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Piercing the Confidentiality Veil: Physician Testimony in International Criminal Trials Against Perpetrators of Torture

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Articles

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> "Whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret."[1]

INTRODUCTION

Physician-patient confidentiality is a notion deeply rooted in most medical traditions throughout the world.[2] Many nations

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1. The Hippocratic Oath, *in* Roberta M. Berry, *The Genetic Revolution and The Physician's Duty of Confidentiality*, 18 J. LEGAL. MED. 401, 408–09 (1997); *see also* Ben A. Rich, *Post Modern Medicine Deconstructing The Hippocratic Oath*, 65 U. COLO. L. REV. 77, 90 (1993) (explaining that the last two substantive paragraphs of the Oath contain prohibitions against sexual relations with patients and breaches of patient confidentiality; these prohibitions are the only two elements of the Oath which appear in all modern codes of professional responsibility); *see also* Bernard Friedland, *Physician-Patient Confidentiality*, 15 J. LEGAL MED. 249, 256 (1994).

2. *See, e.g.*, *infra* notes 72, 96–98, 141–156, 181, 190–192, 243, 299, 314 and

have codified patient protections and rights with statutes that emphasize the inviolability of this confidence.[3] Physicians are prohibited, except in limited circumstances, to reveal any confidential information or communication.[4] Violating confidentiality often exposes the physician to professional, civil, and sometimes criminal sanctions.[5] Confidentiality is designed to protect the patient's most intimate information as well as foster a candid relationship between physician and patient to facilitate successful diagnosis and treatment.[6] And yet despite the *raison d'être* of confidentiality laws and ethical rules protecting confidentiality, there are circumstances in which exceptions do and ought to exist. This article will argue for an exception to medical confidentiality where such secrets may assist in proving the existence of torture and other grave human rights abuses, or where it may lead to the conviction of those individuals who commit such acts.

Torture and ill-treatment[7] are forbidden by international law[8] and U.S. statute.[9] In the wake of the September 11, 2001 terrorist attacks, some government officials have advocated a loosened condemnation of the practice of torture. An August 2002 memorandum by the U.S. Justice Department defined torture far more narrowly than the Convention Against Torture (Torture Convention),[10] stating,

> Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function, or even death. For purely

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accompanying text.

3. 3 ENCYCLOPEDIA OF BIOETHICS 1424 (Warrren T. Reich ed., 1995).

4. *See, e.g., infra* notes 72, 96–98, 141–156, 181, 190–192, 243, 299, 314 and accompanying text.

5. *See, e.g., infra* notes 157–167, 183–189, 250, 300, 314 and accompanying text.

6. *See, e.g.*, Edington v. Mutual Life Ins. Co., 67 N.Y. 185, 194 (1876) ("To open the door to the disclosure of secrets revealed on the sickbed, or when consulting a physician, would destroy confidence between the physician and the patient, and, it is easy to see, might tend very much to prevent the advantages and benefits which flow from this confidential relationship.").

7. *Cf. infra* notes 148–150 (discussing that states which require doctors to report ill-treatment will also have laws prohibiting the underlying ill-treatment).

8. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(d) (2005).

9. *See infra* notes 154–156.

10. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 197, U.N. GAOR., 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984), *entered into force* June 26, 1987 [hereinafter Torture Convention].

> mental pain or suffering to amount to torture . . . it must result in significant psychological harm of significant duration e.g. lasting for months or even years.[11]

Operating under the August 2002 memorandum and similar memoranda, U.S. forces used torture in Afghanistan, Guantánamo Bay, and Iraq.[12] The Justice Department issued a new memorandum on December 31, 2004, redefining torture in somewhat broader terms.[13] Particularly troubling, and pertinent to this article, was the use of medical records to find the torture victims' particular vulnerabilities.[14]

As torture was being applied by U.S. forces, a few scholars were advocating its reintroduction into the U.S. legal system. One scholar even advocated a torture warrant,[15] but its use has been roundly criticized,[16] even by scholars who acknowledge that

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11. U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL COUNSEL, MEMORANDUM FOR ALBERTO R. GONZALES, COUNSEL TO THE PRESIDENT 1 (2002), http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

12. *See* JAMES R. SCHLESINGER, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW THE DOD DETENTION OPERATIONS, August 2004; Anthony R. Jones, *Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade*, 2004, http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf; *Situation of Human Rights in Afghanistan*, U.N. Doc. A/59/370 (Sept. 21, 2004) (*prepared by* M. Cherif Bassiouni); Luigi Condorelli & Pasquale De Sena, *The Relevance of the Obligations Flowing from the UN Covenant on Civil and Political Rights to US Courts Dealing with Guantánamo Detainees*, 2 J. INT'L CRIM. JUST. 107 (2004) (discussing the legal status of detainees at Guantánamo); *U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison*, 98 AM. J. INT'L L. 591 (Sean D. Murphy ed., 2004).

13. U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL COUNSEL, MEMORANDUM FOR JAMES B. COMEY, DEPUTY ATTORNEY GEN. (2004), http://www.usdoj.gov/olc/dagmemo.pdf.

14. *See, e.g.*, John White & Josh Mintz, *Red Cross Cites Inhumane Treatment at Guantanamo*, WASH. POST, Dec. 1, 2004, at A10, *available at* http://www.washingtonpost.com/wp-dyn/articles/A21262-2004Nov30.html; *cf. infra* note 77.

15. ALAN DERSHOWITZ, WHY TERRORISM WORKS (Yale Univ. Press 2002). Though not an original idea—as the book itself notes, the English employed a torture warrant in the sixteenth and seventeenth centuries—Dershowitz's argument has brought the torture warrant back into scholarly debate. *Id.*

16. *See, e.g.*, Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003); Michael Ratner, *Moving Away From the Rule of Law: Military Tribunals, Executive Detentions and Torture*, 24 CARDOZO L. REV. 1513, 1520-22 (2003) (rejecting Dershowitz's torture warrants); Chanterelle Sung, *Torturing the Ticking Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism*, 23 B.C. THIRD WORLD L.J. 193 (book review) (arguing that any torture violates human dignity, international law, and constitutional law). *But see* Andrew A. Moher, *The Lesser of Two Evils? An Argument for Judicially Sanctioned Torture in a Post-9/11 World*, 26 T. JEFFERSON L. REV. 469 (2004) (arguing that judicially sanctioned torture, possibly in the form of torture warrants, would be superior to the

torture may still occur as a practical reality.[17] In light of the renewed discussion about the use of torture,[18] this article will first examine various national and international approaches to physician-patient confidentiality, then explore possible legal responses to an actual situation involving torture in a Chadian prison and a physician's testimony against its perpetrators. Some of the issues that will be addressed are (1) whether communications between a physician and torture victims are considered confidential; (2) whether testifying in a tribunal about the substance of the communications amounts to a breach of confidentiality; (3) whether exceptions to the rule of confidentiality exist to allow for the admissibility of the physician's testimony; and (4) whether an exception should be established for a physician's testimony where, without such testimony, prosecution of perpetrators of torture would be severely impaired.

I. BACKGROUND: EXAMINATION OF VARIOUS NATIONAL AND INTERNATIONAL LEGAL SYSTEMS AND THEIR APPROACHES TO MEDICAL CONFIDENTIALITY

To explore the role physician-patient confidentiality plays in international law as well as other legal systems, it is helpful to examine a sample of principal legal systems. The article will survey international criminal law, international customary law, U.S. federal court practices, French criminal law, English criminal law, Japanese criminal law, and Belgian criminal law.

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present system of underground torture or a system of "torture lite").

17. *See, e.g.*, Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004) (rejecting the use of torture warrants and the continued illegality of torture while arguing that violation of the law may be followed by public ratification of torture by public officials when the public finds that the benefits of the torture have outweighed its costs); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 YALE L.J. 1011 (2003); John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture be an Option?*, 63 U. PITT. L. REV. 743 (2002) (rejecting the use of torture warrants but conceding that "[t]here will, of course, be 'ticking bomb' hypotheticals in which an officer's decision to use torture to obtain vital information would be viewed by everyone as the best choice under the circumstances").

18. *See generally* TORTURE: A COLLECTION (Sandford Levinson ed., Oxford Univ. Press 2004); Richard B. Bilder & Detlev F. Vagts, Editorial Comment, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689 (2004); Antonio Cassese, *Are International Human Rights Treaties and Customary Rules on Torture Binding Upon U.S. Troops in Iraq?*, 2 J. INT'L CRIM. JUST. 872 (2004).

A. INTERNATIONAL LAW

According to Article 38 of the Statute of the International Court of Justice (I.C.J.), the primary sources of international law are international conventions, customary international law, and general principles of law recognized by states.[19] Judicial decisions, along with the writings of highly qualified scholars, are considered secondary sources of international law.[20] Customary international law has two components: the practice should be widespread,[21] and it should be accepted as law by nearly all nation states.[22] A rule of customary international law is binding upon all nations, except for those states that have expressly and consistently rejected it since its inception.[23]

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19. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1031, 1978 Y.B.U.N. 1052 [hereinafter I.C.J]. The phrase "source of law" refers to the particular rules, which constitute the system and the processes by which the rules become identifiable as rules of law. Sources of international law comprise the criteria under which a rule is accepted as valid in the international law system.

20. *Id.*

21. *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 42 (7th ed., Routledge 1997) (writing that a practice can be widespread even if it is not "universally accepted" as customary international law only requires that a practice be accepted among the states particularly involved in the relevant activity); MALCOLM N. SHAW, INTERNATIONAL LAW 72 (5th ed., Cambridge Univ. Press 2003) (explaining that a state's practice constitutes the initial factor, but there are a number of other factors to be considered, such as the practice's duration, consistency, repetition, and generality); *see also* Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, at 276–77 (Nov. 20) (arguing that custom must be in accordance with a uniform and constant usage); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, at 98 (June 27) ("The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules . . . .").

22. North Sea Continental Shelf (F.R.G. v. Den; F.R.G. v. Neth), 1969 I.C.J. 3, at 44 (Feb. 20) ("Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it . . . . The States concerned must therefore feel that they are conforming to what amounts to a legal obligation."); Lotus Case (Fr. v. Tur.), 1927 P.C.I.J. (ser. A) No. 10, at 28 (Sept. 7); MALANCZUK, *supra* note 21, at 44 ("State practice alone does not suffice; it must be shown that it is accompanied by the conviction that it reflects a legal obligation . . . . a conviction felt by the states that a certain form of conduct is required by international law."); SHAW, *supra* note 21, at 80 ("The *opinio juris*, or belief that a state activity is legally obligatory, is the factor which turns the usage into a custom and renders it part of the rules of international law. To put it slightly differently, states will behave in a certain way because they are convinced it is binding upon them to do so.").

23. MALANCZUK, *supra* note 21, at 48; 1 OPPENHEIM'S INTERNATIONAL LAW §10 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. Longman 1992).

Furthermore, there is a set of international principles which are binding upon all states without exception: *jus cogens*[24] rules, or peremptory norms of general international law.[25]

1. Rules Governing Testimony and Evidence in the International Court of Justice and Other Pre-International Criminal Court Tribunals

Article 49 of the Statute of the International Court of Justice provides: "the Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanation."[26] The I.C.J. adopted its Rules of Court in 1978 in order to codify the procedure of the Court in contentious cases.[27] The I.C.J. Rules are silent about testimonial privileges and confidentiality requirements concerning disputes between states. Article 58 of the I.C.J. Rules, however, allows the Court to determine the method of handling evidence on a case-by-case basis after receiving the views of the parties.[28] Neither the I.C.J. nor its predecessor, the Permanent Court of International Justice, has so far ruled on the issue of preserving professional secrecy in international law.[29]

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24. SHAW, *supra* note 21, at 98–100.

25. 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 23; Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").

26. I.C.J., *supra* note 19, art. 49.

27. I.C.J. Rules of Court (1978), *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicrulesofcourt_20001205.html.

28. *Id.* arts. 58, 31. Article 58 provides:

> The order in which the parties will be heard, the method of handling the evidence and of examining any witnesses and experts, and the number of counsel and advocates to be heard on behalf of each party, shall be settled by the Court after the views of the parties have been ascertained in accordance with Article 31 of these Rules.

Id. at art. 58. Article 31 provides: "In every case submitted to the Court, the President shall ascertain the views of the parties with regard to questions of procedure. For this purpose he shall summon the agents of the parties to meet him as soon as possible after their appointment, and whenever necessary thereafter." *Id.* art. 31.

29. DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 377 (1975). Article 64 of the I.C.J. Rules requires that each witness make a declaration that he shall "speak the truth, the whole truth and nothing but the truth." I.C.J.

International tribunals have undisputed power to ask for production of evidence or to investigate the facts at issue.[30] Treaties establishing tribunals either specify the rules of procedure and evidence or include provisions that allow the tribunals to draft their own rules of procedure.[31] Ad hoc or temporary tribunals generally lack specific rules of procedure,[32] and a definitive body of rules of evidence in international law has yet to be fully developed.[33] The general tendency in international civil cases is to disregard restrictions on the admissibility of evidence, allocating to the presiding judge the duty of weighing the evidence before him or her.[34] Since it is usually very difficult for international tribunals to obtain and prepare evidence, they tend to admit any evidence submitted to the tribunal.[35] International criminal tribunals have more restrictive rules on admissibility of evidence than international civil courts or international arbitration institutions. To determine whether an evidentiary rule applies before an international tribunal, both the particular rules of evidence adopted by the tribunal and the tribunal's application of its rules in previous cases must be considered.[36]

The International Criminal Tribunal for the Former

Rules of Court, *supra* note 27, art. 64; *see also* V. S. MANI, INTERNATIONAL ADJUDICATION: PROCEDURAL ASPECTS 231 (1980) (suggesting that this declaration does not obligate a witness to violate professional secrecy).

30. MOJTABA KAZAZI, BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 165 (1996).

31. *See, e.g.*, I.C.J., *supra* note 19, art. 30.

32. SANDIFER, *supra* note 29, at 8, 41–44 (explaining that international tribunals usually have the power to determine their procedure, including rules of evidence, privileges, and duties of the litigants; but international tribunals have no authority in dealing with evidence that goes beyond the provisions of the agreements creating them and the rules adopted in pursuance thereof).

33. *Id.*

34. *Id.* at 4–9 (writing that international tribunals are most concerned with the facts of the question presented and therefore more intolerant of any restriction on their acquisition of such information). Because international disputes involve states rather than individuals, tribunals' decisions often have more far-reaching effects than litigation. *Id.* Tribunals are usually more reluctant to rely on formal and technical rules of evidence. *Id.* They generally insist on their right to seek the truth wherever it may be found. *Id.*

35. *Cf.* David Weissbrodt & James McCarthy, *Fact Finding by International Nongovernmental Human Rights Organizations*, 22 VA. J. INT'L L. 1, 64–66 (1981) (writing that problems of access to facts encountered by NGOs are similar to problems faced by international tribunals).

36. *See, e.g.*, International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, Rule 89, *available at* http://www.ictr.org/ENGLISH/rules/ 240404/ 240404.pdf [hereinafter ICTR Rules] ("The rules of evidence set forth in this Section shall govern the proceedings before the Chambers.").

Yugoslavia (ICTY) sheds some light on the evidentiary rules of international tribunals. On May 24, 1993, the United Nations (U.N.) Security Council established an *ad hoc* international criminal tribunal to prosecute those persons "responsible for serious violations of international humanitarian law committed in the territory of Former Yugoslavia since 1991."[37] Article 15 of the statute establishing the ICTY states that "the judges of the International Tribunal shall adopt rules of procedure and evidence."[38] The ICTY's Rules of Procedure and Evidence contain several rules relating to non-disclosure of certain information and protection of witnesses.[39] Rule 53(A) states that "[i]n exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order."[40] Rule 70(d) provides, "If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber *may not compel* that witness to answer any question relating to the information or its origin, if the witness declines to answer *on grounds of confidentiality.*"[41] Moreover, Rule 97 of the ICTY's Rules of Procedure and Evidence expressly recognizes a lawyer-client privilege.[42]

The International Criminal Tribunal for Rwanda (ICTR) did not provide for a specific rule relating to a physician-patient privilege. The attorney-client privilege is the only privilege

37. S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993).

38. Statute of the International Tribunal art. 15, May 3, 1993, 32 I.L.M. 1159.

39. International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev.36, *available at* http://www.un.org/icty/legaldoc-e/index.htm [hereinafter ICTY Rules]; *see e.g. id.* Rule 33.

40. *Id.* at Rule 53(A).

41. *Id.* at Rule 70(D) (emphasis added). Moreover, Rule 69(A) provides safeguards for the protection of witnesses: "In exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal." *Id.* at Rule 69(A).

42. *Id.* at Rule 97 ("All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless: (i) the client consents to such disclosure; or (ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure."). In drafting the ICTY Rules of Evidence, privileges recognized by other systems were given consideration. *See* 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 574 (1998). Initially, the attorney-client privilege was the only one recognized. *Id.* A witness could still be relieved of the duty to testify when justified by the fundamental considerations underlying other privileges or if the Rules were amended. *Id.* A witness who refused to testify had to be left the opportunity to raise a privilege. *Id.*

recognized in the ICTR Rules of Procedure and Evidence.[43] Rule 89(C) allows the chamber to "admit any relevant evidence which it deems to have probative value."[44] Though relevant and probative evidence may be admitted, the ICTR cannot force a witness to answer questions when "the witness declines to answer on the grounds of confidentiality."[45]

In *Prosecutor v. Simic*, the ICTY decided that the International Committee of the Red Cross (ICRC) could claim a testimonial privilege concerning testimony by a former employee on facts that came to his knowledge by virtue of his employment with the ICRC.[46] The ICTY stressed the fact that confidentiality was necessary for the effective discharge of the ICRC's humanitarian functions, and furthermore, state practice and the ICTY have recognized the ICRC's practices concerning confidentiality.[47] The ICTY mentioned the ICRC's pivotal role in the observance of humanitarian standards and stated that due to widespread international acceptance of the Geneva Conventions, the ICRC's right to confidentiality has become customary international law.[48] Despite the fact that the former

43. ICTR Rules, *supra* note 36, at Rule 97.

44. *Id.* at Rule 89(C).

45. *Id.* at Rule 70(D).

46. Prosecutor v. Simic, Case No. IT-95-9, *Ex Parte* Confidential Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, ¶ 1 (July 27, 1999) ("The Prosecution describes the witness as an eyewitness who, as a former ICRC interpreter, accompanied ICRC staff on visits to places of detention and during exchanges of civilians supervised by the ICRC. The witness was interviewed by the Prosecution's investigators on facts that came to his knowledge by virtue of his employment.").

47. *Id.* ¶¶ 55–57 ("The principle of confidentiality, on which the ICRC relies, refers to its practice not to disclose to third parties information that comes to the knowledge of its personnel in the performance of their functions. The ICRC argues that this principle is a key element on which it needs to rely in order to be able to carry out its mandate. It has been described as a 'working tool.'").

48. *Id.* ¶¶ 73–74 ("The parties to the Geneva Conventions and their Protocols have assumed a conventional obligation to ensure non-disclosure in judicial proceedings of information relating to the work of the ICRC in the possession of an ICRC employee, and that, conversely, the ICRC has a right to insist on such non-disclosure by parties to the Geneva Conventions and the Protocols. In that regard, the parties must be taken as having accepted the fundamental principles on which the ICRC operates, that is impartiality, neutrality and confidentiality, and in particular as having accepted that confidentiality is necessary for the effective performance by the ICRC of its functions. The ratification of the Geneva Conventions by 188 States can be considered as reflecting the *opinio juris* of these State Parties, which, in addition to the general practice of States in relation to the ICRC as described above, leads the Trial Chamber to conclude that the ICRC has a right under customary international law to non-disclosure of the Information." (footnote omitted)).

employee was willing to testify as to information gathered, the ICTY held that the testimony was inadmissible due to the confidentiality interests of the ICRC. It was the ICRC, not the former employee, who was the holder of the privilege.[49] The ICTY's Trial Chamber has also recognized testimonial privileges for employees and functionaries of the ICTY, as well as for the Commander-in-Chief of the United Nations Protection Force.[50]

In 2002, the ICTY's Appeals Chamber recognized a qualified testimonial privilege for journalists and war correspondents in a case that attracted wide public attention.[51] The decision concerned a subpoena to testify before the ICTY that was issued to a journalist who interviewed one of the accused persons, and later published the interview in the *Washington Post*.[52] The Prosecutor sought the journalist's testimony on the ground that no privilege attached concerning published materials and openly identified sources; the journalist, meanwhile, contested the subpoena, arguing that to compel journalists to testify might hinder their ability to obtain information and inform the public.[53]

The Appeals Chamber determined that compelling war correspondents to testify might hamper their ability to inform the public.[54] If journalists were to be compelled to serve as witnesses, interviewed persons might speak less freely or honestly. Moreover, war correspondents might not only be observers of human rights abuses, but may become victims of human rights abuses themselves.[55] The ICTY decision qualified

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49. *Id.*

50. Prosecutor v. Delalic, Case No. IT-96-21-T, Decision on the Motion *Ex Parte* by the Defence of Zdravko Mucic Concerning the Issue of a Subpoena to an Interpreter (July 8, 1997); Prosecutor v. Blaskic, Case No. IT-95-14-T, Decision of Trial Chamber I on Protective Measures for General Philippe Morillon, Witness of the Trial Chamber (May 12, 1999).

51. Prosecutor v. Brdjanin, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, ¶ 50 (Dec. 11, 2002).

52. *Id.* ¶ 3.

53. *Id.* ¶ 4.

54. *Id.* The Appeals Chamber first determined that there was a public interest in the work of war correspondents since vigorous press was essential to the functioning of open societies. The Chamber also argued that society's interest in protecting the integrity of the newsgathering process was particularly clear in the case of war correspondents because the transmission of vital information was essential to keeping the international public informed about matters of life and death and to assisting those who would prevent or punish the crimes under international humanitarian law that fall within the jurisdiction of the ICTY. *Id.*

55. *Id.* (recognizing the journalist testimonial privilege concerning confidential information and stating that many national courts have held that journalists

the privilege by imposing a two-pronged test for compelling a journalist to testify: the prosecutor must demonstrate that (1) the evidence sought is of direct and important value in determining a core issue in the case and (2) that the evidence sought cannot reasonably be obtained elsewhere.[56] It is important to note that the case concerned a subpoena about non-confidential information (that was already made public) and that the testimonial privilege universally enjoyed by journalists concerning confidential information raises even more serious concerns as to the protection of the role of the journalist.[57]

2. *The International Criminal Court*

In 1994, the International Law Commission presented a Draft Statute for an International Criminal Court to the U.N. General Assembly.[58] On July 17, 1998, the U.N. Diplomatic Conference voted to establish the International Criminal Court (ICC), a permanent international court empowered to prosecute war crimes, crimes against humanity, and genocide.[59] In 1998, the Rome Conference established a Preparatory Commission, which adopted the Rules of Procedure and Evidence for the ICC on June 30, 2000.[60] The Rome Statute establishing the ICC entered into force on July 1, 2002, and the ICC began work in April 2003, after the election of its first chief-prosecutor. Although the ICC has not yet brought any charges, its statute has been accepted by ninety-seven nations and it is

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enjoyed testimonial privilege concerning confidential information and had a right to refuse subpoenas concerning such information (referring to Contempt of Court Act, 1981, § 10 (Eng.); C. PR. PÉN. 109 (Fr.); C.P.P. 200(2) (Italy); StPO 53 (F.R.G.); United States v. LaRouche Campaign, 841 F.2d 1176, 1181–82 (1st Cir. 1988); United States v. Cuthbertson, 630 F.2d 139, 147–48 (3rd Cir. 1980)).

56. *Id.*

57. *But see Reporter Sentenced to 6 months of Home Confinement for Refusing to Reveal his Source*, REPORTERS WITHOUT BORDERS, Sept. 12, 2004, http://www.rsf.org/print.php3?id_article=12055 (discussing the case of a journalist sentenced by a federal court in Rhode Island to six months home confinement for refusing to reveal his source even after the source came forward).

58. DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 418 (3d ed. 2001) ("[The U.N.] General Assembly established an *ad hoc* committee to review the major substantive and procedural issues arising in the draft statute. . . . [I]n summer 1998, diplomats representing over 150 countries convened in Rome to finalize a treaty to establish a permanent international criminal court.").

59. *Id.*

60. Rome Statute of the International Criminal Court art. 64(1), July 17, 1998, U.N. Doc. A/CONF.183/9, *available at* http://www.un.org/ law/icc/statute/ romefra.htm [hereinafter Rome Statute].

investigating incidents in the Democratic Republic of the Congo and Uganda.[61] Article 64 of the Rome Statute states that "the functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence."[62] Furthermore, Article 69(5) states that "the Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence."[63]

Rule 73(3) of the Rules of Procedure and Evidence of the ICC expressly recognizes the confidentiality of communications between victims and their doctors, establishing both physician-patient and psychiatrist-patient privileges.[64] Rule 73(2) provides the criteria for recognizing a testimonial privilege, and Rule 82(3) reiterates that the ICC's Trial Chamber may not compel a person to testify about a privileged communication.[65] Similar to the ICTY's and ICTR's rules, the ICC Rules of Evidence have elaborate rules concerning protection of victims and witnesses, including specific measures to protect their

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61. International Criminal Court, Situations and Cases, http://www.icc-cpi.int/cases.html (last visited Jan. 7, 2005).

62. Rome Statute, *supra* note 60, art. 64.

63. *Id.* art. 69(5).

64. Rules of Procedure and Evidence of the International Criminal Court, Rule 73(3), *available at* http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/rules(e).pdf [hereinafter ICC Rules]. Rule 73(3) provides:

> In making a decision under sub-rule 2, the Court shall give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, in particular those related to or involving victims, or between a person and a member of a religious clergy; and in the latter case, the Court shall recognize as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion.

Id.

65. *Id.* Rule 73(2), 82(3). Rule 73(2) states that:

> [C]ommunications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure . . . if a Chamber decides in respect of that class that: (a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure; (b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and (c) Recognition of the privilege would further the objectives of the Statute and the Rules.

Id. Rule 82(3) states that "[i]f the Prosecutor calls a witness to introduce in evidence any material or information which has been protected . . . a Chamber may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality." *Id.*

identities and the establishment of the Victims and Witnesses Unit to provide security arrangements.

3. *The European and Inter-American Courts of Human Rights*

The Rules of the European Court of Human Rights (ECHR) are silent concerning privileges, though Rule 42 states that the court is capable of compelling a witness to testify to facts helpful for deciding the case.[66] The European Court of Justice has encountered physician-patient confidentiality on one occasion and declined to compel the doctor to testify as to his or her private communications with patients.[67] Similar to the ECHR's Rules, the Rules of Procedure of the Inter-American Court on Human Rights (IACtHR) do not mention any privilege or any rule concerning the inadmissibility of evidence on confidentiality grounds.[68] Article 34 of the Rules of Procedure of the IACtHR is similar to the ECHR's Rule 42 in that it admits any evidence helpful in clarifying the facts of the case.[69]

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66. Rules of Court, Eur. Ct. H.R. 51 (2005), *available at* http://www.echr.coe.int/echr/. Rule A1 provides:

> The Chamber may, at the request of a party or of its own motion, adopt any investigative measure which it considers capable of clarifying the facts of the case. The Chamber may, *inter alia*, invite the parties to produce documentary evidence and decide to hear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in carrying out its tasks.

Id.

67. Case 155/78, Miss. M. v. Comm'n, 1980 E.C.R. 1797, 1811 ("[T]he court requested the Commission to draw up a study of comparative law on the question of the confidentiality of medical findings under the laws of the various Member States of the Community. It appears from that study that . . . it is true that in all the Member States such confidentiality is protected because of the confidential relationship which is formed between the patient seeking treatment and the doctor . . . . In these circumstances the refusal to give any information . . . and the reliance, by the doctors in the confidence of the Commission, on the confidentiality of medical findings as grounds for refusing to provide any useful indication has the result of making it impossible for the court to carry out the judicial review . . . .").

68. Rules of Procedure, Inter-Am. C.H.R., OEA/Ser.L/V/III.25 doc.7 at 18 (1992).

69. *Id.*, art. 34(1), (2). Article 34(1) states:

> The Court may, at the request of a party or on its own motion, obtain any evidence which it considers likely to clarify the facts of the case. . . . [I]t may decide to hear as a witness or expert witness, or in any other capacity, any person whose evidence, statements or opinion it deems useful.

Id. art. 34(1). Article 34(2) gives the Court the authority to "request the parties to provide any type of evidence available to them or any explanation or statement that, in its judgment, would be likely to clarify the facts of the case." *Id.* art. 34(2).

4. The Confidential Nature of Patient-Physician Communications Under Customary International Law

There is no treaty concerning confidentiality of communications between doctors and patients.[70] Nor apparently have general principles of law been delineated concerning confidentiality of communications between doctors and patients.[71] In the absence of these sources it is necessary to look at international custom to determine whether communications between doctors and patients are confidential under international law. Evidence of widespread state practice together with international organizations' practices may reflect a customary rule concerning the confidentiality of doctor-patient communications.

The World Medical Association (WMA), an international organization representing physicians from over seventy countries, adopted the Declaration on the Rights of the Patient, which states, "[a]ll identifiable information about a patient's health status, medical condition, diagnosis, prognosis and treatment and all other information of a personal kind, must be kept confidential, even after death."[72] The World Psychiatric Association, with 37,000 U.S. and international member

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70. None of the leading indexes to treaties include entries for medical confidentiality, physician-patient privilege, or related concepts. *See* M.J. BOWMAN & D.J. HARRIS, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS 492-615 (1984); II A GUIDE TO THE U.S. TREATIES IN FORCE 159-800 (Igor I. Kavass ed., 2004); U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2004 iii-vii (2004); Scott Barrett, Summary of Remarks, *Shifting Norms in International Health Law*, 98 AM. SOC'Y INT'L L. PROC. 13, 13 (2004) (stating that, prior to the WHO Framework Convention on Tobacco Control, the World Health Organization had not used international agreements to promote health-related goals). A keyword search of the vast United Nations Treaty Database, http://untreaty.un.org/English/access.asp, also fails to yield treaties on these concepts (Treaty Series database searched Sept. 12, 2005).

71. *See* Robert John Araujo, Essay, *International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the "Priest-Penitent" Privilege under International Law*, 15 AM. U. INT'L L. REV. 639, 661-62 (2000) (citing only to proposed draft rules when discussing general international law principles on confidentiality of information gained during particular relationships); Geoffrey Hazard, Jr. & Michele Taruffo, *Transnational Rules of Civil Procedure: Rules and Commentary*, 30 CORNELL INT'L L.J. 493 (1997); Krysten Hicks, Comment, *Thresholds for Confidentiality: The Need for Articulate Guidance in Determining When to Breach Confidentiality to Prevent Third-Party Harm*, 17 TRANSNAT'L LAW. 295 (2004).

72. The World Medical Association, Declaration on the Rights of the Patient (Sept. 2005), http://www.wma.net/e/policy/l4.htm.

psychiatrists, reiterated the confidentiality requirements in its Declaration of Madrid in 1996.[73] The Council for International Organizations of Medical Sciences (CIOMS), an international, nongovernmental organization established jointly by the World Health Organization (WHO) and U.N. Education Scientific and Cultural Organization (UNESCO) in 1949, adopted its International Ethical Guidelines in 2002.[74] Guideline 18's Comment expressly provides a doctor-patient confidentiality rule.[75]

This section looks first at the promotion and protection of international tribunals and is followed by examples of national protections from the U.S. federal courts. In 1982, the U.N. General Assembly adopted the Principles of Medical Ethics.[76] The Principles of Medical Ethics address doctors' participation in torture sessions but do not mention confidentiality

73. World Psychiatric Association, Declaration of Madrid (Aug. 25, 1996), http://www1.umn.edu/humanrts/instree/madrid1996.html ("Information obtained in the therapeutic relationship should be kept in confidence and used, only and exclusively, for the purpose of improving the mental health of the patient. Psychiatrists are prohibited from making use of such information for personal reasons, or financial or academic benefits. Breach of confidentially may only be appropriate when serious physical or mental harm to the patient or to the third person could ensue if confidentiality were maintained; in these circumstances, psychiatrists should whenever possible, first advise the patient about the action to be taken.").

74. Council for International Organizations of Medical Sciences, What is CIOMS?, http://www.cioms.ch/frame_what_is_cioms.htm (last visited Jan. 7, 2005) ("CIOMS is representative of a substantial proportion of the biomedical scientific community. The membership of CIOMS in 2003 includes 48 international member organizations, representing many of the biomedical disciplines, and 18 national members mainly representing national academies of sciences and medical research councils .... Specific reference should be made to the International Ethical Guidelines for Biomedical Research Involving Human Subjects (developed in conjunction with WHO), which superseded Proposed Ethical Guidelines (1982) and were published in 1993 [and again in 2002]. They have been very widely utilized, particularly in low-income countries ....").

75. COUNCIL FOR INTERNATIONAL ORGANIZATIONS OF MEDICAL SCIENCES, INTERNATIONAL ETHICAL GUIDELINES FOR BIOMEDICAL RESEARCH INVOLVING HUMAN SUBJECTS § 18 (3d ed. 2002), *available at* http://www.cioms.ch/frame_guidelines_nov_2002.htm ("Patients have the right to expect that their physicians and other health-care professionals will hold all information about them in strict confidence and disclose it only to those who need, or have a legal right to, the information, such as other attending physicians, nurses, or other health-care workers who perform tasks related to the diagnosis and treatment of patients. A treating physician should not disclose any identifying information about patients to an investigator unless each patient has given consent to such disclosure and unless an ethical review committee has approved such disclosure.").

76. G.A. Res. 37/194, U.N. Doc. A/RES/37/194 (Dec. 18, 1983).

requirements.[77] The ICRC views communications between ICRC's employees (including its physicians) and victims as confidential in nature.[78] Nonetheless, the ICRC discloses confidential information to third parties when it is necessary for the benefit of threatened persons and when the ICRC is certain human rights are being violated.[79]

5. The Admissibility of Hearsay Evidence in an International Court

Hearsay evidence rules ban witnesses from testifying about out-of-court statements offered to prove the truth of the matter asserted in such statements. In court systems with hearsay evidence rules doctors may be precluded from testifying about statements made to them by patients.[80]

International courts usually admit hearsay evidence.[81] The hearsay rule is characteristic of common law systems. In civil

77. *Id.*

78. *See* Prosecutor v. Simic, Case No. IT-95-9, *Ex Parte* Confidential Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, ¶ 1 (July 27, 1999); Gabor Rona, *The ICRC Privilege Not to Testify: Confidentiality in Action*, 845 INT'L REV. OF THE RED CROSS 207, 211 (2002).

79. David Weissbrodt, *The Role of International Organizations in the Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict*, 21 VAND. J. TRANSNAT'L L. 313, 347–48 (1988) ("While the ICRC's efforts to end violations of international humanitarian law or to prevent such violations are in principle confidential, the ICRC takes a different approach when necessary. The ICRC reserves the right to publicly denounce violations of international humanitarian law when the violations are significant, confidential efforts have not ended the violations, public statements will benefit the threatened persons, and ICRC delegates witnessed the violations or otherwise verified the existence of the violations through reliable sources.").

80. *See infra* notes 169–180 (discussing several exceptions to the hearsay evidence rule that may allow doctors to testify as to certain statements made by their patients).

81. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1842, 1990 n.60 (2001) ("Other departures from typical domestic procedural rights may also be justifiable as targeted attempts to address the factual and legal obstacles specific to international prosecution. For example, commentators have criticized both the ICTY and the ICTR for their broad admission of oral hearsay evidence."); Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, the Hague and Arusha*, 37 COLUM. J. TRANSNAT'L L. 725, 745 (1999) ("A significant practice of all the international tribunals is their refusal to be hindered by a technical approach to the admission of evidence in their search for the truth. This is best illustrated by their approach to hearsay evidence . . . . Hearsay is usually inadmissible in common law systems, but was readily admitted in the Nuremberg and Japanese trials, both in oral evidence and in the form of affidavits.").

law systems, where there is no jury and the judge conducts the fact-finding process, out-of-court statements are usually admitted when relevant. International criminal courts have borrowed their rules of evidence from both common law and civil law systems, but usually favor admissibility of all evidence.

The ICTY, for example, has admitted hearsay evidence on the theory that the ICTY's professional judges will, unlike a lay jury, be able to assess and discount the irrelevant evidence.[82] In trials before the ICTY, testimony containing hearsay is admissible, provided that the evidence is probative and relevant.[83] Similarly, the ICTR has admitted testimony of a witness describing an out-of-court statement of an alleged perpetrator.[84] The Rules of Procedure for the ICC are not very clear on the admissibility of hearsay, and consequently, judges are given wide discretion in admitting any relevant evidence.[85]

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82. Prosecutor v. Tadic, Case No. IT-94-1, Decision on Defence Motion on Hearsay, ¶¶ 14, 19 (Aug. 5, 1996), *reprinted in* 2 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000) ("The International Tribunal, with its unique amalgam of civil and common law features, does not strictly follow the procedure of civil law or common law jurisdictions. . . . Accordingly, in deciding whether or not hearsay evidence that has been objected to will be excluded, the Trial Chamber will determine whether the preferred evidence is relevant and has probative value focusing on its reliability."); MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBURG 108-09 09 (1997) (explaining that in the 1996 trial of Dusko Tadic before the International Criminal Tribunal for the Former Yugoslavia, hearsay evidence was permitted, and several witnesses were allowed to give evidence on an anonymous basis); *see also* Christian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1426 (2001) ("[J]udges of the Yugoslav Tribunal determined that under Sub-rule 89(C), they would admit hearsay evidence in order to obtain as much material as possible to understand the circumstances surrounding a case."); Lee A. Casey, *The Case Against The International Criminal Court*, 25 FORDHAM INT'L L. J. 840, 869 (2002).

83. Prosecutor v. Delalic, Case No. IT-96-21-T, Decision on the Motion of Prosecution for Admissibility of Evidence, ¶ 16 (Jan. 19, 1998) ("The approach adopted by the Rules is clearly one in favour of admissibility as long as the evidence is relevant and is deemed to have probative value . . . .").

84. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, ¶ 21 (Sept. 2, 1998); MORRIS & SCHARF, *supra* note 42, at 566 ("While hearsay may thus be admissible, the Trial Chamber [of the ICTR] is required to exclude relevant evidence notwithstanding its probative value if it was 'obtained by methods which cast doubt on its reliability . . .' under Rule 95."); *see also* Kellye L. Fabian, *Proof and Consequences: An Analysis of the Tadic and Akayesu Trials*, 49 DEPAUL L. REV. 981, 1019–21 (2000).

85. ICC Rules, *supra* note 64, at Rule 63(2); *see also* Defrancia, *supra* note 82, at 1402 ("The current Draft Rules of Evidence and Procedure of the proposed ICC reveal little in the way of indicators as to the models for admissibility of evidence. . . . Although the Rome Statute articulates strong norms for the rights of

The ICC's Rules are largely modeled after the Rules of Evidence of the ICTY and the ICTR, and the ICC's Rules do not include a rule forbidding admissibility of hearsay evidence.[86] Similarly, the European Court of Human Rights admits any kind of evidence without restriction.[87]

B. CONFIDENTIALITY AND PRIVILEGE IN THE FEDERAL COURTS OF THE UNITED STATES

Rule 501 of the Federal Rules of Evidence governs privileges in U.S. federal courts. Rule 501 does not codify a list of specific privileges, but provides that privileges "shall be governed by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience."[88] Through Rule 501 Congress has allowed the courts to continue the evolutionary development of privileges.[89] Federal courts have often referred to the common law in order to determine whether a privilege should be applied in a particular case.[90]

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the accused, the wide-ranging discretion afforded judges in their decisions on the admissibility of evidence is worrisome. Without more specific provisions restricting the admission of hearsay evidence, the evidentiary bases upon which convictions are obtained run the risk of being unclear. In the absence of more specific evidentiary provisions, however, the developing jurisprudence at the ad hoc Tribunals is the proper starting point for drawing up rules of thumb for the enhancement of procedural protections in the future court.").

86. Fabian, *supra* note 84, at 1038–39 ("[S]ome variant on the hearsay rules in the Federal Rules of Evidence should be employed by the judges to at least limit the situations in which hearsay is admitted. For example, hearsay evidence could be admissible where a Commission of Experts has been appointed to conduct interviews of victims and witnesses. The rule would allow a qualified expert who had actually conducted interviews to testify about the general feelings of the victims and the witnesses, but not about specific criminal acts of the accused. The changes suggested are not significant ones, yet are nonetheless critical to avoid serious evidentiary problems and ensure the effectiveness of the ICC.").

87. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 79 (1978) ("The Court is not bound, under the Convention or under the general principles applicable to international tribunals, by strict rules of evidence. In order to satisfy itself, the Court is entitled to rely on evidence of any kind . . . .").

88. FED. R. EVID. 501.

89. FED. R. EVID. 501 advisory committee's note ("The Committee . . . left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases.")

90. *See, e.g.*, Funk v. United States, 290 U.S. 371, 383 (1933); Wolfle v. United States, 291 U.S. 7, 12 (1934); United States v. Meagher, 531 F.2d 752, 753 (5th Cir. 1976).

1. The Physician-Patient Privilege

The physician-patient privilege did not exist at common law.[91] Rule 26 of the Federal Rules of Criminal Procedure provides that privileges are governed by common law in the absence of a federal statute.[92] Because there is no federal statute governing a physician-patient privilege, there is no physician-patient privilege in federal criminal cases.[93] The second sentence of Rule 501 provides that "in civil actions . . . with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law."[94] Consequently, in civil diversity actions, the relevant state law determines if the physician-patient privilege applies with respect to an element of a claim or defense.[95] In 1828, New York became the first state to enact a statutory provision recognizing a physician-patient privilege.[96] Today, about three-fourths of the states have a law recognizing some form of physician-patient privilege with significant variations and numerous exceptions.[97] Less than ten states lack a statute recognizing any form of the physician-patient privilege.[98]

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91. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 479 (3d ed. 1996) (stating that the physician-patient privilege is a creature of statute); 1 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE 182 (1977); JACK B. WEINSTEIN ET AL., WEINSTEIN'S EVIDENCE 504-09 (1996); 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 818-19 (John T. McNaughton rev. 1961); *see also* Whalen v. Roe, 429 U.S. 589, 602 n.28 (1977) (noting that there was no common law evidentiary privilege).

92. WEINSTEIN ET AL., *supra* note 91, at 504–11.

93. *See, e.g.*, United States v. Moore, 970 F.2d 48, 50 (5th Cir. 1992); United States v. Bercier, 848 F.2d 917, 920 (8th Cir. 1988); United States v. Burzynski, 819 F.2d 1301, 1311 (5th Cir. 1987); United States v. Lindstrom, 698 F.2d 1154, 1167 n.9 (11th Cir. 1983); *Meagher*, 531 F.2d at 753; United States v. Harper, 450 F.2d 1032, 1035 (5th Cir. 1971).

94. FED. R. EVID. 501.

95. *See* 28 U.S.C. § 1332 (stating that federal courts shall have original jurisdiction of all civil actions between citizens of a state and citizens of a foreign state).

96. LOUISELL & MUELLER, *supra* note 91.

97. WEINSTEIN ET AL., *supra* note 91, at 504–09. The majority of states copied the language of the 1974 Uniform Rules of Evidence 503, adopted by the Commissioners on Uniform State Laws in 1974, which provided definitions of a physician-patient priviledge and exceptions to the privilege. For the full text of the Uniform Rules of Evidence on the physician-patient privilege, see LOUISELL & MUELLER, *supra* note 91, at 595.

98. GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL EVIDENCE 225 n.169 (4th ed. 2001). See ARTHUR BEST, WIGMORE ON EVIDENCE 2004-2 CUMULATIVE SUPPLEMENT § 2380, at 1336-49 (2005), for a complete listing of the state laws that

Two theories provide justification for the physician-patient privilege.[99] The first is that the privilege would foster candid disclosure on behalf of the patient, which is essential for diagnoses and treatment.[100] The second is that the privilege serves a societal interest by preserving the privacy of intimate communications as to one's physical condition.[101] But it is generally understood that it is a doctor's duty of confidentiality, assured by the medical code of ethics, which better serves to preserve a patient's confidences rather than an evidentiary rule concerning privileges.[102] Wigmore, in his treatise, criticized the states that enacted the physician-patient privilege and argued that the fundamental conditions for the establishment of such a privilege were absent.[103]

Even though particular state provisions may differ, the extent and applicability of the physician-patient privilege in most states can be summarized as follows: the privilege applies when a patient consults a physician for diagnosis or treatment, but does not apply when the patient consults the physician solely for the purpose of litigation.[104] In *Missouri Pacific Railway Co. v. Castle*, the court stated that "[t]he privilege is intended (and by most statutes is declared) to protect only those communications which are necessary for obtaining the benefits of the professional relation—in other words, for enabling the physician to prescribe remedies or relief."[105] Accordingly, the

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have physician-patient privilege.

99. LILLY, *supra* note 91, at 479–80.

100. *Id.*

101. *Id.* at 480.

102. Zechariah Chafee, Jr., *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607, 609-11 (1943); *see infra* Part II for the discussion of medical codes of ethics.

103. WIGMORE, *supra* note 91, at 829–30. Wigmore recognized four fundamental conditions as necessary to the establishment of a privilege: (1) The communication must originate in a confidence that it will not be disclosed; (2) The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) The relation must be the one which in the opinion of the community ought to be sedulously fostered; (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained by the correct disposal of litigation. Wigmore argued that the first, second, and fourth conditions for establishing a privilege did not exist concerning the physician-patient privilege, especially stressing the fact that the number of people consulting doctors for their physical conditions did not increase over the years after the first establishment of the physician-patient privilege in New York in 1828. *Id.*

104. LILLY, *supra* note 91, at 480; LOUISELL & MUELLER, *supra* note 91, at 598.

105. *See* Missouri Pac. Ry. Co. v. Castle, 172 F. 841, 845 (8th Cir. 1909) (applying a Nebraska statute, the court found a statement by the patient with a

physician must be consulted in his or her professional capacity; only communications made at a time when the professional relationship is engaged are privileged.[106] The privilege covers not only communications between the patient and the physician, but also matters observed by the physician during the course of treatment and diagnosis. Similar to other privileges, the physician-patient privilege relates only to the communications actually intended to be confidential. The presence of third persons other than associated medical personnel and close family destroys the privilege (except in the case of an eavesdropper or an interceptor, if reasonable precautions were taken to ensure the confidentiality).[107]

In all states that provide a physician-patient privilege, the privilege belongs to the patient; the physician can only invoke the privilege on the patient's behalf.[108] The privilege survives the patient's death and can be asserted by his or her representative.[109] The physician cannot claim the privilege once the patient has waived it. The filing of a suit to collect damages for the physical or mental condition, testifying about the privileged communication, or calling the treating physician to the stand can all operate as a waiver of the privilege.[110] There are also some exceptions that limit the privilege's applicability. For example, in all states that recognize the privilege, a general crime-fraud exception exists concerning communications made to perpetrate a fraud or crime.[111] Moreover, the privilege does not prevent filing public reports or informing officials when the concerned state law requires physicians to report certain conditions such as gunshot or knife wounds, abuse of a child, or abuse of an elderly or mentally disabled person.[112]

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crushed right leg was not privileged because it was not necessary for treatment); Van Wie v. United States, 77 F. Supp. 22, 46 (D. Iowa 1948) (applying an Iowa statute, the decedent's statement to his physician that he did not see the vehicle which struck him was not privileged due to no pertinence to the treatment); WIGMORE, *supra* note 91, at 842.

106. Ranger, Inc. v. Equitable Life Assurance Soc'y, 196 F.2d 968, 972 (6th Cir. 1952) (applying the Michigan statute, the information obtained while socially friendly with the patient and before the professional relationship existed was not privileged).

107. LOUISELL & MUELLER, *supra* note 91, at 597.

108. WIGMORE, *supra* note 91, at 851.

109. *See* LOUISELL & MUELLER, *supra* note 91, at 597.

110. LILLY, *supra* note 91, at 484.

111. *See* WIGMORE, *supra* note 91, at 848; LOUISELL & MUELLER, *supra* note 91, at 599–600.

112. LOUISELL & MUELLER, *supra* note 91, at 600.

All states recognize a psychiatrist-patient privilege, including those that do not recognize a physician-patient privilege. The unanimous acceptance of the psychiatrist-patient privilege derives from the recognition that diagnosis and treatment depend heavily on the patient's willingness to speak frankly about his or her mental condition (as opposed to the treatment of a physical condition in a physician-patient relationship). The Supreme Court in *Jaffee v. Redmond* asserted that while treatment for physical ailments can be successful through physical examination alone, effective psychotherapy depends on complete disclosure of the patient's emotions, fears, and memories.[113] The Court held that the mere possibility of disclosure of these confidential communications to third parties might impede treatment.[114] Scholars and judges have suggested that an individual with physical ailments would likely consult a physician regardless of confidentiality guarantees, while an individual with mental-health problems may seek help exclusively where his or her confidences were guaranteed.[115] Similar concerns are reflected in the Advisory Note to the Proposed Rules of Evidence Rule 504.[116]

Jaffee v. Redmond is the seminal U.S. case regarding the application of psychotherapist-patient privilege.[117] The case concerns a police officer who shot a man and afterward received extensive counseling from a licensed clinical social worker.[118] At trial, both the officer and the therapist refused to comply with a

113. *See* Jaffee v. Redmond, 518 U.S. 1, 10 (1996).

114. *See id.*

115. *See* Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955); United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1043 (E.D.N.Y. 1976); *see also* WEINSTEIN, *supra* note 91, at 504–19.

116. Proposed Rule 504, 56 F.R.D. 183, 242 (1973) ("Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to insure his patients of confidentiality."). Although the Proposed Rules about privileges were rejected and deleted by the Congress in favor of the current Fed R. Evid. 501, many courts have treated the Proposed Rules as persuasive evidence concerning the content of federal law "in light of reason and experience." United States v. Mackey, 405 F. Supp. 854, 858 (C.D.N.Y. 1975) ("Despite their deletion by Congress, the privilege rules promulgated by the Supreme Court remain of considerable utility as standards. The specific Rules on privilege promulgated by the Supreme Court are reflective of reason and experience."). Those deleted rules are often referred to as "Standards." It is also significant to note that the Supreme Court had approved the Proposed Rules (or Standards) by an eight to one vote and transmitted them to Congress.

117. *Jaffee*, 518 U.S. at 1.

118. *See id.* at 3–4.

court order requiring them to reveal the contents of their conversations.[119] The Supreme Court held that it was appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 of the Federal Rules of Evidence because fifty states and the District of Columbia have codified some form of the psychotherapist privilege.[120] The Court determined that the consensus among state legislatures reflected "reason and experience," and that the privilege serves the public's interest as well as the state's interest in its citizenry's mental health.[121] Moreover, the Supreme Court held that the privilege should be extended not only to licensed psychotherapists but also to licensed social workers.[122] Finally, the Court rejected any balancing approach that would evaluate the patient's need for privacy *vis-à-vis* the evidentiary need for disclosure, holding that the privilege was absolute.[123]

Following the *Jaffee* decision, the psychotherapist-patient privilege has been read to include all communications made to psychiatrists, licensed psychologists, and licensed social workers providing therapeutic services.[124] Most of the states (more than forty-three) recognize a "licensed social worker" privilege independent of a psychotherapist-patient privilege.[125] In 1999,

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119. *Id.* at 5.

120. *Id.* at 12.

121. *Id.* at 13.

122. *Id.* at 15.

123. *See id.* at 17–18.

124. *See* Oleszko v. State Comp. Ins. Fund, 243 F.3d 1154, 1159 (9th Cir. 2001) (extending the psychotherapist-patient privilege to an unlicensed counselor); United States v. Lowe, 948 F. Supp. 97, 99 (D. Mass. 1996) (noting that rape counseling records are privileged in a majority of states and the District of Columbia, the court held that a patient's communications with a rape counseling center are privileged). *But cf.* Carman v. McDonnell Douglas Corp., 114 F.3d 790, 793–94 (8th Cir. 1997) (overturning an earlier district court opinion allowing a privilege for corporate ombudsmen); United States v. Schwensow, 151 F.3d 650, 656–58 (7th Cir. 1998) (holding that statements made to volunteer telephone operators at an Alcoholics Anonymous office were not protected by the psychotherapist-patient privilege because the volunteers did not hold themselves out as counselors, were not licensed, and did not confer in a fashion resembling a psychotherapy session).

125. *See* Robert H. Aronson, *The Mental Health Provider Privilege in the Wake of* Jaffe v. Redmond, 54 OKLA. L. REV. 591, 607 n.154 (2001). Minnesota's privilege statute is typical. It provides:

> A registered nurse, psychologist, consulting psychologist, or licensed social worker engaged in a psychological or social assessment or treatment of an individual at the individual's request shall not, without the consent of the professional's client, be allowed to disclose any information or opinion based thereon which the professional has acquired in attending the client in a professional capacity, and which was necessary to enable the

the Uniform Rules of Evidence were revised to reflect changes in state laws[126] and to offer a general mental health provider privilege which incorporates licensed social workers.[127]

Communications with physicians may qualify for similar protection if the physician stresses the psychosomatic aspects of the patient's treatment.[128] The Proposed Rule 504, which has been influential in interpreting Rule 501, allowed the privilege to be applied when the patient reasonably believed that the physician was a psychotherapist authorized to practice in that jurisdiction.[129]

2. *Waiving the Psychotherapist-Patient Privilege*

The psychotherapist-patient privilege applies to communications that serve the purpose of psycho-diagnosis or psychotherapy.[130] Similar to the physician-patient privilege, the psychotherapist-patient privilege belongs to the patient, and the psychotherapist may claim the privilege on the patient's behalf.[131] The Proposed Rule 504 contained three exceptions, the most important dealing with a case in which the protected

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professional to act in that capacity.
MINN. STAT. § 595.02(g) (2004).

126. *See* Aronson, *supra* note 125, at 607.

127. *Id.* at 608 (explaining that most states define "social work" as "counseling of clients to enhance or restore their capacity for physical, social and economic functioning").

128. *See* WEINSTEIN, *supra* note 91, at 504–16 (writing that the legislative history of the Proposed Rule 504 indicates that the definition of psychiatrist included "a medical doctor engaged in the diagnosis and treatment of mental or emotional conditions" in order not to exclude the general practitioner and to avoid a needlessly refined definition concerning what is and what is not psychiatry).

129. *See* Proposed Rule 504, 56 F.R.D. 183, 242 (1973); *see also* Speaker *ex rel.* Speaker v. County of San Bernardino, 82 F. Supp. 2d 1105, 1112–15 (C.D. Cal. 2000) (holding that a client may invoke the psychotherapist-patient privilege under Rule 501 if he or she reasonably, but mistakenly, believes that he or she was being counseled by a licensed psychologist or social worker). In 1972, the U.S. Supreme Court transmitted to Congress the Proposed Rules of Evidence. The Proposed Rules, which had been formulated by the Judicial Conference Advisory Committee and approved by the Judicial Conference of the U.S., contained nine specific testimonial privileges, including a psychotherapist-patient privilege. *See* FED. R. EVID. 501 House Judiciary Committee's report. Congress rejected the Proposed Rules in favor of the current Rule 501's general mandate. *See id.*

130. *See* LOUISELL & MUELLER, *supra* note 91, at 607; *see also* Vanderbilt v. Town of Chilmark, 174 F.R.D. 225, 230 (D. Mass. 1997) ("To clarify the scope of the privilege, it is also important to note what it does not protect. . . . The substance of the [psychotherapist-patient] communication is privileged. The fact that such communication took place is not.").

131. *See* LOUISELL & MUELLER, *supra* note 91, at 607.

information is an element of a claim or defense.[132] The rationale for the exception is that it is inherently unfair for a party to rely on a condition for a claim or defense, and at the same time suppress the evidence relevant to that same condition.[133] The privilege, however, is lost only to the extent necessary to expose the truth of the mental condition at issue. The residual aspects of the communication remain privileged.[134]

It is also important to note that the privilege may be lost when its disclosure could prevent substantial risk of harm to others. Although the Proposed Rule 504, later rejected by Congress, did not include a crime-fraud exception, one federal court applied the crime-fraud exception to the psychotherapist-patient privilege when a patient allegedly defrauded lenders and disability insurers.[135] When the communication's disclosure is essential to avoid danger to others, courts have held that a therapist is under a duty to warn and reveal relevant parts of the communication.[136] The leading case on this issue is *Tarasoff v. Regents of University of California*, in which the court found a psychologist liable to the parents of a murder victim where the murderer had confided to the psychologist his intentions to kill the victim.[137] The California Supreme Court in *Tarasoff* stated that even when the disclosure of confidential information is necessary to prevent harm to others, the doctor must do so in a manner that preserves the privacy of his patient to the fullest extent possible.[138]

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132. *See* Proposed Rule 504, 56 F.R.D. at 241 (allowing for exceptions to privileged communication where a patient "relies upon the condition as an element of his claim or defense").

133. *See* WEINSTEIN, *supra* note 91, at 504–34.

134. LOUISELL & MUELLER, *supra* note 91, at 611.

135. *See In re* Grand Jury Proceedings, 183 F.3d 71, 74 (1st Cir. 1999).

136. *See* Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 189–91 (D. Neb. 1980); *cf.* United States v. Hayes, 227 F.3d 578, 586 (6th Cir. 2000) (ruling that the duty to protect third parties does not create a "dangerous-patient" exception to the psychotherapist-patient evidentiary privilege in federal criminal proceedings).

137. Tarasoff v. Regents of Univ. of Ca., 551 P.2d 334, 351 (Cal. 1976).

138. *Id.* at 347. *But see* Thompson v. County of Alameda, 614 P.2d 728, 734 (Cal. 1980) (narrowing *Tarasoff* by holding that the duty to warn depended on and arose from the existence of a prior threat to an identifiable victim); Boynton v. Burglass, 590 So.2d 446, 451 (Fla. Dist. Ct. App. 1991) (rejecting *Tarasoff* and holding that imposing a duty to warn on psychiatrists would not only be unreasonable and unworkable but also a breach of the confidentiality of psychiatrist-patient relationship). The Missouri Court of Appeals and the Supreme Courts of Virginia and Texas have declined to follow *Tarasoff* in cases involving mental patients harming third parties where psychiatrists have confidential information concerning their patients' intentions. Matt v. Burrel, Inc., 892 S.W.2d 796, 800 (Mo. Ct. App. 1995); Thapar v. Zezulka, 994 S.W.2d 635, 638 (Tex. 1999); Nasser v.

3. Confidential Communications vs. an Affirmative Duty to Report Information

When a person accepts a physician's professional services for the purposes of treatment, a physician-patient relationship is established.[139] The fact that the physician renders services gratuitously does not prevent the establishment of a confidential relationship; it is sufficient that the patient entrusted himself or herself to the physician's care.[140] The original source of a physician's duty to maintain patients' confidences is the Hippocratic Oath.[141] The pertinent portion of the Hippocratic Oath states: "[w]hatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret."[142] Court decisions and state statutes have recognized the sanctity of the oath.[143] Since confidentiality rules are essentially ethical rules and standards of conduct, the professional medical associations usually codify and enforce such rules. The American Medical Association (AMA) adopted a series of "Principles of Medical Ethics" on June 17, 2001.[144] Principle IV states that "a physician . . . shall safeguard patient confidences and privacy within the constraints of the law."[145] Courts have referred to both the Hippocratic Oath and the AMA Principles as sources for a common law duty of confidentiality.[146]

The Council on Ethical and Judicial Affairs of the AMA regularly issues advisory opinions on ethical issues. In its Opinion 5.05, the Council stated that "[t]he patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The physician should not reveal confidential communi-

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Parker, 455 S.E.2d 502, 506 (Va. 1995).

139. 1 STEVEN E. PEGALIS & HARVEY F. WACHSMAN, AMERICAN LAW OF MEDICAL MALPRACTICE 24 (2d ed. 1992); James L. Rigelhaupt, Jr., Annotation, *What Constitutes Physician-Patient Relationship for Malpractice Purposes*, 17 A.L.R. 4th 132, 137 (1982).

140. PEGALIS & WACHSMAN, *supra* note 139.

141. BARRY R. FURROW ET AL., HEALTH LAW 148 (2d ed. 2000).

142. *Id.*

143. EMANUEL HAYT & JONATHAN HAYT, LEGAL ASPECTS OF MEDICAL RECORDS 74 (1964).

144. AM. MED. ASS'N, CODE OF MEDICAL ETHICS: PRINCIPLES OF MEDICAL ETHICS (2001), http://www.ama-assn.org/ama/pub/category/2512.html.

145. *Id.*

146. FURROW ET AL., *supra* note 141, at 149.

cations or information without the express consent of the patient, unless required to do so by law."[147]

The confidentiality requirement, however, is not absolute. In certain circumstances, disclosure of information is not a breach of confidentiality. Several state public health statutes require medical professionals to report a patient's medical condition in situations involving venereal diseases; contagious diseases; wounds inflicted by violence; poisonings; industrial accidents; abortions; drug abuse; and abuse of children, elderly, disabled, or others.[148] The Council on Ethical and Judicial Affairs of the AMA also mentions a greater good that limits confidentiality.[149]

In circumstances that require reporting, the public interest in disclosure overrides the interests of privacy and confidentiality. In situations involving child abuse or abuse of elderly persons, the reporting requirement's rationale stems from the fact that abuse usually takes place in private places, and abused people would not normally be in a position to come forward and report the abuse.[150] Four-fifths of the states have some type of

147. AM. MED. ASS'N, CODE OF MEDICAL ETHICS: CONFIDENTIALITY (1994), http://www.ama-assn.org/ama/pub/category/2512.html.

148. FURROW ET AL., *supra* note 141, at 155; Phyllis Coleman, *Creating Therapist-Incest Offender Exception to Mandatory Child Abuse Reporting Statutes—When Psychiatrist Knows Best*, 54 U. CIN. L. REV. 1113, 1118 (1986) (stating that all fifty states have statutes that mandate reporting cases of known or suspected child abuse); Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 113 (1998) (stating that legislators in forty-two states and the District of Columbia have enacted mandatory reporting laws for elder abuse).

149. AM. MED. ASS'N, *supra* note 147 ("The obligation to safeguard patient confidences is subject to certain exceptions which are ethically and legally justified because of overriding social considerations. Where a patient threatens to inflict serious bodily harm to another person or to him or herself and there is a reasonable probability that the patient may carry out the threat, the physician should take reasonable precautions for the protection of the intended victim, including notification of law enforcement authorities. Also, communicable diseases, gun shot and knife wounds should be reported as required by applicable statutes or ordinances.").

150. *See* Douglas J. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458, 464 (1978) (arguing that while adult victims of abuse or other crimes can complain to the authorities, child victims may receive protection only when a third person recognizes and reports the danger); Cyril H. Wecht & Glenn M. Larkin, *The Battered Child Syndrome—A Forensic Pathologist's Viewpoint*, MED. TRIAL TECHNIQUE Q. 1, 2 (1982) (pointing out that the state has historically been reluctant to intervene in child abuse situations where the abuser is the parent); David P. Mathews, Comment, *The Not-So-Golden Years: The Legal Response to Elder Abuse*, 15 PEPP. L. REV. 653, 662 (1988) (positing that many abused elders do not come forward on their own and that only mandatory

reporting requirements concerning gunshot wounds, knife wounds, and serious burns.[151] Moreover, forty-five states now have some sort of domestic violence reporting law concerning spousal abuse cases.[152] Generally, the mandatory reporting statutes require reporting of the name, age, sex, race, and location of the injured person; the nature and the extent of the harm; and in abuse cases, the identity of the perpetrator together with any other information useful in establishing the cause of the abuse.[153]

State mandatory reporting statutes have yet to mention torture victims, and case law is silent about physicians' reporting requirements when dealing with torture victims. Nonetheless, it is significant to note that the United States ratified the Torture Convention in 1994.[154] The Torture Convention was implemented by means of the Foreign Affairs Reform and Restructuring Act of 1998.[155] Article 2(1) of the Torture Convention states, "each state party shall take effective legislative, administrative, judicial and other measures to

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reporting will help them).

151. *See* American Academy of Orthopaedic Surgeons, Family Violence Statutes, http://www.aaos.org/wordhtml/abuse/ststatut.htm (last visited on Jan. 14, 2005) (listing states that lack such a requirement: Alabama, Connecticut, Indiana, Louisiana, New Mexico, Pennsylvania, South Carolina, South Dakota, Washington, and Wyoming). A typical example of the reporting requirement can be found in the Minnesota statute regarding wounds. MINN. STAT. § 626.52 (2004) ("A health professional shall immediately report . . . to the local police department or county sheriff all bullet wounds, gunshot wounds, powder burns, or any other injury arising from, or caused by the discharge of any gun, pistol, or any other firearm, which wound the health professional is called upon to treat, dress, or bandage. A health professional shall report to the proper police authorities any wound that the reporter has reasonable cause to believe has been inflicted on a perpetrator of a crime by a dangerous weapon other than a firearm . . . .").

152. James T. R. Jones, *Battered Spouses Damage Action Against Non-Reporting Physicians*, 45 DEPAUL L. REV. 191, 247 n. 289 (1996); *see also* Ariella Hyman et al., *Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-being?*, 273 J. AM. MED. ASS'N 1781, 1781-82 (1995); Alexi Nicole Vital, *Mandatory Reporting Statutes and the Violence Against Women Act: An Analytical Comparison*, 10 GEO. MASON U. CIV. RTS. L.J. 171, 179 n.59 (1999) ("The General Assembly of the Commonwealth of Kentucky recognizes that some adults of the Commonwealth are unable to manage their own affairs or to protect themselves from abuse, neglect, or exploitation. Often such persons cannot find others able or willing to render assistance." (quoting KY. REV. STAT. ANN. § 209.090 (LexisNexis 1997)).

153. Moskowitz, *supra* note 148, at 95; *see also* Kristine Cordier Karnezis, *Physician-Patient Privilege as Applied to Physician's Testimony Concerning Wound Required to be Reported to Public Authority*, 85 A.L.R. 3d 1196 (1978).

154. Torture Convention, *supra* note 10.

155. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-761 (1998).

prevent acts of torture in any territory under its jurisdiction" and article 4(1) states that "each state party shall ensure that all acts of torture are offences under its criminal law."[156] If parties to this treaty are taking their obligations seriously to prevent acts of torture, they should allow doctors to testify.

4. Breach of Patient-Physician Confidentiality and Resulting Disciplinary Action

Failing to assert a privilege on a patient's behalf and testifying as to the substance of a privileged communication gives rise to a breach of confidentiality, even if the doctor's testimony was court-ordered. Courts have used four different theories as a basis for actions for breach of confidentiality:[157] the tort of invasion of privacy,[158] the tort of breach of a fiduciary duty to maintain confidentiality,[159] the violation of statutes defining physician conduct,[160] and the breach of an implied contract.[161] When courts have awarded damages for a breach of confidentiality, they usually find the breach of a fiduciary duty rather than invasion of privacy or breach of an implied contract.[162] This preference is largely because an invasion of

156. Torture Convention, *supra* note 10, arts. 2, 4. On December 10, 1984, the United Nations General Assembly unanimously adopted the Torture Convention. President Reagan signed the Torture Convention on April 18, 1988. One month later, the President transmitted to the Senate the Torture Convention for approval with nineteen proposed U.S. conditions. The Senate adopted its resolution of advice and consent to ratification on October 27, 1990. 136 Cong. Rec. 36,198 (1990). On October 21, 1994, President Clinton deposited the instrument of ratification with the United Nations, and the Torture Convention entered into force for the United States thirty days later. *See* Zheng v. Ashcroft, 332 F.3d 1186, 1192–93 (9th Cir. 2003).

157. Alan B. Vickery, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1437 (1982); *see also* FURROW ET AL., *supra* note 141, at 151.

158. Horne v. Patton, 287 So.2d 824, 830 (Ala. 1973); Clayman v. Bernstein, 38 Pa. D. & C. 543, 546 (Pa. D. & C. 1939).

159. MacDonald v. Clinger, 446 N.Y.S.2d 801, 804 (N.Y. App. Div. 1982) ("[A]n action in tort for a breach of a duty of confidentiality has long been acknowledged in the courts of this state. . . . Ordinarily, the essence of a tort consists in the violation of some duty due to an individual. When such duty grows out of relations of trust and confidence . . . the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract.").

160. Simonsen v. Swenson, 177 N.W. 831, 832 (Neb. 1920); Munzer v. Blaisdell, 49 N.Y.S.2d 915, 917–18 (N.Y. Sup. Ct. 1944); Doe v. Roe, 400 N.Y.S.2d 668, 673 (N.Y. Sup. Ct. 1977); Schaffer v. Spicer, 215 N.W.2d 134, 136 (S.D. 1974).

161. Hammonds v. Aetna Cas. & Sur. Co., 243 F.Supp. 793, 798 (N.D. Ohio 1965) (holding that, when a doctor treats a patient, a contract arises that implies privacy).

162. *See* JOEL I. KLEIN ET AL., LEGAL ISSUES IN THE PRIVATE PRACTICE OF PSYCHIATRY 40 (1984).

privacy requires public disclosure of private facts (as opposed to disclosure to a small group) and damages for breach of contract are limited to economic losses, omitting compensation for emotional distress or loss of employment.[163] In states where courts have recognized a duty of confidentiality, breach of confidentiality may serve as a basis for a malpractice suit or a disciplinary action by his or her professional association.[164] A breach of confidentiality may lead to admonishment, reprimand, suspension, or expulsion from the American Psychiatric Association.[165] Physicians can raise defenses to the allegation of breach of confidentiality. One defense is a patient's consent.[166] Another is, as mentioned above, based on state mandatory reporting requirements.[167]

5. Hearsay as a Bar to Identification of Torturers Under the Federal Rules of Evidence

Under Federal Rule of Evidence 801, any out-of-court statement offered to prove the truth of the matter asserted is generally hearsay and usually inadmissible as evidence.[168] The hearsay rule has twenty-eight enumerated exceptions.[169] A statement that is hearsay can be admitted under any of these exceptions.[170]

One exception is the "medical diagnosis exception," which excludes from hearsay, "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."[171] The rationale for the exception is that patients seeking treatment are generally truthful about their conditions so as to receive proper and effective treatment.[172] The U.S.

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163. *See id.*

164. *See* RONALD JAY COHEN & WILLIAM E. MARIANO, LEGAL GUIDEBOOK IN MENTAL HEALTH 260 (1982).

165. KLEIN ET AL., *supra* note 162, at 42.

166. *See id.* at 41.

167. *See id.* at 42.

168. *See* FED. R. EVID. 801(c). *But see* FED. R. EVID. 801(d).

169. *See* FED. R. EVID. 803, 804. A catch-all exception is also provided for in Rule 807. FED. R. EVID. 807.

170. *See* FED. R. EVID. 803, 804, 807.

171. FED. R. EVID. 803(4).

172. United States v. Iron Shell, 633 F.2d 77, 83–84 (8th Cir. 1980).

Court of Appeals for the 8th Circuit in *United States. v. Iron Shell* devised a two-prong test for admissibility of statements under the medical diagnosis exception: (1) the declarant's motive must be consistent with the purpose of obtaining medical treatment and (2) it must be reasonable for a physician to rely on the statement in order to provide medical treatment or diagnosis.[173] The medical diagnosis exception extends to statements related to causation but not ordinarily to fault.[174]

Some federal courts admit child abuse victims' statements that identify the alleged sexual or physical perpetrator when the statements are made to a medical provider.[175] One federal court admitted into evidence an estranged wife's statement that her husband had raped her, under the medical diagnosis exception.[176] The general trend in federal courts is to admit the identifying statements only when the abuser is a member of the immediate household or closely related to the abused person, based on the rationale that this is the only time when the identity of an abuser is pertinent to the treatment of the patient.[177]

Another exception is the excited utterance exception, which includes "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement

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173. *Id.* at 84.

174. FED. R. EVID. 803(4) advisory committee's note.

175. *See* United States v. Tome, 61 F.3d 1446, 1449 (10th Cir. 1995) (permitting identifying statements when the abuser is related to the child and the abuser's identity becomes reasonably pertinent to the victim's proper treatment); United States v. Farley, 992 F.2d 1122, 1125 (10th Cir. 1993) (permitting identifying statements made to medical personnel even if the abuser is not related to the child but lives in the immediate vicinity); United States v. Renville, 779 F.2d 430, 438 (8th Cir. 1985) (permitting identifying statements under the medical diagnosis exception if the alleged abuser is a member of the child-victim's immediate household, because such statements are reasonably pertinent to treatment). *But see* United States v. Nick, 604 F.2d 1199, 1202 (9th Cir. 1979) (permitting the physician to testify only to those portions of the child's statements that were relevant to the cause of the injury and excluding the identifying statement); Robert R. Rugani, Jr., *The Gradual Decline of a Hearsay Exception: The Misapplication of Federal Rule of Evidence 803(4), the Medical Diagnosis Hearsay Exception*, 39 SANTA CLARA L. REV. 867, 879 (1999) (arguing that expanding the medical diagnosis exception to cover the identity of the abuser is contrary to the purpose of the exception because identifying statements are not always inherently trustworthy).

176. United States v. Joe, 8 F.3d 1488, 1494–95 (10th Cir. 1993) (permitting states of identification under the medical diagnosis exception when the abuser has such an intimate relationship with the victim that identity is "reasonably pertinent" to medical treatment).

177. *See* Rugani, *supra* note 175, at 884.

caused by the event or condition."[178] The rationale for this exception is that a startling event temporarily stills the capacity for reflection and prevents fabrication for a short period of time.[179] The excited utterance exception does not specify how long the stress must last for the statement to be admissible under the exception. The exception and the Advisory Committee seem to favor a case-by-case analysis.[180] Statements made by a victim or observer of an act of torture might be admitted under the excited utterance exception provided the declarant was found to still be under the stress of the act.

C. THE FRENCH CRIMINAL JUSTICE SYSTEM AND ITS TREATMENT OF CONFIDENTIALITY AND PRIVILEGE

Under French law, a physician is required by the medical profession's ethical codes, and by law, to maintain a patient's confidentiality, the breach of which amounts to a criminal offense. The Medical Code of Ethics treats confidentiality as a medical provider's sacred obligation to his or her patients.[181] Article 4 mandates that physician-patient confidentiality includes not only direct communications between the patient and physician, but everything the medical professional hears, observes, or learns.[182] French law prohibits the disclosure of confidential information generally, but there are exceptions in particular circumstances.

Disclosure of information gained during sessions with patients could expose a physician to criminal charges under Article 226-13 of the French Penal Code. Article 226-13 of the penal code states:

> The disclosure of information of a confidential nature by a person who is its depository either by status or profession, or by reason of an office or of a temporary mission, is punishable by one year of misdemeanor imprisonment and by a fine of 100,000 francs [15,244 Euros].[183]

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178. FED. R. EVID. 803(2).

179. LILLY, *supra* note 91, at 275.

180. *See* FED. R. EVID. 803(2) advisory committee's notes.

181. *See* DOMINIQUE THOUVENIN, LE SECRET MÉDICAL ET L'INFORMATION DU MALADE 11 (1977).

182. Code de Déontologie Médicale, Décret No. 95-1000, art. 4 (1995), *available at* http://www.cegetel.rss.fr/res/remplacements/deontologie.pdf [hereinafter Code] ("Le secret professionnel, institué dans l'intérêt des patients, s'impose à tout médecin dans les conditions établies par la loi. Le secret couvre tout ce qui est venu à la connaissance du médecin dans l'exercice de sa profession, c'est-à-dire non seulement ce qui lui a été confié, mais aussi ce qu'il a vu, entendu ou compris.").

183. THE FRENCH PENAL CODE OF 1994 141 (Edward Wise ed., Edward A.

The offense encompasses all medical professions and roles.[184] The information gained while a doctor acts as a psychotherapist, therefore, is treated equally by the penal code as information gained when he or she acts as a physician.

For a physician to commit a breach of confidentiality, the penal code requires that the disclosed information be "a secret."[185] Furthermore, the information must have been obtained during the performance of professional duties, and includes everything a physician observes or hears during a patient's treatment.[186] The criminal offense does not require an injury to the patient as a result of the disclosure or an intention to cause harm.[187] Article 226-13 serves as a prohibition against disclosure or discovery of information protected by physician-patient confidentiality.[188] A physician can, therefore, refuse to answer questions relating to information acquired during sessions with patients and, in fact, is prohibited from doing so. If, however, the disclosed information is not considered confidential, a physician will not face charges or disciplinary action.[189]

1. Exceptions to Finding a Breach of Patient-Physician Confidentiality

While Article 226-13 functions as an absolute bar to disclosure of confidential information, Article 226-14 carves out exceptions to this rule that may permit a physician's testimony under certain circumstances. Article 226-14 of the criminal code states that:

> Article 226-13 is not applicable in cases where the law requires or authorizes the disclosure of a secret. Additionally, Article 226-13 is *not* applicable:

Tomlinson trans., Fred B. Rothman & Co. 1999) (translating CODE PÉNAL [C. PÉN] art. 226-13 (Fr.)) [hereinafter FRENCH PENAL CODE] ("La révelation d'une information à caractère secret par une personne qui en est déspositaire soit par état ou par profession, soit en raison d'une fonction ou d'une mission temporaire, est punie d'un an d'emprisonnement et de 100,000 F d'amende [15,244 Euros].").

184. THOUVENIN, *supra* note 181, at 15.

185. Sabine Michalowski, *Medical Confidentiality and Medical Privilege—a Comparison of French and German Law*, 5 EUR. J. HEALTH L. 89, 91 (1998).

186. *Id.* at 90–91.

187. *Id.* at 91.

188. *Id.* at 92–93.

189. *See infra* note 190 and accompanying text (discussing the effect of a patient's consent on Article 226-13).

1) To a person who informs judicial, medical, or administrative authorities of deprivations or maltreatments, including sexual assaults, of which he or she has knowledge and which have been inflicted on a minor less than fifteen years of age or on a person unable to protect himself or herself by reason of age or physical or mental condition.

2) To a physician who, with the assent of the victim, brings to the attention of the public prosecutor the maltreatment he or she has confirmed in the exercise of his or her profession and which permits the physician to presume that sexual violence of any kind has been committed.[190]

Similarly, Article 12 of the French Medical Ethical Code states that a physician is required to reveal certain information to the proper authorities when that information is necessary for the public's protection and health.[191] Article 44 of the Medical Code states that if a physician discerns that a person is a victim of ill-treatment or injury but by reason of their age, or physical or psychological state, the person cannot adequately protect him or herself, the physician is under duty to alert judicial, medical, or administrative authorities of the misconduct.[192]

Under French law, there is a conflict between medical confidentiality on the one hand, and a citizen's duty to give testimony, on the other. Article 109 of the French code of criminal procedure creates a legal obligation to testify when ordered by a court of law, but Article 109 also contains a provision exempting those subject to professional confidentiality who would otherwise be subject to Article 226-13 and 226-14 sanctions. According to Article 109, "Every person who was subpoenaed to be heard as a witness is under a duty to appear, to swear an oath, and to testify subject to the provisions of Articles 226-13 and 226-14 criminal code."[193]

190. FRENCH PENAL CODE, *supra* note 183, at 142 (emphasis added).

191. Code, *supra* note 182, art. 12 ("Le médecin doit apporter son concours à l'action entreprise par les autorités compétentes en vue de la protection de la santé et de l'éducation sanitaire.").

192. *Id.* art. 44 ("Lorsqu'un médecin discerne qu'une personne auprès de laquelle il est appelé est victime de sévices ou de privations, il doit mettre en oeuvre les moyens les plus adéquats pour la protéger en faisant preuve de prudence et de circonspection. S'il s'agit d'un mineur de quinze ans ou d'une personne qui n'est pas en mesure de se protéger en raison de son âge ou de son état physique ou psychique il doit, sauf circonstances particulières qu'il apprécie en conscience, alerter les autorités judiciaires, médicales ou administratives.").

193. CODE DE PROCEDURE PÉNAL [C. PR. PÉN] art. 109 (Fr.), *available at* http://www.legifrance.gouv.fr/WAspad/RechercheSimpleArticleCode?code=CPROCP

Article 109 only exempts a physician from testifying if obligated to maintain confidentiality. The article is generally interpreted as a protection against a court's attempt to compel a physician to testify about confidential communications with patients.[194] So, in addition to a physician's duty to testify as a citizen, he or she also has an exception when bound by confidentiality. But it is still not clear whether a physician may testify if he or she elects to do so.[195]

2. *Consent, Waiver, and Dispensing with Medical Confidentiality Under Criminal and Civil Law*

French criminal courts treat medical confidentiality differently than civil courts, primarily because the two have different interpretations of the purpose of physician-patient confidentiality.[196] While both value confidentiality as a means of protecting the patient's interest, the criminal system does not allow a patient's *expressed* interest—that is their consent—to overwhelm the more general notion of a patient's interest in privacy and bodily integrity.[197] A civil court, meanwhile, allows the patient's consent to serve as an expression of their interest, negating the element of confidentiality and therefore allowing a doctor to testify.[198]

According to French criminal law, a doctor cannot be relieved of her duty to protect physician-patient confidentiality by a patient's consent alone.[199] This approach has been criticized because it does not recognize that consent negates one of the requisite elements of Article 226-13, namely, that the information revealed be "secret."[200] Nonetheless, the duty is interpreted to guarantee confidentiality absolutely and completely, such that neither a court order alone nor a patient's consent will suffice.[201] Additionally, French criminal courts do

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EL.rcv&art=109&indice=3 ("Toute personne citée pour être entendue comme témoin est tenue de comparaître, de prêter serment et de deposer, sous réserve des dispositions des articles 226-13 et 226-14 du Code pénal.").

194. Michalowski, *supra* note 185.

195. *Id.* at 97 (noting that some commentators on French law believe that 109 only acts to prevent a court from compelling testimony when 226-13 is applicable but allows those who fall under the protection of 226-13 to testify if they wish).

196. *Id.* at 107.

197. *Id.* at 95.

198. *Id.* at 107.

199. *Id.* at 95.

200. *Id.* at 106.

201. *Id.* at 103 (citing cases: 8 May 1947, JCP.1948.1.414; 22 December 1966,

not distinguish between cases where the patient is attempting to invoke the physician's testimony as part of their defense and cases where the patient is a victim of another's crime.[202] A physician will still be subject to punishment in either scenario under Article 226-13.[203]

The principle that neither the court nor the patient alone can force the doctor's testimony receives varied interpretations in court decisions. In its December 22, 1966 decision, the Cour de Cassation reviewed a case in which a woman who had been accused of stabbing her husband to death called her physician as a witness to reveal certain facts regarding her medical condition.[204] The physician refused on the grounds that the information was confidential.[205] The court held that the defendant's consent alone was insufficient to relieve the physician of his duty to maintain medical confidentiality.[206]

Once a physician has been called and the patient has consented to the testimony, courts have ruled that the decision rests with the physician alone whether to honor the confidentiality or disclose the information. In its June 5, 1985 decision, the Cour de Cassation held that if a patient consented to a physician's testimony but the physician refused, the court "cannot determine for the physician in which cases the revelation of confidential information is appropriate."[207] The relevance of this opinion is that the disclosure of information would not, under these circumstances, be considered criminal under Article 226-13.

If the proceedings take place in criminal court, a doctor can neither be compelled by a court to testify, nor permitted by a patient to testify, nor can the doctor testify of his/her own accord.[208] The only exception appears to be if both of the latter elements exist concomitantly.[209] If a doctor is called by the court to testify and had been given consent by her patients, the

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D.1967.122; 16 December 1992, Bull n° 424).

202. *Id.*

203. *Id.*

204. *Id.* at 104 (citing 22 December 1966, D.1967.122).

205. *Id.*

206. *Id.*

207. *Id.* (citing 5 June 1985, Bull n° 218). Here the physician was called as a defense witness. The accused patient had consented to the testimony, but the physician refused anyway. The court held that it was up to the physician only whether or not to testify, and he could at that point be neither compelled nor silenced. *Id.*

208. *Id.*

209. *Id.*

decision would be hers as to whether to testify. To testify under those circumstances would not be a violation of medical confidentiality.

The civil chamber of the Cour de Cassation allows for the disclosure of confidential material if the patient has consented to its revelation.[210] An absolute prohibition of medical disclosure is impracticable in a civil court where physicians are frequently called as witnesses to prove medical facts.[211] No one benefits from a physician's silence where a patient wants these facts revealed.[212] When the secret's master has consented to its revelation in a civil case, there is no longer a duty of confidentiality.[213]

Finally, France ratified the Torture Convention on February 18, 1986.[214] Article 4 of the Torture Convention requires state parties to criminalize torture under their criminal laws.[215] France also ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Human Rights Convention) on May 3, 1974.[216] Article 3 of the European Human Rights Convention prohibits torture by stating "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[217]

D. THE ENGLISH CRIMINAL JUSTICE SYSTEM'S TREATMENT OF CONFIDENTIALITY

The English legal system is a common-law based system.[218]

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210. *Id.* at 107.

211. *Id.* (citing Trib. Civ. de la Seine, D.1955.588).

212. *Id.* at 108.

213. *Id.*

214. Torture Convention, *supra* note 10.

215. *Id.* art. 4.

216. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, *available at* http://www.unhcr.md/article/conv.htm [hereinafter European Human Rights Convention].

217. *Id.* art. 3.

218. 3 MODERN LEGAL SYSTEMS ENYCLOPEDIA 3.230.7 (Linda L. Schlueter ed., 2001) (explaining that the United Kingdom is a union of England, Wales, Scotland, and Northern Ireland, though the English legal system is only concerned with England and Wales while both Scotland and Northern Ireland have their own systems of law and courts); *see also* L. B. CURZON, LAW OF EVIDENCE 3 (2d ed. 1986) (1978) ("In general, trials under English law reflect the *adversary system* . . . parties and their representatives have primary responsibility for finding and presenting evidence . . . . The judge does not generally investigate the facts; he acts as an umpire between parties, rather than as an inquisitor."); GARY SLAPPER AND DAVID KELLY, Q&A SERIES: ENGLISH LEGAL SYSTEM 51 (2d ed. 1995) ("The doctrine of

Much of English evidentiary law is based on the assumption that the normal method of trial is by judge and jury.[219] Though very few criminal cases and hardly any civil cases are tried by jury today, English rules of evidence still reflect the common law approach to evidence.[220] Under English rules of evidence, admissibility questions are ones of law, and therefore determined by a judge.[221] The laws governing evidence are generally the same for civil and criminal proceedings.[222]

Privilege is a rule that entitles one party to withhold relevant evidence and refuse to answer questions in court.[223] English courts recognize two forms of testimonial privilege: the legal advice privilege (communications related to obtaining legal advice and assistance from a solicitor are privileged), and the litigation privilege (communications between the client and solicitor for the sole or dominant purpose of litigation or for collecting evidence for the litigation, are privileged).[224] Marital privilege (the right of spouses not to disclose communications made between them during marriage) was abolished in civil cases by the 1968 Civil Evidence Act, and in criminal cases by the Police and Criminal Evidence Act.[225] Under English rules of evidence, communications with doctors, priests, and journalists are not privileged.[226] English courts have consistently held that testimonial privileges for professionals are of a very limited character, and privileges are restricted to obtaining a lawyer's assistance.[227] One of the most cited cases on the issue of doctor-

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binding precedent, or *stare decisis*, lies at the heart of the English legal system. In essence, the doctrine refers to the fact that within the hierarchal structure of the English courts, a decision of a higher court will be binding on a court lower than it in that hierarchy.").

219. PHIPSON ON EVIDENCE 1 (M. N. Howard et al. eds., 15th ed. 2000) (1892).

220. *Id.*

221. *Id.* at 14.

222. CURZON, *supra* note 218, at 10.

223. PHIPSON ON EVIDENCE, *supra* note 219, at 503.

224. *Id.* at 506–507.

225. CURZON, *supra* note 218, at 152.

226. *Id.* at 155; D.B. CASSON & I.H. DENNIS, MODERN DEVELOPMENTS IN THE LAW OF CIVIL PROCEDURE 61 (1982) ("Professional privilege is restricted to the legal profession, and does not extend to protect communications with other professional advisers, such as accountants and doctors. However, in appropriate cases, the party seeking discovery may be required to give an undertaking not to divulge the contents of such documents to any person otherwise than for the purposes of litigation . . . ." (footnotes omitted)); PHIPSON ON EVIDENCE, *supra* note 219, at 506.

227. Wheeler v. Le Marchant, (1881) 17 Ch.D. 675, 681; Southwark and Vauxhall Water Co. v. Quick, (1878) 3 Q.B.D. 315, 321; Anderson v. Bank of B.C., (1876) 2 Ch.D. 644, 648; *see also* P. ST. J. LANGAN, CIVIL PROCEDURE AND EVIDENCE 229 (1970); ADRIAN KEANE, THE MODERN LAW OF EVIDENCE 404 (2d ed.

patient privilege is *Wheeler v. Le Marchant,* where Judge M.R. Jessel stated that "the communications made to a medical man . . . are not protected."[228]

Another frequently cited case on the issue of privilege is *Hunter v. Mann,* where the court ordered a doctor to disclose information supplied by his patients in order to discover the identity of the drunk driver who had hit them.[229] The *Hunter v. Mann* court held that medical practitioners, unlike lawyers, are not protected or bound by professional privilege.[230] In *D. v. National Society for the Prevention of Cruelty to Children,* Lord Edmund-Davies wrote that "we have no doubt that the only kind of professional privilege which English law allows is that of legal adviser and client."[231]

In criminal cases, however, judges have discretion to exclude legally admissible evidence that is tendered by the prosecution.[232] The judge, as part of his or her duty to ensure fair trials, has discretion in criminal cases to refuse non-privileged, legally admissible evidence if the prejudicial effect of the evidence on the accused outweighs its probative value.[233] In civil cases, judges have no discretion and they must admit all non-privileged relevant evidence. Discretion in criminal cases is determined on a case-by-case basis.[234]

Nonetheless, a communication's confidentiality is never a justification for invoking a testimonial privilege; there must be

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Butterworths 1989) (1985).

228. Wheeler v. Le Marchant, (1881) 17 Ch.D. 675, 681.

229. Hunter v. Mann, [1974] Q.B. 767, 768.

230. *Id.* at 772–73.

231. D. v. Nat'l Soc'y for the Prevention of Cruelty to Children, [1978] A.C. 171, 244 (H.L.) (appeal taken from Eng.) (U.K.) (quoting THE CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT (EVIDENCE (GENERAL)), 1972, Cmnd. 6252) ("During the hearing of this appeal it was suggested that the report demonstrated that it is no longer right to say that 'The only profession . . . which is given a privilege from disclosing information to a court of law is the legal profession' and that a judge is, for example, nowadays always entitled to direct a doctor not to answer a question concerning his patient's health on the simple ground that disclosure was opposed by his patient. I know of no decided cases supporting such a view or of any textbook writers who indicate that such is the law. On the contrary, the writers are unanimous that only in the case of lawyers and their clients is the court so empowered . . . .").

232. KEANE, *supra* note 227, at 33.

233. R v. Sang, (1980) A.C. 402, 402 (H.L.) (appeal taken from Eng.) (U.K.); Morris v. Beardmore, (1981) A.C. 446, 469 (H.L.) (appeal taken from Eng.) (U.K.); Selvey v. Dir. of Pub. Prosecutions, (1970) A.C. 304, 352 (H.L.) (appeal taken from Eng.) (U.K.).

234. KEANE, *supra* note 227, at 33.

additional reasons for excluding relevant evidence.[235] In *Science Research Council v. Nassé*, Lord Wilberforce held that the ultimate test was whether discovery of the confidential communication was necessary for a fair trial; if it was, discovery must be ordered notwithstanding confidentiality.[236] The case involved allegations of sex and national origin discrimination concerning job promotions, and the two plaintiffs sought preliminary discovery of confidential reports about other interviewees for the same position, prepared by the hiring employers.[237] Lord Wilberforce stated that where the court was impressed with the need to preserve confidentiality, it would consider whether the necessary information could be obtained by other means not involving a breach of confidence.[238]

In *British Steel Corp. v. Granada*, the court ordered the disclosure of an informant's identity who, as a former employee of the plaintiff, had sent the plaintiff's secret documents to the defendant.[239] Lord Wilberforce stated that courts had an inherent *wish* to respect confidences arising between doctor-patients, priest-penitents or in other relationships, but in all those cases, courts might have to decide that the interest of preserving confidences was outweighed by the interest of avoiding the *denial of justice*.[240] The court in *British Steel Corp.* approved the dictum of Lord Denning in *Attorney-General v. Mulholland*, who argued that the judge, as a person entrusted on behalf of the community, had to balance confidentiality with justice.[241]

1. Breaches of Confidentiality Under British Law

Under British law, "there is no general statutory protection for medical information."[242] All health care professionals employed by the National Health Service, however, are required by their employment contract to maintain patients' confi-

235. Wheeler v. Le Marchant, (1881) 17 Ch.D. 675, 681.

236. Science Research Council v. Nassé, (1980) A.C. 1028, 1029 (H.L.) (appeal taken from Eng.) (U.K.).

237. *Id.* at 1028.

238. *Id.* at 1034.

239. British Steel Corp. v. Granada Television Ltd., (1981) A.C. 1096, 1096-97 (H.L.) (appeal taken from Eng.) (U.K.).

240. *Id.* at 1170–71 (emphasis added).

241. AG v. Mulholland, (1963) 2 Q.B. 477, 489–90.

242. JEAN MCHALE ET AL., HEALTH CARE LAW: TEXT, CASES AND MATERIALS 473 (1997).

dentiality.[243]

The duty of confidentiality is generally governed by professional ethical codes. The 1858 Medical Act recognized medicine as a single profession and created the General Medical Council (GMC).[244] The 1983 Medical Act granted the GMC the power to take disciplinary action against doctors who were guilty of serious professional misconduct.[245] The GMC adopted its rules of Professional Conduct and Discipline (Blue Book) in 1995, under which it provided broad protections against disclosure of confidential information.[246] Judicial decisions have often referred to the GMC's rules in actions for breach of confidentiality.[247] Similarly, the British Medical Association (BMA), a professional association of doctors of which about 80% of all doctors in England are members, has adopted its Guidance on "Confidentiality and disclosure of health information" (Guidance) with broad confidentiality requirements.[248] Moreover, Lord Goff in *Attorney-General v. Guardian* expressly recognized the existence of a confidentiality requirement in the English legal system.[249] A doctor who fails to keep patients' confidences may face disciplinary actions from his or her professional association as well as in civil actions (in the form of actions for breach of confidence, breach of implied contract, or negligence).[250]

The duty of confidentiality is not absolute, and certain

243. *Id.* at 439.

244. JONATHAN MONTGOMERY, HEALTH CARE LAW 137 (1997).

245. *Id.* at 142.

246. MCHALE ET AL., *supra* note 242, at 440 ("Confidentiality: Guidance from the General Medical Council (London: GMC 1995) 1. Patients have a right to expect that you will not disclose any personal information which you learn during the course of your professional duties. . . .").

247. W. v. Egdell, (1990) 1 All E.R. 835 (applying rules 79-81 of the GMC's Blue Book to determine the duty of confidence owed by a doctor to a patient).

248. BMA Guidance, "Confidentiality and Disclosure of Health Information" (Oct. 14, 1999), *available at* http://www.bma.org.uk/ap.nsf/Content/Confidentialitydisclosure?OpenDocument&Highlight=2,confidentiality,disclosure ("Patients have a right to expect that identifiable information about themselves provided or discovered in the course of their health care will not be shared with other people without their knowledge, and the disclosure of identifiable information to someone who did not previously know it, breaches confidentiality.").

249. AG v. Guardian Newspapers, (1988) 3 All E.R. 545.

250. *See* R v. Dep't of Health, (2001) Q.B. 424, 426 ("For a case of breach of confidence to succeed (1) the information must have the necessary quality of confidence about it; (2) the information must have been imparted in circumstances importing an obligation of confidence; and (3) there must be unauthorized use of that information to the detriment of the party communicating it."); *see also* MCHALE ET AL., *supra* note 242, at 447.

situations require the disclosure of otherwise confidential information. One of the exceptions to the confidentiality requirement is the "public interest exception."[251] Courts have allowed the disclosure of confidential information when it is in the public's interest to do so.[252] Rule 81(g) of the GMC's Blue Book also provides a public interest exception to the confidentiality rule.[253] For example in *W. v. Edgell*, the court dismissed a breach of confidence action against a doctor who informed authorities of his psychopathic patient's obsession with explosives.[254] In 1996, the Department of Health issued its guidance regarding the justifiable disclosure of confidential information on public interest grounds.[255] The public interest exception is usually invoked to prevent fraud, criminal conduct, and iniquity.[256] The BMA's Guidance requires disclosure of confidential information when public safety is threatened.[257] The BMA's Guidance specifically states that doctors owe a duty to society and this duty may require, in circumstances involving a threat to public safety or public health, disclosure of confidential information.[258]

Another exception to the confidentiality requirement arises when the doctor is compelled by a court of law to disclose the

251. MCHALE ET AL., *supra* note 242, at 454.

252. Beloff v. Pressdram Ltd., (1973) 1 All E.R. 241, 260; Initial Services, Ltd. v. Putterill, (1967) 3 All E.R. 145, 147.

253. MCHALE ET AL., *supra* note 242, at 461 ("[81](g) Rarely, disclosure may be justified on the ground that it is in the public interest which, in certain circumstances such as, for example, investigation by the police of a grave or serious crime . . . .").

254. W. v. Egdell, (1990) 1 All E.R. 835.

255. The Protection and Use of Patient Information, Guidance from the Department of Health (DOH, 1996): 5.8 (stating that passing on information to help tackle serious crime may be justified if the following conditions are satisfied: (i) without disclosure, the task of preventing, detecting, or prosecuting the crime would be seriously prejudiced or delayed; (ii) information is limited to what is strictly relevant for a specific investigation; (iii) there are satisfactory undertakings that the information will not be passed on or used for any purpose other than the present investigation).

256. MONTGOMERY, *supra* note 244, at 257 ("The final general exception to confidentiality arises where the public interest in disclosure outweighs the public interest in ensuring confidentiality. This does not oblige health professionals to breach confidence, but permits them to do so if they judge it necessary.").

257. BMA Guidance, *supra* note 248 ("Personal health information may be disclosed properly without consent because there is perceived to be a strong public interest justifying disclosure. Disclosure which is essential to prevent or lessen a serious and imminent threat to public health or to the life or health of another individual typifies this category of justification.").

258. *Id.*

communication between him or her and the patient.[259] The relationship between a medical practitioner and his patient does not excuse the practitioner from the obligation to give evidence in a court of law.[260] A doctor may be summoned to give evidence in civil or criminal cases and may be punished by contempt if he or she refuses to testify.[261] When a judge orders a doctor to testify as to the substance of confidential communications, the doctor's duty of confidentiality is overridden by the needs of justice and a fair trial.[262] The BMA's Guidance states that "When a patient has not given consent for the disclosure of medical records, health professionals are nonetheless justified in disclosing information when they believe on reasonable grounds that a court has authorized it."[263] The GMC's rules advise doctors to disclose confidential information when the court requests it.[264] Accordingly, disclosing confidential information when requested by a court of law does not amount to a breach of confidentiality and may not give rise to an action for breach.[265]

Like France, the United Kingdom has ratified the Torture Convention and the European Human Rights Convention.[266] The Human Rights Act of 1998, which came into force on October 2, 2000, incorporated into UK law the substantive rights set out in

259. Parry-Jones v. Law Soc'y, (1969) 1 Ch. 1, 9 ("[A] duty of confidence is subject to, and overridden by, the duty of any party to comply with the law of the land. . . . For example, in the case of banker and customer, the duty of confidence is subject to the overriding duty of the banker at common law to disclose and answer questions as to his customer's affairs when he is asked to give evidence on them in the witness box in a court of law. I think that similar provisions as to disclosure apply to doctors under the National Health Act.").

260. 30 HALSBURY'S LAWS OF ENGLAND ¶ 18 (4th ed. 1973).

261. *Id.*; MONTGOMERY, *supra* note 244, at 267 ("[H]ealth professionals have no right to withhold confidential information from a court when called as a witness. It is legitimate to ask permission from the judge to decline to answer a question because it would involve breaching confidence but if the judge requires it, the information must be revealed.").

262. W. v. Egdell, (1990) 1 All E.R. 846 (noting the exception to confidentiality in the GMC's Blue Book, when "the doctor is directed to disclose information by a judge or other presiding officer of a court").

263. BMA Guidance, *supra* note 248.

264. MCHALE ET AL., *supra* note 242, at 443 ("You may also disclose information if ordered to do so by a judge or presiding officer of a court. . . . You should object to the judge or the presiding officer if attempts are made to compel you to disclose other matters which appear in the notes, for example matters relating to relatives or partners of the patient who are not parties to the proceeding.").

265. J. K. MASON & R.A. MCCALL SMITH, LAW AND MEDICAL ETHICS 107 (1983) ("The doctor in the witness box has absolute privilege and is protected against action for breach of confidence.").

266. European Human Rights Convention, *supra* note 216; Torture Convention, *supra* note 10.

the European Human Rights Convention.[267] Article 3 of the Human Rights Act states, "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[268] Under Section 134 of the 1988 Criminal Justice Act, torture is a criminal act punishable by imprisonment.[269]

2. *The Inadmissibility of Hearsay Evidence Under British Law*

Hearsay is an out-of-court statement proffered as evidence of any fact or opinion contained in the statement.[270] Under the common-law rule in both civil and criminal proceedings, hearsay statements are inadmissible for proving the truth of the facts declared in the statements.[271] Under modern English law, there are numerous common-law and statutory exceptions to and derogations from the rule against hearsay. In civil proceedings, the 1968 Civil Evidence Act largely reversed the rule against hearsay.[272] In criminal cases the 1984 Police and Criminal Evidence Act and the 1988 Criminal Justice Act have allowed for the admissibility of confessions and certain hearsay statements in documents.[273] In addition to those statutory provisions, hearsay statements are admissible if the statements fall under one of the various common-law exceptions to the hearsay rule.[274]

One of the common-law exceptions to the hearsay rule is the statement of physical sensation, which allows the admissibility of statements relating to one's bodily condition.[275] In *R v. Nicholas*, the court held that "[i]f a man says to his surgeon, 'I have a pain in the head,' or a pain in such a part of the body, that is evidence."[276] A statement concerning bodily condition

267. Human Rights Act, 1998, c. 42 (U.K), *available at* http://www.hmso.gov.uk/acts/acts1998/19980042.htm#aofs.

268. *Id.* sched. 1, Part 1, art. 3.

269. Criminal Justice Act, 1991, c. 33, s. 134; *see also* R v. Bow Street Metro. Stipendiary Magistrate, *Ex parte* Pinochet Ugarte, [2000] 1 A.C. 61 (H.L.) (U.K.); Hutchinson v. Newbury Magistrates Court O., 2000 W.L. 1480082 CO/663/00; The Queen on the Application of Tadeusz Roszkowiski v. Special Adjudicator, 2000 W.L. 1629499.

270. KEANE, *supra* note 227, at 176.

271. R v. Gibson, (1887) 18 Q.B.D. 537, 539; SIR RUPERT CROSS, EVIDENCE 6 (5th ed. 1979).

272. KEANE, *supra* note 227, at 176.

273. *Id.*

274. G. D. NOKES, COCKLE'S CASES AND STATUTES ON EVIDENCE 161 (11th ed. 1970).

275. CROSS, *supra* note 271, at 589–90.

276. R v. Nicholas, (1846) 2 Car. & Kir. 246, 248.

does not have to be contemporaneous with physical sensation.[277] The exception concerning physical sensation does not cover statements relating to the cause of the sensation or condition.[278]

Another exception to the hearsay rule is a statement concerning the offeror's state of mind or emotion.[279] Statements concerning emotions are admissible to prove the existence of political opinion, affection, fear, or dislike, but are inadmissible to prove the existence of the conditions that caused the emotions.[280] In *Thomas v. Connell*, the court held that in a fraud action, a statement by the bankrupt individual that he knew that he was insolvent was admissible to prove his knowledge of that fact, but not to prove the insolvency.[281]

There is also an exception to the hearsay rule for spontaneous statements relating to an event made by participants or observers.[282] The exception requires close association in time between the statement and the event so that the declarant would be less likely to make a distortion of facts or an error relating to the facts.[283]

The 1968 Civil Evidence Act has limited the scope of the hearsay evidence rule in civil proceedings.[284] The 1968 Civil Evidence Act allows the court to admit hearsay evidence if notice is given.[285] Although there is no statutory authority concerning a judge's discretion to include hearsay evidence in criminal cases, courts have decided against such discretion in criminal cases.[286]

E. JAPANESE LAW REGARDING INTERNATIONAL TREATIES, TORTURE, AND TESTIMONIAL PRIVILEGE

Japan is a civil law nation using primarily codified laws.[287]

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277. *See* R v. Black, (1922) 16 Crim. App. 118, 119.
278. *See* Gilbey v. Great W. Ry. Co., (1910) 102 L.T. 202, 203.
279. *See* KEANE, *supra* note 227, at 220–21.
280. *See id.*
281. *See* Thomas v. Connell, (1838) 4 M. & W. 267.
282. CROSS, *supra* note 271, at 578.
283. *See* Ratten v. The Queen, [1972] A.C. 378, 390 (P.C.) (appeal taken from Vict.).
284. KEANE, *supra* note 227, at 224.
285. *Id.*
286. *See* Myers v. Dir. of Pub. Prosecutions, (1964) 2 All E.R. 881, 887 (H.L.) (appeal taken from Crim. App.) ("It is true that a judge has a discretion to exclude legally admissible evidence if justice so requires, but it is a very different thing to say that he has a discretion to admit legally inadmissible evidence.").
287. *See* A. DIDRICK CASTBERG, JAPANESE CRIMINAL JUSTICE 5 (1990); HIROSHI ODA, JAPANESE LAW 35 (2d ed. 1999). There are six major "codes": the Constitution,

The Japanese Constitution has three basic tenets: the sovereignty of people, the pacifism of the nation, and the inviolability of fundamental human rights.[288] Article 36 of the Constitution strictly prohibits the use of torture and cruel punishment by government officials.[289]

Article 98, paragraph 2, of the Constitution states that treaties as well as the established laws of nations must be faithfully observed.[290] Japan ratified the International Convention on Civil and Political Rights in 1979 and acceded to the Torture Convention in 1999.[291] Article 7 of the International Covenant on Civil and Political Rights prohibits the use of torture, while Article 4 of the Torture Convention requires State parties to criminalize the acts of torture.[292] A Japanese criminal court is under an obligation to prevent future torture and to prosecute any perpetrators of torture.

The Japanese Code of Criminal Procedure governing the rules of evidence was enacted in 1948 and was largely modeled on U.S. laws.[293] Article 143 of the Code of Criminal Procedure

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the Civil Code, the Commercial Code, the Penal Code, the Code of Criminal Procedure, and the Code of Civil Procedure. *Id.* at 35. The Constitution is the "Supreme Law of the nation." *Id.* Next are statute laws enacted by the Diet (the legislative body), then Cabinet orders, followed by ministerial ordinances. *Id.*

288. *See* MERYLL DEAN, JAPANESE LEGAL SYSTEM: TEXT AND MATERIALS 506 (1997). Chapter III of the constitution provides an extensive list of human rights and fundamental freedoms, but that list is not exhaustive. *See id.* at 618. Article 13 of the constitution allows courts to recognize rights that are not specifically provided in the constitution. It states: "All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs." *Id.* (translating NIHONKOKU KENPŌ (1946) [KENPŌ] art. 13 (Japan)).

289. *See id.* at 620. Article 36 states: "The infliction of torture by any public officer and cruel punishments are absolutely forbidden." *Id.*

290. ODA, *supra* note 287, at 49 (writing that treaties are incorporated directly into the national legal order without enacting legislation).

291. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp; Torture Convention, *supra* note 10.

292. International Covenant on Civil and Political Rights, *supra* note 291, art. 4; Torture Convention, *supra* note 10, art. 4.

293. *See* Keiji soshōhō (Code of Criminal Procedure) [KEISOHŌ] (Japan), *translated in* 1 THE ATTORNEY GENERAL'S OFFICE, CODES AND STATUTES OF JAPAN (1948). Under the 1948 Code of Criminal Procedure, criminal trials are held in public and are adversarial in character, which means that parties, instead of judges, take the initiative to produce and examine evidence. *See* DEAN, *supra* note 288, at 415 (diagramming the trial process). A typical criminal case has four phases during the trial: opening, examination of evidence, closing arguments, and judgment. *See*

states "[e]xcept as otherwise provided in this law, a court may examine any person whomsoever as a witness."[294] Nonetheless, Article 149 recognizes a testimonial privilege for doctors, lawyers, and priests.[295] The second paragraph of Article 149 admits the testimony if the clients or patients have consented to the disclosure, which arguably designates the holder of the privilege as the client or the patient.[296] The recognition of a doctor-patient privilege in criminal cases is in accordance with the court decisions, which have long recognized the doctor-patient privilege in civil cases.[297] The protection of professional and industry secrets is deemed important in the Japanese legal system.[298]

Under Article 134 of the Japanese Penal Code and Article 14 of the Medical Practitioners' Law, Japanese physicians are legally obligated to protect patients' privacy.[299] Article 134 of

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id.

294. KEISOHŌ, *supra* note 293, art. 143, at 36.

295. *Id.* art. 149, at 38 (permitting doctors, lawyers, priests, and others to refuse to testify about knowledge received through professional work that relates to "secrets of other persons"). The article provides:

> A person who is, or was, a *doctor*, dentist, midwife, nurse, advocate, patent agent, notary public or a religious functionary may refuse testimony in respect to facts of which he has obtained knowledge in consequence of a mandate he has received in professional lines and which relates to *secrets of other persons*. However, this shall not apply if *the principal* (clients) has consented, or if the refusal of testimony is deemed as nothing but an abuse of right intended merely for the interest of the accused when he is not the principal or if there exist any special circumstances which shall be provided by the Rules of Court.

Id. (emphasis added).

296. *See id.*

297. *See* Caryl Ben Basat & Julian D. Nihill, *Corporate Counsel*, 31 INT'L. L. 245, 255 (1997). The attorney-client privilege was recently codified for the first time in Japan under the new Civil Procedure Law. *See id.* at 254–55. Prior to the new Civil Procedure Law's enactment, privilege was mainly treated in connection with the disclosure of medical documents. *Id.* at 255. There were, however, several cases which ruled that a doctor is not obligated to disclose documents which record communication with, or medical history or diagnosis of, his or her patients. *Id.* Japanese lawyers have interpreted the rulings regarding the disclosure of medical documents to imply that correspondence with their clients is privileged. *Id.*

298. Jason Marin, *Invoking The U.S. Attorney-Client Privilege: Japanese Corporate Quasi Lawyers Deserve Protection In U.S. Courts Too*, 21 FORDHAM INT'L L.J. 1558, 1605 (1998).

299. *See* Robert B. Leflar, *Informed Consent and Patients' Rights in Japan*, 33 HOUS. L. REV. 1, 35 (1996). Under company health insurance plans, however, employees' medication and treatment charges must be reported to the health insurance association. *See id.* This information can then be obtained by employers, which has raised serious problems for HIV patients—and at least one case has been reported in which an individual was fired after his employer's human resources

the 1954 Penal Code states that "[w]hen a doctor, pharmacist, [or] druggist . . . *without cause*, discloses a secret which has come to his knowledge in the course of the conduct of his profession, imprisonment at forced labor for not more than six months or a fine of not more than one hundred yen shall be imposed."[300] Article 155 of the Penal Code states that secrecy violations shall be prosecuted only upon complaint.[301] Patient-physician relationships are considered as creating binding contracts, which are confidential or fiduciary in nature.[302]

Individual privacy and the right to one's personal sphere have been established rights in Japan since the 1960s.[303] The Japanese courts first recognized invasion of privacy as a tort in the 1964 case of *Arita v. Hiraoka*.[304] Nonetheless, Japanese laws concerning confidentiality do not specify the contours of the obligation to protect privacy rights, and no case has been decided thus far on the issue of the breach of medical confidentiality.[305] Article 134 of the Penal Code does not define what would constitute a justifiable "cause" such that the disclosure would not be considered a violation of secrecy.

The traditional Japanese approach to medical ethics emphasizes the trust relationship between the doctor and the patient, as well as the complete reliance upon doctors' judgments, rather than the obligations of the doctors toward their

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office learned of his HIV status. *See id.* at 35–36.

300. KEIHŌ (Penal Code) art. 134 (Japan), *translated in* THE CRIMINAL CODE OF JAPAN 87 (Thomas L. Blakemore trans., 1954).

301. *Id.* art. 135, at 87.

302. Marc A. Rodwin & Atoz Okamoto, *Physicians Conflicts of Interest in Japan and the United States: Lessons for the United States*, 25 J. HEALTH POL. POL'Y & L. 343, 349 (2000). Japanese fiduciary law is less developed in medical jurisprudence, and courts do not generally invoke fiduciary principles to decide cases of consent, medical malpractice, or other health law issues. *Id.* Instead, Japan shares the United States' medical ideal that doctors should act in the best interest of patients. Nonetheless, both the Japan Medical Association (JMA) Code of Ethics and the more recent JMA report on social responsibility of doctors and professionalism do not explicitly address physicians' conflicts of interest (Physicians' Ethics Code 1951; Fourth Committee on Bioethics 1996). *Id.*

303. Marc Lim, *The First Step Forward - The AIDS Dismissal Case and the Protection Against AIDS-Based Employment Discrimination in Japan*, 7 PAC. RIM L. & POL'Y J. 451, 476 (1998).

304. *Id.* at 459, 476 (detailing how in 1995, a Brazilian working in Japan filed suit against his employer and his hospital for violating his privacy when it conducted an HIV test without his permission, after which time he was fired for testing positive).

305. *Cf. id.* at 475–77 (discussing the lack of a bright line rule protecting employees' medical privacy and noting that the Japanese legislature and courts have failed to create a broad privacy right).

patients.[306] In the long tradition of Japanese medical practice, the Confucian notion of *jin* (benevolence) has been the most important ethical principle, and physicians, as conduits of *jin*, were required to act with benevolence toward their patients.[307] Physicians fulfilled their responsibilities toward their patients by acting in a paternalistic and authoritative way, and the doctor-patient relationship was analogous to a child-parent relationship where parents decided what was best for the child.[308]

F. CONFIDENTIAL TESTIMONY IN A BELGIAN CRIMINAL CHAMBER

Belgium is a civil law country. Primary sources of Belgian law are the Constitution, codes and statutes, delegated legislations, and international law.[309] Treaties are not self-executing in Belgium and they must be ratified by the King, approved by the Parliament, and published in the Official Gazette in order to have legal effect.[310] Belgium is a State Party to the European Human Rights Convention, the International Covenant on Civil and Political Rights, and the Torture Convention.[311] Recently, Belgium has proved to be a particularly relevant jurisdiction for analysis because Belgian courts have been assuming universal jurisdiction over cases involving crimes against humanity.[312] A case involving torture could therefore be brought before a Belgian court.[313]

Article 458 of the Belgian Criminal Code states:

> Doctors, surgeons, health officers, pharmacists, midwives and all other

306. 3 ENCYCLOPEDIA OF BIOETHICS 1496-97 (Warren Thomas Reich ed., 1995).

307. *Id.* at 1496.

308. *Id.*

309. HERMAN NYS, MEDICAL LAW IN BELGIUM 16–18 (1997).

310. MODERN LEGAL SYSTEMS CYCLOPEDIA 3.20.24 (Linda L. Schlueter ed., 2000).

311. European Human Rights Convention, *supra* note 216, art. 3 (prohibiting the use of torture); International Covenant on Civil and Political Rights, *supra* note 291, art. 7 (prohibiting the use of torture); Torture Convention, *supra* note 10, art. 4 (requiring State parties to criminalize the act of torture).

312. *See Belgium: Universal Jurisdiction Law Repealed*, HUMAN RIGHTS NEWS (Human Rights Watch), Aug. 1, 2003, http://www.hrw.org/press/2003/08/belgium080103.htm. This article notes that the 1993 "universal jurisdiction" law permitted victims of atrocities abroad to file claims in Belgium. *Id.* Giving in to pressure from the United States, Belgium changed the law to give Belgian courts jurisdiction when the accused or a victim is Belgian. *Id.* The changes did allow three notable prosecutions to go forward: a Rwandan genocide case, the murder of two Belgian priests in Guatemala, and the case against Hissène Habré. *Id.*

313. *Id.*

> professionals who are entrusted with confidences or professional secrets, as a result of their status or profession, and who disclose them, shall be punished by a term of imprisonment of between 8 days to six months and/or subjected to a fine of between 100 and 500 BF [2.48 and 12.39 Euros] except if they were required to give evidence in court or were obliged, by law, to disclose those secrets.[314]

Article 458 has a general and absolute character in the sense that it applies immediately and indiscriminately to every person (professionals and some non-professionals) who keeps others' confidences because of a legal obligation, social tradition, or custom.[315] The doctor's obligation of non-disclosure applies not only to information obtained directly from the patient but also to the information about the patient that is acquired from other sources.[316]

The professional who fails to abide by the duty to maintain professional secrecy will also incur disciplinary sanctions under Belgian laws.[317] Every physician has to register with the Order of Physicians in Belgium.[318] The National Council of the Order of Physicians is responsible for drafting and implementing general principles and rules of professional conduct relating to the practice of medicine.[319] In 1975, the National Council announced its Code of Professional Ethics and submitted it to the Ministry of Public Health.[320] The provincial councils of the Order of Physicians ensure the observance of all rules of professional conduct for doctors as well as the maintenance of

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314. Louis Lafili & Nicole Van Crombrugghe, *Professional Secrecy of Lawyers in Belgium*, 7-SPG INT'L L. PRACTICUM 18, 22 (1994); Code Pénal, LOI 8 Juin 1867, Modifiée par la loi du 30 Juin 1996; Chapitre VI De Quelques Autres Délits Contre Les Personnes, Article 458 ("Les médecins, chirurgiens, officiers de santé . . . et toutes autres personnes dépositaires par état ou par profession, des secrets qu'on leur confie, qui hors le cas où ils sont appelés à rendre témoignage en justice . . . et celui où la loi les oblige à faire connaître ces secrets, les auront révélés, seront punis d'un emprisonnement de huit jours à six mois et d'une amende de cent francs à cinq cent francs.").

315. Cour de Cassation [Cass.] [highest court of ordinary jurisdiction], 20 février 1905, Pas. 143 ("La disposition de l'article 458 du code pénal a un caractère général et absolu et doit être appliquée indistinctement à toutes les personnes investies d'une fonction ou d'une mission de confiance, à toutes celles qui sont constituées par la loi, la tradition ou les mœurs, les dépositaires nécessaires des secrets qu'on leur confie . . . .").

316. NYS, *supra* note 309, at 88 ; *see also* XAVIER RYCKMANS & RÉGINE MEERT-VAN DE PUT, LES DROITS ET LES OBLIGATIONS DES MÉDECINS 112 (2d ed. 1971).

317. Lafili & Van Crombrugghe, *supra* note 314, at 22.

318. Crown Order No. 79 of 10 November 1967, art. 2.2., Moniteur Belge, 14 November 1967.

319. NYS, *supra* note 309, at 50.

320. *Id.*

dignity and good order.[321] Although the provincial councils have no normative authority concerning the elaboration of the professional rules, they have the power to impose disciplinary sanctions against their physician members.[322] The sanctions the councils may impose are: warning, censure, reprimand, suspension of the right to practice medicine for a period less than two years, or permanent prohibition to practice medicine in Belgium.[323] Title II, Chapter V of the 1975 Code of Professional Ethics is related to medical secrecy and prohibits disclosure of confidential information.[324]

In addition to the rules of the Order of Physicians, the Law on the Practice of Medicine contains certain obligations, the non-compliance of which has been made a disciplinary offense.[325] Moreover, a doctor who breaches his duty of professional secrecy may incur civil liability.[326] Belgian laws follow the approach of the French Cour de Cassation, which has held that the relationship between the physician and the patient is a contractual one.[327] In addition to an action for breach of contract, the physician may face tort liability under Article 1382 of the Belgian Civil Code resulting from a claim of negligence.[328] Under the Belgian Civil Code, patients are required to show mental or moral damage in order to be entitled to recovery in an action for breach of the duty of secrecy.[329]

A Belgian doctor, who is summoned to give testimony in a proceeding as to the substance of confidential communications, is free to disclose the confidential information or refuse to testify.[330] Belgian laws allow doctors to choose between reveal-

321. *Id.* at 49.
322. *Id.* at 54.
323. *Id.*
324. *Id.* at 51.
325. *Id.* at 52.
326. *Id.* at 62.
327. *Id.*
328. *Id.*
329. *Id.* at 66. The author explains that under Article 2262 of the Civil Code, breach of contract and negligence actions have a statute of limitations that lasts thirty years. *Id.* But when that same breach or tort was simultaneously a criminal act, the civil action must be brought within five years after the criminal act was allegedly committed. *Id.* So where there was a breach of the duty of medical secrecy (which is a crime), an action for breach of contract or negligence must be brought within five years after disclosure. *Id.*
330. Cour de Cassation [Cass.], Sept. 23, 1986, Pasicrisie Belge 89, 93 ("Une personne appelée à rendre témoignage en justice au sujet de faits couverts par le secret professionnel peut révéler ces faits si elle estime devoir le faire. Elle apprécie elle-même l'opportunité de conserver le secret . . . .").

ing confidential information in the courtroom and keeping it secret.[331] It is generally recognized that the physician has a right to silence or testimonial privilege, which permits the physician to refuse to disclose confidential information in the courtroom. Article 929 of the Civil Procedure Code has expressly recognized the right to silence, and although the Criminal Procedure Code does not contain a similar provision, the testimonial privilege is generally accepted in criminal cases as well.[332]

Disclosing confidential information in a court proceeding upon the request of the judge constitutes an exception to Article 458 of the Criminal Code, which criminalizes the disclosure of medical secrets. A doctor who testifies in a criminal case about his patient's confidential information cannot be sanctioned for a breach of the duty of medical secrecy.[333] The decision on whether to testify and disclose confidential information rests with the physician, who is to have the patient's best interest in mind.[334] A party or another witness may not oppose the patient's testimony by invoking medical secrets and may not prevent the physician from testifying as to confidential information.[335]

Furthermore, disclosure of confidential information is justified under Belgian laws when the disclosure is necessary to prevent grave and imminent harm to other persons.[336] The so-called "state of necessity" provides justification for disclosing otherwise confidential information for the enhancement of a higher cause or value. For example, under the Crown Order of March 1, 1971, doctors are obligated to notify public health officials about communicable and venereal diseases.[337] Article

331. MICHEL FRANCHIMONT ET AL., MANUEL DE PROCÉDURE PÉNALE 315 (1989) ("Des lors qu'un médecin par exemple, est appelé comme témoin devant le juge d'instruction (il en sera d'ailleurs de même devant le juge du fond) il a l'obligation de se présenter, mais il a le choix de parler ou de se taire.").

332. NYS, *supra* note 309, at 89.

333. *Id.*

334. *Id.*

335. RYCKMANS & MEERT-VAN DE PUT, *supra* note 316, at 142.

336. Cass., May 13, 1987, Pasicrisie Belge 1987, 1061, 1063 ("Le médecin, auteur d'une violation du secret professionnel, peut être justifié par l'état de nécessité, lorsque, sur la base de circonstances de fait . . . et en présence d'un mal grave et imminent pour autrui, ce médecin aurait peut estimer qu'il ne lui était pas possible de sauvegarder autrement qu'en commettant cette violation du secret professionnel un intérêt plus impérieux qu'il avait le devoir ou qu'il était en droit de sauvegarder avant tous les autres.").

337. NYS, *supra* note 309, at 89.

20 of the Crown Order of May 31, 1885, allows physicians to inform authorities about situations that may give rise to prosecution.[338] Moreover, Article 30 of the Criminal Procedure Code imposes upon every citizen a duty to inform the authorities about any crime of which he has been a *witness*.[339]

In two recent judgments, the Cour de Cassation has approved the decisions of the Court of Appeals of Liege not to prosecute a physician who disclosed his patient's confidences (involving illegal drug abuse and kidnapping) to competent authorities.[340] When the patient is a victim of a crime, such as child abuse, the same reasoning permits the physician to disclose confidential information without being subject to sanctions for breach of duty. The Cour de Cassation has held that Article 458 of the Criminal Code is intended to protect the interest of the patient.[341] Consequently, Article 458 would not impede the prosecution of the author of a crime of which the patient has become a victim.[342] The court held that the prohibition against disclosure of medical secrets, therefore, might not apply to facts about how the patient has become a victim.[343]

II. ANALYSIS: CASE STUDY

The article will now turn to an actual situation in Chad and analyze the facts of the case in light of the different approaches to the confidentiality issue in the laws of different jurisdictions.[344] This section attempts to formulate a coherent approach concerning a physician's testimony in cases of torture and other gross violations of human rights.

To provide a thorough analysis of how the different legal systems function, the article will first present the actual

338. *Id.* at 90.

339. *Id.* (emphasis added).

340. Cass., May 8, 1985, Pasicrisie Belge 1106, 1109; Cass., May 13, 1987, Pasicrisie Belge 1061, 1064.

341. Cass., Feb. 9, 1988, Pasicrisie Belge 662, 663.

342. *Id.*

343. *Id.*

344. Though the incident occurrred in Chad, the law of Chad is not analyzed. As a former French colony, Chad derived its first code from French Law. *See* Nellie Mitchell, *The Legal System of Chad*, *in* 6 MODERN LEGAL SYSTEMS CYCLOPEDIA 6.130.12 (Kenneth Robert Redden ed., 1990). Chad has not subsequently developed any laws that would appear to lead to a distinguishable result from the result under French law. *See id.* at 6.130.12–14.

situation. Then, the article will assume that the situation might have occurred in each one of the six jurisdictions examined above, namely (1) a U.S. federal court, (2) a French criminal court, (3) an English criminal court, (4) a Japanese criminal court, (5) a Belgian criminal court, and (6) an international criminal court/tribunal. The purpose of the exercise is to compare each of the approaches. Within this hypothetical framework for each country examined, the article will assume that the situation happened within the borders of that jurisdiction, that both the accused and the witness are citizens of that country, and that the relevant criminal court of that jurisdiction has both personal and subject matter jurisdiction over the events and the persons involved.[345] All questions concerning choice of law issues and personal jurisdiction problems are therefore ignored.[346] For each jurisdiction five questions will be answered: (1) would the jurisdiction find that a physician-patient privilege or a similar privilege exists; (2) would the jurisdiction find that communications within the

345. It is nonetheless significant to state that torture is considered a crime against humanity conferring subject matter jurisdiction over any court in the world to hear a case involving torture, providing the court has personal jurisdiction over the defendant. The concept of universal jurisdiction refers to the power of a state to punish certain crimes, wherever and by whomsoever they have been committed, without any required connection to territory, nationality or special state interest. MALANCZUK, *supra* note 21, at 113. International law traditionally allows states to exercise universal jurisdiction over certain acts which threaten the international community as a whole, and which are criminal in all countries. The four Geneva Conventions of 1949 contain provisions that provide universal jurisdiction for grave breaches of the laws of armed conflict, which include, *inter alia*, torture and inhuman treatment. Article 4 of the Torture Convention criminalizes the use of torture in all State parties, and Articles 5 and 7 of the Torture Convention permit a State party to prosecute an offender found in its territory even if the alleged act was not committed within its territorial boundaries. Therefore, even if it is not assumed that the situation has happened within the particular country examined, a court of that country possesses universal jurisdiction to try Mr. Habré since Chad and all of the countries examined have ratified the Torture Convention, which empowers them to exercise such a jurisdiction. See *infra* note 348 for the status of the prosecution of Mr. Habré.

346. It is important to note that even if the choice of law rules point to a different body of law than the governing substantive law, a court would use the procedural rules of its own jurisdiction. In accordance with the rules of conflict of laws of every nation, matters pertaining to procedure are governed by the *lex fori* (the law of the forum). Procedural rules may be unintelligible to a foreign judge and unworkable in a foreign court system. It has been said that a party to a case in a country must take the law of procedure as he finds it. P.M. NORTH & J.J. FAWCETT, CHESHIRE & NORTH: PRIVATE INTERNATIONAL LAW 74 (11th ed. 1987). Therefore, the governing rules of evidence will probably be that of the forum where the case is heard.

relationship were confidential and/or privileged; (3) would the jurisdiction be likely to allow the doctor to testify despite any confidence and/or privilege; (4) would the doctor in this fact situation fall into any exception, or would the doctor be in a situation analogous in purpose to an existing exception; and (5) are there any other independent barriers to the doctor's testimony?

After discussing each jurisdiction's likely decision in the given fact situation, this article will offer a general argument on the benefits of allowing doctors to testify. Finally, the article will conclude by offering a proposed rule and show how this proposed rule would fit within the present legal framework.

A. THE FACTS

Dr. J. established a clinic in Chad to provide medical and psychological care to torture victims over a period of several years.[347] During that period Dr. J. conducted individual interviews and medical examinations in Chad. The confidentiality of these medical examinations was expressly assured. Years later, a prosecution was commenced against the former dictator of Chad, Hissène Habré, and several other former officials in a criminal court.[348] Dr. J. was asked to testify during a preliminary proceeding. The investigating judge questioned Dr. J. as to whether the patients had mentioned that Mr. Habré directly participated in the torture sessions. Dr. J. answered "yes, several times." The judge then asked the doctor to disclose the names of torturers; the place where torture took place; the

347. For reasons of confidentiality and security, the name of the doctor who treated torture victims will be kept confidential and the doctor will hereafter be referred as Dr. J. Dr. J. has cooperated in and consented to the publication of this article.

348. According to Human Rights Watch, Hissène Habré resided in exile in Senegal when he was indicted by a Senegalese court on charges of torture and human rights violations. The Senegal Supreme Court ruled in 2002 that Mr. Habré could not be tried in Senegal. Senegal has held Mr. Habré in detention with the expectation that Belgium will seek the extradition of Mr. Habré under Belgium's revised "universal jurisdiction" statute. *See* Belgium: Universal Jurisdiction Law Repealed, *supra* note 312; Human Rights Watch, The Case Against Hissène Habré, an "African Pinochet," http://www.hrw.org/justice/habre/ (last visited Feb. 11, 2005). Despite the changes to the "universal jurisdiction" statute, Mr. Habré's prosecution will be allowed to continue. *See* Human Rights Watch, Chronology of the Habré Case, http://www.hrw.org/english/docs/2004/10/29/chad9579.htm (last visited Feb. 11, 2005). On September 19, 2005, a Belgian court issued an international warrant, and the Belgian government has requested that Senegal extradite Mr. Habré to Belgium. *See* Amnesty International News Service 279/2005 (Oct. 18, 2005).

time of the torture; and several other details concerning the tortuous acts. Dr. J. testified as to most of the information sought by the judge. It does not appear that the torture victims were present during the proceedings. The article will hereinafter assume that Dr. J. did not receive any express consent from the victims.

B. ANALYSIS UNDER VARIOUS LEGAL SYSTEMS

1. The United States

First, a court would need to determine whether a physician-patient relationship existed. U.S. courts recognize both a physician-patient relationship and a psychotherapist-patient relationship.[349] A U.S. court would recognize a physician-patient relationship between Dr. J. and the torture victims.[350] The fact that most of the torture victims did not pay for the treatment would not preclude this relationship.[351] Based on *Jaffee v. Redmond*, the court would also recognize a psychotherapist-patient privilege for that portion of the relationship that was intended to treat mental illness.[352]

Second, the court must examine whether this relationship was confidential or privileged. U.S. doctors are bound to treat their relationships with patients as confidential.[353] Certainly, Dr. J.'s relationships with the patients would be confidential; however, only a portion of the relationship would be privileged.[354] U.S. federal courts do not recognize any physician-patient privilege, but they do recognize an absolute psychotherapist-patient privilege.[355] Any part of Dr. J.'s relationship with the torture victims that primarily related to their mental health would be privileged under the psychotherapist-patient privilege.[356] Any part of Dr. J.'s relationship with the torture victims that primarily related to treating their

349. *See supra* notes 88–131 and accompanying text.
350. *See supra* notes 88–129 and accompanying text.
351. *See supra* notes 139–140 and accompanying text.
352. *See supra* notes 117–129 and accompanying text.
353. *See supra* notes 139–147 and accompanying text.
354. *See supra* notes 88–129, 139–147 and accompanying text. Notes 139–147 explain that all communications are confidential, while notes 88–129 explain that a testimonial privilege only attaches in certain jurisdictions or settings.
355. *See supra* notes 88–129 and accompanying text.
356. *See supra* notes 128–130 and accompanying text.

physical health would not be covered under any privilege.[357]

It should be noted that if a federal court is sitting in diversity jurisdiction in a civil case, the federal court would be required to apply state law.[358] Most states do recognize some form of physician-patient privilege.[359] In this event, all of Dr. J.'s conversations and treatments provided to the victims would be privileged.[360]

Third, given that any portion of the physician-patient relationship that relates to physical health is not protected by privilege in federal court, Dr. J. would be able to testify about the results of the torture. Dr. J. could also testify about the methods of torture and the perpetrators of these acts if Dr. J. discovered the information while treating the physical injuries to his patients. Only if Dr. J. discovered the methods and identities of the perpetrators while treating the victim's mental health would Dr. J. be prohibited from testifying. If the civil case is in diversity jurisdiction, Dr. J. would be unable to testify if the applicable state's laws provided for a physician-patient privilege. A breach of this confidential relationship could result in professional sanctions and civil suits.[361]

Fourth, under the federal rules, there is no physician-patient privilege and therefore no exceptions exist. The federal courts have not provided an exception to the psychotherapist-patient privilege.[362] If Dr. J. became involved in a federal action where state laws applied, Dr. J.'s information could fall within an exception. Most states provide for reporting incidents of violence especially where the victims are elderly, children, or the mentally incompetent.[363] Dr. J.'s patients were the victims of violence, and some of the victims could have been elderly, children, or mentally incompetent. It is also not difficult to argue for an extension by analogy. The goal of the state exceptions is to aid the state in protecting victims of violent acts and punish persons who perpetrate these crimes. In particular, the goal of both is to protect those persons who may be to afraid to testify against the perpetrators.

Fifth, the United States is one of the few countries that still

357. *See supra* note 93 and accompanying text.
358. *See supra* notes 94–95 and accompanying text.
359. *See supra* notes 97–98 and accompanying text.
360. *See supra* notes 105–107 and accompanying text.
361. *See supra* notes 157–165 and accompanying text.
362. *See supra* note 123 and accompanying text.
363. *See supra* notes 148–153 and accompanying text.

has a hearsay rule.[364] Portions of Dr. J.'s testimony, particularly that part that identifies Mr. Habré as the perpetrator of the torture, would fall under the hearsay rule.[365] Dr. J.'s testimony about the medical condition of the victims would be admitted under the medical diagnosis exception to the hearsay rule.[366] It is also possible that Dr. J. could identify Mr. Habré under the excited utterance exception.[367] This exception would only work if the victims sought Dr. J.'s care promptly after the incident; if several days passed, the court would likely find that the victims had too much time to contemplate the event and the torture would be inadmissible hearsay.[368]

2. France

First, a French court would treat Dr. J.'s relationship with the torture victims as a physician-patient relationship.[369] Unlike U.S. courts, French courts do not treat physicians differently then psychologists.[370]

Second, under French law, Dr. J.'s communications would be considered confidential. Article 4 of the Ethical Code obligates Dr. J. to keep clients' secrets.[371] A French court would allow Dr. J. to invoke this confidentiality to establish that the communications were privileged.[372]

Third, without the consent of the victims Dr. J. would be prevented from testifying. The victim's consent alone, however, would not be enough to force Dr. J. to testify.[373] If there was patient consent, Dr. J. could choose whether to testify.[374]

Fourth, Dr. J. faces a particularly difficult problem in France which requires neither the intent to injure nor an injury in fact for the physician to be punished for revealing secrets.[375] Dr. J. would have an available exception to Article 226-13 under Article 226-14.[376] It could be argued that the torture victims fall

364. *See supra* note 168 and accompanying text.
365. *See supra* note 168 and accompanying text.
366. *See supra* notes 171–174 and accompanying text.
367. *See supra* notes 178–180 and accompanying text.
368. *See supra* notes 178–180 and accompanying text.
369. *See supra* notes 181–182 and accompanying text.
370. *See supra* note 184 and accompanying text.
371. *See supra* note 182 and accompanying text.
372. *See supra* notes 195–209 and accompanying text.
373. *See supra* notes 199–209 and accompanying text.
374. *See supra* note 206–209 and accompanying text.
375. *See supra* note 187 and accompanying text.
376. *See supra* note 190 and accompanying text.

within those "persons incapable of defending themselves against deprivation and injustice."[377] If the victims fall within this category, Dr. J. would have the ability to inform judicial or administrative authorities of the injuries or ill-treatment.[378] If Dr. J. is able to fall within this exception, there would be a way of avoiding criminal action and/or sanctions. Even if Dr. J. does not fall within the exception, it is also not entirely clear whether a doctor who chooses to testify under Article 109 will be subject to liability under Article 226-13.[379]

Finally, French law does not have a hearsay rule to prevent the testimony of Dr. J.

3. *The United Kingdom*

First, Dr. J.'s relationship with the torture victims would be considered a physician-patient relationship. Like France, physicians and psychologists are not treated differently.

Second, English courts do not recognize any privileges other than an attorney-client privilege.[380] English doctors are obligated to treat their communications with patients confidentially.[381] In England, Dr. J. could be subject to civil action and professional sanctions if there is a violation of this secrecy.[382]

Third, in England, without a court order, Dr. J. should not testify.[383] Under these circumstances Dr. J. could be subject to sanctions and civil action.[384] If a court orders a doctor to testify, the GMC allows Dr. J. to testify without fear of sanctions.[385]

Fourth, Dr. J. has an available exception. The GMC provides that doctors can testify if it is in the public interest.[386] If a doctor testifies under this exception, he or she will not face professional sanctions.[387] It is almost certain that testifying about acts of torture and the perpetrator of these acts would be in the public interest.[388]

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377. *See supra* note 190 and accompanying text.
378. *See supra* note 190 and accompanying text.
379. *See supra* note 195 and accompanying text.
380. *See supra* notes 223–241 and accompanying text.
381. *See supra* notes 242–250 and accompanying text.
382. *See supra* note 250 and accompanying text.
383. *See supra* notes 259–265 and accompanying text.
384. *See supra* notes 264–265 and accompanying text.
385. *See supra* notes 259–265 and accompanying text.
386. *See supra* notes 251–258 and accompanying text.
387. *See supra* notes 251–258 and accompanying text.
388. *See supra* notes 251–258 and accompanying text.

Fifth, England has eliminated the hearsay exception in both civil and criminal actions.[389]

4. Japan

First, a Japanese court would consider the relationship between Dr. J. and the victims to be within a physician-patient privilege. Japanese law does not appear to distinguish between a physician and a psychologist.[390]

Second, in Japan the relationship would be confidential and privileged. Though Article 143 of the Japanese Code of Criminal Procedure enables Japanese courts to call any witnesses, Article 149 would allow Dr. J.'s patients to invoke a privilege preventing Dr. J.'s testimony.[391] Article 134 of the Japanese Code of Criminal Procedure and Article 14 of the Medical Practitioners' Law in Japan deem the information confidential and establish that the doctor is legally obligated to protect that privacy.[392]

Third, without a court order, a Japanese court may hold that Dr. J. testified *without cause*.[393] This holding would subject Dr. J. to civil action and professional sanctions.[394] When deciding how to rule, a Japanese court would be guided by the Confucian notion of benevolence toward patients.[395] Under this notion the physician would be granted leeway to act in a way the doctor believes is best for the patient.[396] So, if Dr. J. felt it was best for the victims of torture to have the perpetrator exposed, a court would be more likely to allow Dr. J. to violate the confidentiality. If a court ordered Dr. J. to testify and Dr. J. felt it was in the best interest of the victims, a Japanese court would almost certainly decide that Dr. J. testified with cause. In these circumstances Dr. J. would be protected from professional sanctions and civil action.

Fourth, Japan does not have a reporting requirement for doctors or a public interest exception.

Fifth, Japan does not have a hearsay rule.

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389. *See supra* notes 270–286 and accompanying text.
390. *See supra* notes 287–308 and accompanying text.
391. *See supra* notes 294–298 and accompanying text.
392. *See supra* notes 299–300 and accompanying text.
393. *See supra* notes 300–305 and accompanying text.
394. *See supra* notes 300–305 and accompanying text.
395. *See supra* notes 306–308 and accompanying text.
396. *See supra* notes 306–308 and accompanying text.

5. Belgium

First, Belgium would consider Dr. J.'s relationship to the torture victims to be a physician-patient relationship. Belgium does not appear to differentiate between a physician and a psychotherapist.[397]

Second, under Belgian law this relationship would be confidential and privileged. Article 458 of the Belgian Criminal Code and Article 929 of the Civil Procedure Code provide that physician-patient communications are privileged and confidential.[398] Title II of Chapter V of the 1975 Code of Professional Ethics also provides that physician-patient communications are confidential in Belgium.[399]

Third, Article 458 makes it a criminal offense for doctors to testify in Belgium unless they are "required to give evidence in court or were obliged, by law, to disclose those secrets."[400] A physician could also be civilly liable for testifying in violation of this statute.[401] If a court requires a physician to testify, that physician falls within the exception to Article 458.[402] A doctor testifying under a court order is also protected against civil liability and professional sanctions.

Fourth, even without a court order a doctor may be able to testify under several exceptions. Belgian law allows a doctor to inform authorities about events that may give rise to criminal prosecutions.[403] There is also a "state of necessity" exception, which allows a physician to disclose confidential information if it promotes a higher cause or value.[404]

Fifth, there is no hearsay rule in Belgium.

6. International Courts and Tribunals

First, both the ICC and ICTY would acknowledge a physician-patient relationship existed between Dr. J. and the torture victims.

Second, the ICTY and the ICTR only recognize an attorney-

397. *See supra* notes 309–343 and accompanying text.
398. *See supra* notes 315–316, 332 and accompanying text.
399. *See supra* notes 317–324 and accompanying text.
400. *See supra* notes 333–335 and accompanying text.
401. *See supra* note 328 and accompanying text.
402. *See supra* notes 333–335 and accompanying text.
403. *See supra* note 338 and accompanying text.
404. *See supra* note 336–337 and accompanying text.

client privilege.[405] The ICTY's rules did allow a witness to decline to testify if the information is confidential.[406] The ICC rules expressly recognize a physician-patient privilege.[407] The ICC would also treat any communications between psychiatrist and patient as privileged.[408]

Third, when determining whether to permit a privilege holder to testify, international tribunals defer to the privilege holder.[409] Therefore, Dr. J. would be permitted, but not compelled, to testify.

Fourth, the basic purpose for exceptions that permit doctors to testify without the consent of patients is to protect the doctors against civil or criminal liability. International courts and tribunals do not hold their witnesses civilly or criminally liable so these jurisdictions do not have exceptions. A doctor wishing to testify would likely want to look to the jurisdiction where the relationship occurred and possibly the doctor's own jurisdiction to see if the testimony would be protected under any exceptions.

Fifth, there is no hearsay rule in international courts.[410]

7. *Summary of Dr. J.'s Ability to Testify in Each Jurisdiction*

If Dr. J. had met with the victims in the United States, Dr. J. would be allowed to testify about information acquired while healing physical ailments, but would not be able to testify as to information acquired healing the victims' mental health. If the events had occurred in France, Dr. J. would be permitted to testify with the patient's consent, or if it were determined that the victims fell into the class of those persons unable to protect themselves. If the events occurred in England, Dr. J. would be permitted to testify. In Japan, Dr. J. would rely on his/her professional judgment as to whether the testimony is in the patient's best interest. In Belgium, Dr. J. would be permitted to testify with a court order, or under various exceptions. Finally, in an international court or tribunal Dr. J. would be permitted

405. *See supra* notes 42–43 and accompanying text.

406. *See supra* notes 41 and accompanying text.

407. *See supra* note 64 and accompanying text.

408. *See supra* notes 64–65 and accompanying text.

409. *See supra* notes 45–49 and accompanying text. Though the employee who wished to testify was not permitted to in the ICRC case, the ICTY held that the employee was precluded from testifying only because it was the ICRC and not the employee who held the privilege in that case. Here it would appear that Dr. J. would stand in the position of the ICRC and would therefore hold the privilege. *Id.*

410. *See supra* notes 81–87 and accompanying text.

to testify.

C. THE SPECIAL ROLE OF PHYSICIANS IN PROSECUTING HUMAN RIGHTS ABUSES AND THE NEED FOR AN EXCEPTION TO THE CONFIDENTIALITY RULE

The final issue is whether a universal exception to the duty of confidentiality ought to be carved out for physicians who become recipients of information concerning human rights violations and who are afterward summoned to testify before a criminal court.

When summoned to the criminal court, Dr. J. encountered a situation in which two conflicting obligations created an ethical dilemma. One is the obligation to testify truthfully and accurately to help the evidentiary process of fact-gathering, and the other is the duty of confidentiality. It is a typical dilemma professionals face who, as part of their activities promoting human rights and protecting victims, witness human rights violations by simply being present in the field. This dilemma is accentuated with medical professionals treating torture victims because, by virtue of the treatment, they are likely to observe many of the most useful types of evidence.[411]

The laws of different jurisdictions offer varying solutions to this dilemma, each providing less than comprehensive protection for a testifying professional. Some jurisdictions preclude criminal or civil actions for breach of confidentiality when a court obliges the physician to disclose the confidential information. Still, some jurisdictions require the physician to refuse to testify even with a court order. Several jurisdictions require physicians to report the abuse of vulnerable persons or wounds inflicted by deadly weapons, but most of the existing reporting requirements fail expressly to incorporate injuries resulting from torture or other human rights abuses. Overall, national laws have yet to address the problem of a doctor or human rights professional who is bound by the duty of confidentiality but is nonetheless willing to disclose some relevant information related to torture, a crime against

411. *See* CAMILLE GIFFARD, HUMAN RIGHTS CENTRE, UNIVERSITY OF ESSEX, THE TORTURE REPORTING HANDBOOK (2000), http://essex.ac.uk/torturehandbook/english.htm (noting useful types of information including medical evidence, physical evidence, psychological evidence, statements of the victims, statements of witnesses, and expert medical testimony and that it is only logical that a doctor treating torture victims would have access to most if not all these forms of information).

humanity, or other grave human rights abuse.

Dr. J.'s dilemma is accentuated by some additional factors—torture is usually perpetrated in a location where there are few witnesses and is often difficult to prove. An international criminal court or tribunal usually faces considerable difficulties in fact-gathering and would be in great need of a professional's testimony who had observed the torture's physical and psychological effects and who had received information from persons with first-hand knowledge. In Dr. J.'s situation, the prosecution and the court/tribunal may be unable to find witnesses to testify against the former dictator of a country. Another factor that may have induced Dr. J. to testify may be the fact that it was Dr. J. who opened a clinic in the country to treat victims and to protect them. Part of Dr. J.'s mission as a promoter of human rights in Chad was to care for victims and prevent future violations. Unlike the ICRC,[412] Dr. J. has no institutional need to assure continual access to the victims in Chad. Dr. J. may have found the violations were significant, that confidential efforts might not end the violations, that the disclosure would benefit the threatened persons, and that violations were verified through reliable sources.

The ethical dilemma that awaits many physicians working in the human rights field begs the following question: should the physicians, who would like to disclose confidential information in a criminal process in order to assist the prosecution of a human rights violator, be exempt from the duty of confidentiality? The response to that question necessarily entails balancing two sets of interests: the public interest in bringing the perpetrators to justice against the public interest of adequate care for the victims of human rights abuses and the privacy interests of the threatened and injured persons.

There are several arguments against any exemption to the duty of confidentiality. First, there is a concern that the victims of abuse would be afraid to seek treatment if they felt that their medical conditions would become a matter of public record. Second, the violators of human rights abuses would be more likely to keep out medical providers seeking to treat the victims of their abuse if they thought those individuals would later testify against them. Finally, those who provide care to the victims of human rights abuses might themselves become targets if the violators believe those care providers will testify

412. *See supra* notes 47–49 and accompanying text.

against them.

Despite these problems, within the context of prosecuting human rights violations the scales tilt toward the public interest, *i.e.* creating an exception to the duty of confidentiality for physicians.

First, in a criminal court with evidentiary rules similar to the ICC, numerous provisions related to witness protection would provide adequate protection for victims' personal information such as their identities, locations, and professions. By incorporating the scheme devised by the ICC, it is possible to achieve reliable and accurate fact-gathering without jeopardizing the safety of witnesses. Protecting the victim's identities should address the first argument against any exception to confidentiality. Additionally, by protecting witnesses' identities one can partially address the concern that the care givers will be attacked as the perpetrators of abuse would not know which doctors have testified in the past (though, admittedly, this measure would not address indiscriminate attacks on medical providers).

Second, despite the fear of future retaliation against them or their families, at least some torture victims would still be willing to help prosecute the perpetrator. In jurisdictions where patients hold the privilege of confidentiality for medical communications, some of the victims may waive it to allow the physician to testify or testify themselves. The perpetrator's conviction and incarceration would inevitably decrease the possibility of future violations by the same person and possibly by others.

Third, given an international court's and prosecutor's limited fact-finding abilities and limited ability to locate former patients, a physician who received information from people with first-hand knowledge is an invaluable resource. Providing the trustworthiness of the victims' statements is established, Dr. J.'s testimony is extremely relevant and probative during trial. Considering the evidentiary difficulties of establishing the elements of the crime of torture which took place in a country under a dictatorial government, the criminal court or the prosecutor should have the authority to encourage human rights activists to come forward and disclose relevant information.

Fourth, the recognition of torture as a crime against humanity and the universal renunciation of torture have moved the international community closer to prioritizing prosecution over privacy interests. A universal agreement exempting

physicians from testimonial consequences is consistent with the Torture Convention's call for member states to take active measures to prevent torture. The provisions of the Torture Convention urge State Parties to take measures for the prevention of torture. For the countries examined above, it would be sensible to include torture injuries within the mandatory reporting statutes. If most of the countries examined above have already decided to forego confidentiality in order to protect against the abuse of children and elderly persons, the extra step to protect vulnerable torture victims would not be difficult. The widespread acceptance of the Torture Convention and the other treaties barring torture, coupled with the growing international consensus that crimes against humanity must be prosecuted, support a universal exception for physicians wanting to testify about torture.

D. A PROPOSED RULE CODIFYING THE RIGHT OF PHYSICIANS TO TESTIFY WHEN THEY WITNESS HUMAN RIGHTS ABUSES IN THE COURSE OF THEIR HUMAN RIGHTS ACTIVITIES

While the various jurisdictions discussed vary in their approach to the physician-patient privilege, it is still possible to draft a rule to respond to the human rights abuses while acknowledging the concerns of each. A rule could read:

> **Any physician, or similar medical professional, is allowed to testify before any international tribunal or national criminal proceeding without fear of criminal or civil repercussions in any country when all of the following conditions are present:**
>
> **(1) The doctor wishes to testify;**
>
> **(2) The victim(s) consent, or if the victim(s) cannot be located or identified, the court appoints counsel to act on behalf of the victim(s)'s best interests;**
>
> **(3) A judge will be the finder of fact, or if a jury is a finder of fact, a judge will first screen the testimony of any physician prior to its presentation to the jury with attention to any exceedingly prejudicial information; and**
>
> **(4) The court requests the testimony.**

This rule addresses many of the concerns of the various jurisdictions studied in this article. For the United States, which would likely allow Dr. J. to testify, point three addresses

the concerns of the hearsay rule. The United States is the only country that maintains a hearsay rule, which reflects a concern that juries would not properly weigh hearsay evidence.

French law requires patient consent and the doctor's desire to testify before a doctor testifies. The first and second points ensure that the doctor wishes to testify and provide for patient consent or at least a hearing on the patient's best interest prior to the doctor's testimony.

The United Kingdom currently allows doctors to testify when a court orders them to do so. Point four requires the court to request the testimony prior to having the doctor testify. Though this is a request, the basis of the request is analogous to the basis for in order in British law.

Japanese doctors must act with the best interests of their patients in mind. Point one requires that the doctor wants to testify. Presumably the doctor believes that it is in the best interests of the victims if the doctor wants to testify. This point should meet the requirement under Japanese law that a doctor testify only with cause.

Belgian law allows doctors to testify under court order. This is largely met by point four's request on the part of the court. Additionally, Belgian law allows the doctor to testify when there is a public policy interest in doing so. The court will consider the public policy against torture when determining whether to order a doctor's testimony.

CONCLUSION

This article provides an example of an actual situation where a doctor working in the human rights field is faced with two contradictory obligations: either helping the prosecution of a perpetrator of human rights abuses or obeying the professional code of conduct as narrowly construed. It also explores several national legal systems and the current status of international law related to this issue. This article suggests an alternative way to approach the issue by offering a restatement of the law that would provide the greatest protection of human rights.