those regarding sexual offences committed by UN Peacekeeping personnel.

* Senior Lecturer in International Relations, School of Political Science and International Studies, University of Queensland.

** Arts-Law degree candidate, T C Beirne School of Law, University of Queensland.

I Introduction

The necessity of protecting children from sexual abuse and exploitation has been almost universally recognised around the world.¹ A number of international treaties and legal instruments relate to the commercial exploitation of children (including sexual and labour exploitation), such as the *Universal Declaration of Human Rights* ('UDHR'),² and the *International Covenant on Civil and Political Rights*.³ While the UDHR is not legally binding on states, arts 3 (liberty), 4 (slavery) and 5 (degrading treatment) render the sexual exploitation of children contrary to the spirit of the UDHR. The United Nations *Convention on the Rights of the Child* and its optional protocols make specific reference to combating Child Sex Tourism ('CST').⁴ The *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography* was ratified by the UN General Assembly on 25 May 2000, and requires each member state to ensure that its domestic legislation allows the prosecution of its nationals for crimes of child sexual exploitation regardless of whether such acts were committed domestically or internationally.⁵ The *1996 Stockholm Declaration*,⁶ Agenda for Action and subsequent World Congresses have reaffirmed the *Convention on the Rights of the Child* and the *Optional Protocol* provisions and developed further measures to combat child sexual exploitation.⁷

Prosecuting sexual offences committed against children by visiting child sex tourists, foreign residents, or international police or peacekeepers — the latter of which have legal impunity from prosecution in the state of their posting⁸ — have raised serious legal and moral challenges to justice for victims of abuse. For example, there have been

¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 34 ('*Convention on the Rights of the Child*') enunciates State Parties' obligations to protect children from 'all forms of sexual exploitation and abuse'. See also Fiona David, 'Child Sex Tourism Legislation is no "Paper Tiger"' (2000) 69 *Platytypus* 31, 32.

² Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

³ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁴ Above n 1, arts 19, 34.

⁵ *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002) art 3.

⁶ *The Stockholm Declaration and Agenda for Action* (31 August 1996) First World Congress against Commercial Sexual Exploitation of Children <http://www.ecpat.org/wp-content/uploads/2016/04/stockholm_declaration_1996.pdf>.

⁷ Marianna Brungs, 'Abolishing Child Sex Tourism: Australia's Contribution' (2002) 8(2) *Australian Journal of Human Rights* 101, 105.

⁸ See generally Elizabeth F Defeis, 'U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity' (2008) 7(3) *Washington University Global Studies Law Review* 185; Joanne Mariner, 'UN Peacekeepers Who Rape and Abuse are Criminals — So Treat Them as Such', *The Guardian* (online), 20 August 2016 <<https://www.theguardian.com/global-development/2015/aug/20/un-peacekeepers-rape-sexual-abuse-criminals-car-ban-ki-moon>>.

recent reports of the widespread sexual abuse of women and children by UN Peacekeepers in the Central African Republic ('CAR') between 2014 and 2016,⁹ and numerous other UN peacekeeping missions prior to this.¹⁰ Such circumstances raise questions concerning the capacity of a state to assert extraterritorial jurisdiction over its nationals who have committed such criminal offences.

II Child Sex Tourism and the Role of Extraterritorial Law

CST is a form of transnational sexual exploitation of children where nationals of one country — often a comparatively developed country — visit other countries as 'tourists' and engage in the sexual exploitation of children during their visit.¹¹ In some cases, the local authorities of the country in which the crime occurs are unwilling or unable to prosecute the tourist for this activity. In response, many developed nations have enacted extraterritorial legislation to enable their citizens or residents to be prosecuted for CST, even if the act itself takes place in another country. Australia, the UK, the US, and many European Union countries have enacted such laws.¹²

Until 2010, Australia's CST offences were located in the *Crimes Act 1914* (Cth) ('*Crimes Act*') pt IIIA. In 2010, the *Crimes Act* provisions were replaced by sections inserted into the *Criminal Code Act 1995* (Cth), amending the previous offences.¹³ Under both regimes these offences criminalised Australian citizens or permanent residents engaging in sexual intercourse and other acts of indecency with a child under 16

⁹ Mariner, above n 8.

¹⁰ For a wider review of these issues, see Anthony J Miller, 'Legal Aspects of Stopping Sexual Exploitation and Abuse in U.N. Peacekeeping Operations' (2006) 39(1) *Cornell International Law Journal* 71; Muna Ndulo, 'The United Nations Responses to the Sexual Abuse And Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions' (2009) 27(1) *Berkeley Journal of International Law* 127; Roisin Burke, 'Troop-Discipline and Sexual Offences by UN Military Peacekeepers: The UN's Response - Moving beyond the Current Status Quo?' (Working Paper No 1.5, Centre for International Governance and Justice, Australian National University, 2012); Melanie O'Brien, 'Protectors on Trial? Prosecuting Peacekeepers for War Crimes and Crimes Against Humanity in the International Criminal Court' (2012) 40(3) *International Journal of Law, Crime and Justice* 223; Melanie O'Brien, 'Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court: The Big Fish/Small Fish Debate and the Gravity Threshold' (2012) 10(3) *Journal of International Criminal Justice* 525; Sabrine Karim and Kyle Beardsley 'Explaining Sexual Exploitation and Abuse in Peacekeeping Missions: The Role of Female Peacekeepers and Gender Equality in Contributing Countries' (2016) 53(1) *Journal of Peace Research* 100.

¹¹ Karen D Breckenridge, 'Justice Beyond Borders: A Comparison of Australian and U.S. Child-Sex Tourism Laws' (2004) 13(2) *Pacific Rim Law & Policy Journal* 405, 408–9.

¹² See generally The Protection Project, 'International Child Sex Tourism: Scope of the Problem and Comparative Case Studies' (Research Report, Paul H Nitze School of Advanced International Studies, Johns Hopkins University, June 2007) <http://www.protectinonproject.org/wp-content/uploads/2010/09/JHU_Report.pdf>.

¹³ *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) sch 1 inserting *Criminal Code Act 1995* (Cth) div 272 ('*Criminal Code*').

outside of Australia.¹⁴ Despite the constituent elements of the term ‘Child Sex Tourism’ there is no element of tourism required for the offence, so long as it occurs outside Australia. This means that Australian citizens permanently residing overseas can be prosecuted under these offences. Further, the offences contained within the legislation do not make a distinction between the commercial and non-commercial exploitation of children overseas.

Existing international legal commentary has identified the challenges involved in bringing charges related to CST offences in the jurisdiction of the offender’s citizenship.¹⁵ While extraterritorial offences are recognised as one (albeit important) part of a spectrum of legal and socio-political measures implemented to combat CST, serious obstacles remain.¹⁶ For example, Svensson has argued that ‘[a]ttempting to prosecute an offender for crimes committed thousands of miles away has inherent difficulties that will always be present regardless of the degree of cooperation between destination and sending countries’.¹⁷ Some of these difficulties include the use and reliability of child witness evidence, delays in time between the commission of alleged offences and charges being laid, and the collection of evidence in overseas jurisdictions for presentation at trial.

In August 2004, Frederick Martens, an Australian citizen living and working as a pilot and businessman in Papua New Guinea, was arrested in Cairns for offences allegedly committed pursuant to *Crimes Act* s 50BA. It was alleged that in 2001, Martens had engaged in sexual intercourse with a 14-year-old girl. Martens was convicted, and spent several years in jail in Australia. He was ultimately successful in an application for pardon after further evidence came to light demonstrating that he could not have committed the alleged offence because he was not with the girl in question in Port Moresby at the time the offence was alleged to have been committed. As a result of his wrongful conviction and imprisonment he pursued civil claims for compensation against the Australian and Papua New Guinean governments. This article focuses on

¹⁴ See generally James McNicol and Andreas Schloenhardt, ‘Australia’s Child Sex Tourism Offences’ (2012) 23(3) *Current Issues in Criminal Justice* 369; Danielle Ireland-Piper, ‘Extraterritoriality and the Sexual Conduct of Australians Overseas’ (2010) 22(2) *Bond Law Review* 16.

¹⁵ See, eg, Naomi L Svensson, ‘Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Laws’ (2006) 28(3) *Loyola of Los Angeles International and Comparative Law Review* 641; Kalen Fredette, ‘International Legislative Efforts to Combat Child Sex Tourism: Evaluating the Council of Europe Convention on Commercial Child Sexual Exploitation’ (2009) 32(1) *Boston College International & Comparative Law Review* 1, 23–8; McNicol and Schloenhardt, above n 14, 384–7; Catherine Beaulieu, ‘Extraterritorial Laws: Why They Are Not Really Working and How They Can Be Strengthened’ (Compendium of Articles, End Child Prostitution in Asian Tourism International, September 2008) 8–13.

¹⁶ For a more in-depth discussion of these issues in relation to the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth), see Ireland-Piper, ‘Extraterritoriality’ above n 14, 19–30; McNicol and Schloenhardt, above n 14, 372–8.

¹⁷ Svensson, above n 15, 664.

the pitfalls and challenges of extraterritorial CST prosecutions through a case-study of the Martens case. It examines the circumstances and facts of the case to provide a lens through which to consider some of the concerns often present in CST cases noted above. This article addresses the way in which the case was handled by the Australian Federal Police ('AFP') and the Commonwealth Director of Public Prosecutions ('CDPP'). In particular, the significant issues encountered throughout the gathering of evidence in this case serve to highlight the problematic power imbalance between the defence and prosecution in extraterritorial CST cases.

The case also raises questions regarding the proper application of CST legislation, and the importance of preserving a fair trial when prosecuting those accused of exploiting children overseas. This article aims to contribute to the existing body of research on the application of Australian CST laws and the wider international debate concerning the utility of extraterritorial CST offences.¹⁸ It also addresses certain related controversies regarding the extraterritorial application of criminal laws, including sexual offences committed by UN Peacekeeping personnel.¹⁹ It does not, however, attempt to make wider claims from the Martens case in relation to prosecution trends and outcomes under the *Crimes [Child Sex Tourism] Amendment Act 1994* (Cth). Those who sexually abuse children should undoubtedly be pursued and punished, but the experience of Frederick Martens should serve to illustrate some of the difficulties surrounding prosecutions under extraterritorial CST offences. This article therefore aims to complement existing research on the prosecution of sexual offences against children by tourists and permanent residents in the jurisdiction in which the offences occurred.²⁰ The article also discusses concerns raised by the case and adds to the wider literature regarding the role of extraterritorial jurisdiction and transnational crime in relation to evidentiary concerns, issues inherent to relying on child witnesses, the time delay often involved in prosecuting CST offenders, fair trial concerns, and the problematic application of extraterritorial jurisdiction.

III The Facts and History of the Case

A Introduction

Frederick Martens was initially arrested in Cairns in August 2004. He was charged with two counts of engaging in sexual intercourse with a

¹⁸ See, eg, Rita Shackel, 'The Commercial Sexual Exploitation of Children: A Review of International Legal Responses' [1999] *Australian International Law Journal* 91; Breckenridge, above n 11; Svensson, above n 15; Beaulieu, above n 15; Fredette, above n 15, 23–7.

¹⁹ These issues are explored in the various sources cited above n 8, 10.

²⁰ See, eg, Melissa Curley, 'Combatting Child Sex Tourism in South-East Asia: Law Enforcement Cooperation and Civil Society Partnerships' (2014) 41(2) *Journal of Law and Society* 283.

person under 16 while outside of Australia under *Crimes Act* s 50BA. One of these charges proceeded to trial, where Martens was convicted and sentenced to five and a half years imprisonment. He unsuccessfully appealed both the conviction and sentence in April 2007.²¹ In March 2008, members of Martens' family submitted fresh evidence that cast significant doubt on his guilt to the Minister for Home Affairs as part of an application for pardon. While the application was refused, the Federal Court found that the Minister's power to refuse the application for pardon had been exercised incorrectly, and that the matter should be referred to the Court of Appeal to determine if a pardon should be granted under *Criminal Code 1899* (Qld) s 672.²² The Court of Appeal subsequently quashed his conviction in 2009.²³ In 2008, the prosecution entered a *nolle prosequi* with respect to the second charge, which had never gone to trial.²⁴ Martens then initiated civil proceedings against the Australian and Papua New Guinean governments in 2012.²⁵ This Part examines each step of the case in more detail.

B The Background Circumstances and Investigation

Frederick Martens conducted many business activities in Papua New Guinea, and flew planes as a commercial pilot. He often flew supplies and passengers between Port Moresby and a resort located in a remote area of the Western Province of Papua New Guinea, and was interested in purchasing the resort. The complainant's father was the principal traditional landowner of the lands around the resort, and members of her family worked in the trading stores in the resort and in her village. The owner of the resort at the time, Mr Brumley, had been involved in disputes with the traditional landowners over the resort. For this reason, when Martens was interested in buying the resort he included the traditional landowners in his negotiations. He sought to establish good relations with them, and suggested that he could sponsor the complainant to attend a high school in Cairns.²⁶

The complainant's first contact with police regarding Martens was when she was interviewed by a male officer of the Papua New Guinea Police ('PNG Officer A'), with whom she produced a signed statement stating that Martens had engaged in sexual intercourse with her.²⁷

²¹ *Martens Appeal* [2007] QCA 137 (20 April 2007).

²² This section allows a Crown Law Officer considering a petition for pardon to refer the whole case to the Court, who then hears and determines the case as though it was an appeal. For a discussion of the application of this section, see generally *Martens Judicial Review* (2009) 174 FCR 114.

²³ *Martens Quashing Proceedings* (2009) 262 ALR 106.

²⁴ Martens, 'Amended Statement of Claim', Submission in *Martens v Stokes*, QSC 613/2010, 31 May 2012, 43 [212].

²⁵ See *Martens v Stokes* [2013] 1 Qd R 136, where Martens' statement of claim was struck out and he was given permission to re-plead.

²⁶ *Martens Appeal* [2007] QCA 137 (20 April 2007) [2], [18]–[19].

²⁷ *Ibid* [7]–[8].

Although the alleged offence was said to have occurred in 2001, this interview took place on 1 December 2003 at the Daru Police Station and was conducted at the request of an AFP officer.²⁸ The complainant gave evidence at Martens' 2004 committal hearing that she had not previously made any complaint to the AFP or Papua New Guinean Police about Martens.²⁹ According to the complainant, prior to this interview, she had not told anyone that she had engaged in sexual intercourse with Martens, and had made only a more limited complaint to an aunt.³⁰ It is not known how the AFP learnt of the alleged offence, though Martens appears to suggest that his ex-wife Raina Martens may have made accusations to this effect.³¹

In March 2004, an AFP Officer ('AFP Officer S') went to the complainant's village to interview her. AFP Officer S had become involved in the operation after receiving the statement made by the complainant to PNG Officer A in late 2003. On or around 5 August 2004, AFP Officer S obtained a statement from another local woman, DM, who claimed that Martens had raped her in 1996 when she was 15. AFP Officer S arrested Martens in Cairns on 24 August 2004 and he was charged with two offences under *Crimes Act* s 50BA, namely engaging in sexual intercourse with a person who was under 16 years of age outside of Australia. The complainant associated with the charge that led to conviction was identified as GN in court records. The other charge never resulted in a conviction, and a *nolle prosequi* was presented in January 2008, after DM swore an affidavit in which she conceded that her original allegations had been untrue.³²

C *The Initial Trial*

In October 2006, Martens was convicted on the charge relating to his alleged sexual encounters with GN after a six day jury trial. He was sentenced to five and a half years imprisonment, with a non-parole period of three years.³³ Although the transcripts of the initial trial are not

²⁸ Ibid [26].

²⁹ Martens, 'Amended Statement of Claim', Submission in *Martens v Stokes*, QSC 613/2010, 31 May 2012, 10 [36].

³⁰ *Martens Appeal* [2007] QCA 137 (20 April 2007) [7].

³¹ One of Martens' arguments in the appeal was that he should have been allowed to cross-examine witnesses about rumours that Raina had allegedly been spreading. The judge's comments from the original trial suggested that it had been 'hinted' that Raina had been behind the initial accusations, motivated by vengeance: *Martens Appeal* [2007] QCA 137 (20 April 2007) [61]. In Martens' Amended Statement of Claim in civil proceedings against AFP Officer S, the AFP and the CDPP, he makes reference to a statement given by Raina Martens to the AFP that stated that the complainant had told her that Martens forced her to have sex with him. This statement is not consistent with other witnesses' evidence, and does not appear to have been used at trial: Martens, 'Amended Statement of Claim', Submission in *Martens v Stokes*, QSC 613/2010, 31 May 2012, 6 [19].

³² Martens, 'Amended Statement of Claim', Submission in *Martens v Stokes*, QSC 613/2010, 31 May 2012, 43 [212].

³³ *Martens Appeal* [2007] QCA 137 (20 April 2007) [73].

publically available, the evidence presented was summarised in detail by McMurdo P in her Honour's judgement in Martens' appeal against his initial conviction.³⁴

1 *The Prosecution Evidence*

Due to the passage of time between the trial and Martens' alleged conduct there was very little direct evidence that shed light on the events in question,³⁵ and the prosecution evidence consisted of statements from a number of witnesses. GN alleged that Martens had flown her to Port Moresby twice. First, he allegedly flew her to Port Moresby in March to fill out forms and get her picture taken so that she could obtain a passport, which she would need to attend school in Australia. On this trip she stayed for two nights with Caroline Martens, Martens' adopted daughter. Martens then flew her back to her village.

Second, GN alleged Martens flew her to Port Moresby between the 10th and the 16th of September 2001. These dates were fixed by reference to GN's birthday (10 September) and Papua New Guinea's national Independence Day (16 September). GN celebrated her birthday in her village before she left for Port Moresby, and she remembered being in Port Moresby for the Independence Day celebrations. On the day of this flight her mother fetched her from school and told her that her father wanted her to go to Port Moresby with Martens. After Martens and GN arrived in Port Moresby they went to Martens' house in the suburb of Korobosea, before they went to what GN identified as 'the party place'. GN asked Martens if he was taking her to her Uncle T's house where her father was staying, and he said that he was not. Instead he took her back to his house, where he said they would sleep in the bedroom. It was alleged by GN that as she was sleeping in the bed beside him, Martens grabbed her, undressed her and had sex with her. The next morning he took her to her uncle's house where she stayed for three weeks before flying home on a commercial flight. In her statement to police, GN claimed that Martens had taken her to her uncle's house on a Saturday, which would mean that the flight occurred on the Friday, and the sexual intercourse on Friday night.

GN's mother's evidence supported her record of events. She stated that Martens flew GN to Port Moresby on two occasions, the second of which was a school day when GN's father was in Port Moresby. She could not remember what day of the week that flight occurred. She gave evidence that EI, a local policeman, was on the plane with GN and Martens.³⁶

Papua New Guinean Senior Constable EI lived in GN's village. He gave evidence that on a Friday in September 2001 he flew from GN's

³⁴ Ibid [2]–[46].

³⁵ Ibid [2]–[28].

³⁶ Ibid [15]–[17].

village to Port Moresby with GN, Martens and one other passenger. After he and the other passenger (a man identified as Pastor Kingsley) were dropped at their destinations, GN and Martens drove off together. PNG Senior Constable EI stayed at the complainant's 'Uncle T's' house, and the next day Martens brought GN there as well.³⁷

The complainant's father gave evidence that Martens had flown him to Port Moresby in September 2001. During his second week there he saw Martens at Uncle T's house with GN and PNG Senior Constable EI in the car with him. He did not know that GN was in Port Moresby.³⁸

GN's cousin N said that she saw GN in September 2001 when Martens brought her to Uncle T's house. She also said that she had run into GN on the street in August 2001 when GN was in Port Moresby and staying at Uncle T's house.³⁹

2 The Defence Evidence

Martens gave and called evidence in his defence.⁴⁰ He said that as part of his efforts to have good relations with the traditional owners of the land around the resort, he agreed to assist GN and her female cousin by sponsoring their costs of schooling in Australia, including travel costs. There were a number of documents that would need to be organised for them to be schooled in Australia. They did not have birth certificates, so in order to obtain passports they required statutory declarations regarding their place and time of birth, as well as photographs that needed to be obtained in Port Moresby. He arranged to fly GN to Port Moresby one Friday so that he could have the photographs taken on Saturday morning and she could return early the next week.

It was standard practice for him to enter the flight crew's flight log into his pilot's logbook when completing the day's flights, as required by Australian law. This log book was tendered in evidence. By reference to it, Martens gave evidence that he had flown GN to Port Moresby on Friday 10 August 2001. The logbook also contained information for September, when the rape was alleged to have occurred. The log book recorded a flight from the village to Port Moresby on both the 9th and 16th of September, but only a return flight from the village to Daru (the previous capital of the Western Province, far from Port Moresby) between those dates. This evidence directly contradicts the prosecution's evidence. GN said that Martens flew her to Port Moresby after 10 September but before 16 September. According to the log book, there was no flight to Port Moresby in that time. Martens maintained that he only flew the complainant to Port Moresby once, in August, which was consistent with the evidence of the log book.

³⁷ Ibid [24]–[25].

³⁸ Ibid [18]–[20].

³⁹ Ibid [22].

⁴⁰ Ibid [29]–[46].

Martens gave evidence about what had occurred in August when he took GN to Port Moresby. He said that PNG Senior Constable EI was on the flight in August, but did not have money to pay for the flight and ‘took off’ as soon as they reached Port Moresby. Martens did not take GN to Uncle T’s house because it was late and it was in a high crime area. Martens’ residence at that time in Port Moresby was a room rented from his friend Ian Proctor, as Raina and Caroline Martens were living in the Korobosea property. They went to the Proctor home, where there would be plenty of room for them both to sleep, but it was locked. They found Mr Proctor at the local squash club, and he agreed that GN could stay at his home with the women of his family. Martens slept in his room while the complainant stayed in the lounge with the women watching TV. Martens assumed that GN slept on the traditional kunai mats on the floor of the lounge. According to Martens they were in separate rooms the whole night and did not have any sexual contact, then or at any other time. Due to the passage of time there was no physical evidence that could establish where the defendant and complainant had stayed that night.

The next morning they drove to have GN’s passport photo taken. A photograph of the complainant and negatives in a Fotofast package were tendered in evidence, and handwritten on the back was the date ‘11-8-01’. A receipt for \$9.00, dated the same, was also submitted, although it did not describe what was purchased or where. One of the photographs had handwriting on the back confirming it was of the complainant, with the date 16 August 2001. The passport itself was issued on 24 August 2001. The material associated with the passport photos was part of the limited amount of physical evidence that was tendered at the trial.

Ian Proctor also gave evidence that supported Martens’ story. He said that he had met Martens and a young woman, introduced to him as “G”, one Friday night in 2001. The three of them went to his home and GN watched television with his daughter and mother and then slept in the lounge with them. He slept in the end bedroom while the defendant slept in the bedroom closest to the lounge room. He also gave evidence that the house was not stable, and it was easy to hear anyone moving around at night. He thought that the date they had stayed at his house was 10 August.

Caroline Martens, the adopted daughter of Fred Martens, gave evidence in his defence. She was living in one of Martens’ units in Korobosea, having separated from her boyfriend in August 2001. She remembered the complainant coming to the Korobosea units in August and again around 10 or 11 September. Although this evidence was given as part of the defence case, it in fact seemed to support GN’s recollection of events, as it placed her in Port Moresby, on the defendant’s property, during 10-16 September, the time GN had said the offence occurred.

On consideration of all the evidence, the jury found Martens guilty, and the judge sentenced him to five and a half years in jail, with a three year non-parole period.

D *Grounds of Appeal*

In 2007, Martens appealed the conviction in the Queensland Court of Appeal. Though he argued the appeal on a number of grounds, Martens' main contention was that the evidence should not have been enough to convince the jury, and that a *Longman* type warning should have been given to make the jury aware of potential problems with the evidence.⁴¹ Martens had produced some physical evidence to support his case, but it was not conclusive, and the jury's decision came down to whether they believed Martens' story or the complainant's, based on the direct evidence given by the various witnesses to events.⁴²

The most significant area of conflict on the evidence was the timing. GN claimed that she had flown to Port Moresby with the defendant twice, once in March and once in September 2001, while Martens claimed he had only flown her to Port Moresby once, in August. Caroline Martens, PNG Senior Constable EI and the complainant's parents and female cousin, N, all gave evidence that supported the complainant being in Port Moresby in September. Fred Martens, Caroline Martens and Ian Proctor's evidence placed the complainant in Port Moresby in August. The few pieces of physical evidence tendered at trial went to this issue of timing. The passport and the associated materials clearly pointed to GN having been in Port Moresby in August. On appeal, it was said that the jury was not required to find that GN was wrong about the September trip because she was confused about the timing of the passport photograph.⁴³ The only physical evidence that spoke to whether the September trip occurred was the log book. The log book was handwritten,⁴⁴ and although it had been kept since 1999 it contained only one stamp indicating there had been a mandatory biennial flight review, dated 28 March 2003, long after the flights in question.⁴⁵ This suggested that it had not been independently corroborated or checked. On appeal it was found that the jury was open to find this evidence unpersuasive. As they found Martens guilty the jury must have found that the log book was inaccurate, whether by accident or by design on Martens' part.

The proper identification of the residences in which the complainant and Martens had stayed were the subject of conflicting evidence at trial. From August 2001 onwards, Caroline Martens had been staying in one of Fred Martens' two units, situated above his office in Korobosea.⁴⁶ According to both Fred and Caroline Martens, his wife Raina Martens (from whom he had effectively separated) lived in the other unit.⁴⁷ According to the evidence of Caroline Martens, Frederick Martens and

⁴¹ *Longman v The Queen* (1989) 168 CLR 79.

⁴² *Ibid* [48].

⁴³ *Ibid* [49].

⁴⁴ *Ibid* [33].

⁴⁵ *Ibid* [38].

⁴⁶ *Ibid* [45].

⁴⁷ *Ibid* [37], [45].

Ian Proctor's evidence there was no electricity or water at the Korobosea units during August and September, as those utilities had been cut off.⁴⁸ In her initial statement to PNG Officer A, GN said that on the second trip to Port Moresby (the September trip) she and the defendant travelled from the airport to Caroline Martens' house, where she was watching TV. Later on cross-examination, however, she agreed that there was no electricity at the premises.⁴⁹

In the evidence GN gave at trial she identified the premises where she had stayed as being in Korobosea. She did not remember whether there was a locked gate around the premises, as there was at the Korobosea units. GN denied that Raina Martens was living in the other unit. She said that before they went to the 'party place' she had showered, but according to other evidence there was no water at the Korobosea units at that time. She gave evidence that after they returned from the 'party place' there was no electricity, and the defendant had to light a candle. She denied spending the night at Ian Proctor's house, where there was both water and electricity.⁵⁰ The inconsistencies between GN's evidence at trial and her statement to PNG Officer A were said to be a result of her difficulties in communicating with the officer, and it was accepted by the judge and witnesses that many of the words in her statement were his, not hers.⁵¹ The judges on appeal said that these inconsistencies did not compel the jury to have reasonable doubt about the occurrence of the offence.⁵²

The defence attempted to suggest at the original trial that GN's accusations had been fabricated and that the false allegations had been organised by Raina Martens. An account of an angry Raina Martens seeing the defendant in the car with the complainant and Caroline Martens appeared in the evidence of all three witnesses. This led to a violent altercation between Martens and Raina's family, when the latter threw rocks at the car that Martens, GN and Caroline were driving in.⁵³ There was also evidence given that GN's aunt had a connection to Raina, as they were both Kerema people, who are generally regarded to be intimidating. It appears that the defence was trying to suggest that Raina had intimidated GN into making false accusations. However, while Raina Martens had a motive to discredit the defendant and knew of the complainant, GN denied making false accusations and there was no evidence that she had.⁵⁴ The trial judge did not allow the defence to cross examine the witnesses about rumours that Raina Martens had been spreading about a relationship between the defendant and the complainant. On appeal it was held that the trial judge was right to close off this area of questioning. Even if those rumours had reached the

⁴⁸ Ibid [37], [39], [45].

⁴⁹ Ibid [8].

⁵⁰ Ibid [11], [39].

⁵¹ Ibid [50].

⁵² Ibid [56].

⁵³ Ibid [9], [36], [45].

⁵⁴ Ibid [52].

complainant, and the police had sought her out based on reports from Raina Martens, this would only matter if those rumours had caused her to make a false accusation, which she denied. It was held that this would have distracted the jury from their true task, and was not a sufficient reason to disregard the rule against hearsay.⁵⁵

The judges on appeal found that the jury was entitled to convict on the evidence. None of the other grounds of appeal succeeded, and the original sentence was upheld.

E *The Fresh Evidence and Application for Pardon*

Ever since his arrest, Martens had asserted that there were civil aviation records which could verify the evidence provided by the logbook. During the committal hearing for the original trial, AFP Officer S said that she and another AFP officer had made enquiries about these records, but had been told that records of aircraft movement were not kept for longer than 3 months. She read an email from the Papua New Guinea Police that stated that the Civil Aviation Authority (the 'CAA') said that they were not required to keep flight records for individual pilots and they did not have records of Martens' flights. At a later point in the committal hearing she said that further enquiries had been made, but the CAA had been unable to locate any record. Inspector Ibgasi of the Papua New Guinean Police gave a statement saying that no records could be found for the relevant aircraft.⁵⁶

By 5 March 2008,⁵⁷ CAA records titled 'Aerocharge Invoices Schedule' had been located by members of Martens' family.⁵⁸ The records were certified by an officer of the CAA as true and correct. Records are kept of aircraft that take off from unmanned aerodromes, both for safety and so that the CAA can charge for the use of the aerodromes. The initial records of the flights made by the air traffic controllers are not kept once the information on them has been transferred by the accounts department to the invoice schedule.⁵⁹ This may explain why the AFP and Papua New Guinean Police were told that the records did not exist. The flight records confirmed the evidence of the log book that there had been no flights from the village to Port Moresby between 9 and 16 September, when the complainant alleged the offence occurred. Though the records did not contain details of the pilot, only of the aircraft, the aircraft in question had not been flown by anyone other than Martens, nor had he flown any other aircraft. In quashing the conviction, the Queensland Supreme Court

⁵⁵ Ibid [57]–[58].

⁵⁶ *Martens Quashing Proceedings* (2009) 262 ALR 106, 144 [168].

⁵⁷ The date at which a document was submitted to the Minister for Home Affairs in pursuit of a pardon based partly upon the new evidence: see *Martens Judicial Review* (2009) 174 FCR 114, 116 [3].

⁵⁸ *Martens Quashing Proceedings* (2009) 262 ALR 106, 143 [165].

⁵⁹ Ibid 140–1 [150].

commented that there was no reasonable doubt as to the authenticity of those records.⁶⁰

In March 2008, Martens submitted an application to the Minister for Home Affairs that amounted to a request to either recommend that the Attorney-General grant a pardon, or to refer the case to the Queensland Court of Appeal in accordance with *Criminal Code Act 1899* (Qld) sch 1 s 672A. This section allows a Crown Law Officer considering a petition for the exercise of the pardoning power to refer the case in its entirety to the court, which will consider the case as if it were an appeal.⁶¹ The Minister declined these requests, and Martens began proceedings for a judicial review of the decision.⁶² He argued that the Minister had not had the lawful power to make a determination whether or not to refer the case to the Court of Appeal, and that the Minister had not taken relevant considerations into account when declining the requests made of him. Although the first ground failed, Martens was successful on the second. The Minister had declined the request, despite the new evidence, on the grounds that because it only corroborated evidence that had been seen by the jury at trial (the logbook), it could not be regarded as ‘new evidence’.⁶³ Logan J judged that the Minister had used too strict a test, and that he should have instead asked whether it was reasonably arguable that an appellate court might find that there is a significant possibility that a jury, acting reasonably, would have acquitted.⁶⁴

Logan J found that the Minister had failed to take account of the relevant considerations, and that the matter should be referred back to the Minister for further consideration.⁶⁵ On 9 April 2009, the Attorney-General referred the case to the Court of Appeal under *Qld Criminal Code* s 672A.⁶⁶ The matter was heard as if it were an appeal by the Supreme Court of Queensland, who found that the conviction could not be supported by the evidence, and ordered that it be quashed and the order for imprisonment set aside.⁶⁷ All three judges agreed on the effect of the new evidence, although Fraser JA dissented, finding that the court had no jurisdiction to quash the conviction.⁶⁸

F Civil Claims

After his release and the quashing of his conviction, Frederick Martens began legal proceedings against AFP Officer S and the Commonwealth of

⁶⁰ Ibid 141 [151].

⁶¹ *Criminal Code Act 1899* (Qld) sch 1 (‘*Qld Criminal Code*’) s 672A.

⁶² These proceedings were commenced under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The relevant proceeding is *Martens Judicial Review* (2009) 174 FCR 114.

⁶³ *Martens Judicial Review* (2009) 174 FCR 114, 133 [63], quoting Letter from Minister for Home Affairs to Frederick Martens, 4 September 2008.

⁶⁴ *Martens Judicial Review* (2009) 174 FCR 114, 135 [68].

⁶⁵ Ibid 138 [78].

⁶⁶ *Martens Quashing Proceedings* (2009) 262 ALR 106, 111 [19].

⁶⁷ Ibid 149 [204].

⁶⁸ Ibid 121–2 [53]–[54].

Australia to claim damages for various harms arising out of his prosecution. His first claim was struck out due to his failure to submit a written notice of claim to the proposed defendant before starting a proceeding in court pursuant to the relevant personal injury legislation.⁶⁹ He appealed this decision, and was partially successful.⁷⁰ In his original statement of claim, Martens stated that the defendants:

- (a) conspired to pervert the course of justice;
- (b) maliciously prosecuted the plaintiff;
- (c) were guilty of misfeasance in a public office;
- (d) were guilty of breach of statutory duty;
- (e) defamed the plaintiff to the world at large and, inter alia, to the owners of the Pajinka Resort on Cape York;
- (f) breached their international obligations to the sovereign state of Papua New Guinea for their own purposes to the detriment of the plaintiff, and so that he would not have the safeguards and freedoms afforded to him by the Constitution thereof as a resident of Papua New Guinea;
- (g) breached their duty of care to the plaintiff; and
- (h) committed perjury.⁷¹

Martens' statement of claim received significant discussion during the appeal. The judge noted that perjury is a crime, not a course of civil action, and it was never established (and was not argued on appeal) that Martens could have standing to sue regarding the AFP's international obligations to Papua New Guinea.⁷² Wilson AJA further criticised the statement of claim for being unclear. It did not specify what conduct was relied upon as the basis for each cause of action.⁷³ The statement contained claims for damages for 'physical, emotional, psychological and financial injury', but only the claims for damages for personal injury were satisfactorily enunciated, and the other claims for damages were not clearly articulated or based on the information contained in the statement of claim.⁷⁴ The claim had initially been struck out because it did not comply with the relevant legislation, but this only applied to claims for personal injuries. Because it was unclear whether all of Martens' claims did in fact relate to personal injuries, the court ordered that he would have leave to file an amended statement of claim to plead any claim that is not for personal injuries.⁷⁵

⁶⁹ *Martens Damages Proceedings* (2011) 247 FLR 357.

⁷⁰ *Martens v Stokes* [2013] 1 Qd R 136.

⁷¹ *Martens Damages Proceedings* (2011) 247 FLR 357, 358 [2].

⁷² *Martens v Stokes* [2013] 1 Qd R 136, 150 [51].

⁷³ *Ibid* 139 [14].

⁷⁴ *Ibid* 139 [14], 143 [34].

⁷⁵ *Ibid* 151 [59].

By the end of May 2012, an amended statement of claim had been prepared by lawyers acting for Martens.⁷⁶ This statement of claim added the CDPP as a third defendant. Martens claimed damages for reputational harm⁷⁷ and pecuniary loss. Rather than the eight grounds the previous claim was based on, the amended statement of claim focuses on the actions of the defendants in pursuing the prosecution, and argued that they could not have honestly thought there was a proper case, did not have sufficient grounds to pursue the case, and only ever did so because they were succumbing to pressure to prosecute an Australian citizen in Papua New Guinea for child sex offences. This statement of claim was submitted to the court in November 2012.⁷⁸ To date, the parties appear to have voluntarily withdrawn the claim and no other publicly available sources appear to comment on the claim.

IV Concerns Raised by the Case

A *The Conduct of the AFP and CDPP*

The most obvious anomaly in the case is the failure of the AFP to locate the evidence that proved that Martens was not able to commit the offence upon which he was indicted. The AFP had known that the CAA in Papua New Guinea kept records of flights since at least 29 December 2004, when Martens' solicitors sent the CDPP a letter informing them, *inter alia*, of the existence of those records. Furthermore, once the records were located the CDPP attempted to argue that, as they existed at the time of the original trial, they were not fresh evidence, and should not be considered in Martens' application for pardon. Chesterman JA commented:

It is a poor reflection upon the two organisations that one should have failed to find them, and denied their existence, and the other object to their use in the reference on the ground that the petitioner should have obtained them earlier.⁷⁹

Martens went further than saying that the AFP should have been more rigorous in locating the evidence, alleging that the prosecution had been malicious and corrupt. The first document sent to the Minister of Home Affairs as part of his pardon request was titled '*The Queen v Frederick Arthur Martens: A Corrupt Prosecution*'.⁸⁰ In this document he alleged that the AFP had not simply failed to locate the Aerocharge invoices and

⁷⁶ Martens, 'Amended Statement of Claim', Submission in *Martens v Stokes*, QSC 613/2010, 31 May 2012.

⁷⁷ *Ibid* [115]–[116].

⁷⁸ Queensland Courts Registry 'File Summary: 613/10 Martens v Stokes & Another' (7 September 2015) Queensland Courts <<http://apps.courts.qld.gov.au/esearching/FileDetails.aspx?Location=CRNS&Court=SUPRE&Filenumbr=613/10>>.

⁷⁹ *Martens Quashing Proceedings* (2009) 262 ALR 106, 144 [170].

⁸⁰ *Martens Judicial Review* (2009) 174 FCR 114, 116 [3].

other evidence, but had deliberately suppressed this evidence as part of a conspiracy to fabricate the allegations against Martens.⁸¹ The Minister commented that there was no evidence indicating that the records had ever been suppressed. The evidence Martens presented to show that there was a conspiracy against him was ‘hearsay accounts of varying levels of remoteness’.⁸² The Minister thought that this evidence ‘did not clearly demonstrate that there was a conspiracy to frame Martens’,⁸³ and there does not seem to be anyone, other than Martens, who disagrees with that assessment.

Beyond Martens’ assertions, there is no evidence to support the claim that there was a conspiracy to falsely convict him for CST crimes. Nevertheless, the case resulted in criticism of the AFP for its conduct during the trial and subsequent appeal. Even if the AFP’s only mistake was to fail to find the evidence, the high profile nature of the case resulted in the Agency’s motive being questioned and discussed in the media. A *Courier Mail* article titled ‘Spotlight on AFP Motives — Jailed child-sex case pilot’s claim’ contains the allegation (by Martens) that the AFP ‘muscled its way into the potentially high-profile investigation to boost its standing in the region’.⁸⁴ These sorts of allegations could potentially reduce public and political confidence in the AFP.⁸⁵ Martens’ compensation claim was originally for \$45 million.⁸⁶ The concerns noted above speak to broader issues of police and government conduct, ethics and investigation requirements, and difficulties with the collation of evidence in foreign jurisdictions. While space precludes a broader discussion, the role and impact of increasing police involvement in extraterritorial criminal prosecutions, participation in peacekeeping missions, and ‘police-building’ operations, are emergent topics in the policing and law enforcement field.⁸⁷

⁸¹ Ibid 134–5 [64].

⁸² Ibid.

⁸³ Ibid 134 [63].

⁸⁴ Michael Wray, ‘Spotlight on AFP Motives - Jailed Child-Sex Case Pilot’s Claim’, *Courier Mail* (Brisbane), 12 March 2010, 28.

⁸⁵ See also Danielle Ireland-Piper, ‘Abuse of Process in Cross-Border Cases: *Moti v The Queen*’ (2012) 12(2) *QUT Law and Justice Journal* 120. In the discussed case, Mr Julian Moti, the former Attorney-General of the Solomon Islands, was deported and charged in Australia with extraterritorial child sexual offences. He, like Martens, claimed that there was a political motivation behind the charges.

⁸⁶ Melanie Petrincec, ‘Pilot Fights for \$45m Claim’, *The Cairns Post* (Cairns), 31 March 2011, 9.

⁸⁷ For a review of some debates in this area, see generally Markus Dubber and Mariana Valverde (eds), *The New Police Science: The Police Power in Domestic and International Governance* (Stanford University Press, 2006); Shahar Hameiri, ‘Governing Disorder: The Australian Federal Police and Australia’s New Regional Frontier’ (2009) 22(5) *The Pacific Review* 549.

B Evidentiary Concerns

The difficulty in gathering evidence from a foreign jurisdiction is a concern associated with extraterritorial offences. Martens' experience highlights a number of evidentiary concerns associated with many CST cases, such as the use of child witnesses, the necessity of co-operation with local law enforcement, issues associated with time delay, and the imbalance of resources between prosecution and defence that is often present in criminal cases, but is magnified in the case of CST offences.

1 Child Witnesses

Due to the nature of CST offences, the use of child witnesses will often be necessary to achieve a conviction. The use of child witnesses in these cases can create difficulties. Child witnesses can sometimes be perceived as unreliable or inaccurate,⁸⁸ and this perception can be exacerbated by cultural differences.⁸⁹ Cultural issues not normally dealt with in an Australian context were touched upon in the Martens case as an explanation for the inconsistencies between GN's statements to PNG Officer A and her later statements. GN had trouble communicating with PNG Officer A as he was a male, and much of her statement was later said to be composed of his words, not her own, and conflicted with her other evidence.⁹⁰ The court also commented on the age of GN, noting that '[t]he jury were entitled to accept that the complainant was confused as to the date of the passport photographs, especially as she was young [and] unsophisticated'.⁹¹ Of course, GN's evidence turned out to have more than minor inconsistencies, as it was incorrect as to the crucial details of the date and existence of a second flight. There was some evidence (although it was not admitted or accepted by a court) that GN had told some relatives that she had fabricated the accusation.⁹² However, there is insufficient evidence to determine whether GN's evidence was mistaken or deliberately false.

Both within Australia and internationally, reforms have been adopted to improve the environment in which child witnesses give evidence, particularly in relation to sexual offences. These reforms include the provision of adult attendants to provide emotional support to child

⁸⁸ Danielle Ireland-Piper, 'Extraterritoriality,' above n 14, 24–5.

⁸⁹ This is what occurred in the John Holloway case, the stimulus for reform in the procedures for using child witnesses in Australian courts. The court in this case was criticised for finding the testimony of two 14 year-old boys unreliable without properly appreciating their cultural differences and unfamiliarity with an adversarial system of justice. Holloway had been charged with engaging in sexual intercourse with two 14 year-old Thai boys, who were also the key witnesses in the case. The boys gave evidence via video link, and were cross-examined over three days in a confronting manner including questions as to their sexual history and referred to as 'prostitutes' and 'street-children' by the defence. The charges were dismissed following the committal proceedings. See Brungs, above n 7, 109–10.

⁹⁰ *Martens Appeal* [2007] QCA 137 (20 April 2007) [8], [50].

⁹¹ *Ibid* [49].

⁹² *Martens Quashing Proceedings* (2009) 262 ALR 106 141–3 [152]–[163].

witnesses and alternative methods of giving evidence, which do not require children to come face-to-face with those accused of crimes against them.⁹³ Methods of giving evidence indirectly include pre-recorded video statements, live video links,⁹⁴ and screens to prevent child witnesses having sight of the accused. For example, in the United States, a procedure allowing for a child witness to give evidence from behind a screen was successfully challenged under *United States Constitution* amend VI. This amendment gives an accused the right 'to be confronted with the witnesses against him'.⁹⁵ Procedural rules, which aim to enhance the ability to prosecute cases based on the evidence of child witnesses, must balance that goal with the danger of restricting the procedural safeguards which exist to prevent unjust convictions.⁹⁶

Australia's current regime of child sex tourism offences now contains provisions which allow witnesses in child sex tourism cases who are outside Australia to testify via video link where attending court in person would 'cause the witness psychological harm or unreasonable distress'.⁹⁷ Although not explicitly directed to child witnesses, this provision can be used to help avoid unreasonable distress for a child witness.⁹⁸ Before the adoption of these provisions it had been widely recommended that more child witness friendly procedures should be implemented.⁹⁹ These video links have been used in successful prosecutions in Australia.¹⁰⁰ While a more victim-friendly environment is a positive step forward, it is unlikely that it would have made a difference in Martens' case. GN's evidence was accepted as reliable by the jury, so the evidence does not appear to have suffered appreciably from being heard in open court and exposed to cross examination.

Unfortunately, the fact that the evidence given by GN turned out to be substantially incorrect may have wider reaching repercussions than Martens' freedom. There is no doubt that child witnesses are often integral in convicting offenders who should be found guilty, and that in many cases their evidence is treated with too great a degree of suspicion, rather than too little. High profile cases where evidence given by child complainants is false, or worse, fabricated, do a disservice to legitimate claims that rely on the evidence of child witnesses.

⁹³ See, eg, 18 USC § 3509 (2016).

⁹⁴ *Ibid.*

⁹⁵ *Coy v Iowa*, 487 US 1012 (1988).

⁹⁶ See generally Bennett L Gershman, 'Child Witnesses and Procedural Fairness' (2001) 24(3) *American Journal of Trial Advocacy* 585.

⁹⁷ *Criminal Code* div 279.

⁹⁸ Breckenridge, above n 11, 426–7.

⁹⁹ See, eg, David, above n 1, 34.

¹⁰⁰ See, eg, The World Today, *Child Sex Case Breaks New Ground* (31 May 2000) ABC Local Radio <<http://www.abc.net.au/worldtoday/stories/s133184.htm>>; Breckenridge, above n 11, 427.

2 Time Delay

Time delay was also a notable feature of the Martens case, and may have affected the accuracy of the evidence given at trial. Two years had passed between the alleged offence and the complainant's first interview with police, and the trial took place a further two years after that interview. The evidence submitted at trial was notable for being mainly composed of direct rather than physical evidence, and for the high degree of confusion regarding the dates and locations of events. It is understandable that such a long gap in time could cause this confusion, but it resulted in the jury's decision resting almost entirely upon which group of conflicting witnesses they believed.

A judge is able to give the jury a warning about the reliability of evidence in sexual offence cases after a long delay.¹⁰¹ The rationale for this warning, termed a Longman warning, is the inherent unreliability of memory after a long delay, as well as the lack of opportunity for the defence to explore the circumstances around the alleged offences, due to the time that has elapsed. However, in *Longman v The Queen*, a period of 20 years had elapsed between the alleged commission of the relevant offences and the trial date, and the charges related to offences said to have been committed 'on a date unknown' at any point during a period of a year.¹⁰² This made it almost impossible for the defendant to mount a defence, and the extreme amount of time which had elapsed (along with the age of the victim at the time of the alleged offences) meant that the possibility of error, even in the recollection of an honest witness, was high.

Due to the nature of the offence, a delay in reporting the assault is a common feature in cases of sexual offences perpetrated against children. Children who have been assaulted often delay making a report out of shame, or fear of not being believed or suffering repercussions.¹⁰³ The Longman warning has therefore been criticised, particularly as it has been perceived that judges have 'erred on the side of caution and ... appeal-proof[ed]' their decisions by giving the warning.¹⁰⁴ In New South Wales, the *Evidence Act 1995* (NSW) s 165B ('*Evidence Act*') has reformed the position, and replaced the widely applicable Longman warning with an instruction for the judge to inform the jury where they are satisfied that the accused has suffered a forensic disadvantage because of a delay. Further, the judge is prevented from suggesting to the jury that it would be 'dangerous or unsafe' to convict purely because of the delay that has occurred.

The delay in the Martens case was far less extreme than that present in *Longman*. Only a few years had passed, and the defence was able to

¹⁰¹ *Longman v The Queen* (1989) 168 CLR 79.

¹⁰² *Ibid* 82.

¹⁰³ Jennifer Zhou, 'Challenges in Prosecuting Child Sexual Assault in New South Wales' (2010) 34(5) *Criminal Law Journal* 306, 316.

¹⁰⁴ *Ibid* 317.

gather some evidence and witnesses, although this task may have been easier if less time had elapsed. Furthermore, while a time delay can undoubtedly contribute to the unreliability of memory, in the Martens case the complainant's evidence appeared to be supported by the recollection of other witnesses. For these reasons it was thought that it was not necessary to specifically instruct the jury that the evidence may have been unreliable due to the delay.¹⁰⁵

Although the trial and appeal judges decided that a Longman warning was not required in the Martens case, the effect of time delay should not be forgotten. Evidence gathering is already made difficult by the circumstances inherent to CST prosecutions (young witnesses and the necessity of overseas evidence gathering) and a time delay only exacerbates these difficulties. It would presumably have been less difficult for the AFP to locate the CAA records if they had not been looking for them two years after the original offence. In this particular case there was a likely forensic disadvantage, in the words of the *Evidence Act*, suffered by the defence due to the time delay which had occurred.

It seems that in Martens' case this particular delay occurred because the AFP was not aware of the alleged offence until well after it occurred, when the Papua New Guinean Police Force requested their assistance. It is inevitable that sometimes evidence will only come to light after a significant period of time has passed. Nevertheless, a delay between the offence and investigation of this sort only exacerbates the evidentiary challenges inherent in child sex tourism cases.

3 *Relative Resources of Prosecution and Defence*

The extraterritorial nature of CST offences creates the potential for a high degree of power imbalance between the prosecution and defence. Much of the evidence collection for cases of CST must be done overseas. This presents difficulties for the prosecution, who often must cooperate with or rely upon local law enforcement agencies.¹⁰⁶ This can be seen in the Martens case, where many of the AFP's attempts to locate the CAA records (and the subsequent assurances that they did not exist) were carried out through the Papua New Guinean Police Force. Difficult though it may be for the prosecution to locate relevant evidence, it is generally far harder for the defence.¹⁰⁷ In almost all cases the defendant does not have the advantage of high level connections with other governments to facilitate evidence gathering. While the AFP was able to

¹⁰⁵ *Martens Appeal* [2007] QCA 137 (20 April 2007) [68].

¹⁰⁶ Schloenhardt and McNicol, above n 14, 384–5. This cooperation can be assisted through the use of mutual assistance treaties and AFP liaison officers: see, eg, Daniel Edelson, 'The Prosecution of Persons Who Sexually Exploit Children in Countries Other Than Their Own: A Model for Amending Existing Legislation' (2001) 25(2) *Fordham International Law Journal* 483, 513.

¹⁰⁷ Schloenhardt and McNicol, above n 14, 386–7.

use the local law enforcement agencies to attempt to locate the flight records, Martens was forced to rely on phone calls and visits to the CAA by his family. That the latter approach proved more fruitful in this particular case should not undermine the power imbalance that exists between the defence and prosecution.

Furthermore, defendants can often be disadvantaged by the conditions of their bail, if indeed any is granted, which will often require that they remain in Australia. Martens was lucky in that his family was able to undertake investigations on his behalf; a defendant who must personally locate the evidence for his defence may not be so fortunate. The aim of the legislation is to convict those guilty of CST offences; it should be in everyone's best interests that as much evidence as possible is located.

C Fair Trial Concerns

The issue of sexual abuse of children is emotionally charged, and it is important not to lose sight of the fundamental need to provide those accused of committing such acts with a fair trial when attempting to punish and prevent these offences. Convictions for these offences cost defendants their reputations, freedom and sometimes livelihoods,¹⁰⁸ not to mention the cost of running a prosecution or defence to both the defendant and the public purse. For these reasons it is important not to let the desire to convict those guilty of such offences to override the importance of ensuring a fair trial for those accused. As the Law Council of Australia commented:

[T]he heinous character of child sex offending and the intense community opprobrium which it attracts demands that the greatest care is taken to avoid the possibility of wrongly accusing a person ...¹⁰⁹

As in all criminal cases, a defendant must be regarded as innocent until proven guilty, and the burden of proving their guilt beyond reasonable doubt lies with the prosecution. This presumption is recognised by the UN Human Rights Committee as a fundamental element of a fair trial.¹¹⁰ The jury has the duty to determine whether reasonable doubt exists as to whether the prosecution has proven its case and displaced this presumption. It is possible in CST cases that the jury may have strong feelings about the sexual abuse of children that could

¹⁰⁸ Martens lost many business ventures while imprisoned and was living on Centrelink benefits waiting for his court claim for damages: Michael Wray, 'Plea for Relief as Kids Suffer - Cleared of Child-Sex Charges, Pilot Slams Compensation Delay', *Courier Mail* (Brisbane), 27 April 2010, 15.

¹⁰⁹ Law Council of Australia, Submission No 8 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 [Provisions]*, March 2010, 7.

¹¹⁰ Human Rights Committee, *General Comment No 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) 9 [30].

potentially lead them to favour the evidence of a complainant.¹¹¹ Because of the difficulties in obtaining physical evidence in these types of cases, especially for the defendant, these cases may often come down to a jury's choice between two competing accounts. In this situation the importance of prosecutorial discretion is magnified.

The decision to prosecute is a two-tiered test. The prosecutor should first be satisfied that there is sufficient evidence to prosecute, and secondly they should be satisfied that it is in the public interest to prosecute.¹¹² The Martens case suggests that there may be a danger that the high degree of public interest in CST cases overshadows the requirement for sufficient evidence. In the Martens case what limited physical evidence was available appeared to support the defence case, and the prosecution had been informed of the existence of independent records that would corroborate this evidence. It is possible that, based on this evidence, the case would not have gone to trial had it not been a matter of such public concern. The breadth of some CST offences means that prosecutorial discretion may be the only mechanism to prevent some innocent activities being criminalised,¹¹³ but the Martens case demonstrates that this may not be effective. Whether because of public pressure to prosecute or a desire to punish offenders, there is a danger that if prosecutions are improperly pursued they may lead to convictions unsupported by the evidence.

It has been noted that the new CST offences, like the old offences, do not give any guidance on prosecutorial discretion beyond the two-tiered test that is used for every offence.¹¹⁴ Without clearer guidance the legislation is left open to allegations that it serves a political agenda.¹¹⁵ Martens himself made such allegations, in his statement of claim and elsewhere, claiming that his case was pursued because of pressure to prosecute an Australian citizen in Papua New Guinea for child sex charges.¹¹⁶

D Application of Legislation

Under customary international law, states can claim authority to exercise jurisdiction from three main principles: territoriality, nationality and universality. This article has explored the use of the nationality principle (active nationality) to prosecute perpetrators in the country of their citizenship who have committed sexual offences against children in

¹¹¹ The trial judge in the Martens case commented as much during his directions to the jury, asking them to put those feelings aside to consider the case before them: *Martens Appeal* [2007] QCA 137 (20 April 2007) [60].

¹¹² Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, 2008, [2.4]–[2.14].

¹¹³ Schloenhardt and McNicol, above n 14, 384.

¹¹⁴ Ireland-Piper, 'Extraterritoriality,' above n 14, 40.

¹¹⁵ *Ibid.*

¹¹⁶ Martens, 'Amended Statement of Claim', Submission in *Martens v Stokes*, QSC 613/2010, 31 May 2012, 31 [132].

foreign jurisdictions. The criminalising of acts of nationals occurring overseas falls outside the most basic ground on which a State may claim jurisdiction over a criminal act: the territoriality principle. It is universally recognised that the courts of a State in whose territory a crime is committed may exercise jurisdiction.¹¹⁷ The offences under which Martens was charged do not criminalise activity occurring within the territory of the criminalising state (Australia), but acts committed by nationals of that state in the territory of another (in this case, Papua New Guinea). Jurisdiction is therefore based on the nationality of the person committing the offence ('active personality' jurisdiction). According to Professor James Crawford, nationality 'is also generally recognized as a basis for jurisdiction over extraterritorial acts'.¹¹⁸ He goes on to note that while many states place limits on the nationality principle, which has the potential to result in incidences of parallel jurisdiction and double jeopardy, these limitations are not required by international law.¹¹⁹ A state claiming jurisdiction on the basis of the nationality of the offender does not substitute their jurisdiction for the jurisdiction of the state where the offence occurred, but claims jurisdiction in addition to the jurisdiction the other state may exercise on the basis of the territorial principle (i.e. extraterritoriality).

The rationale for the legislated offences is to deter potential child sex tourists and to provide supplementary prosecutorial mechanisms when child sex tourism occurs.¹²⁰ The offences are not designed to be the law under which everyone who commits a sexual offence against children overseas is punished, but rather to provide a means to prosecute such an offence if the local authorities are unable or unwilling to do so. In many cases there are local laws that criminalise the same behaviour that may be more appropriate to prosecute under. Martens and his lawyers have commented that his case ought to have been tried in Papua New Guinea, rather than Australia. Though he was an Australian citizen, he was a permanent resident in Papua New Guinea and his alleged offence was against a Papua New Guinea national and occurred in Papua New Guinea. Martens' lawyer in Papua New Guinea has commented that the charges could have been prosecuted there, and that they would be asking the Australian Government to explain why the charges were not prosecuted in 'the most natural jurisdiction'.¹²¹

Despite their rationale as supplementary enforcement measures, the offences enable Australia to prosecute any and all Australian offenders. There is a tendency among commenters to see increased prosecutions in Australia as the solution to any problems with the efficacy of the

¹¹⁷ James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 458.

¹¹⁸ *Ibid* 459.

¹¹⁹ *Ibid* 460.

¹²⁰ Schloenhardt and McNicol, above n 14, 372.

¹²¹ Wray, 'Spotlight', above n 84.

legislation. International NGO ECPAT argued in relation to extraterritorial laws that States should:

Exercise jurisdiction over CST crimes based on the active and passive personality principles (applying to both nationals and residents) and, whenever possible, the universality principle; the 'extradite or prosecute' obligation should form part of national law; and

Require that a prosecutor's refusal to proceed is justified.¹²²

The Martens case shows that Australian authorities may not always be in the best position to pursue the charges, and that the importance and advantages of local prosecutions should not be forgotten, despite the desire to ensure that those who commit sexual offences against children are punished.

It is easy to view the difficulties in prosecuting overseas sexual offences as impediments to justice. It has been recommended that to improve their legislation, States should abolish 'double criminality requirements and other impediments to extraterritorial prosecution'.¹²³ It should be remembered, though, that not every factor that may prevent a successful conviction should be seen as an obstacle to be overcome. Instead, these difficulties can sometimes act as an impediment to wrongful convictions. A Longman warning, or a decision not to prosecute for insufficiency of evidence, might sometimes be better seen as preserving the burden of proof and the presumption of innocence than as 'letting a child abuser go free'.

The Martens case further highlights some of the issues raised in the wider literature on use of extraterritorial jurisdiction as a response to transnational crime, such as money laundering and terrorism. As Ireland-Piper notes, the active nationality principle — the notion that a state has jurisdiction over the conduct of its nationals overseas — is often viewed as the strongest basis for direct extraterritorial jurisdiction.¹²⁴ While legal debate exists as to the underlying philosophical justifications for the principle,¹²⁵ scholars such as Arnell provide compelling reasons for the application of active nationality,¹²⁶ such as its emergence in response to increased international mobility and the rise of transnational organized crime. However, Arnell also argues that the nationality principle is a symptom of the societal progression from introspective territorial self-interest to a broader notion of a collective interest in global conduct.¹²⁷

¹²² Beaulieu, above n 15, 17.

¹²³ Edelson, above n 106, 532.

¹²⁴ Danielle Ireland-Piper, 'Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law' (2012) 13 *Melbourne Journal of International Law* 122, 133.

¹²⁵ See generally Alejandro Chehtman, 'The Extraterritorial Scope of the Right to Punish' (2010) 29(2) *Law and Philosophy* 127.

¹²⁶ P Arnell, 'The Case for Nationality Based Jurisdiction' (2001) 5 *International and Comparative Law Quarterly* 955.

¹²⁷ *Ibid* 960–1; Ireland-Piper, 'Extraterritorial Criminal Jurisdiction', above n 124, 133.

The call for greater accountability across borders is also echoed in the work of scholars exploring transnational obligations within international human rights law,¹²⁸ although space prevents a wider discussion of these implications. The article has however attempted to raise the implications of a *move* towards increased reliance on extraterritorial criminal jurisdiction as a response to transnational criminal activity, the rise in treaty law and the moral obligations that may influence a state's decision to utilize extraterritorial jurisdiction.

The discussion above also provides some salient points for debates about the impunity of UN peacekeepers that have allegedly committed sexual crimes against citizens in the countries in which they are based. As Whalan has noted, immunity from prosecution by the host state is intended to allow peacekeepers to operate without host state interference, however in practice 'immunity has enabled impunity' particularly in relation to sexual violence and assault.¹²⁹ As such, states contributing peacekeepers are solely responsible for investigating and prosecuting their personnel who committed crimes. The Martens case and the literature on the difficulties of extraterritorial prosecutions provide a number of cautionary points here, particularly in relation to cases of sexual offences against minors.

The first relates to the *evidentiary concerns* raised in investigating and gathering evidence in a foreign jurisdiction, such as time delays, the likely lack of physical evidence, and the challenges and admissibility of child witness testimony. While not all victims of abuse in UN peacekeeping operations are minors, research indicates that a sizeable proportion of victims are.¹³⁰ Research on extraterritorial CST prosecutions illustrate that many countries where CST occurs are developing economies, with large populations of vulnerable children.¹³¹ Often law enforcement capacity in relation to extraterritorial CST offences is limited or under-funded, particularly given that there are many other complex criminal matters competing for police attention. Under these circumstances, along with social taboos and concerns about reporting and giving evidence about sexual assault, significant barriers exist for law enforcement. These conditions are likely to be at play in many potential prosecutions of UN peacekeepers, where some participating countries will have limited resources to investigate and gather evidence relating to alleged crimes. As O'Brien notes:

¹²⁸ Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2012); Sigrun I Skogly and Mark Gibney, 'Transnational Human Rights Obligations' (2002) 24(3) *Human Rights Quarterly* 781.

¹²⁹ Jeni Whalan, 'Here's How to End UN Peacekeeping's History of Sexual Violence' on Lowy Institute, *The Lowy Interpreter* (29 April 2016) <<https://www.lowyinterpreter.org/the-interpreter/heres-how-end-un-peacekeepings-history-sexual-violence>>.

¹³⁰ For a review of this evidence in both UN and NGO reports, see O'Brien, 'Protectors on Trial?', above n 10, 224.

¹³¹ The Protection Project, 'International Child Sex Tourism Scope of the Problem and Comparative Case Studies' (Report, 2007), 21–2.

For crimes committed by peacekeeping personnel within the jurisdiction of the host state (e.g. civilian UN staff) it is usually not possible for the host state to undertake investigation and prosecution.

Peacekeeping missions operate in climates of armed conflict or post-conflict, in states or regions where there is little to no rule of law, and the law and order structure has collapsed.¹³²

The second relates to *prosecution and defence functions*. The specific context of UN peacekeeping offences — their location and conflict related context — will make it more difficult for both the prosecution and defence to fulfil their function.¹³³ As noted above, Svensson's caution that '[a]ttempting to prosecute an offender for crimes committed thousands of miles away has inherent difficulties that will always be present regardless of the degree of cooperation between destination and sending countries' holds in these circumstances.¹³⁴ While legal avenues should always be considered following sexual abuse allegations, training, awareness-raising and monitoring of UN peacekeeping operations must also be a priority, with tangible penalties applied by the UN if member countries do not see progress.¹³⁵

V Conclusion

The need to punish offenders must, as always, be balanced against the rights of the accused. Incorrect convictions for CST offences do not only come at the cost of someone's liberty and reputation, but have wider consequences for the perception of the greater law enforcement regime. This balancing act is made more difficult in CST cases, because of the unique nature of the offences that make it more difficult for both the prosecution and defence to fulfil their function. The emotive nature and public interest in these offences should not overshadow the necessity of a fair trial for the accused, based on all available evidence. Due to the imbalance between the overseas evidence gathering abilities of the prosecution and defence, the prosecution could attempt to make the evidence gathering channels available to them open to the defendant, especially in cases such as *Martens* where the defence is able to identify evidence that would help their case.

This article has aimed to shed light on the challenges of extra-territorial prosecutions, drawing on one prosecution under s 50BA of the *Crimes Act 1914* (Cth), a provision inserted into the Act to prevent and punish CST. The *Martens* case exemplifies some of the common

¹³² O'Brien, 'Protectors on Trial?', above n 10.

¹³³ O'Brien cites two known cases involving the prosecution of UN peacekeeping personnel; a Canadian case prosecuting nine defendants for the torture and murder of a Somalian teenager, and the US case of *United States v Ronghi*, 60 MJ 73 (2004) in which a peacekeeper was found guilty of raping a murdering a ten-year old girl in Kosovo: *ibid*, 7–8.

¹³⁴ Svensson, above n 15, 664.

¹³⁵ See Whalan, above n 129. See also O'Brien, 'Protectors on Trial?', above n 10; O'Brien, 'Prosecutorial Discretion', above n 10.

difficulties arising in prosecuting extraterritorial CST offences. The case serves as a warning regarding the difficulties of these trials and the danger of ill-considered prosecutions. The article has reviewed concerns raised by the case, including evidentiary concerns, issues inherent to relying on child witnesses, the time delay often involved in prosecuting CST offenders, fair trial concerns, and the problematic application of extraterritorial jurisdiction. While focused on CST, the article also related the context of extraterritorial prosecutions of sexual crimes against children in foreign jurisdictions, to crimes perpetrated by UN personnel during peacekeeping operations (for which they have immunity in the country of the offence). In doing so, it highlights certain related controversies regarding the extraterritorial application of criminal laws. It has not, however, attempted to make wider claims from the *Martens* case in relation to prosecution trends and outcomes under the *Crimes [Child Sex Tourism] Amendment Act 1994* (Cth).

Legal scholarship on prosecutions under Australia's federal extraterritorial child CST laws, initially enacted in 1994 as *Crimes [Child Sex Tourism] Amendment Act 1994* (Cth), has largely focused on the cases of *Moti* and *Martens*.¹³⁶ In April 2010 a new div 272 titled 'Child Sex Offences outside Australia' was inserted into the Criminal Code (Cth) adding to and amending Australia's previous 'Child Sex Tourism Offences' dating from 1994. Like the previous offences, they employ extraterritorial jurisdiction to criminalise a variety of sexual activities with children by Australians or Australian permanent residents. However, the new offences extended the scope of the criminal activity, and make definitional changes that affect the onus of proof.¹³⁷ As is suggested by the new title of the legislation, the agenda of the revised law is broader than its predecessor and aims to enable a more *pre-emptive* legislative regime. Further research on prosecution trends and outcomes under both legislative regimes (the *Crimes [Child Sex Tourism] Amendment Act 1994* (Cth), and div 272 'Child Sex Offences outside Australia') is required to enhance our understanding of the use and application of extraterritorial offences related to this crime type over time. It would also be able to explore the way in which the new offences under div 272 are being applied to emergent patterns of offending against children over the internet, such as seen in the reports of sexual exploitation of children via live webcam in the Philippines.¹³⁸ In sum, the policing and enforcement of extra-territorial offences — committed in online spaces or forums, and its relationship to contact offending — is a growing area requiring further research and exploration.

¹³⁶ McNicol and Schloenhardt, above n 14; Ireland-Piper, 'Extraterritoriality', above n 14; Ireland-Piper, 'Abuse of Process', above n 85.

¹³⁷ McNicol and Schloenhardt, above n 14.

¹³⁸ Hawley, Samantha, 'Australian Federal Police say 250 Australians with child sex convictions travelled to the Philippines in the last four years' *ABC News* (online), 13 April 2015 <<http://www.abc.net.au/news/2015-04-09/afp-250-australians-child-sex-convictions-travelled-philippines/6379794>>.

Emerging debates in legal scholarship on assertions of extraterritorial jurisdiction suggest that greater attention needs to be paid to ‘the development of a consistent set of principles to guide prosecution discretion in the context of extraterritorial crimes’.¹³⁹ In her discussion on extraterritoriality and the future of criminal law, Ireland-Piper argues that, while the increasing reliance on assertions of extraterritorial criminal jurisdiction is justified as a response to a ‘post-globalisation’ increase in transnational organisation crime, ‘fundamental human rights may be undermined if the right to assert extraterritorial jurisdiction is not accompanied by corresponding responsibilities to accord due process, procedural fairness and domestic human rights guarantees’.¹⁴⁰ Ensuring accountability of UN peacekeeping personnel accused of committing criminal offences while based in a foreign jurisdiction was one such further example highlighted. The Martens case is a useful example of the intricacies and potential pitfalls of extraterritorial CST prosecutions, but it also has relevance for debates on the interrelationship between extraterritorial jurisdiction, criminal law and transnational crime.

¹³⁹ Ireland-Piper, ‘Extraterritorial Criminal Jurisdiction’, above n 124, 157. See also Ellen S Podgor, ‘“Defensive Territoriality”: A New Paradigm for the Prosecution of Extraterritorial Business Crimes’ (2002) 31(1) *Georgia Journal of International and Comparative Law* 1; O’Brien, ‘Prosecutorial Discretion’, above n 10.

¹⁴⁰ Ireland-Piper, ‘Extraterritorial Criminal Jurisdiction’, above n 124, 156.