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International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the "Priest-Penitent" Privilege Under International Law

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INTERNATIONAL TRIBUNALS AND RULES OF EVIDENCE: THE CASE FOR RESPECTING AND PRESERVING THE “PRIEST-PENITENT” PRIVILEGE UNDER INTERNATIONAL LAW

ROBERT JOHN ARAUJO, S.J.*

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The Lord spoke to Moses, saying: Speak to the Israelites—When a man or woman wrongs another, breaking faith with the Lord, that person incurs guilt and shall confess the sin that has been committed. The person shall make full restitution for the wrong, adding one fifth to it, and giving it to the one who was wronged.¹

If we confess our sins, he who is faithful and just will forgive us our sins and cleanse us from all unrighteousness.²

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1. *Numbers* 5:5-7.

2. 1 *John* 1:9. See generally CATECHISM OF THE CATHOLIC CHURCH, para. 1441 (noting that in the Catholic Church, only God may forgive sins). However, “[s]ince Christ entrusted to his apostles the ministry of reconciliation, bishops who

INTRODUCTION

During the summer of 1998 in Rome, the Diplomatic Conference of Plenipotentiaries for the Establishment of an International Criminal Court established a Preparatory Commission ("Prep Com") to generate Rules of Procedure and Evidence.³ Amongst its responsibilities, the Prep Com was charged with the responsibility of addressing exceptions to the receipt of evidence based on confidential privilege. However, the Statute adopted at the Diplomatic Conference⁴ simply stated that, "[t]he Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence."⁵ While the Statute did not identify which privileges to include in the Rules of Procedure and Evidence, it employed the mandatory "shall" rather than the discretionary "may" to indicate that these privileges—once identified—would exclude otherwise relevant evidence.⁶ Even though Article 69 of the Statute was silent on specific privileges, the Diplomatic Conference did address and identify certain privileges.

In particular, the Working Group on Procedural Matters of the Committee of the Whole discussed the possible inclusion of certain privileges, including the privileges specific to lawyer-client, doctor-patient, and priest-penitent relationships.⁷ The Prep Com acknowledged the legacy of this work. Accordingly, it was reminded of the

are their successors, and priests, the bishops' collaborators, continue to exercise this ministry." *Id.* para. 1461. By virtue of the sacrament of Holy Orders, bishops and priests have the power to forgive sins "in the name of the Father, and of the Son, and of the Holy Spirit." *Id.* Moreover, "[t]he confessor is not the master of God's forgiveness, but its servant." *Id.* para. 1466.

3. See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/10, 17 July 1998, Res. F (setting forth the duty of the Commission to prepare proposals not only for the addressing of Rules of Procedure and Evidence, but also for the Elements of Crimes thus demonstrating the importance of the Prep Coms).

4. See Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998 [hereinafter Rome Statute] (establishing the International Criminal Court).

5. *Id.* art. 69.5.

6. See *id.* (noting that the Court shall respect privileges on confidentiality).

7. See Report of the Working Group on Procedural Matters, A/CONF.183/C.1/WGPM/L.2/Add.1, 29 June 1998, n.6.

privileges in a Note circulated by the Secretariat of the Prep Com distributed several weeks before the First Session held in New York from February 16-26, 1999.⁸ These privileges concerning doctor-patient, priest-penitent and lawyer client relationships, became a focus of the attention of the Prep Com delegates.⁹

During the winter and summer 1999 Prep Com sessions, several delegations acknowledged the importance of preserving these privileges specified in the Note which are observed in many legal systems of the world. For example, the Colombian delegation noted in the Second Session of the Prep Com¹⁰ specific examples of confidentiality with respect to Rule 6.4. Colombia indicated that it is important to recognize circumstances having to do with profession or conscience and proposed that a rule should be drafted to reflect these circumstances and improve the wording in Rule 6.4. Consequently, Colombia stated that the Prep Com should take such proposals into account, including references to relationships such as confessor-penitent, doctor-patient, and between relatives, when developing a newly drafted Rule 6.4.¹¹

The position paper of the Colombian delegation is one illustration of the contribution that various legal systems of the world have made and can make to the credibility of the International Criminal Court ("ICC") by taking steps to comply with the due process of law. These measures are consistent with general principles of law recognized by the nations of the world. Thus, in drafting the Rules of Pro-

8. See References to Rules of Procedure and Evidence found in the Rome Statute of the International Criminal Court and in relevant documents of the United Nations Diplomatic Conference of Plenipotentiaries for the Establishment of an International Criminal Court, PCNICC/1999/L.2, 26 January 1999 (recalling the work of the Diplomatic Conference and reiterating those privileges which had been identified for possible inclusion in the Rules of Procedure and Evidence).

9. See *id.* at 8 (calling attention to the Report of the Working Group on Procedural Matters, document A/CONF.183/C.1/WGPM/L.2/Add.1 of 28 June 1980).

10. See Preparatory Commission for the International Criminal Court, PCNICC/1999/L.4/Rev.1 (running from July 26, 1999 to Aug. 13, 1999).

11. See Proposal submitted by Colombia concerning the Rules of Procedure and Evidence, Comments on the coordinator's proposal (PCNICC/1999/WGRPE/RT.5), PCNICC/1999/WGRPE/DP.24, 29 July 1999 (setting forth Colombia's proposals on how to improve the privilege). The proposal noted in footnote 1 that its delegation "submitted a special proposal on family relationships on the basis of our constitutional provisions." *Id.* at DP. 15 and 16.

cedure and Evidence, the members of the Prep Com can and should rely on the contributions of “general principles of law recognized by” various legal systems throughout the world as an important and relevant source of international law.¹² Upon examining the provisions of a number of legal cultures, one can see that the traditional evidentiary privileges, such as lawyer-client, priest-penitent, doctor-patient, and specified family relationships, are long observed and respected. Moreover, they do not undermine the need to seek the truth in evidentiary proceedings. In addition, some of these privileges can further the interests of justice. For example, the spiritual counseling that takes place within the priest-penitent, or similar clergy privilege,¹³ can provide an incentive for an accused to reconcile not only with God and the spiritual world but also with the victims of crimes committed by the accused.¹⁴

The purpose of this Essay is to inform readers about the history of the priest-penitent privilege. In addition, it will demonstrate how this venerable evidentiary exclusion is essential to an international tribunal concerned with due process of criminal law. This Essay concludes that the priest-penitent privilege should be incorporated into the Rules of Procedure and Evidence for the ICC.

12. See I.C.J., Art. 38.1(c) (discussing the court’s duty to decide disputes in accordance with principles of international law).

13. See Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723 n.3 (1987) (expanding the traditional term “priest-penitent” to “cleric-confider”).

14. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 1, para. 1440 (setting for the practice and beliefs of the Catholic Church, confession to a member of the clergy takes place in the context of the Sacrament of Penance and Reconciliation). It states in pertinent part, “conversion entails both God’s forgiveness and reconciliation with the Church, which are expressed and accomplished liturgically in the sacrament of Penance and Reconciliation.” *Id.* This sacrament requires on the part of the penitent several things; first, to be contrite for the sin or sins committed. See *id.* paras. 1451-1454. Second, it also requires the penitent to confess or disclose these sins to a priest. See *id.* paras. 1455-1458. Third, it further requires the penitent to do what is possible to offer satisfaction [penance] to anyone they harmed. See *id.* paras. 1459-1460. Illustrations of the satisfaction can include: prayer, an offering, works of mercy, service of neighbor, voluntary self-denial, and sacrifices. See *id.* para. 1460. In short, the sacrament is a major way in which the wrongdoer reconciles with both God and those who were harmed. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 1, para. 1469.

I. THE PRIEST-PENITENT PRIVILEGE'S ORIGINS

The practice of religious confession has enjoyed an ancient tradition in religious thought and practice. The Bible indicated that in the early days of the Christian Church, the resurrected Christ exhorted his Apostles: "If you forgive the sins of any, they are forgiven them; if you retain the sins of any, they are retained."¹⁵ After the Church survived its initial persecution, the early Patristic period saw rites of confession, forgiveness, and penance mature. Around 244 A.D., the homilies of Origen instructed the faithful that sins could be remitted through penance and one should not withhold from declaring their sins to a priest of the Lord.¹⁶ Somewhere between the years 336 and 337, Aphraates in his *Treatises* wrote about a priest's duty concerning confession in the following fashion:

You physicians . . . who are the disciples of our illustrious Physician, you ought not deny a curative to those in need of healing. And if anyone uncovers his wound before you, give him the remedy of repentance . . . And when he has revealed it to you, do not make it public. . . .¹⁷

Further examples come from the symbols of Saint Ambrose and Rufinus, who acknowledged the importance of the forgiveness of sin around the years of 397 and in 404 respectively.¹⁸ During the First Council of Constantinople in 381, the early church confirmed the principles of faith established earlier at Nicea in 318, which included

15. *John* 20:23.

16. See WILLIAM A. JURGENS, *THE FAITH OF THE FATHERS* 207 (1970) (setting forth the instructions given to the faithful on forgiveness of sins).

17. *Id.* at 303 (making it apparent that in the first half of the Fourth Century the confidentiality of the confessional was recognized).

18. See *THE CHRISTIAN FAITH: IN THE DOCTRINAL DOCUMENTS OF THE CATHOLIC CHURCH* (Neuner & Dupuis eds., Alba House, New York, 1981, [hereinafter Neuner]) (exemplifying the importance of forgiveness as shown through various symbols). The Symbol of St. Ambrose (ob. 397), "I believe in God, the Father almighty, And in Jesus Christ . . . the forgiveness of sin and the resurrection of the body." *Id.* para. 3. The Symbol of Rufinus (c. 404) reads, "I believe in God, the Father almighty, invisible and impassible, And in Jesus Christ . . . the forgiveness of sins and the resurrection of the body . . ." *Id.* para. 4. The Symbols of Ambrose and Rufinus reflected the earlier ones of Cyril of Jerusalem (c. 348) and Epiphanius, Bishop of Salamis (c. 374), respectively. See generally *id.* paras. 8, 10.

the “forgiveness of sins.”¹⁹ In his letter to the bishops of Vienna and Narbonne written in 428, Pope Celestine I furnished pastoral instruction on the desirability of providing reconciliation to those who were approaching death and asked for it. In one exhortation to his brother bishops, he asserted that because God knows the heart, penance can not be denied to anyone who asks for it.²⁰ In the fifth century, the secrecy and confidentiality of the confessional was taking hold. During this period, Theodore of Mopsuestia acknowledged the confidential nature of confessional communications and encouraged the faithful with this exhortation:

It behooves us, therefore, to draw near to the priests in great confidence and to reveal to them our sins; and those priests, with all diligence, solicitude, and love, and in accord with the regulations . . . will grant healing to sinners. [The priests] will not disclose the things that ought not be disclosed; rather, they will be silent about the things that have happened, as befits true and loving fathers who are bound to guard the shame of their children while striving to heal their bodies.²¹

Pope St. Leo I recommended the practice of private confession and ordered confessors to stop revealing penitents' sins publicly.²² In his letter of 452 to Theodore, Bishop of Frejus, Pope Leo explained that the role of the priest is indispensable to the rite of reconciliation and this sacrament constitutes the Church's official intercession to reconcile sinners, through penance, with God. As Pope Leo wrote, “these remedies of the divine goodness have been so ordained that God's forgiveness cannot be obtained except through the supplication of the priests.”²³ A few years later in 459, the same Pope wrote to the bishops of the Roman rural districts and instructed them on the need for secrecy in confession in order to safeguard the reputation of the penitent and to promote greater reconciliation between God and

19. *See id.* para. 12 (acknowledging one baptism—the forgiveness of sins).

20. *See id.* para. 1604 (explaining why one who asks for forgiveness should be forgiven).

21. Michael Mazza, *Should Clergy Hold the Priest-Penitent Privilege?*, 82 MARQ. L. REV. 171, 174 n.20 (quoting from WILLIAM A. JURGENS, *THE FAITH OF THE EARLY FATHERS*, at 83-84 (1979)).

22. *See id.* at 272-73.

23. Neuner, *supra* note 18, para. 1605.

people.²⁴

After Pope Leo's appeal took hold, and by the end of the ninth century, an explicit papal order aimed at violators of the seal of the confessional was promulgated.²⁵ In 1215, at the time the Fourth Lateran Council convened, the absolute obligation of the secrecy of the confessional was imposed on the entire Church:

Let (the confessor) take absolute care not to betray the sinner through word or sign, or in any other way whatsoever. In case he needs expert advice he may seek it without, however, in any way indicating the person. For we decree that he who presumes to reveal a sin which has been manifested to him in the tribunal of penance is not only to be deposed from the priestly office, but also to be consigned to a closed monastery for perpetual penance.²⁶

The confidence of the confessional and the prohibition against breaking the seal of confession continued thereafter. Three centuries later, in 1551, the Council of Trent emphasized that it was an error for anyone to deny that sacramental confession was instituted by divine law and necessary for salvation through secret confession made to a priest.²⁷ The seriousness with which the obligation of the seal of confession was met is illustrated by priests who sacrificed their lives to preserve the secrecy and confidentiality of the confessional.²⁸ The

24. *See id.* para. 1606 (setting forth Pope Leo's idea that revealing sins only to a priest and not to the public will make people more willing to confess).

25. *See* JOHN BUSH & WILLIAM HAROLD TIEMANN, *THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATION AND THE LAW* 33-90 (3d ed. 1989) [hereinafter BUSH & TIEMANN] (discussing broadly the punishments for priest who violated the seal). The punishments were removal from office and being placed in exile for life. *See id.* at 44.

26. Neuner, *supra* note 18, para. 1609.

27. *See id.* para. 1646 (stating that those who denied sacramental conference were at variance with the institution and command of Christ); *see also* WILLIAM TIEMANN, *THE RIGHT TO SILENCE: PRIVILEGED COMMUNICATION AND THE PASTOR* 57-58 (John Knox Press, 1964) (demonstrating that in the early Seventeenth Century, a few of the reformed churches in Europe practiced secret confessions and observed the seal of confession).

28. *See id.* at 24-29 (exemplifying the negative backlash that can accompany efforts to compel members of the clergy to testify); *see also* BUTLER'S—LIVES OF SAINTS, VOL. II 332 (1956) (demonstrating the seriousness with which one respected the seal of the confessional typified in the life of the 14th century priest and martyr St. John Nepomucen). "A tradition, widely credited in Bohemia to this

importance of the secrecy of the confessional continues to be observed in the present day under the 1983 Code of Canon Law of the Catholic Church, which obliges those who know the contents of penitential communications to maintain the secrecy.²⁹ The Code

day, attributes the martyrdom of St. John Nepomucen to the resentment aroused in the king by the holy man's uncompromising refusal to reveal to him the substance of the queen's confession." *Id.*; See JOHN J. DELANEY, *DICTIONARY OF SAINTS* 324 (1980) (elaborating on the legend concerning St. John Nepomucen's death). With news of the John's refusal to disclose the content of the queen's confession, King Wenceslaus IV ordered the martyr to be tortured, murdered, and thrown into the Moldau River. *See id.*; Michael Perrella, *Should Western Australia Adopt an Evidentiary Privilege Protecting Communications Given In Religious Confessions?*, 4 MURDOCH UNIV. ELECTRONIC J. L., No. 3 (Sept. 1997) (illustrating a more recent analysis of the consequences priests have suffered for not disclosing the content of a confession). In the case, *R. v. Hay*, [1860] 2 F. & F. 4, a Catholic priest heard a confession of a person who had stolen a watch. *See id.* Whilst at confession, the thief gave the watch to the priest. In turn, the priest handed the watch over to the civil authorities. *See id.* When he was called to testify about whom gave him the watch, the priest relied on the seal of the confessional and refused to answer. *See id.* The court instructed the priest that he was asked to testify about a fact [from whom did he receive the watch] rather than what was the content of the confession. *See id.* The priest apparently concluded that this "factual statement" itself would be an invasion of the private confession and refused to answer after which he was held in contempt and jailed. *See id.* However, a footnote in the case suggests that the court implied recognition of the privilege of the confessional when it stated, "[i]t has been erroneously supposed that the learned Judge denied that any privilege attached to confession; but, as will be seen, he did not deny it; on the contrary, impliedly admitted it, and drew a distinction which would otherwise have been futile." *Eng. Rep.*, vol. 175 (1930) 934, *quoted in* TIEMANN, *supra* note 27, at 87.

29. *See* RITES OF THE CATHOLIC CHURCH, Rite of Penance, para. 10(d) (emphasizing secrecy). The Rite of Penance states: "[c]onscious that he has come to know the secrets of another's conscience only because he is God's minister, the confessor is bound by the obligation of preserving the seal of confession absolutely unbroken." *Id.*; *see also* INTRODUCTION TO THE NEW ORDER OF PENANCE, MISERICORDIAM SUAM, 7 Feb. 1974, para. 8 (stating, "[t]he confessor, realizing that, as God's minister, he knows the secret conscience of his brother, is under a most sacred obligation to maintain the sacramental seal."); THE CODE OF CANON LAW, A TEXT AND COMMENTARY, commentary, Canon 983 (James A. Coriden et al. eds., 1985) [hereinafter 1983 CODE OF CANON LAW] (indicating the relationship between the seal of confession and the civil law). The commentary to Canon 983 states: "[t]he obligation of the canon is not affected by a contrary disposition of civil law in jurisdictions where communications to an ordained minister, whether sacramental or extra-sacramental, are not considered privileged at law." *Id.* In other words, the minister has a principal duty to observe the seal of the confession even where the civil law does not exclude or excuse the testimony of the confessor. *See generally* Anthony Cardinal Bevilacqua, *Confidentiality Obligation of Clergy from the Perspective of Roman Catholic Priests*, 29 LOY. L.A. L. REV. 1733

clearly establishes that the sacramental seal is inviolable. Accordingly, it is criminal for a priest in any way to betray the penitent for any reason whatsoever whether by word or in any other fashion. If an interpreter is present, this third party is also obliged to observe this secret, as are all others who learn of sins from a confession.³⁰

Moreover, Canon Law forbids church authorities from using

(1996) (discussing the pastoral issues as well as the canon law issues).

30. See 1983 CODE OF CANON LAW, *supra* note 29, at Canon 983, secs. 1, 2. While some may argue that Catholic priests may divulge the contents of a sacramental confession upon the consent of the penitent (and this view is reflected in certain domestic legislation), see, e.g., *infra* notes 64, 65, and 66, this may not be the case from a canon law perspective. As Canon Law declares, the sacramental seal is inviolable. See 1983 CODE OF CANON LAW, *supra* note 29, at Canon 983, secs. 3, 4.

The use of the Latin construction *ne fas* ('absolutely wrong') shows how seriously the norm of this canon is regarded. Put simply, the priest is strictly forbidden to reveal by any means whatever anything the penitent may have disclosed to him. Even the penitent cannot release him from this obligation.

THE CANON LAW SOCIETY OF GREAT BRITAIN AND IRELAND, THE CANON LAW: LETTER & SPIRIT 535 (1995). As commentary to Canon 983 points out:

Neither the canon nor earlier interpretations admit exceptions to the norm: this is the meaning of the expression: 'in any way. . . by word or in any other manner or for any reason.' No distinction is made among the matters confessed, whether the sinful action itself or attendant circumstances, or the acts of satisfaction of penances imposed, etc. The secrecy concerning the penitent and his or her confession of sins that is to be maintained is properly described as total.

1983 CODE OF CANON LAW, *supra* note 29, at commentary to Canon 983. Recently, the Archbishop of Philadelphia, Anthony Cardinal Bevilacqua, who is trained in both canon law and civil law, offered the following statement on this subject:

That which the priest learns in the confessional, he knows uniquely as the representative of God, and not at all through human knowledge or communication; he should completely detach himself from (such knowledge); it is as if he knows nothing. It is necessary that the faithful have the most absolute confidence in the perfect discretion of confessors. Also the secret is more rigid than any other and never permits the least exception.

See Bevilacqua, *supra* note 29, at 1735-36 (quoting EMILE JOMBART, *Le Secret*, 4 Dictionnaire de Droit Canonique 41 (Raoul Naz ed., 1957)); see also 1983 CODE OF CANON LAW, *supra* note 29, clause 220 (stating that "[n]o one is permitted to damage unlawfully the good reputation which another person enjoys not to violate the right of another person to protect his or her own privacy"). Thus, the seal of the confessional protects not only the rights of the party confessing but also the duties of the confessor.

knowledge obtained from a confession for other purposes within the church.³¹ As the *Catechism of the Catholic Church* points out, a priest is bound to keep in absolute secrecy any confession that he hears.³² This secret is without exception and is called the sacramental seal.³³

Anyone who betrays the seal of the confessional faces a stringent penalty of automatic excommunication.³⁴ This long-standing respect for the confidentiality of priest-penitent communications is not only evident in canon law and the practice of the faithful. It also appears in the foundation on which the secular law conducted evidentiary hearings that might involve witnesses who were parties to various confidential communications. Surely the early courts were familiar with the reasons that the members of the clergy had a well-founded belief in their obligation to keep certain communications secret.³⁵ Consequently, an examination of the evolution of the priest-penitent privilege's adoption into the common law and other temporal legal systems is in order.

II. THE PRIVILEGE AT CIVIL AND COMMON LAW

A. EUROPE, CANADA, AUSTRALIA, AND NEW ZEALAND

The ancestry of the clerical privilege in the common law is ancient. While some argued that the priest-penitent privilege either did not exist under the common law or retreated as a result of the Refor-

31. See 1983 CODE OF CANON LAW, *supra* note 29 at Canon 984, secs. 1, 2 (forbidding the use of knowledge acquired in the confession to the detriment of the penitent).

32. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 2, para. 1467 (setting forth the language that effectively bound priest to absolute secrecy in regards to confessions).

33. See *id.*

34. See 1983 CODE OF CANON LAW, *supra* note 29, at Canon 1388, secs. 1, 2 (subjecting interpreters, as well as priest, to a just penalty, not excluding excommunication).

35. See JOHN MAHONEY, THE MAKING OF MORAL THEOLOGY: A STUDY OF THE ROMAN CATHOLIC TRADITION 1-36 (1987) (setting forth background information about the evolution of the auricular confession from its earliest times).

mation,³⁶ others demonstrated that this was not the case.³⁷ Judge Duffy, an illustrator of this second view, concluded over fifty years ago:

I have no doubt that the seal of the confessional was respected in the courts of England before the Reformation . . . and its recognition before the Norman conquests seems to be proved . . . The attitude of pre-Reformation courts towards any wider claim by a priest is probably unascertainable to-day, for law-reporting was in its infancy.³⁸

Historical research demonstrates that the Anglo-Saxon rulers of England respected the practice of confession and honored the seal of the confessional probably because of the close relationship between civil and religious laws and of the membership of bishops and priests on the courts.³⁹ The replacement of Anglo-Saxon with Norman rulers did not materially affect the privilege. It appears that during his reign in the early twelfth century, Henry I, son of William the Conqueror, promoted the following observance: "Priests should not reveal to

36. See, e.g., Jacob Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 101 (1983) (analyzing the Anglican Church's position on confession and 15th century religious transformation in England in order to understand why the privilege ceased to exist).

37. See 26 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE*, sec. 5612, at 29 & n.28 (1992) (demonstrating the infirmity of the authority that supports the proposition that there was no priest-penitent privilege).

38. *Cook v. Carroll*, [1945] Ir. R. 515, 519-21 (High Court), *quoted in* 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW*, sec. 2394, at 871 (1961) (noting, however, that later English judges disagreed with Judge Duffy's conclusions).

39. See BUSH & TIEMANN, *supra* note 25, at 47 (asserting that, England's common law originated from ancient rules and customs of the people). In those times, close connections between church and state existed. See *Id.* Therefore it is not surprising that the seal of confession was recognized early in English common law, despite the fact that this recognition did not apply during the Revolution when "America fixed her heritage of English common law." *Id.* In addition, Pollock and Maitland stated:

[I]t is by 'popish clergymen' that our English common law is converted from a rude mass of customs into an articulate system, and when the 'popish clergymen' yielding at length to the pope's commands no longer sit as the principal justices of the king's court the golden age of the common law is over.

POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW*, vol. 1, at 133 (1968).

anyone the things that were revealed to them in confession or they will live as "honorless pilgrim[‘s]."⁴⁰ Within a century, the Council of Durham in 1220 concluded:

A priest shall not reveal a confession—let none dare from anger or hatred or fear of the Church or of death, in any way to reveal confessions, by sign or word, general or special, as (for instance), by saying, "I know what manner of men ye are," under peril of his Order and Benefice, and if he shall be convicted thereof he shall be degraded without mercy.⁴¹

Preservation of the seal of the confessional was crucial, and the consequences of betraying the seal were draconian. In short, ostracism and expulsion were the responses to breaking the seal of the confidential priest-penitent relationship.⁴²

Given the nexus between the laws of the land and the laws of the Church in a Christian country such as England,⁴³ it is inconceivable that judges and lawyers would compel a priest to break the seal of the confessional or make use of any confidential communication. Jeremy Bentham spoke at some length about the exclusion of the evidence of a Catholic priest concerning the content of a confession made to him.⁴⁴ Bentham noted that compelling clerics to disclose confidential communications would violate one of their "most sacred . . . religious duties."⁴⁵ He further argues that wherever the Catholic religion is tolerated, any coercion upon its priests to divulge the content of a secret confession would be "inconsistent and incompatible" with that toleration.⁴⁶

There exists disagreement amongst evidence scholars about the status of the privilege subsequent to the Reformation. While Wig-

40. See BUSH & TIEMANN, *supra* note 25, at 48-49.

41. See R. S. Nolan, *The Law of the Seal of Confession*, THE CATHOLIC ENCYCLOPEDIA, vol. XIII, at 650 (1912).

42. See *supra* note 40 and accompanying text.

43. See POLLOCK & MAITLAND, *supra* note 39, at 131-35.

44. See generally 4 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 586-92, vol. IV (1st ed. 1827).

45. *Id.* at 588, 589 (stating that some priests would stand firm under persecution while others would sink under it).

46. *Id.* (arguing that the religious faithful would be inhibited from exercising a vital aspect of their religion).

more claimed that English courts continued to grant the privilege after the break with Rome in 1531, he further noted that the privilege ceased to exist after the Restoration of the monarchy in 1660.⁴⁷ Tiemann, on the contrary, pointed out that the privilege continued from early Reformation England until well into the seventeenth century.⁴⁸ Wright and Graham concluded that Wigmore's claim is suspect because of the case law to which Wigmore cited.⁴⁹ In reliance on historical research, Judge Fahy noted in the 1958 case of *Mullen v. United States*,⁵⁰ that:

It thus appears that non-recognition of the privilege at certain periods in the development of the common law was inconsistent with the basic principles of the common law itself. It would be no service to the common law to perpetuate in its name a rule of evidence which is inconsistent with the foregoing fundamental guides furnished by that law. . . [T]he denial was never uniform or resolute, so strong were the claims of reason in sup-

47. See 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, sec. 2394, at 869 (1961) (reporting, however, that several judges avowed not to compel disclosure in practice). Interestingly, the government of the United Kingdom has on occasion opposed disclosure of evidence before the International Court of Justice on the grounds of professional and state secrecy. See, e.g., Corfu Channel Case, 1949 I.C.J. 32, documenting a case where the United Kingdom witnesses declined to answer questions about certain naval documents). On January 30, 1997, the late Basil Cardinal Hume, Archbishop of Westminster, wrote to the Rt. Hon. Michael Howard, Q.C., M.P., Secretary of State, concerning the need for reassurances about the impact of the Police Bill on the seal of confessions made to a priest. See *id.* As Cardinal Hume addressed in his correspondence, an individual penitent must know that the priest, no matter what the crime, will not reveal what was said in confession and that the state cannot interfere with the Church's guarantee of secrecy. See *id.* Furthermore, the fundamental right to practice the religion is jeopardized if sacramental confessions can be bugged or used as evidence. See *id.* The trust of citizens must not be undermined or threatened or their peace of mind may be destroyed. See *id.* People need to be reassured that confidences will not be betrayed. See *id.* Specifically, those who confess must be certain that what they say will never be revealed. See *id.*

48. See BUSH & TIEMANN, *supra* note 25, at 53 (indicating that the scholarship is not uniform on a precise date). Tiemann argues that the privilege may have been revoked during the Restoration of the Monarchy in order to prevent Puritan pastors from withholding secrets from royal tribunals. See *id.* Tiemann also suggests that the seal probably did not survive during Cromwell's reign. See *id.* at 54.

49. See WRIGHT & GRAHAM, *supra* note 37, at 40 (arguing that most cases cited dicta, one had no precedential value, and only two were decisive).

50. 263 F.2d 275 (1958) (upholding the clergy-communicant privilege for a Lutheran minister).

port of the privilege . . . Sound policy—reason and experience—concedes to religious liberty a rule of evidence that a clergyman shall not disclose on a trial the secrets of a penitent's confidential confession to him, at least absent the penitent's consent. Knowledge so acquired in the performance of a spiritual function as indicated in this case is not to be transformed into evidence to be given to the whole world . . . The benefit of preserving these confidences inviolate overbalances the possible benefit of permitting litigation to prosper at the expense of the tranquility of the home, the integrity of the professional relationship, and the spiritual rehabilitation of the penitent. The rules of evidence have always been concerned not only with truth but with the manner of its ascertainment.⁵¹

It is evident in both the Anglican and Catholic traditions that Church officials unequivocally contended that a cleric could not divulge any information garnered from a confession to a third party. The reasons for the Catholic view were previously presented. The Church of England acknowledged that while applicable Church law dates from 1603 and tested in the civil courts in modern times, it would appear that Anglican priest would go to jail before disclosing information obtained in confession.⁵² In the late 1950s, the Archbishop of Canterbury reaffirmed by way of a Church resolution the doctrinal principle that the clergy are bound to keep secret whatever is disclosed in the confessional.⁵³ While no applicable statute was en-

51. See *id.* at 280 (emphasis added). Judge Edgerton, in his concurring opinion notes that communications made with reasonable confidence that it will not be disclosed and that disclosure shocks the moral sense of the community, should not be subject to disclosure in a judicial proceeding regardless of who the trusted person may be. See *id.* at 281. Judge Edgerton refers to Mr. Justice Holmes whom noted of wiretapping, "it is less evil for some criminal to escape than that the Government to play an ignoble part." *Id.*

52. See Kennett Love, *Canterbury Backs Confession Secrecy*, N.Y. TIMES, Apr. 29, 1959, at A1 (assuming the present view of priest on the issue of confession is to uphold the vow to secrecy).

53. See *Anglicans Reaffirm Confession Secrecy*, N.Y. TIMES, Apr. 30, 1959, at A19 (deferring, however, measures aimed at obtaining legal protection for the confessional seal of secrecy). This would accord with the historical research done by Bush and Tiemann. See BUSH & TIEMANN, *supra* note 25, at 55-61. Moreover, in the 1979 Book of Common Prayer adopted at the Episcopal General Convention in Denver adopted rubrics concerning the Rite of Reconciliation which declared, "The content of a confession is not normally a matter of subsequent discussion. The secrecy of a confession is morally absolute for the confessor and must under no circumstances be broken." THE BOOK OF COMMON PRAYER (The Church Pension Fund, 1979), at 446, *quoted in* BUSH & TIEMANN, *supra* note 25, at 60.

acted by Parliament, English courts exercised judicial discretion and upheld the confidentiality of the confessional. For example, in one early nineteenth century case, the court concluded that it "would never compel a clergyman to disclose communications made to him by a prisoner . . ."⁵⁴ In the late 1950s, a Roman Catholic official in England pronounced that, confessional secrecy is absolute and not even an Act of Parliament can change that.⁵⁵

According to Professor Reese, while there is no statutory recognition of the clerical privilege in England,⁵⁶ for many years other countries formally recognized the privilege in some form.⁵⁷ One illustration is from Section 151 of the Austrian Code of Criminal Procedure of 1873, which stated, in pertinent part, that a minister's testimony would be void if examined as a witness in regard to facts communicated during confession or under a seal of secrecy.⁵⁸ According to Human Rights Watch, the German Code of Criminal Procedure recognizes other categories of privileged communication.⁵⁹ For example, the German Zivilprozessordnung, Section 383(1), states in part that no person is required to testify if one is the sort "to whom matters are entrusted by virtue of their office, profession or trade, which are to be kept secret due to their nature or by law, with respect to the facts to which the duty of secrecy pertains."⁶⁰

54. *Broad v. Pitt*, [1828] 3 Car. & P. 518, 519, 172 E.R. 528, 529, *quoted in* R. V. Gruenke, [1991] 3 S.C.R. 263, 304 (L'Heureux-Dubé & Gonthier, JJ., concurring).

55. *See* N.Y. TIMES, Apr. 29, 1959, p. 2, col. 2.

56. *See* Yellin, *supra* note 36, at 103 (citing a number of cases for the proposition that England does not recognize the clerical privilege).

57. *See* Seward Reese, *Confidential Communications to the Clergy*, 24 OHIO STATE L.J. 55, 56-57 (1963) (stating that 44 states in the United States have enacted statutes recognizing the clerical privilege).

58. *See id.* at 57 n.9 (setting forth those who are excused from serving as witnesses).

59. Human Rights Watch, *Commentary to the Preparatory Commission on the International Criminal Court—Elements of Crimes and Rules of Evidence and Procedure*, July 1999, at 46 n.25 (recognizing other privileges such as physician-patient, psychotherapist-patient, attorney-client, religious and spousal privileges).

60. ZPO sec. 383(1) 6, *quoted in* Bastuck & Gopfert, *Admissions and Presentation of Evidence in Germany*, 16 LOY. L.A. INT'L & COMP. L.J. 609, 624 & n.71 (noting that section 383(1)6 is reinforced by an existing penal code provision addressing breach of confidentiality). *See* Strafgesetzbuch [StGB] sec. 203(1)(3).

It is indisputable that France also makes provision for a religious testimonial exemption. Peter Herzog and Martha Weser indicated that while Article 378⁶¹ of the *Code Pénal* prohibits physicians, surgeons, pharmacists, midwives, and other persons to disclose information they acquire in the course of their professional duties.⁶² Some interpret this as giving these persons the right to refuse disclosing confidential information if called to give testimony in court.⁶³ Moreover, this "privilege is not restricted to specified occupations, but may be invoked by *any person who has acquired confidential information in a professional capacity.*"⁶⁴ French jurisprudence specifically applied this privilege to members of the clergy. In the case of Lambel-Mayer,⁶⁵ the Supreme Court of Appeal ("*La Cour de Cassation*") found that Article 378 of the Penal Code did exempt, as a professional secret, the content of a confession made by one of the parties to a priest.

During this century, four Australian states (New South Wales,⁶⁶ the Northern Territory,⁶⁷ Tasmania,⁶⁸ and Victoria⁶⁹) adopted legisla-

61. Article 378 [now 373] states in pertinent part:

Les medecins, cirurgiens et autres officiers de sante, ainsi que les pharmaciens, les sages-femmes et toutes autres personnes depositaires, par etat ou profession ou par fonctions temporaires ou permauntes, des secrets qu'on leur confie, que, hors le cas ou la loi les oblige ou les autorise a se perter denonciateurs, auront revele ces secrets, seront punis d'un emprisonnement d'un mois et d'une amende 'de 500 F a 8,000 F.'

62. See PETER HERZOG & MARTHA WESER, CIVIL PROCEDURE IN FRANCE 337-38 (1967)

63. See *id.*

64. *Id.* (emphasis added).

65. See La Cour de Cassation, Premiere Chambre Civile, Arrêt N° 545, Pourvoi N° 63-12.006, 4 Juillet 1963.

66. See EVIDENCE ACT 1995 (New South Wales), sec. 127(1). 127 States: "A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy." Subsection 127(4) continues by stating: "In this section: religious confession means a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the church or religious denomination concerned." See *id.*

67. See EVIDENCE ACT 1939 (Northern Territory), sec. 12(1) (notes that clergy men belonging to any church or religious denomination shall not divulge any confessions made to them as a professional in a proceeding of any kind without the

tion providing for the clergy-penitent privilege.⁷⁰ New Zealand also codified legislation granting an evidentiary privilege to a minister who hears the confession of a penitent.⁷¹ Quebec, another jurisdiction representing the civil law tradition provides in its Charter of Human Rights and Freedoms that, "Every person has a right to non-disclosure of confidential information."⁷² This right includes physi-

consent of the person who made the confession).

68. See EVIDENCE ACT 1910 (Tasmania), sec. 96(1) (stating, "No clergyman of any church or religious denomination shall divulge in any proceeding any confession made to him in his professional character, except with the consent of the person who made such confession.").

69. See EVIDENCE ACT 1958 (Victoria), sec. 28(1). Sec. 28(1) states:

No clergyman of any church or religious denomination shall without the consent of the person making the confession divulge in any suit action or proceeding whether civil or criminal any confession made to him in his professional character according to the usage of the church or religious denomination to which he belongs.

Id.

70. See Perrella, *supra* note 28.

71. See New Zealand Evidence Amendment Act (No. 2), 1980, sec. 31(1) (stating, "A minister shall not disclose in any proceeding any confession made to him in his professional character, except with the consent of the person who made the confession."). In *R. v. Howse*, [1983] NZLR 246, the Court of Appeal, Wellington, noted that this section could apply to a situation in which the penitent did not have any prior association with the minister or the church. See *id.* at 248. The Court of Appeal also concluded that confession did not mean "a confession in a legal sense" but meant "in [a] religious sense . . . [the] seeking [of] some spiritual response for himself. In the ordinary sense that means an avowal of penitence and a request for forgiveness or absolution. That may not apply in the forms and beliefs of all churches but, at the least, there must be a request for spiritual help for the person making the confession." *Id.* at 249. The Court of Appeal also recognized that, "[t]he rationale of any such privilege must be that a person should not suffer temporal prejudice because of what is uttered under the dictates or influence of spiritual belief." *Id.* at 251.

72. R.S.Q.c. C-12, sec. 9 states in its entirety:

Secret professionnel—chacun a droit au respect du secret professionnel. [Divulgarion de renseignements confidentiels.] Toute personned tenue par la loi au secret professionnel et tout prôte ou autre ministre du culte ne peuvent, même en justice, divulger les renseignements confidentiels qui leur ont été révéléacute en raison de leur état ou profession, à moins qu'ils n'y soient autorisés par celui leur a fai ces confidences ou par une disposition expresse de la loi.

Id.

cians, members of other health professions, priests, and other ministers of religion who receive confidential information from those whom they serve.⁷³

The Canadian common law tradition also makes some provision for the priest-penitent privilege. For example, the Province of Newfoundland enacted legislation unmistakably protecting the confidential communications of the confessional.⁷⁴ In 1991, the Supreme Court of Canada was reluctant to find a general common law privilege exempting a priest or minister from giving evidence obtained from a religious communication; however, it did concede that there are circumstances in which such communication can be excluded from evidence because of the privilege.⁷⁵ The Court noted that the fact that communications were not made to either an ordained priest, a minister, or that they were not part of a formal religious confession would not preclude application of the privilege under the proper circumstances.⁷⁶ The Court found that religious communications can be excluded and the testimony of a priest or minister privileged if the communications in particular cases satisfy the four "Wigmore" criteria.⁷⁷ These criteria are: (1) the communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and, (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.⁷⁸ In their separate

73. See John Dawson, *Compelled Production of Medical Records*, 43 MCGILL L.J. 25, 59 (1998) (quoting the Quebec Charter that extends professional secrecy privileges to priests and ministers even in judicial proceedings).

74. See R.S.N., 1970, C. 115, sec. 8. (stating that "[a] member of the clergy or a priest shall not be compellable to give evidence as to a confession to him or her in his or her professional capacity").

75. See *R. v. Gruenke*, [1991] 3 S.C.R. 263, 289. The communications in this case were made to a pastor and a counselor of a fundamentalist Christian church that did not have any particular tenet about confidential communication. See *id.* at 273, 280.

76. See *id.* at 291.

77. See *id.*

78. See *id.* at 265.

opinion, Justice L'Heureux-Dubé and Justice Gonthier, citing *R. v. Howse*,⁷⁹ noted that the "rationale [for this] privilege must be that a person should not suffer temporal prejudice because of what is uttered under the dictates or influence of spiritual belief."⁸⁰ They also observed that Prof. Wigmore "concluded that '[the pastor's] privilege has adequate grounds for recognition.'"⁸¹ Moreover, these concurring Justices argued that in order to encourage spiritual relationships, people must feel certain that they may confess their sins in complete confidentiality, otherwise they may not confess freely, and this ultimately can lead to a detrimental effect on spiritual relationships in our society:

In [our] view, it is more in line with the rationales identified earlier, the spirit of the Charter and the goal of assuring the certainty of the law, to recognize a pastor-penitent category of privilege in this country. If our society truly wishes to encourage the creation and development of spiritual relationships, individuals must have a certain amount of confidence that their religious confessions, given in confidence and for spiritual relief, will not be disclosed. Not knowing in advance whether his or her confession will be afforded any protection, a penitent may not confess, or may not confess as freely as he or she otherwise would. Both the number of confessions and their quality will be affected. [Citation omitted] The special relationship between clergy and parishioners may not develop, resulting in a chilling effect on the spiritual relationship within our society. In that case, the very rationale for the pastor-penitent privilege may be defeated. The lack of a recognized category also has ramifications for freedom of religion.⁸²

B. THE UNITED STATES

Throughout the United States, courts generally observe the priest-penitent privilege.⁸³ Today, all fifty states have legislation respecting

79. See [1983] N.Z.L.R. at 246.

80. *R. v. Gruenke*, [1991] 3 S.C.R. at 297 (L'Heureux-Dubé & Gonthier, JJ., concurring) (citing *R. v. Howse*, [1983] N.Z.L.R. 246, 251).

81. See *R. v. Gruenke*, [1991] 3 S.C.R. at 310 (L'Heureux-Dubé & Gonthier, JJ., concurring) (citing Wigmore at 878).

82. See *R. v. Gruenke*, [1991] 3 S.C.R. at 311 (L'Heureux-Dubé & Gonthier, JJ., concurring).

83. See WRIGHT & GRAHAM, *supra* note 37, sec. 5612, at 43 (noting a dearth of U.S. cases denying the existence of a penitent's privilege).

the confidence of the cleric and the communicant.⁸⁴ The status of the privilege under Federal law relies on the common law because Congress does not provide specific privileges within Rule 501 of the Federal Rules of Evidence, which is the only rule addressing confidential communications.⁸⁵ Nonetheless, the United States Supreme Court recognized the privilege under the common law.

In *Totten v. United States*,⁸⁶ the Supreme Court voiced its concern about confidential communications and its caution over litigation that would "lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."⁸⁷ While *Totten* focused on matters of national security and secrecy, the Court did acknowledge it could not maintain suits that would require the disclosure of "*confidences of the confessional*."⁸⁸ Without the benefit of statutory law supporting its rationale, the Court indicated its deference to and protection of the confidence of secrets revealed during private communications between a priest and a penitent.

Almost a century after *Totten*, the Supreme Court again ratified the priest-penitent privilege in *United States v. Nixon*.⁸⁹ In finding that not all communications between the chief executive and members of his staff are protected by the doctrine of Executive Privilege, the Court reiterated that communications between a confessor and

84. See Mazza, *supra* note 21, at 178 n.74 (reporting each state has enacted its own laws creating a priest-penitent privilege and providing the citation to each state's statute).

85. See Fed. R. Evid. 501 (stating that "the privilege of a witness [or] person . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."). It must be noted that the states within the United States did begin to address this confidentiality as early as 1828 when the New York legislature enacted a widely encompassing statute which read in part: "No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confession made to him in his professional character, in the course of discipline enjoined by the rules of practice or such denomination." WRIGHT & GRAHAM, *supra* note 37, sec. 5612, at 46-47 n.152, citing N.Y. REV. STAT. 1828, Pt. 3, c. 7, tit. 3, sec. 72.

86. 92 U.S. 105 (1875).

87. *Id.* at 107.

88. *Id.* (emphasis added).

89. 418 U.S. 683 (1974).

penitent are protected.⁹⁰ The Court noted that, in general, “an attorney or a priest may not be required to disclose what has been revealed in professional confidence.”⁹¹

In 1980, the Supreme Court endorsed once more the priest-penitent privilege in a case focusing on spousal privilege, *Trammel v. United States*.⁹² In its examination of confidential communications between husband and wife, the Court stated that evidentiary privileges protecting confidential communications between a “priest and penitent, attorney and client, and physician and patient . . . are rooted in the imperative need for confidence and trust.”⁹³ The Court reinforced its recognition of the clerical privilege by declaring that the priest-penitent privilege acknowledges that humans need to disclose sins to a priest and receive guidance knowing that the information being disclosed is held in absolute confidence.⁹⁴

In 1990, the U.S. Court of Appeals for the Third Circuit, in a case involving statements made to a Protestant minister, held that the clergy-communicant privilege exists and this privilege protects communications made to a clergy member, while working in a professional capacity, by a person seeking spiritual counseling believing that the information shared will remain confidential.⁹⁵

The evolution of the common law privilege for penitential and religious communication began in the early nineteenth century with a New York case. In *People v. Phillips*, the New York Court of General Sessions established an important precedent in common law de-

90. *See id.* at 709 (noting confessions to a priest fall within an exception to the rule that the public has a right to all evidence).

91. *Id.*

92. 445 U.S. 40 (1980).

93. *Id.* at 51.

94. *See id.*

95. *See In re Grand Jury Investigation*, 918 F.2d 374, 377 (3d Cir. 1990). (comparing the attorney client privilege in the presence of third parties to that of clergy communication privilege). The Court stated that the presence of third parties does not vitiate the communication privilege if it is in furtherance of or essential to the communication. *See id.* The Court also stated that this privilege [extended to a Lutheran pastor] is amongst the “least controversial” evidentiary exemptions. *See id.* at 381.

signed to protect the seal of the confessional.⁹⁶ In *Phillips*, Father Anthony Kohlmann, a Catholic priest, was given stolen goods by the penitent during a confession.⁹⁷ After the confession, the priest returned this property to its legitimate owner.⁹⁸ Subsequently, Father Kohlmann was asked by the civil authorities to identify the individual who turned over the stolen property, but he objected to revealing the person's identity and referred to the seal of the confessional.⁹⁹

The New York City Court of General Sessions declined to extract the testimony from the priest, and it justified its conclusion by stating:

After carefully examining this subject, we are of the opinion that such a witness ought not to be compelled to answer. The benevolent and just principles of the common law guard with the most scrupulous circumspection, against temptations to perjury, and against a violation of moral feeling, and what greater inducement can there be for the perpetration of this offence, than placing a man between Scylla and Charybdis, and in such an awful dilemma that he must either violate his oath, or proclaim his infamy in the face of day, and in the presence of a scoffing multitude?¹⁰⁰

The court justified its conclusion by stating that its was also based "upon the ground of the constitution, of the social compact, and of civil and religious liberty."¹⁰¹ Of course religious liberty and associated practices, such as the seal of the confessional, are legal rights protected under International Law.

96. See generally *Privileged Communications to Clergymen*, 1 CATH. LAW. 199 (1955) (describing the case in detail, relying on the work of an "attorneys who participated in the case as "amicus curiae."). There is no official report of the proceedings before the Court of General Sessions. See *id.*

97. See *id.* (noting the circumstances giving rise to the privilege).

98. See *id.* (explaining how it was discovered the priest knew who was responsible for the crime).

99. See *id.* at 200 (reporting Fr. Kohlmann refused to disclose the penitent's name).

100. *Id.* at 201-02.

101. *Id.* at 206.

III. THE PRIVILEGE UNDER INTERNATIONAL LAW

The point of origin for the principle in international law that such important religious practices require confidential communication is the Universal Declaration of Human Rights (UDHR).¹⁰² While this text is not, *per se*, a legal instrument, it is the source of many principles which have been codified in human rights law found in international conventions that are binding on State parties. Article 18 of the UDHR acknowledges everyone's right to religious freedom in practice, teaching, observance, and worship.¹⁰³ It would be an incursion on this universal right of practice, and observance of religious beliefs that encourage confidential communication about wrongful acts, to require a party to such communication to divulge anything about the communication.

The 1966 International Covenant on Civil and Political Rights (ICCPR)¹⁰⁴ took the general principles regarding religious belief in the UDHR and codified them into law. Article 18(1) of the ICCPR repeats almost verbatim the language of Article 18 of the UDHR.¹⁰⁵ Although some religious beliefs may be subject "only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others,"¹⁰⁶ Article 18(2) declares that, "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."¹⁰⁷ Requiring a member of the clergy to disclose something heard from a person in the context of a confidential communication made in the exercise of religious belief would constitute a coercion impairing one of the most basic religious beliefs held by many people across the world. Furthermore, such a

102. See G.A. Res. 217(III)(A), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR].

103. See *id.* at 74 (recognizing religious freedom).

104. See International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 (1976) [hereinafter ICCPR].

105. Compare *id.* at 178, with UDHR, *supra* note 102, at 74 (granting freedom to adopt a religion and to manifest that right).

106. See ICCPR, *supra* note 104, at 178.

107. See *id.*

disclosure could also interfere with the rights of an accused and of the confessor that are also protected in the ICCPR.¹⁰⁸ In addition, the coerced disclosure of this important and protected confidential communication would run afoul of the anti-discrimination provisions of the ICCPR.¹⁰⁹

Although these international rights regarding religious practices may be viewed in a theoretical framework, concerns about them are manifested in the practical world. For example, the late Basil Cardinal Hume, Archbishop of Westminster, wrote to the British Secretary of State in 1997 regarding a possible effect of pending legislation, the Police Bill, on the confessional seal. In asking for a clarification on how the Home Office would interpret and apply such legislation, the Cardinal stated that an individual penitent who goes to confession to a priest has to be certain that, whatever the crime, not only will the priest never reveal what is said, but that the state will not conspire to undermine the Church's guarantee of absolute secrecy. Cardinal Hume noted further that "[i]f a sacramental confession can be bugged, worse still, used in evidence, a fundamental right to the practice of religion is put in jeopardy."¹¹⁰

Given the Cardinal's concern, this suggests that an investigator of the status of the priest-penitent confidentiality should analyze attempts made to protect certain confidential communications in international or transnational litigation. In 1996, Professors Geoffrey C. Hazard, Jr., University of Pennsylvania Law School, and Michele Taruffo, University of Pavia (Italy) Law Faculty jointly drafted the Transnational Rules of Civil Procedure and Accompanying Commentary.¹¹¹ Professors Hazard and Taruffo's collaboration merged common and civil law principles designed to protect confidential

108. See *id.* at 176-77 (delineating criminal procedure rights).

109. See *id.* at 179 (requiring all persons be equal before the law and be entitled to equal protection of the law).

110. Letter from Basil Cardinal Hume, Archbishop of Westminster, to Rt. Hon. Michael Howard, QC MP, Secretary of State, Home Office (Jan. 30, 1997) (on file with author) (discussing concern over the possible threat the Police Bill poses regarding the sacrament of confession).

111. See generally Geoffrey Hazard et al., *Transnational Rules of Civil Procedure: Rules and Commentary*, 30 CORNELL INT'L L.J. 493 (1997) (providing the Rules and Commentary).

communications from disclosure in transnational litigation.¹¹² They produced draft rules of evidence that could be useful to both common and civil law lawyers in international litigation.¹¹³ An earlier draft of their work was presented at a symposium sponsored by the Cornell-Paris I Summer Institute of International and Comparative Law and the Cornell Berger International Legal Studies Program.¹¹⁴ On July 13, 1996, scholars and practitioners from the United States and Europe gathered at the University of Paris I Law Facility for the symposium.¹¹⁵ The comments and discussion received at the symposium formed the basis of the revised draft of the rules.¹¹⁶

Professors Hazard and Taruffo, while respectively schooled in the common law and civil law traditions, were each receptive to the best features of the other legal system.¹¹⁷ The Rules combine the attributes of the common and civil law systems for use in international litigation.¹¹⁸ Borrowing from civil law traditions, for example, the Rules eliminate juries, elaborate evidentiary rules, and the extensive use of depositions.¹¹⁹ The Rules do adopt, however, the common law practice of direct and cross-examination of witnesses and allow some deposition taking.¹²⁰

After detailed examination of various legal traditions and much discussion, the drafters devised Rule 20, which addresses confidential communications. This rule reads, in pertinent part:

112. *See id.* (noting the Rules are a fusion of civil and common-law practices).

113. *See id.* (providing that the purpose of the Rules is to provide efficiency and fairness in international cases).

114. *See id.* (introducing the development of the rules).

115. *See id.* (reporting that an earlier draft of the rules was presented for review).

116. *See id.* (noting common and civil law systems were well represented at the symposium).

117. *See generally* Hazard et al., *supra* note 111 (emphasizing the cooperation that existed during the drafting process).

118. *See id.* (characterizing this combination as a fusion of the best features of each system).

119. *See id.* (reporting the civil traditions incorporated in the rules).

120. *See id.* (reporting the common law traditions founding the Rules). Judges are also permitted to question witnesses and depositions are only permissible upon court order. *See id.*

RULE 20. Evidentiary Privileges

(a) Evidence cannot be admitted of information covered by the following privileges:

- (1) Attorney-client. Communications with an attorney who is not in independent practice are not privileged;
- (2) Attorney work-product;
- (3) Husband-wife;
- (4) Priest-penitent;
- (5) Doctor-patient. Communications with a psychiatrist or clinical psychologist are covered by this privilege¹²¹

The Hazard-Taruffo collaboration has borne fruit. In its February 1999 briefing paper for use by delegates at the first Preparatory Commission, Human Rights Watch observed that a previous draft rule addressing confidential communications provided only for the lawyer-client relationship. The Human Rights Watch, however, recommended that the same privilege afforded to the lawyer-client relationship should extend equally to other professional relationships, such as counselor-patient, confessor-penitent, and physician-patient.¹²²

Finally, the experience of those involved with the *ad hoc* tribunals for Rwanda and the former Yugoslavia would be useful for drafting the final rules of evidence for the ICC. In particular, the wisdom of Judge Louise Arbour, who previously served as Chief Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, should be considered in identifying the confidential communications, which will be exempted in cases before the ICC. She has argued from her experience with the *ad hoc* tribunals that while there is a need to have government officials testify in judicial proceedings that address the most serious crimes of concern to the international community, there are certain communications which still merit the protection of confidentiality. One of those she identified as generally warranting protection from disclosure is the “priest-

121. *Id.* at 503.

122. See Human Rights Watch, *Commentary to the Preparatory Commission Rules of Evidence and Procedure for the International Criminal Court* (visited Jan. 13, 2000) <<http://www.hrw.org/hrw/campaigns/icc/prepcom-feb99.htm#evidence>>.

penitent" privilege.¹²³

CONCLUSION

For an International Criminal Court to succeed in bringing those responsible for the commission of the most serious crimes of concern to the international community to justice, it must be a credible tribunal. As Judge Gabrielle Kirk McDonald informed the Preparatory Commission on July 30, 1999, "Above all, the ICC can only succeed if it is fair and perceived to be fair. I urge you to keep this uppermost in your minds as you continue drafting its roadmap—the Rules of Procedure and Evidence."¹²⁴

One way of assisting this cause is to assure that the evidentiary law of the ICC respects important confidences that are protected in many legal traditions throughout the world. Including the priest-penitent privilege in the Rules of Procedure and Evidence is a small, but important step to pledging the success of a credible ICC. In recognizing the confessor-penitent privilege and placing it in the Rules of Evidence and Procedure, the Preparatory Commission will not confer a special privilege on a particular class of people or on a specific profession; rather, it will acknowledge and respect a long-standing principle of criminal evidentiary procedure that exists in numerous legal systems.

In short, the inclusion of this confidential privilege will help the ICC in achieving the credibility it needs to guarantee due process of

123. See Judge Louise Arbour, *History and Future of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 13 AM. U. INT'L L. REV. 1495, 1502 (1998). Judge Louise Arbour states that:

"[U]niversal acceptance of the duty to give evidence in criminal cases can be understood by all in our own society, but not in the international arena. That duty supersedes all other legitimate concerns, except in the narrow end of the lost privilege. It covers the very few concerns that can trump the search for truth in a criminal trial, like national security interests and the penitent priest privilege. There is only a handful of these privileges that we uphold above and beyond the duty to come to court and provide evidence."

See id.

124. Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the Former Yugoslavia, Remarks to the Preparatory Commission for the International Criminal Court, New York, United Nations Headquarters (July 30, 1999).

law and to earn the credibility about which Judge McDonald eloquently spoke.