MAY IT PLEASE THE CROWD? THE ROLE OF PUBLIC CONFIDENCE, PUBLIC ORDER, AND PUBLIC OPINION IN BAIL FOR INTERNATIONAL CRIMINAL DEFENDANTS

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I. INTRODUCTION

Letting people accused of war crimes, crimes against humanity, or genocide out on bail before or during their trials is hard for the public to swallow. Should it matter? There is precedent in domestic jurisdictions, particularly in Europe and Canada, for detention of alleged criminals based on “public confidence in the administration of justice”1 or based on “public order.” These bases for detaining international criminal defendants likewise have gained some traction at international and internationalized criminal tribunals.

Bail—also known as provisional or interim release2—for international criminal defendants, once unthinkable, has become relatively common practice, at least at the International Criminal Tribunal for the former Yugoslavia (ICTY).3 Given that defendants often wait years before their trials, which, in turn, often take several years, and that several defendants have been acquitted, this practice is a commendable human rights development for international justice.4

Bail for alleged international criminals has emerged as an important, rapidly changing, and increasingly studied issue in

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1. Hereinafter, this Article will use the term “public confidence” in lieu of “public confidence in the administration of justice.”
2. This Article uses the term “bail” to describe the phenomenon of releasing defendants pending resolution of the charges against them, not in the sense of release based on financial conditions.
3. See generally Caroline L. Davidson, No Shortcuts on Human Rights: Bail and the International Criminal Trial, 60 Am. U. L. Rev. 1, 36 (2010) (noting that, of the international tribunals, the ICTY has released the greatest number of defendants).
4. Id. at 4–5 (noting the progress made by the ICTY in increasingly allowing pre-trial release and discussing the challenges to defendants’ rights posed by the length of international trials since, thus far, all defendants have been detained for trial).
international criminal justice. However, none of the existing scholarship on bail at international criminal tribunals has analyzed critically the question of whether international criminal defendants should be detained on grounds other than risk of flight or danger to the community—in particular, the potential public backlash to a defendant’s release. Despite the dearth of scholarly attention to this question, international courts have struggled with it, and a group of experts on international criminal procedure has put forth a proposed model of international criminal procedure that includes detention on the ground of public order. This Article seeks to fill the gap in legal scholarship on this issue.

To justify detention pending trial on criminal charges, international human rights law requires “specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual
Significantly, the public interest need not necessarily be restricted to preventing flight or danger to the community. However, at least one international human rights court, the European Court of Human Rights (ECtHR), to which international tribunals have looked for guidance in the context of bail, has held that the gravity of the charges alone is insufficient reason to justify detention.


9. See id. Cf. United States v. Salerno, 481 U.S. 739, 754 (1987) (stating that “nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight.”); R. v. Hall, [2002] 3 S.C.R. 309, 328 (Can.) (rejecting claim that all grounds for bail denial other than risk of flight and danger to the community were suspect, and stating that earlier cases “made clear that the grounds for bail denial are not frozen [but that] Parliament may make any law for bail denial it wishes. . . .”).


This Article applies theories of public repute discourse—in particular the conception of public repute discourse as public justification—to the public confidence and public order bail inquiries. Examining the public confidence and public order bail inquiries through the lens of public repute discourse reveals the theoretical inconsistency and malleability of the standards as courts use them. Although jurisdictions allowing for detention based on public confidence and public order seem at first glance to address different problems—a threat to the public's faith in and willingness to obey the judicial system versus a risk of rioting or violence, respectively—as the discussion of international and domestic jurisdictions that rely on the concepts will show, the line between the two concepts is often blurry.

This Article argues that, although, in theory, using public confidence or public order factors to decide whether to detain international criminal defendants can be consistent with human rights norms, as courts typically use these factors, they prove vague, logically inconsistent, and run the risk of allowing public opinion to override the fundamental human rights of criminal defendants. As this author has argued previously, in order for international criminal tribunals to achieve their essential function of promoting respect for human rights, they must serve as models of human rights best practices in trying those before them.12

To the extent that the real concern of international courts is public violence stemming from a defendant's release, then international tribunals should consider adopting a narrow public order, or better, public safety ground that includes danger stemming from community violence. The French public order ground, which has the approval of at least one major international human rights court,13 offers a useful template with its requirements of an “exceptional and persistent” threat to the public order and the insufficiency of conditions short of detention to obviate the threat. Still, this Article contends that it behooves international tribunals to avoid the term “public order.” This inherently vague term invites nebulous judicial calculations about public confidence and, ultimately, public opinion into the bail calculus. The preliminary proposal of a group of international procedural experts to allow for detention based on “public safety” appears to address this problem.

Order, ¶¶ 74–76 (March 20, 2008) (discussing provisional detention on grounds of public order).

12. See Davidson, supra note 3, at 35.
13. See infra text accompanying notes 190–93.
A further safeguard warrants consideration. Since the threat to the public order or public safety often stems from the gravity of the charges alone, this Article contends that for a defendant to be detained based on public safety, tribunals should consider requiring the prosecution to make a strong preliminary showing, such as by clear and convincing evidence or even proof beyond a reasonable doubt, of the defendant's guilt.

Current events help to illustrate the potential allure of a public order or public confidence ground. If, rather than being captured while attempting to flee Libya,\textsuperscript{14} Saif al-Islam Gaddafi, Muammar Gaddafi's son, had surrendered voluntarily to the International Criminal Court (ICC) for prosecution on the charges of murder and persecution as crimes against humanity\textsuperscript{15} and the ICC fashioned a way of ensuring that Gaddafi posed no risk of flight, committing more crimes, or obstructing justice while on release,\textsuperscript{16} should he nevertheless have been detained because the Libyan or international public might be unhappy, riot, or lose faith in international criminal justice?

This example demonstrates the potential utility to international tribunals of detaining defendants based on public confidence or public order. Actors in international criminal tribunals, including judges who make bail decisions, understandably may wish to avoid unnecessarily undermining public confidence or the public's belief in their legitimacy. Likewise, for detention based on public order, most would prefer to avoid unnecessary public violence or loss of life.


\textsuperscript{16} The ICC statute permits detention based on the following grounds:
(i) To ensure the person's appearance at trial;
(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

For detention based on public confidence, it bears noting that the legitimacy of international institutions\(^\text{17}\) and, in particular, international criminal tribunals, is a hotly debated topic.\(^\text{18}\) This Article flags but skirts the thorny issues of the many meanings of public confidence and legitimacy, the degree to which they differ, how best to achieve them, and the benefits they purportedly confer,\(^\text{19}\) but notes that, whatever the concepts mean or offer, international tribunals appear to be concerned about them.

An unpopular bail decision, it must be noted, is not the worst case. Worse still would be a defendant’s absconding after the court granted release. Although no ICTY defendant let out on provisional release has yet absconded, defendants convicted of war crimes and crimes against humanity before the State Court of Bosnia and Herzegovina have escaped to avoid serving their sentences.\(^\text{20}\)


\(^{19}\) See generally Richard Fallon, Legitimacy and the Constitution, 118 Harv. L. Rev. 1787, 1790 (2005) (noting the many uses of the term “legitimacy” and distinguishing between legal, normative, and sociological legitimacy); Allen Buchanan & Robert O. Keohane, The Legitimacy of Global Governance Institutions, 20 Ethics & Int’l Affairs 405, 405 (2006) (distinguishing between an institution’s normative legitimacy—having the right to rule—and social or sociological legitimacy—being believed to have the right to rule); Daniel Bodansky, The Concept of Legitimacy in International Law, in Legitimacy in International Law 309, 313 (Rüdiger Wolfrum & Volker Röben eds., 2008) (noting that “social legitimacy” is a factual issue “that can be studied empirically . . . through interviews and public opinion surveys, or by studying the claims that public authorities make in trying to justify their authority”). See also James L. Gibson et al., Measuring Attitudes Toward the United States Supreme Court, 47 Am. J. Pol. Sci. 354, 355 (2003) (concluding that public confidence “is not the same thing as diffuse support for an institution,” and that “confidence reflects a blend of short-term and long-term judgments of the institution”).

Although domestic jurisdictions deal with the phenomenon of defendants skipping bail routinely, they also handle vastly more cases, most of which involve relatively minor offenses and garner little public attention.

This Article proceeds in four parts. Part II discusses the theoretical landscape in which the public confidence and public order inquiries operate, in particular the theory of public repute discourse as public justification. Part III describes the current practice of using public repute discourse in bail decisions at international tribunals and domestic courts. It contrasts the Canadian public confidence model with the French public order one. It also examines South Africa’s hybrid public order/public confidence provision, which illustrates the potential for the inquiries to collapse into a vague standard that allows judges to detain based on public opinion. It also discusses the use of public repute discourse in the United States, where no state or federal jurisdiction allows for detention on the basis of public confidence or public order. Finally, Part IV asks whether there is anything exceptional about international criminal justice or tribunals that changes the picture for public repute discourse and bail.

This Article concludes that even though international tribunals typically deal with extremely grave crimes, are especially dependent on state support, and may have reason to be even more concerned about their perceived and actual legitimacy than domestic courts, the lessons of public repute discourse and public justification in the domestic bail context still hold true. International courts should proceed with extreme caution before adopting provisions allowing for detention on the grounds of public confidence or public order. If they must choose one, they should choose a narrow public safety ground akin to the French public order rule and the rule proposed by the International Expert Framework on International Criminal Procedure. In addition, since the threat to the public order or safety typically stems solely from the gravity of the charges and not any non-charge related conduct of the defendant, they should consider requiring a strong showing of the defendant’s guilt.

II. PUBLIC REPUTE DISCOURSE AS PUBLIC JUSTIFICATION

Public justification theory helps to clarify the current use of public repute discourse in bail and to demonstrate the proper role of public confidence and public order in the bail equation. This Section discusses existing theory on the role of the appearance of justice, in
particular Fredrick Schumann’s theory of public repute discourse as public justification. It relies on Schumann’s theory because it best accounts for the problems with using public confidence as a basis to detain criminal defendants.

Various scholars have attempted to explain domestic courts’ attention to the appearance of justice.21 In a compelling foray into this topic, Fredrick Schumann labeled courts’ explicit consideration of the public’s perception of a decision “public repute discourse.”22 He explains: “Public repute discourse occurs when courts attend to how their actions appear to the public.”23 Public repute discourse is not limited to discussions of the appearance of justice. Rather, it also encompasses instances where judges ask whether their decision will undermine public confidence, because this question requires considering how the decision appears to the public.

Public repute discourse turns up in many different legal tests—sometimes judicially-created, sometimes statutory, and sometimes constitutional.24 In domestic law, the three chief areas where it normally appears are in decisions regarding judicial impartiality and recusal, participatory procedural rights, and misconduct of nonjudicial officers.25 Schumann surveys caselaw from


22. Schumann, supra note 21, at 190.

23. Id.

24. Id. at 191. See also Hellman, supra note 21, at 672–73 (arguing that the plurality opinion in the abortion case Planned Parenthood v. Casey was “especially noteworthy” for explicitly endorsing the importance of appearances).

25. Schumann, supra note 21, at 191–92. Schumann also notes that two uniquely Canadian contexts in which it arises are the public confidence ground for denying bail and the Canadian rule on the exclusion of unconstitutionally obtained evidence. Id. Of course, as the discussion on the South African public
the three typical areas where public repute discourse is discussed and also, notably for this Article, from the Canadian bail statute authorizing detention of criminal defendants based on public confidence.26

When courts engage in public repute discourse, they typically invoke the reasonable, informed person as the relevant “observer of the legal system.”27 As at least one court has observed, this reasonable, informed person, in essence, represents the ideal of the judge:

Since . . . the court investigates the actual circumstances, knowledge of such circumstances as are found by the court must be imputed to the reasonable man; and in the result it is difficult to see what difference there is between the impression derived by a reasonable man to whom such knowledge has been imputed, and the impression derived by the court, here personifying the reasonable man.28

Since actual public confidence is not the issue, the appropriate public confidence or public repute discourse inquiry is non-empirical.29

Even if the informed, reasonable person at issue simply represents the ideal of the judge, public repute discourse is more than just judicial discretion.30 At a minimum, it “impl[ies] an external perspective from which the judge's action must appear justified.”31 Schumann explains that this “[j]ustification implies addressing an argument to another in terms which one might reasonably expect the opinion/public confidence provision demonstrates, the bail provision is not unique, but it is rare.

26. See Schumann, supra note 21, at 191–92. See also Section III.B.2.
27. Id. at 197 (quoting In re Drexel, 861 F.2d 1307, 1313 (2d Cir. 1988) (“Like all legal issues, judges determine appearance of impropriety . . . by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.”).
29. Schumann, supra note 21, at 196.
30. Id. at 201 (“[O]ne might object that the 'public' has disappeared from public repute discourse. Employing a reasonable observer to whom courts impute various normative and factual understandings, and then linking that reasonable observer to the ideal of the judge, boils down to judicial discretion.”).
31. Id. at 201. See also Hellman, supra note 21, at 655 (discussing the appearance of impropriety).
other to accept."32 Rather than resting on a judge's individual opinion
or conclusion, it rests on some externally observable facts.33

Drawing on the writings of Rawls and Hegel, Schumann argues that public repute discourse represents courts' effort at public justification or ensuring the authenticity of the law in the eyes of the reasonable person. A person subject to the rule of law is participating in the “legal relation.”34 This participant or, in the language of public justification, “persona,” is concerned with “the authenticity of the law and the soundness of the court’s exposition of legal obligations.”35 The law must be authentic in order to have binding force. The court’s job in this relation is to explain and justify the law as authentic, which is necessary for the law to have “obligatory force.”36 This justification must be public, in the sense that it “must be addressed to the characteristics of the persona corresponding to the relation.” According to Schumann, “[a] legal obligation is justified in the legal relation when its apparent authenticity satisfies the reasonable person implied by that relation.”37

Schumann is not alone in believing that attention to public repute discourse, or the appearance of justice, may cause judges to make fairer decisions in some contexts. For example, John MacKenzie argues:

In an age when images—televised or conjured up by molders of public opinion and taste—often blend so confusingly with reality, does not the appearance of justice have something to do with the reality of justice? If justices and judges [paid] more attention to appearances, would there not be more hope that they are performing their tasks justly? If the “consumers” of the judicial system perceive it as just, on the basis of fair disclosure of its actual operations, what more can they ask of the system? . . . . [T]he appearance of justice is an indispensable element of justice itself.38

This notion of public repute discourse makes the appearance of justice an essential element of justice.

32.  Id. at 201–02.
33.  Id.
34.  Id. at 214.
35.  Id. at 217.
36.  Id.
37.  Id.
38.  See Oakes & Davies, supra note 21, at 620 (quoting Mackenzie, supra note 21, at 241).
To others, however, an excessive focus on the appearance of justice can undermine actual justice. Oakes and Davies, for example, contend that one must not forget that fair outcomes, not only fair procedures, matter for justice. They argue that public repute discourse, or what they call “the doctrine of appearances,” does not stem from longstanding tradition, but rather reflects “a growing concern with the importance of procedural transparency in public life and suggest that this is a particular manifestation of late twentieth and early twenty-first century concern with the loss of public confidence in the institutions and operating principles of government.”

By contrast, Schumann contends that public repute discourse is “not aimed at securing the support of the actual public.” Rather, “[i]t is ultimately about the legitimacy of the legal obligations [courts] expound.” Although Schumann does not specify what he means by “legitimacy,” it appears that he means that decisions are just and justifiable based on objective, articulable criteria, not whether the public will support the decision.

This Article posits that whether or not Schumann is right as a descriptive matter, he is right as a normative one. Courts should be concentrating on whether their decisions are just and justifiable based on objective, articulable criteria, not whether the public will agree with them.

Significantly, as Schumann notes, this non-empirical assessment of the appearance to an informed, reasonable public does not jibe with the instrumental explanation courts typically give for why they attend to the public's reaction “is that an effective justice system requires public confidence, support,

39. Oakes and Davies believe that excessive focus on the appearance of justice can undermine actual justice: “to the extent that [the assumption that procedures have a value which is independent of outcomes] purports to show that procedures generate their own normative framework but neglects the importance of correct outcomes in shaping the popular confidence from which legitimacy is said to derive, it is . . . fundamentally flawed.” Oakes & Davies, supra note 21, at 577.
40. Id. at 576.
41. Schumann, supra note 21, at 191.
42. Id.
43. As noted above, the term legitimacy has many meanings, and scholars do not always specify which meaning they are adopting. See supra note 19.
44. Legitimacy scholars might call this conception of legitimacy legal or normative legitimacy. See supra note 19.
and cooperation . . . . Public confidence requires that the justice system, beyond being just in itself, must appear just to the public.\textsuperscript{45} Schumann calls this explanation for judges' attention to public reaction "the instrumental rationale."\textsuperscript{46} The goal is to realize certain ends, enforcing decrees and gaining public cooperation, not justice itself.\textsuperscript{47} However, the instrumental rationale is inconsistent with public repute discourse because to gain rule of law and compliance, one needs to take into account the actual public, not just the informed, reasonable public invoked in public repute discourse.\textsuperscript{48}

Although there are ways to defend the instrumental logic, the defenses raise problems of their own. One defense of the instrumental logic—taking the actual public reaction into account and dispensing with the reasonable person—is evident in the public order bail inquiries of France, South Africa, and the hybrid or internationalized\textsuperscript{49} Extraordinary Chambers of the Courts Cambodia (ECCC).\textsuperscript{50} This actual public inquiry is perhaps more logically consistent but raises other problems. As Schumann notes, "[a]ctual public opinions are indeterminate and volatile, and ascertaining them is often controversial."\textsuperscript{51} Moreover, "the idea that the actual reaction of the public should determine or even influence legal results seems inconsistent with the fundamental nature of law and justice."\textsuperscript{52}

\textsuperscript{45} Schumann, supra note 21, at 203. Cf. Hellman, supra note 21, at 661 ("The judge has an obligation to the litigants before him to avoid causing them to distrust his good faith. In the words of the familiar maxim, 'justice must not only be done but must manifestly be seen to be done,' or, as paraphrased by Justice Frankfurter, 'justice must satisfy the appearance of justice.'").

\textsuperscript{46} Id.

\textsuperscript{47} Id.

\textsuperscript{48} Id. See also Hellman, supra note 21, at 659 ("If the appearance of wrongdoing matters only because of the harmful consequences that it causes, then what matters in judging whether a particular action is wrong on mimetic grounds would be the predictability and not the reasonableness of the audience's reaction.").

\textsuperscript{49} The ECCC is a court within the Cambodian judicial system staffed by a mix of international and Cambodian judges and prosecutors. See David Scheffer, The Extraordinary Chambers in the Courts of Cambodia, in International Criminal Law 219, 219 (M. Cherif Bassiouni ed., 2008) (explaining that the ECCC is "a special court in Cambodia requiring the participation of international judges, prosecutors, and administrators in the ECCC alongside their Cambodian counterparts"). See also Phuong Pham et al., Human Rights Ctr., After the First Trial 9 (2011) (noting that the "ECCC is a mix of Cambodian and international judges with a majority of Cambodians").

\textsuperscript{50} See infra Parts III.A.3, III.B.2–3.

\textsuperscript{51} Schumann, supra note 21, at 205.

\textsuperscript{52} Id.
The other possible defense of the instrumental logic—that courts “should only concern themselves with the dangers of reasonable losses of confidence or justified vigilantism”—is the approach courts usually take. However, “introducing these normative qualifiers on public reaction re-introduces the idealized reasonable person.” The analysis then becomes non-instrumental.

III. PUBLIC REPUTE DISCOURSE AND BAIL IN PRACTICE

Both domestic and international courts have used public repute discourse to guide bail decisions in criminal cases. Part A discusses a preliminary recommendation of a group of international criminal procedural experts that international tribunals adopt rules allowing for detention on the basis of public safety or public order. It also explores the emerging practice of judges turning to the public to decide bail in international criminal cases. In particular, it focuses on the ICTY, where detention based on public confidence, as a matter of judicial discretion, has been controversial, and the ECCC, where detention based on public order is explicitly listed in its bail rules.

Part B discusses the experience of domestic courts with invoking the public in the context of bail. It briefly outlines the jurisprudence of the United States, where public repute discourse is notably absent from the bail calculus, and then provides background on the law of Canada, South Africa, and France, which allow for detention of criminal defendants based either on public confidence or public order.

This discussion demonstrates some of the difficulties of considering the public when deciding bail. Unless public repute discourse is done in the purest sense, meaning looking at whether a decision is justified by objective, external criteria, and is, well, just, it runs the risk of letting public opinion override a criminal defendant’s basic human rights. No jurisdiction, including Canada, which purports to invoke the informed, reasonable public in assessing the effect of a defendant’s release on public confidence, uses such “pure” public repute discourse. Although it may offer a more concrete standard and powerful justification for encroaching on defendants’ liberty interests, allowing judges to assess whether public disorder or social unrest among the actual public will stem from a decision to release a defendant still poses serious problems. It puts defendants at

53. Id. at 206.
54. Id.
55. Id.
the mercy of public opinion—informed, reasonable, or not—and pushes judges into the role of social scientists, for which they are ill-suited. Before enacting rules allowing for detention on the basis of public order, tribunals should proceed with caution.

A. Public Repute Discourse in International Criminal Bail Decisions

International criminal bail law is in flux. One area of contention is whether international criminal defendants should be detained based on factors other than risk of flight or danger to the public—in particular, public confidence or public order. This discussion has appeared in international policy circles as well as international court rules and decisions. Part A.1 discusses the proposal of a group of international procedural experts to allow international courts to detain defendants in order to protect public safety and security, that is, public order. Part A.2 explores the jurisprudence of the international and internationalized criminal courts on public repute discourse. Next, Part A.3 examines the jurisprudence of the ICTY, where judges have discussed the possibility of detaining defendants, even absent a risk of flight or danger, based on public confidence.

The most extensive practice of courts using the potential public reaction to a defendant’s release as a basis for detaining defendants appears in the hybrid criminal courts. At least one trial chamber at the Special Court for Sierra Leone Trial Chamber has made the potential public reaction and prevention of public disorder a relevant factor in determining whether or not release is appropriate. The War Crime Chamber of the State Court of Bosnia and Herzegovina amended its Criminal Procedure Code in 2009 to allow for detention on the basis of public order. Finally, at the ECCC, the

56. See Davidson, supra note 3.
58. The War Crime Chamber of the State Court of Bosnia and Herzegovina falls within the court system of Bosnia and Herzegovina. The Chambers has jurisdiction over defendants charged with war crimes, crimes against humanity, and genocide. It been characterized as “mainly a national institution with international involvement.” Alejandro Chehtman, Developing Bosnia and Herzegovina’s Capacity to Prosecute War Crimes Cases, 9 J. Int’l Crim. Just. 547, 562 (2011).
59. Article 132(1) of the Code of Criminal Procedure of Bosnia and Herzegovina provides:
rules not only allow for detention on the basis of public order, but the court has based the detention of every defendant, at least in part, on this detention ground. The ECCC’s jurisprudence is discussed in greater detail below.


Consideration of the public response to bail for international defendants has gained popularity in policy circles. Notably, the International Expert Framework on International Criminal Procedure (ICPEF), a group that has worked since 2007 to identify general rules and principles of international criminal procedure, has issued a report that recommends adding “protect[ing] public safety

If there is a grounded suspicion that a person has committed a criminal offense, custody may be ordered against him: . . . in exceptional circumstances, in case of a criminal offence carrying a prison sentence of ten years or a more severe punishment, which is of particular gravity taking into account the manner of perpetration or the consequences of the criminal offense, if the person’s release poses a realistic threat to disturb public order.


60. The International Expert Framework on International Criminal Procedure describes its work as follows:

Since 2007, a group comprising some of the world’s leading experts, have [sic] been working on identifying general rules and principles of international criminal procedure. The General Rules and Principles of International Criminal Procedure is a landmark study of existing procedures in all the international and internationalised courts and tribunals. It is tested rigorously through the parameters of international human rights law, comparative criminal procedure and the goals and objectives of international criminal procedure. It is intended to be a guiding framework for international criminal procedural law and practices in the future. The overarching objective of the project is to assist in facing the greatest challenge of international criminal justice: delivering fair and effective trials.


61. In addition to identifying standards that embodied the present status of the law, the group also issued “recommendations” for “improved international criminal procedure advanced on the basis of painstaking and critical evaluation of the law and practice of international criminal tribunals.” They explain: “While the recommendations give expression to the Project’s normative aspiration, it has
and security” to the grounds for arresting and detaining international criminal defendants. The ICPEF recommends cabining this ground with the language: “An arrest warrant for the purpose of protecting public safety and security may only be issued when there is direct and convincing evidence that the suspect’s liberty is likely to directly endanger public safety and security.” The recommendations make clear that the grounds for detention are to track the grounds for arrest and should therefore include the new ground of “protect[ing] public safety and security” to the permissible bases for detention prior to and pending trial.

The commentary to the recommendation reveals that the drafters intended to propose a new ground for “public order and safety” akin to the public order grounds of the ECCC and domestic jurisdictions. The commentary states:

The above recommendation follows to a significant degree Article 58(1)(b) of the ICC Statute, but it adds the protection of public order and safety as a ground justifying arrest and detention. This ground is available under human rights law and also applies, for example, to the ECCC and many national jurisdictions. There is thus in principle no objection to make this ground also available to international criminal justice.

generally not been our objective to revolutionize the current approaches to conducting international criminal proceedings but rather to offer a number of restrained yet motivated and constructive proposals meant to cover legal gaps or refine the practice.” Hague Inst. for the Internationalisation of Law, General Rules and Principles of International Criminal Procedure and Recommendations of the International Expert Framework 5 (2011) (on file with author) [hereinafter ICPEF Recommendation].

62.  Id. at 17 (Recommendation 3.2(d)).
63.  ICPEF Recommendation 3.4 provides:
A judge shall periodically (alternative: every 30/60/90 days) review the detention of the accused at the seat of the Tribunal/Court. He shall proprio motu or at the request of either party satisfy himself that there continues to be a reasonable basis to believe that the detained person has committed a crime within the jurisdiction of the Tribunal/Court and that detention continues to be necessary for one of the purposes a-d [in Section 3.2 on the Issuance of an arrest warrant].
Id. at 18. See also id. at 17 (Recommendation 3.2).
64.  Id. at 17.
65.  Id.
The commentary acknowledges the potential risk that the provision, “when interpreted loosely, would make detention in case of accusations of crimes against humanity, war crimes, or genocide almost automatic [and] the ground be converted into a provision for automatic detention.” The ICPEF therefore recommends a “high evidentiary burden” to invoke it.

2. Public Confidence and Bail at the ICTY

The bail statutes of the international criminal tribunals in many ways look similar to those of domestic jurisdictions. At the ICC, the ICTY, and the International Criminal Tribunal for Rwanda (ICTR), defendants may be detained before and during their trials based on flight risk or danger. The ICC also allows for detention based on the risk that a defendant obstruct justice. At the ICTY and ICTR, the judges retain the discretion to detain a defendant even if he or she poses neither a flight risk nor a danger to the community. Scholars, including this author, have argued that ICTY judges’ discretion to detain is excessive and is inconsistent with international human rights norms. By contrast, at the ICC, if the prosecution fails to establish one of the bases for detention, in theory, the court has no discretion to detain a defendant.

Despite the absence of any provision for detention based on threat to the public order or public confidence in the rules of the ICC, the ICTY, or the ICTR, the prosecution at the ICTY has repeatedly argued for detention based on public confidence as part of judges’ residual discretion to detain, even if a defendant is neither a flight risk nor a danger to the community. 

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66. Id.
67. Id.
68. See Int’l Crim. Trib. for the Former Yugoslavia, R. P. Evid. 65(B), U.N. Doc. IT/32/Rev. 46 (2011), available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/it032rev46e.pdf [hereinafter ICTY Rules of Procedure]; Rome Statute, supra note 16, art. 58, ¶ 1. See also Int’l Crim. Trib. for Rwanda, R. P. Evid. 65(B), available at http://www.unictr.org/Portals/0/English/Legal/ROP/100209.pdf (“Provisional release may be ordered by a Trial Chamber only after giving the host country and the country to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger.”).
70. See ICTY Rules of Procedure, supra note 68, art. 65(B); Davidson, supra note 3, at 21; Fairlie, supra note 5, at 1172–74.
71. See Davidson, supra note 3, at 21; Fairlie, supra note 5, at 1173 (arguing that “the unfettered discretion that the ICTY judiciary has granted itself in matters of provisional release” helps to create “a worrisome picture indeed”).
72. See Davidson, supra note 3.
risk nor a danger. In *Prosecutor v. Sainovic*, the prosecution argued that detention was necessary to maintain confidence in the administration of justice by the tribunal “in its international setting.” It contended that the tribunal needed the public’s confidence in order to achieve its objectives of restoration of international peace and security.

Although no ICTY majority decision has decided on the merits the validity of using public confidence in bail decisions, at least one ICTY appeals judge has written a concurrence in which he supported detention based on public confidence. In the *Sainovic* case, Judge Shahabudeen stated that public confidence was an acceptable consideration for the Trial Chamber in exercising its discretion. He contended that “[i]n the circumstances, the [defendants’] provisional release after about two months of pre-trial detention may not be easily understood by the international community.”

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73. See, e.g., Prosecutor v. Gotovina, Case No. IT-06-90-T, Decision on Motion for Provisional Release of Ivan Cermak, ¶ 7 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 14, 2008); Prosecutor v. Tolimir, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber’s Decisions Granting Provisional Release, ¶¶ 30, 32 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 19, 2005) (declining to decide whether provisional release would undermine “public confidence in the administration of justice” because the prosecution had failed to raise the issue before the Trial Chamber); Prosecutor v. Simic, Case No. IT-95-9-A, Decision on Motion of Blagoje Simic Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for his Father, ¶ 7 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 21, 2004) (noting the prosecution’s argument that release would undermine “public confidence in the administration of justice” by creating the impression that judgments of Trial Chambers must be considered inherently uncertain until confirmed on appeal).


75. Id. ¶ 86.

76. In *Prosecutor v. Tolimir*, the Appeals Chamber refused to decide the applicability of public confidence to the bail analysis due to the prosecutor’s failure to preserve the issue, but noted, “obiter dictum,” that “the Prosecution has not sufficiently demonstrated that the Trial Chamber’s decision would affect the confidence of the international community in the administration of justice by the International Tribunal.” Prosecutor v. Tolimir, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber’s Decision Granting Provisional Release, ¶ 72 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 19, 2005).

77. At the ICTY, it is called a “separate opinion.”

Canadian jurisprudence allowing for detention on the basis of public confidence, he explained that the international community’s potential inability to understand the decision mattered because releasing the defendants “would weaken the confidence of the international community in the administration of justice by the Tribunal . . . .” He cautioned against “trivialising public bewilderment” by ascribing it “to uninformed hysteria.” Implicitly, the “public” that Judge Shahabudeen recognized was the informed, international public, not the public in the former Yugoslavia. It is unclear whether by “international community” he meant states or individuals among the international public or something else.

The dissent to the same decision also discussed, but ultimately ducked the prosecution’s public confidence argument. Judge Hunt contended that public confidence does not mean that the public must believe that “all judicial decisions are wise . . . .” Rather, “to sustain confidence in the judicial institutions which administer justice,” the public must be “satisf[ied] that the justice system being administered is based upon values of independence, impartiality, integrity, and professionalism, and that, within the limits of ordinary human frailty, the system pursues those values faithfully.” In other words, for Judge Hunt, procedural fairness, not catering to the public’s limited powers of comprehension, was the key to public confidence.

Judge Hunt was more optimistic than Judge Shahabudeen about the public’s ability to maintain confidence in the tribunal despite an unpopular bail decision. He argued that the “standing” of the tribunal was not “so frail that the international community would lose confidence in its administration of justice” merely because it disagreed with one procedural decision. Rather, failing to condemn the prosecution’s “extraordinary” argument that the defendant ought

79. Id. ¶¶ 16–17.
80. Id.
81. Judge Hunt refused to decide the proper role of public confidence in the bail inquiry due to the prosecution’s failure to preserve the issue. Sainovic, Case No. IT-99-37-AR65, Hunt Dissent from Decision on Provisional Release, ¶ 91. He noted that “the concept . . . needs careful examination and a somewhat more careful definition than the prosecution has suggested.” Id. This Article seeks to answer Judge Hunt’s call for further definition of the concept.
82. Id. ¶ 89 (citing Hon. Murray Gleeson, Chief Justice of Australia, Public Confidence in the Judiciary, Address at the Colloquium of the Judicial Conference of Australia (Apr. 27, 2002)).
83. Sainovic, Case No. IT-99-37-AR65, Hunt Dissent from Decision on Provisional Release, ¶ 90 (emphasis added).
to be detained until he gave a statement—which the court rejected since it violated the defendant’s right against self-incrimination—was far more likely to damage the international community’s confidence in the tribunal’s administration of justice and “would have shocked the conscience of informed members of the international community.”84 Procedural unfairness, he posited, would do more damage to public confidence in the ICTY than would an unpopular bail decision.

Despite refusing to decide whether public confidence was an acceptable ground for denying bail, Judge Hunt implicitly agreed with Judge Shahabudeen that the informed, international public is the public at issue in the public confidence inquiry.85 He looked to the standing of the tribunal vis-à-vis informed members of the international community, not the former Yugoslavia. Again, it is unclear just who is a member of this international community.

Although neither judge invokes the “actual public,” nor do the judges, with their informed, international publics, invoke “pure” public repute discourse, which uses an informed, reasonable public equivalent to an idealized judge as a proxy for asking whether the decision is justified by objective facts. Both make an instrumental argument. They seem to invoke public repute discourse or the appearance of justice not as a way of finding objective support for their decision and therefore ensuring its legal or moral correctness, but rather to assess whether a decision will undermine or bolster public support for the ICTY.

The judges’ differing predictions on the effect of an unpopular bail decision on the confidence of the informed, international public may stem from different notions about the sources of public confidence. Judge Shahabudeen appears to focus on outcomes—the likelihood that the public will agree with the result—whereas Judge Hunt appears to focus on fair procedure—the likelihood that the public will object to unfair procedure. This disagreement echoes the scholarly disagreement over the sources of legitimacy.86

As discussed above in Part II, not only is this sort of instrumental analysis arguably logically inconsistent—to ensure public support for the tribunal and adherence to its decisions, the entire public is relevant, not just the informed international community—but it is also unworkable. Each judge makes a prophecy

84. Id. ¶ 90.
85. Id.
86. See discussion infra note 203.
that is rather difficult to prove or disprove. How to define and
measure public confidence in institutions, not to mention the related
concept of legitimacy, are problems that have vexed social scientists
for years.87 It defies logic to think that international judges are
equipped to do any better in isolated bail decisions. Moreover, social
scientists have found that public confidence is an inaccurate measure
of legitimacy or diffuse support for an institution.88

Further, not all ICTY judges agree that the relevant public
for bail is the informed, international one. At least one ICTY judge
has justified a defendant’s detention based on something like public
confidence by reference to the public in the affected region. Arguing
that a defendant in the Prlic case should not be released during a
court break, Judge Schomburg explained that the public back in the
region would likely struggle to understand why someone is released
when on trial for war crimes.89 Judge Schomburg in essence made a
public confidence argument that made the public from the affected
region the focus of its inquiry. It is unclear whether Judge Schomburg
was contemplating the actual public in the former Yugoslavia or the
informed, reasonable public.

In sum, the ICTY jurisprudence on public confidence
demonstrates the confusion over the identity of the public to be used
in the public confidence inquiry. If the public confidence inquiry is
instrumental and empirical, is the public the international public or
the public in the affected region? Who makes up the international
public, and what if there are inconsistent views within it? Should the
public be the informed and reasonable public or the actual public,
which likely includes many uninformed and possibly unreasonable
people? Should the public be the immediate public or the some public
in the future looking back at the tribunal?

The ECCC’s public order analysis discussed below
demonstrates a different approach—deciding bail based on the
appearance to and the potentially disorderly reaction of the actual

87. See Fallon, supra note 19, at 1829 n.183.
88. See id. at 1829–30. See also Gibson et al., supra note 19, at 364
(ending that public confidence, as usually tested in the United States, “is not
the same thing as diffuse support for an institution”).
89. Prosecutor v. Prlic, Case No. IT-04-74-AR65.6, Reasons for Decision on
Prosecution’s Urgent Appeal Against “Décision Relative à la Demande de Mise en
Liberté Provisoire de L’Accusé Pusic”, ¶ 10 (Int’l Crim. Trib. for the Former
Yugoslavia Apr. 23, 2008) (Schomburg, J., dissenting) (noting that it is “difficult
for alleged victims and their relatives to comprehend that an alleged war criminal
is permitted to be in the region whilst they would expect him to answer his case
before the International Tribunal”).
public in the affected region. Part III.A.3 will demonstrate some of
the difficulties in that approach.

3. Public Order and Bail at the ECCC

At the ECCC, the rules of procedure explicitly include
preservation of the “public order” as a basis for provisional
detention.90 Unlike the domestic public confidence and public order
provisions discussed below,91 neither the statute nor the rules provide
any guidance on the meaning of “public order.” The ECCC public
order ground has thus become something of a blank check for
detention. Every ECCC bail decision has denied bail and cited, among
other grounds, public order as a basis for detention.92 The ECCC also

90. To detain a charged person, there must be a “well founded reason to
believe that the person may have committed the crime or crimes specified in the
Introductory or Supplementary Submission.” Extraordinary Chambers Court of
Cambodia, Internal R. 63(3)(a) [hereinafter ECCC Rules]. In addition, the judges
must consider provisional detention to be necessary to:

i.) prevent the Charged Person from exerting pressure on
any witnesses or Victims, or prevent any collusion between
the Charged Person and accomplices of crimes falling
within the jurisdiction of the ECCC;

ii.) preserve evidence or prevent the destruction of any
evidence;

iii.) ensure the presence of the Charged Person during the
proceedings;

iv.) protect the security of the Charged Person; or

v.) preserve the public order.
ECCC Rule 63(3)(b)(i-v) (emphasis added). See also Robert Petit & Anees Ahmed,
A Review of the Jurisprudence of the Khmer Rouge Tribunal, 8 Nw. U. J. Int’l
French-style public order ground, rather than the Canadian public confidence one,
may not be a coincidence. The Cambodian system is based on the French “civil
law” model. Pham et al., supra note 49, at 9 n.14. Moreover, the judge who led the
group tasked with drafting and negotiating the “internal rules,” the rules of
procedure and evidence of the ECCC, was French. See Scheffer, supra note 49, at
238.

91. See discussion infra Parts III.B.2-4.

(PTC01), Decision on Appeal Against Provisional Detention Order, ¶¶ 74–76
(March 20, 2008); Prosecutor v. Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ
(PTC03), Decision on Appeal Against Provisional Detention Order of Ieng Sary,
¶¶ 111–117 (Oct. 17, 2008); Prosecutor v. Ieng Thirith, Case No. 002/19-09-2007-
ECCC/OCIJ (PTC02), Decision on Appeal Against Provisional Detention Order of
Ieng Thirith, ¶¶ 64–70, 72 (July 9, 2008); Prosecutor v. Kaing Guek Eav Alias
“Duch,” Case No. 001/18-07-2007-ECCC-OCIJ (PTC01), Decision on Appeal
Against Provisional Detention Order of Kaing Guek Eav Alias “Duch,” ¶¶ 49–52
(Dec. 3, 2007); Prosecutor v. Khieu Samphan, Case No. 002/19-09-2007-
brings at least one segment of the actual public—victims—into the bail procedure. The ECCC recognizes victims’ participation rights in bail decisions, at least on appeal.93

The ECCC public order provision, like the French one, represents “impure” public repute discourse in that it contemplates the perception of the actual public, not the informed, reasonable public, in deciding the likelihood of a disturbance to the public order. In addition, the logic behind it is nakedly instrumental—the court cares about the reaction of the public, because it seeks to avoid public violence. Although, thus far, ECCC judges have interpreted the provision to allow for detention based only on a threat of unrest, the term public order could be read more broadly to encompass a risk to public confidence, in the sense of the public’s faith in the system.94

As is not surprising given the absence of any definition of public order in the ECCC rules, the prosecution and defendants have disagreed on the scope of the public order ground for detention. For example, in the appeal of one defendant, Nuon Chea, the defense argued that, “detention on grounds of public order ‘must be invoked only where it is justified by precise facts and where it is the only means of quelling an actual disturbance.’”95 By contrast, the prosecution contended that no such precision was required or possible:

A domestic court . . . may be able to determine whether the release of a suspect charged with the commission of domestic crimes would inevitably cause public unrest in a localized area. In contrast, it would be nearly impossible for the ECCC to predict with any certainty whether the release of a person charged with the commission of international crimes

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94.  See *infra* Part III.B.3.

95.  *Nuon Chea*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), Decision on Appeal Against Provisional Detention Order, ¶ 74.
inevitably would cause public unrest in a country of millions.96

In sum, the parties disagreed over the evidence and concreteness of the threat to the public order required. The defense wanted the bar set high, the prosecution low.

The ECCC Appeals Chamber turned to international human rights jurisprudence to give meaning to its public order provision, but its application of the jurisprudence was rather anemic.97 In particular, the Appeals Chamber turned to the ECtHR jurisprudence for guidance on the meaning of the public order ground.98 It noted the requirement set out in the ECtHR case, Letellier v. France, of “facts capable of showing that the accused’s release would actually disturb public order.”99 In addition, it noted the limitation that continued detention remains legitimate only if the threat to the public order persists.100

The ECCC Pre-Trial Chamber allowed for a measure of guesswork in the public order equation. It noted that, “although specific evidence is required to demonstrate an actual risk that public order may be disturbed if a defendant is released, this assessment

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96. Id. (quoting Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTCOl), Co-Prosecutors’ Response to Nuon Chea’s Appeal Against Provisional Detention Order of 19 September 2007, ¶ 35).
97. The parties also disagreed over the applicability of international human rights norms to bail decisions at the ECCC generally. The Nuon Chea defense cited ECtHR caselaw in support of its argument that precise facts of an actual disturbance were needed. The prosecution argued that jurisprudence from jurisdictions such as the ECtHR, which review the compliance of national decisions with the ECHR, “cannot be strictly applied in cases of war crimes, crimes against humanity and genocide before the ECCC.” Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTCOl), Decision on Appeal Against Provisional Detention Order, ¶ 74. For an argument that the bail regimes of international tribunals ought to comply with international human rights norms in order for tribunals to achieve their key function of promoting respect for human rights, see generally Davidson, supra note 3.
98. See Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTCOl), Decision on Appeal Against Provisional Detention Order, ¶¶ 74–76. The Appeals Chamber also cited “the domestic resonance of this ground” as a reason to turn to ECHR jurisprudence for guidance. Id. ¶ 75.
100. Id.
necessarily involves ‘a measure of prediction,’ particularly in the context of mass atrocity crimes.”

Unlike the ICTY’s debate over public confidence and bail, the public order sections of the various ECCC bail decisions, which are almost verbatim replicas of one another, focus on the threat to Cambodian public order. The judges supported their conclusions that public order warranted detention on the grounds that some portion of the population alive in the late seventies suffered from post-traumatic stress disorder and the opinion of specialists that the beginning of judicial proceedings at the ECCC “may pose a fresh risk to Cambodian society” and “lead to the resurfacing of anxieties and a rise in the negative social consequences that may accompany them.” The judges took judicial notice of the existence of “everyday disturbances,” violent crimes, and the anti-Thai riots of 2003 and concluded that they demonstrated the “potential for politically motivated instability” and confirmed that “the perceived threat to security is not illusory.” They also noted a “great deal of interest amongst the Cambodian population and press” generated by the hearings. In each case, they concluded that these facts “[w]ere capable of showing that the Charged Person’s release would actually disturb public order” and that detention was therefore necessary to preserve the public order.

101. Petit & Ahmed, supra note 90, at 176 (citing Case of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 03), Decision on Appeal Against Provisional Detention Order of Ieng Sary, ¶ 112 (Oct. 17, 2008)).


103. Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), Decision on Appeal Against Provisional Detention Order, ¶ 77.

104. Id. ¶ 80.

105. Id. ¶ 79. See also Kaing Guek Eav Alias “Duch,” Case No. 001/18-07-2007-ECCC-OCIJ (PTC01), Decision on Appeal against Provisional Detention Order, ¶ 52 (noting a great deal of public interest in the case).

106. See Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), Decision on Appeal Against Provisional Detention Order, ¶ 81; Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 03), Decision on Appeal Against Provisional Detention Order of Ieng Sary, ¶ 117; Ieng Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), Decision on Appeal Against Provisional Detention Order of
The court’s analysis indicates that the threat to the public order need not stem from any conduct of the defendant regarding the trial, the tribunal, witnesses, or other recent matter, but rather from the charges alone. In only one decision was the defendant’s recent conduct beyond the crimes for which he or she was charged mentioned.107

In contrast to the French public order ground, which precludes basing a finding of a threat to the public order solely on media attention given to the case,108 the ECCC rules do not limit judges’ reliance on media attention in the public order determination. In the decision to detain Kain Guek Eav “Duch,” for example, the court noted the great media attention given to the first public hearing in his case, which it maintained demonstrated “the fact that the trials of senior leaders and those most responsible for the crimes committed during the Kampuchea Democratic period from 1975 to 1979 are still a matter of great concern today for the Cambodian population and the international community.”109 Concededly, media attention was not the only basis for the court’s conclusion that the defendant’s release would threaten the public order.110

The ECCC judges did not discuss explicitly the sticky issue of the definition of “public” in the public order equation, but, implicitly, they seem to contemplate the actual Cambodian public as the relevant public. The ECCC judges’ focus on the volatility of Cambodian society and the persistent PTSD of Cambodians suggests that the court is concerned about the actual Cambodian public, not the informed, reasonable Cambodian public. The only mention of any international public appears in the judges’ noting that media

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Ieng Thirith, ¶ 72. See also Kaing Guek Eav Alias “Duch,” Case No. 001/18-07-2007-ECCC-OCIJ (PTC01), Decision on Appeal against Provisional Detention Order of Kaing Guek Eav Alias “Duch,” ¶ 56 (finding “the provisional detention of the Charged Person is a necessary measure to preserve public order”).

107. Ieng Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), Decision on Appeal Against Provisional Detention Order of Ieng Thirith, ¶ 71 (noting that the defendant had made statements hostile to the ECCC, and finding a possibility that the defendant might make more statements that have “the potential to affect public order, notably if they were to be issued after the Charged Person’s release from provisional detention”).


110. Id. ¶¶ 49–52
attention and a U.N. General Assembly statement indicated that the crimes continued to be a concern to the international community.\textsuperscript{111}

This domestic focus makes some sense since the ECCC is situated within the Cambodian court system. However, given that the ECCC involves international participants and deals with international crimes,\textsuperscript{112} the focus on the domestic public may also be driven by the more practical concerns noted by the ECCC prosecution. As difficult as assessing the threat to the public order of Cambodia may be, it is considerably harder to assess a threat to the international public order.

B. Public Repute Discourse in Domestic Bail Decisions

The law of bail at international tribunals, like all international criminal procedure, borrows from the law and experience of domestic jurisdictions. To assess the wisdom of detaining defendants before international tribunals on public confidence or public order grounds, it is instructive to understand how domestic jurisdictions handle release decisions. Some jurisdictions—notably, not including the United States—allow for detention of criminal defendants prior to conviction on the basis of public confidence or public order, even where a defendant poses no risk of flight nor danger to the community.\textsuperscript{113}

The bail jurisprudence of various domestic jurisdictions is discussed below. First, to provide familiar context for American

\begin{itemize}
  \item \textsuperscript{112} See supra note 49. The ECCC website describes the ECCC as a domestic court, but notes the international nature of the crimes, the need to uphold international standards of justice, and the participation of international staff. See Introduction to the ECCC, ECCC, http://www.eccc.gov.kh/en/about-eccc/introduction (last visited Mar. 26, 2012).
  \item \textsuperscript{113} In addition to the jurisdictions discussed in detail below, the Netherlands also allows for detention based on public order. A.H.J. Swart, The Netherlands, in Criminal Procedure Systems in the European Community 279, 301 (Christine Van den Wyngaert et al. eds., 1993). Denmark also allows detention on remand to “protect the public sense of justice” but the rule is controversial. Vagn Greve, Denmark, in Criminal Procedure Systems in the European Community 51, supra, at 64. In Germany, a threat to the public order does not on its own provide a basis for detention, but it reduces the prosecutor’s burden in showing risk of flight or danger. Hans-Heiner Kühne, Germany, in Criminal Procedure Systems in the European Community 137, supra, at 150.
\end{itemize}
readers and to illustrate a bail regime that eschews inquiry into public confidence or public order, Part B.1 discusses bail law in the United States. Part B.1 also briefly examines areas where United States law recognizes a role for public repute discourse. Then, to illustrate some of the issues that detaining based on the public’s reaction raises, Parts B.2, B.3, and B.4 will focus on the jurisprudence of two common law jurisdictions, Canada and South Africa, and one civil law jurisdiction, France.

Canadian jurisprudence on public confidence and bail is particularly relevant, not only because the Supreme Court of Canada has addressed the constitutionality and defendants’ rights implications of detaining criminal defendants based on public confidence, but also because ICTY judges, in considering detention based on public confidence, turned to this jurisprudence for guidance.114 The French public order provision is likewise worthy of consideration because the ECCC appears to have loosely modeled its provision on the French one, but jettisoned some of its limitations. The French provision is also of interest because a major human rights court, the ECtHR, has found it to be consistent with the human rights norms set out in the European Convention on Human Rights (ECHR).115 The South African jurisprudence warrants attention because the law blends public confidence and public order as grounds for detention and because the Constitutional Court of South Africa justified resorting to these grounds on the basis of the violent and fragile social conditions in post-apartheid South Africa. Similar social conditions may exist in many of the states from which international criminal defendants are haled.

1. United States

In the United States, preservation of public confidence and the public order are not valid bases for detaining alleged criminals. State and federal law allow for detention based on risk of flight.116 The federal system and half of the states also allow for preventive detention, meaning detention based on danger to the community.117

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114. See discussion infra Part III.A.2.
115. See infra text accompanying notes 190–93.
117. For example, the 1984 Bail Reform Act, which governs bail in the U.S. federal system, provides:
The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the
American scholars disagree whether, historically, any bases for denying bail, other than risk of non-appearance for trial, were recognized in the United States. Detention on the basis of danger to the community is a relatively recent development. Not until the 1984 Bail Reform Act did the U.S. federal system add a provision allowing for detention based on danger to the community.

In United States v. Salerno, the United States Supreme Court upheld the constitutionality of danger to the community as a basis for detention on the grounds that the Act was regulatory and not punitive and there is no constitutional right to bail but rather merely a right to be free from excessive bail. At the time of Salerno, detaining criminal defendants based on future danger was highly controversial, and the majority opinion in Salerno drew vigorous

appearance of such person as required and the safety of any other person and the community—

(2) upon motion of the attorney for the Government or upon the judicial officer’s own motion in a case, that involves—

(A) a serious risk that such person will flee; or

(B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.


118. Laurence Tribe, for example, has argued that “[t]he history of bail . . . suggests that, for a substantial period lasting at least until the adoption of the excessive bail clause, the only legitimate function of pretrial incarceration was to provide assurance that the accused could be prosecuted and, if guilty, sentenced.” Laurence Tribe, An Ounce of Detention, 56 Va. L. Rev. 371, 402 (1970). But see Albert W. Alschuler, Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process, 85 Mich. L. Rev. 510, 548 (1986) (“The available evidence offers no support for the common perception that pretrial detention in England and America lacked protective goals; indeed, a few sources indicate that this common perception is erroneous.”).

119. Salerno, 481 U.S. at 742 (“By providing for sweeping changes in both the way federal courts consider bail applications and the circumstances under which bail is granted, Congress hoped ‘to give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.”’ (citing S. Rep. No. 98-225, at 3 (1994)).

120. See Salerno, 481 U.S. at 742. See also Thirty-Eighth Annual Review of Criminal Procedure, 38 Geo. L.J. Ann. Rev. Crim. Proc. 323, 329–30 (2009) (describing Salerno’s holding). Alschuler argues that the U.S. Bail Reform Act is unconstitutional because it fails to demand any “adequate preliminary proof of guilt or convictability as a predicate for extended detention.” Alschuler, supra note 118, at 511. He argues that to detain based on future danger the prosecution should have to demonstrate that the “proof is evident” or the “presumption great.” He contends that the probable cause standard is insufficiently rigorous. Id. at 566.
dissents. In his dissent, Justice Marshall argued that the future danger ground violated the presumption of innocence. Although some claim that the controversy has subsided, scholarly criticism of preventive detention—in particular based on the presumption of innocence—persists.

To the extent U.S. courts have considered the public in the realm of bail, they emphasize only that public opinion is not an acceptable part of the bail equation. As Justice Jackson stated in a seminal Supreme Court case on bail, *Stack v. Boyle*:

> But the protest charges, and the defect in the proceedings below appears to be, that, provoked by the flight of certain Communists after conviction, the Government demands and public opinion supports a use of the bail power to keep Communist defendants in jail before conviction. Thus, the amount is said to have been fixed not as a reasonable assurance of their presence at the trial, but also as an assurance they would remain in jail. There seems reason to believe that this may have been the spirit to which the courts below have yielded, and it is contrary to the whole policy and philosophy of bail.

Likewise, the New Jersey Court of Chancery rejected the argument that the allegedly “aroused state of public opinion” was a valid ground for detaining defendants. Finally, the Rhode Island Supreme Court struck down a bail condition restricting the defendant’s activities while on release in which the trial court had cited public confidence as the basis for the condition.


122. Compare Richman, supra note 121, at 439 (noting that the controversy has died down), with Paul Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 Harv. L. Rev. 1429 (2001) (arguing that prevention and justice ought to be separated), and Shima Baradaran, *Restoring the Presumption of Innocence*, 72 Ohio St. L.J. 723 (2011) (arguing that the presumption of innocence is rooted in the Due Process Clause of the United States Constitution and precludes pre-trial detention other than to secure the defendant’s attendance at trial or to prevent the defendant’s interference with the judicial process).


125. See *State v. Tavone*, 446 A.2d 741, 742 (R.I. 1982) (vacating the trial court’s condition that the defendant not show X-rated films while on release pending appeal, following a conviction for showing an obscene movie). The trial
The only cases in which courts considered public confidence favorably in bail decisions merely used it to support existing bail factors. In Demmith v. Wisconsin Judicial Conference, the Supreme Court of Wisconsin cited public confidence only to describe the source of the legislature's authority to regulate bail. Likewise, in People v. Esquivel, a New York state trial court noted that:

The public's confidence in the criminal justice system would unquestionably suffer if judges were prohibited from disallowing bail bonds which do not ensure a defendant's return, but instead, invite flight. Where a court believes that an indemnitor has been bribed or coerced to put up collateral, there is no assurance that the threat of forfeiture of that collateral will inhibit a defendant's flight.

Thus, in Esquivel, the trial court simply explained that the public confidence would be undermined by a bail system that did not effectively guard against the defendant's flight. Risk of flight, not public confidence, was the basis for detention.

Even though American law does not provide for detention based on public confidence or public order, American judges often turn to public repute discourse to assist in decision making in other contexts. Public confidence and the appearance of justice are central to decisions on judicial recusals. Courts also turn to public

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126. Demmith v. Wis. Judicial Conference, 480 N.W.2d 502, 508 (Wis. 1992) (stating "[t]he legislature possesses the power to regulate the administration of bail under its power to promote the public welfare and to effectuate the public policy of maintaining a fair judicial system and public confidence in that system") (internal citations omitted).


128. See Schumann, supra note 21, at 192. For example, in a recent case on judicial bias, the United States Supreme Court considered the test for "appearance of impropriety" under the 1990 version of the ABA Model Code of Judicial Conduct, "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2266 (2009) (citing Model Code of Judicial Conduct Canon 2A (1990) (amended 2007)). The arguments over the rule also invoked public
confidence in the context of police and prosecutorial misconduct. For example, public confidence is cited as a basis for the prohibition on basing peremptory challenges on race. In *Rose v. Mitchell*, the Supreme Court stated that, “[s]election of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process.”

The Court acknowledged the costs of this decision, but said that the costs “are outweighed by the strong policy the Court consistently has recognized of combating racial discrimination in the administration of justice.”

Likewise, the United States Supreme Court justifies the tradition of the public trial, fundamental to the U.S. justice system, in part on the need for public confidence. The Supreme Court has cited therapeutic value from “community catharsis” as one reason in support of public trial. In addition, however, it has noted that, “[o]penness enhances . . . the appearance of fairness so essential to public confidence in the criminal justice system.”

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129. *See* *Rose v. Mitchell*, 443 U.S. 545, 551–57 (1979) (holding that racial discrimination in the selection of a grand jury foreman was sufficient grounds to dismiss a murder indictment); *see also* Fred A. Bernstein, *Behind the Gray Door*, 69 N.Y.U. L. Rev. 563, 568 n. 27 (1994) (analyzing the outcome in *Rose*).

130. *See* *Rose*, 443 U.S. at 558; Bernstein, *supra* note 129, at 568 n. 27.

131. *See generally* Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 Ind. L.J. 397 (2009) (arguing that the jury trial right is not only the right of a defendant, but rather is also a collective right).

132. *See* Abraham S. Goldstein, *Converging Criminal Justice Systems*, 49 S.M.U. L. Rev. 567, 569 (1996) (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564 (1980)) (“The Supreme Court has often stressed this relation between public trial and public confidence in the administration of justice.”). In the United States, the public has a First Amendment right of access to criminal trials. *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 507 (1984) (holding that the trial court had violated the public and press’s right to access under the First Amendment by closing all but three days of a six-week voir dire, without considering alternatives to closure and without stating findings to support the order).


134. *Press-Enterprise Co.*, 464 U.S. at 507. Nevertheless, “[t]he Supreme Court has emphasized that the public’s right of access to criminal proceedings is not absolute, and that it must in some circumstances give way to the paramount rights of the accused.” *In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984) (citing *Press-Enterprise Co.*, 464 U.S. at 508). Privacy interests may also militate
Despite the absence of a rule allowing for detention based on public confidence, a United States federal appeals court has analyzed the issue of the relation between the right to a public trial, including its attendant implications for public confidence, and a defendant’s fair trial and privacy rights in bail hearings. In *Globe Newspapers*, the First Circuit stated that, although the right of access extends to bail hearings, the defendant’s privacy and fair trial rights outweigh it:

"The interests of the press and the public weigh less heavily at this early point in the proceedings than they do later, both because the tradition of openness in bail hearings is not as strong and because the press and public will have later opportunities to examine the material admitted at those hearings. By contrast, the privacy and fair trial interests of the defendants are at their zenith during the bail hearings, since they have not yet had an opportunity to test the material admitted at the hearings."  

Thus, although U.S. courts acknowledge public confidence as an important consideration, they do not use it to detain defendants or even to restrict conditions of release and are wary of using it to encroach on defendants’ rights generally. This wariness may be even greater at the bail stage where the privacy and fair trial rights of the defendants “are at their zenith.”

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against open proceedings. *Id.* at 59. See also State v. Dunne, 590 A.2d 1144, 1151 (N.J. 1991) ("We would never deprive the defendant of a fair trial in order to maintain public confidence . . . Having said that, we must never forget . . . the importance of maintaining the public's confidence in our criminal-justice system. Trial by jury . . . is one of the foundations of that confidence.").

135. *In re Globe Newspaper Co.*, 729 F.2d at 59.

136. The author does not mean to suggest that bail in the United States is without its flaws. Notably, in the “war on terror,” the United States carved out means of detaining people without charges or findings on flight or danger through extraordinary procedures such as material witness warrants. Moreover, the United States’ detention of prisoners at Guantanamo and other sites abroad circumvent the ordinary federal bail procedures and international human rights law. See Michael Greenberger, Indefinite Material Witness Detention Without Probable Cause: Thinking Outside the Fourth Amendment 30 (2004); Alfred de Zayas, *Human rights and indefinite detention*, 87 Int'l Rev. Red Cross 15, 18 (2005). Further, 27 states preclude bail for capital offenses altogether, either through statute, constitutional provisions, or criminal rules. See Baradaran, *supra* note 122, at 750 n.160. Thus, defendants charged with extremely serious offenses such as genocide, crimes against humanity, or some war crimes would likely not be considered eligible for bail at all.
2. Canada

Unlike in the United States, the Canadian Criminal Code provides for detention on the basis of “public confidence in the administration of justice,” even where a defendant poses neither a risk of flight nor a danger to the community.137 Canadian bail scholar Gary Trotter contends that, consistent with British law,138 Canadian courts initially allowed for detention based only on the need to secure the defendant’s attendance.139 Inspired by a 1947 British Court of Appeals decision allowing for detention on grounds other than flight risk, Canadian law eventually identified factors other than ensuring attendance at trial as legitimate grounds for an accused’s detention.140 Beginning in the 1950s, Canadian courts began to recognize preventing the commission of future offenses as another valid basis for denial of bail.141 Still, as Trotter puts it, “[t]he propriety of detention for reasons unrelated to attendance in court is a controversial issue in the context of the [Canadian] Charter.”142

In 1972, the Canadian Parliament passed the Bail Reform Act, which, among a variety of other changes, allowed for detention based on the “public interest” and the prevention of further offenses.143 The Supreme Court of Canada later held unconstitutional the “public interest” basis for detention, and, in 1996, the Parliament replaced it with a provision that allowed for detention based on “public confidence in the administration of justice” or “any other just cause.”144 In a 2003 case, Regina v. Hall,145 the Supreme Court of

137. Criminal Code, R.S.C. 1985, c. C-46, s. 515(10)(c) (Can.).
138. But see Alschuler, supra note 118, at 549–50 (disputing the contention that British law recognized only risk of flight as a permissible basis for detention before conviction).
140. Id.
141. Id. at 9–10.
142. Id. at 8.
143. Id. at 12.
144. The statute examined and rejected in part by R. v. Hall, [2002] 3 S.C.R. 309 (Can.), provided:
For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
(a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
(b) where the detention is necessary for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if released
Canada struck down the Canadian Bail Reform Act provision allowing for detention based on “any other just cause,” but upheld by a five to four vote the constitutionality of the provision for detention based on “public confidence in the administration of justice.”

The Supreme Court of Canada found that the provision “serve[d] an important purpose—to maintain confidence in the administration of justice in circumstances such as [those presented in the case].” These circumstances included the “heinous and unexplained” nature of the crime, the small city in which it occurred, the strength of the evidence, and fear in the community. The Hall majority reasoned that releasing defendants “in the face of a heinous crime and overwhelming evidence may erode public confidence in the administration of justice,” which, in turn, puts the entire justice system at risk and may give rise to public unrest and vigilantism. It explained that “public confidence and the rule of law are inextricably intertwined” and that “[t]o sustain the rule of law, a core value of our society, it is necessary to maintain public respect for the law and the courts.” The majority concluded: “Where, as here, the

from custody, commit a criminal offence or interfere with the administration of justice; and

(c) on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution’s case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

Criminal Law Improvement Act, S.C. 1996, c. 18, s. 59 (Can.) (emphasis added). It bears noting that the statute’s use of the word “including” suggests that the list is illustrative, rather than exhaustive. See also Trotter, supra note 139, at 30.


146. See id. at 324; Trotter, supra note 139, at 31.

147. Hall, 3 S.C.R. at 326.

148. Id. Hall involved a gory, highly publicized murder, and the evidence against the defendant was “compelling.” Id. at 317–18.

149. Id. at 326 (“Where justice is not seen to be done by the public, confidence in the bail system and, more generally, the entire justice system may falter. When the public’s confidence has reasonably been called into question, dangers such as public unrest and vigilantism may emerge.”).

150. Id. at 327 (quoting R. v. MacDougal [1999], 178 D.L.R. 4th 227, 237 (B.C. C.A.)). In MacDougal, the Court of Appeals for British Columbia cited R. v. Alexander [1998], 51 O.T.C. 261 (Ont. Gen. Div.), “a horrific case of home invasion,” as “a good example of a case where such circumstances were present.” MacDougal, 178 D.L.R. 4th at 236. In Alexander, “the facts supportive of conviction were very strong: the conduct was monstrous, resulted in severe trauma to the victims, and the potential for heavy sentences was high.” Id.
crime is horrific, inexplicable, and strongly linked to the accused, a justice system that cannot detain the accused risks losing the public confidence upon which the bail system and the justice system as a whole repose.\footnote{151}

The majority emphasized that courts should be concerned only about the reasonable person,\footnote{152} but its analysis suggests that the subjective views of the potentially unreasonable public were relevant as well. The majority stated that “[c]ourts must be careful not to pander to public opinion or to take account of only the overly excitable.”\footnote{153} The bail statute, it contended, achieved this aim by narrowing the inquiry “to the reasonable community perception of the necessity of denying bail to maintain confidence in the administration of justice, judicially determined through the objective lens of ‘all the circumstances,’” including “the apparent strength of the prosecution’s case; the gravity of the nature of the offence; the circumstances surrounding its commission; and the potential for a lengthy term of imprisonment.”\footnote{154} However, the Court’s logic—arguing that to release a defendant accused of a “heinous crime” where there is “overwhelming evidence” against him or her may undermine the “public confidence in the administration of justice” and thereby increase the “dangers of public unrest and vigilantism”—suggests a more subjective, instrumental approach.\footnote{155}

Moreover, the Supreme Court of Canada described the public confidence inquiry as asking whether “a reasonable member of the community would be satisfied that denial [of bail] is necessary to maintain confidence in the administration of justice.”\footnote{156} Schumann notes that the question is not whether the reasonable public would

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\begin{itemize}
\item 151. \textit{Hall}, 3 S.C.R. at 332. The explanation for the Dutch rule—allowing for detention if an offense with a possible sentence of over twelve years of imprisonment has “seriously shocked the community”—is similar: “[t]hese are cases in which society would be unable to understand why such offenders could remain at large.” Swart, \textit{supra} note 113, at 301. Of course, these “offenders” are still only alleged offenders until conviction.
\item 152. \textit{Hall}, 3 S.C.R. at 333 (“At the end of the day, the judge can only deny bail if satisfied that . . . a reasonable member of the community would be satisfied that denial is necessary to maintain confidence in the administration of justice.”).
\item 153. \textit{Id.} at 327 (quoting \textit{MacDougall}, 178 D.L.R. 4th at 237).
\item 154. \textit{Hall}, 3 S.C.R. at 330, 332. It bears noting that the statute’s use of the word “including” suggests that the list is illustrative, rather than exhaustive.
\item 155. Schumann, \textit{supra} note 21, at 203–04.
\item 156. \textit{Hall}, 3 S.C.R. at 333. The court also stated that “the reasonable person making this assessment must be one properly informed about the philosophy of the legislative provisions, \textit{Charter} values and the actual circumstances of the case . . . .” \textit{Id.} (internal citations omitted).
\end{itemize}
lose confidence in the administration of justice, but rather whether a reasonable member of the community thinks that the public might lose confidence. Therefore, “the reaction is situated within society, and the reasonable person merely observes that reaction, the reasons for the reaction are not subject to the strictures about facts and [constitutional] values which [the majority] places on the reasonable person.” The inquiry thus devolves into an assessment of public opinion.

The Hall dissent also took the majority to be approving, at least implicitly, consideration of the unreasonable public’s opinion. The dissent noted the bail judge’s findings regarding the fear voiced by some members of the small city in which the crime occurred and concluded that “the bail judge [had] erred in considering the subjective fears of members of the public when he had already determined that the accused should not be denied bail for fear of flight or threat to the public.”

It does not further our pre-trial release scheme to allow irrational fears and inclinations to distort the proper application of bail requirements. No authority is needed for the proposition that ill-informed emotional impulses are extraneous to our bail system.

The dissent concluded that “[t]he problem with [the Canadian Bail Reform Act provision] is that, stripped to its essence, its very purpose is to allow these subjective fears to form the sole basis by which bail is denied.”

Hall and the Canadian public confidence bail provision illustrate the inconsistency between the invocation of the informed, reasonable public and the instrumental rationale. In Hall, the majority’s justification for turning to public confidence was instrumental—the public must see that justice is done to retain confidence in the bail system and in the justice system, and to avoid public unrest and vigilantism. However, if the Court is concerned about the rule of law and vigilantism, the Court must address not

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157. Schumann, supra note 21, at 207.
158. Hall, 3 S.C.R. at 361 (Iacobucci, J., dissenting).
159. Id. at 362.
160. Id. at 361.
161. Id.
only the informed, reasonable public, but also the uninformed, unreasonable public.\textsuperscript{162}

The dissent took the majority to task for this very inconsistency. It noted that the public confidence provision “allow[ed] for pre-trial detention on the basis of nothing more than a serious crime coupled with a strong \textit{prima facie} case”\textsuperscript{163} and questioned how detention, “where there is little risk of flight or to public safety, could possibly promote confidence in the administration of justice in the mind of an informed public fully aware of the importance of the presumption of innocence and the right to bail.”\textsuperscript{164} Approached from the perspective of an informed, reasonable public, the dissent doubted the need for a “public confidence” ground for detention over and above the existing provisions for risk of flight or danger.\textsuperscript{165}

According to the dissent, the majority’s approval of public confidence as a basis for detention also detracted from the Court’s traditional and essential role as defender of constitutional norms in the face of public pressure:

\begin{quote}
[T]he role of this Court, and indeed of every court in our country, to staunchly uphold constitutional
\end{quote}

\textsuperscript{162} See Schumann, \textit{supra} note 21, at 203, 207 (arguing that the \textit{Hall} decision was incorrect because the majority failed to explain “why the public would react negatively to bail for reasons [unrelated to] prevent[ing] the accused from interfering with the administration of justice [including by fleeing] or [preventing] further crime”).

\textsuperscript{163} \textit{Hall}, 3 S.C.R. at 358 (Iacobucci, J., dissenting).

\textsuperscript{164} \textit{Id.} See also Schumann, \textit{supra} note 21, at 208. Schumann argues:

If the accused, however, posed no risk to the administration of justice or to public safety, the only plausible reason to favour denying bail is as punishment, either as a scapegoat for a heinous crime, or as a shortcut to the sentencing which the accused is assumed to deserve. Punishing the accused in this way is incompatible with the presumption of innocence, so the reasonable person would reject it as a justification, but the actual public is not always so scrupulous. Hence the requirement in s. 11(e) of the Charter that the denial of bail always be justified, or done for “just cause”. The majority’s judgment is incorrect for this reason, and it conceals its error by claiming, but failing, to employ the reasonable person whose reasoning the presumption of innocence constrains.

\textit{Id.}

\textsuperscript{165} \textit{Hall}, 3 S.C.R. at 350 (Iacobucci, J., dissenting) (noting that “counsel were hard pressed to raise even a convincing hypothetical scenario which called for pre-trial detention for reasons other than” risk of non-appearance and danger, and that “the wording [of the danger to the community section] is broad enough to encompass any type of threat to ‘the protection or safety of the public’. . .”).
standards is of particular importance when the public mood is one which encourages increased punishment of those accused of criminal acts and where mounting pressure is placed on the liberty interest of these individuals. Courts must be bulwarks against the tides of public opinion that threaten to invade these cherished values. Although this may well cost courts popularity in some quarters, that can hardly justify a failure to uphold fundamental freedoms and liberty.\textsuperscript{166}

Courts, in sum, should not be in the business of catering to public opinion, particularly when public opinion favors punishment and encroaching on defendants’ rights.

\textit{Hall} and the public confidence basis for detention have met with “virtually universal academic scorn.”\textsuperscript{167} Canadian scholars have suggested that the amendment providing for detention based on “public confidence in the administration of justice,” appeared to serve no purpose other than political.\textsuperscript{168} At least one scholar has argued that the provision that allows detention on the basis of public confidence has undermined the presumption of innocence.\textsuperscript{169}

Like the ECCC with its public order provision, Canadian courts also appear to employ the public confidence ground quite liberally. An empirical study of bail decisions based on public confidence found that of sixty-four Canadian decisions where courts used the “public confidence in the administration of justice’ basis for detention, more than half resulted in detention.”\textsuperscript{170} The authors posit that their findings give rise to doubts as to whether \textit{Hall} “is being applied sparingly” and note “that there are worrisome inconsistencies.”\textsuperscript{171} The authors noted that, paradoxically, other than in the case of murder, “[t]here is some indication that the worst fears of the minority—that accused will be detained simply because the

\begin{footnotes}{166}\textit{Id.} at 361.\end{footnotes}
\begin{footnotes}{167}\textit{Myles McLellan, Bail and the Diminishing Presumption of Innocence,} 15 Can. Crim. L. Rev. 57, 74 (2010).\end{footnotes}
\begin{footnotes}{168}\textit{Id.} at 61 (quoting Trotter, \textit{supra} note 139, at 31).\end{footnotes}
\begin{footnotes}{169}\textit{McLellan, \textit{supra} note 167, at 74 (arguing that due to the court’s ability to detain based on “public confidence in the administration of justice” and the proliferation of provisions putting the burden on the defendant to justify release, “the presumption of innocence in the Canadian bail process has become an illusory concept, at best”).}\end{footnotes}
\begin{footnotes}{170}\textit{Don Stuart & Joanna Harris, Is the Public Confidence Ground to Deny Bail Used Sparingly?}, in 21 Criminal Reports 232, 236 (Don Stuart ed., 6th ed. 2004).\end{footnotes}
\begin{footnotes}{171}\textit{Id.}\end{footnotes}
judge thinks the offence is serious and the Crown has a strong case—are sometimes materializing into reality.”

The Hall dissent noted that South Africa had a similar bail provision, but contended that the conditions justifying the South African provision were absent in Canada. It also maintained that the South African provision is narrower and “seems more akin to the ‘public safety’ ground.” The South African provision, which demonstrates the potential overlap between public confidence and public order and their potentially wide sweep, is examined below.

3. South Africa

The South African bail provision allows for the denial of bail “where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.” The public order provision stemmed from

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172. *Id.* at 239.
173. *R. v. Hall,* [2002] 3 S.C.R. 309, 361 (Can.) (Iacobucci, J., dissenting) (“It is obvious that in Canada no comparable social conditions exist, either currently or in the foreseeable future, which would justify s. 515(10)(c) under [the Canadian constitution]”). Iacobucci apparently did not take Stanley Cup losses into his account in his appraisal of Canadian social conditions.
174. *Id.* at 364.
175. *S v. Dlamini* 1999, (4) SA 623 (CC) (S. Afr.). The bail statute provides factors that may be used to assess whether there is a threat to the public order:

In considering whether the ground in subsection (4) (e) has been established, the court may, where applicable, take into account the following factors, namely-

(a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;

(b) whether the shock or outrage of the community might lead to public disorder if the accused is released;

(c) whether the safety of the accused might be jeopardized by his or her release;

(d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;

(e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or

(f) any other factor which in the opinion of the court should be taken into account.

a 1997 amendment to South Africa’s bail statute, which “for the first time in South African bail legislation,” focused attention “not on the accused, but on the community.”

As the Constitutional Court observed in a challenge to the bail statute, “[c]learly the legislative intention remained to curtail bail for suspects in very serious cases.” South Africa’s post-apartheid bail framework represents a blend of pre-apartheid bail rules that are now evaluated under the new rights-oriented post-apartheid constitutional framework.

The South African public order provision demonstrates the fine line between detention based on a risk to the public order and detention based on maintaining public confidence. In deciding whether there is a threat to the public order, judges may consider “whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system.” Nothing in the provision appears to require any risk of public violence. Thus, the South African version of public order may well be equivalent to the Canadian concept of public confidence.

Indeed, the Constitutional Court of South Africa, which “reluctantly” upheld the provision in the face of a constitutional challenge, justified the public order provision in part based on public confidence. It contended that the “arrest and detention [of ringleaders] on serious charges does instill confidence in the criminal justice system and does tend to settle disquiet, whether the arrestees are warlords or drug-lords.”

In considering public order and public confidence, the South African Constitutional Court apparently adopted the “actual public” approach. It justified the provision based on the serious crime problem in South Africa and, in particular, “public eruptions of violence related to court proceedings,” the “widespread misunderstanding regarding the purpose and effect of bail,” and “experience hav[ing] shown that organised community violence, be it instigated by quasi-political motives or by territorial battles for control of communities for commercial purposes, does subside while ringleaders are in custody.” Thus, unlike the Supreme Court of

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177. *Id.* at 643.
178. *Id.* at 632–34.
179. *Id.* at 641.
181. *Dlamini*, (4) SA 623 at 660
182. *Id.*
Canada, the Constitutional Court explicitly included in its relevant public a public that was uninformed about bail. The risk of this approach, of course, is that the judicial system allows and even endorses prioritizing public opinion over defendants' rights.

4. France

And then there is France.

The French public order provision on its face differs markedly from the Canadian public confidence provision and even the South African public order one. In France, defendants may be detained pre-trial on the basis of a threat to the public order. The French criminal procedure code provides that:

Provisional detention may only be ordered or extended if it is shown, considering precise and detailed facts [or circumstances] set out in the record,\(^\text{183}\) that it represents the only way to attain one or more of the following objectives and that they could not be attained through placement under judicial supervision or house arrest with electronic surveillance: . . . to put an end to an exceptional and persistent threat to the public order caused by the gravity of the crime, the circumstances of its commission or the significance of the harm [the crime] has caused. This disturbance cannot stem only from media coverage of the case.\(^\text{184}\)

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183. The meaning of this phrase, “au regard des éléments précis et circonstanciés résultant de la procédure,” is somewhat unclear. A literal translation is “under the precise and detailed elements resulting from the procedure,” but a more natural reading of the phrase in context is that the showing of the need to detain on one of the enumerated grounds must be demonstrated by precise and detailed proof set out in the record.

184. Article 144 of the French Code of Criminal Procedure provides in full:

La détention provisoire ne peut être ordonnée ou prolongée que s'il est démontré, au regard des éléments précis et circonstanciés résultant de la procédure, qu'elle constitue l'unique moyen de parvenir à l'un ou plusieurs des objectifs suivants et que ceux-ci ne sauraient être atteints en cas de placement sous contrôle judiciaire ou d'assignation à résidence avec surveillance électronique :

1° Conserver les preuves ou les indices matériels qui sont nécessaires à la manifestation de la vérité ;
2° Empêcher une pression sur les témoins ou les victimes ainsi que sur leur famille ;
Thus, the French provision attempts to narrow the scope of this potentially broad ground by requiring that there be no alternative to detention and that the threat to the public order be “exceptional and persistent,” not stem solely from media attention, and be shown by “precise and detailed” proof in the record.

Although the French rule requires evidence of an “exceptional and persistent” threat to the public order, it is unclear what public order means. According to one French scholar, at least as of 1960, French scholars viewed preventive detention as a necessary evil, and considered detention to preserve the public order a form of preventive detention:

They explain that it is at times indispensable—either to guarantee the appearance of the *inculpé* at the proceedings and for the eventual execution of the penalty, by precluding every possibility of flight—or as a safeguard in establishing the truth, by assuring non-interference with the evidence (dispersal of relevant material, subornation of witnesses)—or as a means of preserving public order, by calming the community, preventing the defendant from committing other offenses and sometimes even by protecting him from mob violence.¹⁸⁵

³° Empêcher une concertation frauduleuse entre la personne mise en examen et ses coauteurs ou complices ;
⁴° Protéger la personne mise en examen ;
⁵° Garantir le maintien de la personne mise en examen à la disposition de la justice ;
⁶° Mettre fin à l'infraction ou prévenir son renouvellement ;
⁷° Mettre fin au trouble exceptionnel et persistant à l'ordre public provoqué par la gravité de l'infraction, les circonstances de sa commission ou l'importance du préjudice qu'elle a causé. Ce trouble ne peut résulter du seul retentissement médiatique de l'affaire. Toutefois, le présent alinéa n'est pas applicable en matière correctionnelle.


By this description, the French public order ground seems not to be based on nebulous concerns about the public’s faith in judicial system or long-term rule of law issues. Rather, it appears to address a more immediate, subjective matter of “calming the community” and preventing mob violence.

The current French bail provision, however, separates detention on the grounds of ending a disturbance to the public order, preventing the defendant from committing other offenses, and protecting the defendant’s safety. Thus, putting an end to a disturbance to the public order must mean something beyond preventing future crimes by the defendant or protecting him from violence. The question is what. Does it mean ending a riot that puts people’s lives in danger, or can it mean merely putting an end to peaceful protests or other inconvenient but not dangerous disruptions? Arguably, the “Occupy” movement of 2011 and 2012 amounts to an “exceptional and persistent” disturbance, but it seems no grave threat to public safety.

The French provision does not explicitly define the “public” at issue in its public order provision, but, implicitly, it seems to contemplate the actual public, not the informed reasonable one. Arguably, the actual public is included in the French public order analysis, since only the unreasonable and uninformed would need calming if the defendant posed no risk of flight or danger.

The ECtHR has recognized a threat to the public order, which it equated with a “social disturbance,” as one of four permissible grounds for refusing bail. In *Letellier v. France*—the case ECCC judges discussed to interpret their “public order” provision—the
The ECtHR considered the French provision in an earlier and broader form than its current one and found it to be consistent with the ECHR. The ECtHR accepted that “by reasons of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time” and that this factor may be considered, where it applies in domestic law, for the purposes of the ECHR Article 5(3) analysis in “exceptional circumstances.” The court implicitly rejected the argument that the bail court must consider “the possible attitude and conduct of the accused once released” by focusing on “certain offenses,” not defendants. Nevertheless, the ECtHR demanded

190. The rule at issue in Letellier v. France provided:
In cases involving less serious criminal offences (matière correctionnelle), if the sentence risked is equal to or exceeds one year’s imprisonment in cases of flagrante delicto, or two years’ imprisonment in other cases, and if the constraints of court supervision are inadequate in regard to the functions set out in Article 137, the detention on remand may be ordered or continued:
1° where the detention on remand of the accused is the sole means of preserving evidence or material clues or of preventing either pressure being brought to bear on the witnesses or the victims, or collusion between the accused and accomplices;
2° where this detention is necessary to preserve public order from the disturbance caused by the offence or to protect the accused, to put an end to the offence or to prevent its repetition or to ensure that the accused remains at the disposal of the judicial authorities . . .


191. Id. ¶ 51. See also Tomasi v. France, 15 Eur. Ct. H.R. (ser. A) 1, ¶ 91 (1992) (accepting that certain cases may give rise to “public disquiet” capable of justifying pre-trial detention for a time, but that at some point the disquiet must disappear).

192. The ECtHR noted but neither explicitly approved nor disapproved the conclusion of European Commission on Human Rights, which had referred the case to the ECtHR, that in order to determine whether there would be a danger of disturbing public opinion following the release of a suspect, it was “necessary to take account of [factors other than the gravity of a crime or the charges pending against the person], such as the possible attitude and conduct of the accused once released; the French courts had not done this in the present case.” Letellier, 207 Eur. Ct. H.R. ¶ 18. Since the French government had argued that “the disturbance to public order is generated by the offence itself,” implicitly, the ECtHR appears to have rejected the view that the disturbance to the public order
“facts capable of showing that the accused’s release would actually disturb public order” and, for continued detention, that release would continue to disturb the public order. 193

C. Conclusions

As this part has shown, even though jurisdictions allowing for detention based on public confidence and public order appear to address different problems—a threat to the public’s faith in the judicial system on one hand, versus a risk of rioting or violence on the other—in practice, the inquiries often collapse. In discussing its public confidence provision, the Supreme Court of Canada made clear that it was concerned both with long-term rule of law issues and short-term problems such as vigilantism—in short, preserving the public order. 194 Conversely, at least one jurisdiction that allows for detention based on public order, South Africa, uses public confidence as a factor in determining whether there is a threat to the public order. 195

Even a public order provision, like the French one, that appears to exclude consideration of public confidence and focus on the risk of a social disturbance implicates public repute discourse. Courts must consider how their decisions appear to the public in order to assess whether a threat to the public order—whatever this term means—exists. The key difference in the public order inquiry is that courts, quite consciously, look to the actual public, with all its uninformed, unreasonable, and possibly dysfunctional baggage.

IV. THE APPROPRIATE, LIMITED SPACE FOR THE PUBLIC IN INTERNATIONAL BAIL DECISIONS.

This section applies public repute discourse theory to international bail and asks whether deciding bail based on public confidence or public order is consistent with international criminal

must stem from the defendant’s actions by saying that “certain offenses may give rise to a social disturbance capable of justifying pre-trial detention.” Id. at 18.

193. Letellier, 14 Eur. Ct. H.R. 83 ¶ 51. See also Tomasi, 15 Eur. Ct. H.R. (ser. A) 1 ¶ 16 (noting that French authorities had detained based on the need to protect the public order); Smirnova, 39 Eur. H.R. Rep. 22 ¶ 59 (recognizing the risk of public disorder as a basis for denying bail).

194. See, e.g., R. v. Hall, [2002] 3 S.C.R. 309, 326 (Can.) (“When the public’s confidence has reasonably been called into question, dangers such as public unrest and vigilantism may emerge.”).

195. See supra Part III.B.3.
justice's important function of promoting respect for human rights. This section also assesses whether there is anything different about international tribunals that makes consideration of public confidence or public order more appropriate in international bail decisions than in domestic ones. It concludes that, despite some of the peculiarities of international criminal justice institutions, it is a bad idea to try to build or maintain public support for such institutions through bail decisions catering to public opinion.

Detaining international defendants based on public confidence or public order poses significant fairness and defendants’ rights concerns.196 Public confidence provisions, even if purportedly focused on the informed and reasonable public, tend to deviate from “pure” public repute discourse—which considers whether a decision is just and justified by externally observable criteria—and have the effect of allowing vague judicial predictions of public opinion decide bail. Detaining based on a narrow, clearly defined public order ground, such as preventing public violence, is preferable to detaining based on nebulous considerations of public confidence,197 but still raises concerns. How are judges to assess the likelihood of a riot or a social disturbance? Moreover, to the extent that a public order provision incorporates considerations of public confidence, as in South Africa, it is unfair and unwise for the same reasons as a public confidence provision is; in particular, it risks letting public opinion trump defendants’ rights. Fairness and respect for human rights are critical if tribunals are to achieve their critical “socio-pedagogic” or expressive function of promoting respect for human rights.

This Article concludes that, to the extent stakeholders in international justice—such as policymakers, prosecutors or judges—wish to expand the bases for detention to include a ground designed to prevent public violence, they should proceed with caution. Any such ground should require strong evidence of the threat to the public order or, better, public safety posed by a defendant’s release. Moreover, since the threat to the public order may stem from nothing other than the charges against the defendant, the prosecution also ought to be required to make a strong preliminary showing of the defendant’s guilt.

196. For a discussion of the many human rights implicated by bail decisions, see Davidson, supra note 3, and Fairlie, supra note 5.

197. Indeed, as noted above, the ECtHR has found this ground for detention to be consistent with the ECHR. See supra note 189.
A. The Fairness of Considering the Public in International Bail Decisions

Deciding bail based either on public confidence or public order raises concerns regarding fairness to international criminal defendants. The fairness of public repute discourse using the ideal public and the actual public in the context of bail is examined below.

1. “Pure” Public Repute Discourse—The Ideal Public

Arguably, to the extent courts adhere to the informed, reasonable public or the “idealized judge” version of public confidence, detaining defendants on this basis may be fairer than leaving the detention decision to the broad discretion of judges, as at the ICTY.198 If courts used the informed, reasonable “idealized judge” notion of the “public,” it could limit judicial discretion.199 As noted above, this “pure” public repute discourse requires some objective, externally observable justification, not merely the judge’s own opinion.200

Moreover, in theory, considering the appearance of a bail decision to an idealized, informed, reasonable public could favor release. As one defendant, Stanisic, argued at the ICTY:

In the event an Accused meets all the criteria for provisional release, a just application of the rule of law and the principle of equity should lead to provisional release and by applying this system based on these fundamental principles of morality and justice, the confidence of the international community in the Tribunal’s administration of justice may be endorsed instead of weakened.201

Stanisic’s argument that the public confidence argument should be “viewed from a rule of law perspective” ties in to Schumann’s vision of public repute discourse as a mode of justifying the authenticity of the bail decision.202 At the same time, he is making the argument, often

198. See Davidson, supra note 3, at 21 (arguing that judges’ excessive discretion in deciding bail at the ICTY is inconsistent with international human rights norms); Fairlie, supra note 5, at 1170–74.
199. See supra text accompanying notes 30–33.
200. See id.
202. Id.
seen in social science literature, that procedural fairness, not the popularity of an individual decision, is the key to legitimacy.203

However, in practice, public confidence is a one-way street that leads to detention. In Canada, for example, public confidence provides an additional basis for detaining criminal defendants beyond risk of flight or danger to the community, not a basis for granting release when a defendant is a flight risk or danger.204 This framework is consistent with the existing bail rules at international tribunals. At the ICTY, judges have the discretion to detain defendants even if none of the grounds for detention is met, but they do not have the discretion to release them if any ground is met.205 At the ICC, if any ground for detention is met, the defendant must be detained.206

203. Again, this Article side-steps the difficult questions of what legitimacy means and how best to achieve it. However, it bears noting that at least some legitimacy theorists give fairness and transparency a prominent role in determining an institution’s legitimacy. See Tom Tyler, Psychological Perspectives on Legitimacy and Legitimation, 57 Ann. Rev. Psychol. 375, 379–80 (2006) (arguing that people view authorities and institutions as more legitimate and accept their decisions and rules more readily when these authorities and institutions “exercise their authority through procedures that people experience as being fair”); Thomas Franck, Fairness in International Institutions 7 (1995). Thus, the fairness of bail procedures, arguably, is central to an international criminal tribunal’s legitimacy. Recognizing however that there is a great deal of disagreement as to the sources of legitimacy for international institutions or even the meaning of legitimacy, this Article does not press this point. Rather, it sticks to the more modest claim that trying to garner public confidence or legitimacy through bail decisions catering to public opinion is unjust and unlikely to succeed.

204. See supra note 144.

205. At the ICTY, a Trial Chamber “may” order release if “it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.” ICTY Rules of Procedure, supra note 68, R. 65(B). ICTY caselaw makes clear that judges have the discretion to deny release even if the defendant meets the requirements of Rule 65(B). See Prosecutor v. Haradinaj, Case No. IT-04-84-T, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, ¶ 8 (Int’l Crim. Trib. for the Former Yugoslavia Jul. 20, 2007).

206. Although ICC judges have much less discretion on release than do ICTY judges, the detention grounds are still a one-way street. If any of the grounds for detention are met, an accused must be detained. If not, he or she must be released. Rome Statute, supra note 16, art. 60(2) (“A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person . . . ”). See also Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 (OA 7), Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga
Therefore, unless international tribunals depart from domestic examples and the existing structure of their bail rules—which frame the bail question in terms of grounds for detention, not grounds for release—public confidence will only serve as an additional ground to detain defendants.

Further, as Schumann and the dissent in Hall note, it is hard to understand why the reasonable, informed public (or idealized judge) would detain a defendant on any basis other than risk of flight or danger, if not to punish the defendant for the crime he or she is alleged to have committed. Punishing a defendant in this manner violates the presumption of innocence.

2. “Impure” Public Repute Discourse—The Actual Public

Detaining based on the potential reaction of the actual public has some advantages over the tangle of the reasonable, informed person and the instrumental rationale apparent in the ICTY and Canadian conceptions of public confidence. The actual public approach is at least logically consistent—to avoid a riot or maintain the rule of law, one must consider the entire public and not just the reasonable, informed one.

However, a public confidence inquiry focusing on the actual public raises fairness concerns. Basing a legal decision on what boils down to potentially unreasonable and uninformed public opinion, which courts more or less explicitly do when they turn to the “actual public,” takes a decision out of the arena of the law.\textsuperscript{207} Again, as the Supreme Court of Canada’s Justice Iacobucci noted in Hall, judges are supposed to be bulwarks against public opinion, not barometers of it.\textsuperscript{208} The lack of clarity as to the identity of the relevant public also makes assessments of any potential unrest arbitrary and unfair.

Whether public confidence or public order is at issue, deciding bail based on the potential reaction of the actual public also puts judges in the position of social scientist, for which they are ill-qualified. It forces judges to act as political scientists (assessing support for the court and a release decision) and psychologists (assessing the fragility of the relevant population and the likelihood

\textsuperscript{207}. \textit{See supra} text accompanying note 52.

\textsuperscript{208}. \textit{See supra} text accompanying note 166166.
of rioting, violence, or general discontentment with the justice system). 209 International judges are no more social scientists or psychologists than are domestic ones.

To some degree judges already wear these hats in attempting to predict the defendant’s behavior for risk of flight or danger, 210 but predicting the response of the various publics of international criminal justice is even more challenging. Unlike when judges predict a defendant’s dangerousness, it is unclear that procedures such as assigning the defendant counsel and allowing a defendant to testify on his or her own behalf, present information by proffer or otherwise, or even cross-examine witnesses 211 would ensure the accuracy of the court’s public order or confidence determination. On the matter of the public’s dangerousness or mood, unlike his own, the defendant is no expert.

This problem is more than procedural. Detention on the basis of public order or public confidence is also less fair than detaining on the basis of danger to the public, in that detention may not even be based on the defendant’s potential actions, but rather those of the public over which he or she may have no control. 212 The ECtHR case, 

209. Cf. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2272 (2009) (Roberts, C.J., dissenting) (“today’s opinion requires state and federal judges simultaneously to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?), and psychologists (is there likely to be a debt of gratitude?”).


211. In Salerno, the Court explained:

Under the Bail Reform Act, the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination. Detainees have a right to counsel at the detention hearing. They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community.

Salerno, 481 U.S. at 751–52 (internal citations omitted).

212. Of course, courts may try to connect the threat to the defendant’s actions where possible. In the case of Ieng Thirith, for example, the ECCC noted
Letellier, appears to stand for the proposition that the risk to the public order need not stem from any action or statements of the defendant, but rather may stem from the nature of the crime itself.\textsuperscript{213} The public order basis for detention is also problematic because it uses the indictment as evidence of the defendant’s threat to the public order, even though the defendant is presumed innocent of all charges.\textsuperscript{214} Since non-indicted people are not being detained on the basis that their presence in the community represents a threat to the public order, it effectively uses the indictment as evidence against the defendant.\textsuperscript{215} This criticism, however, applies equally to future danger or future crimes grounds already in place and relatively uncontroversial at international tribunals.\textsuperscript{216} As discussed below, one way around the presumption of innocence problem is to require proof of the defendant’s guilt beyond a reasonable doubt, at least with respect to a subset of charges, before detaining on the basis of public order, but the feasibility and wisdom of this measure is debatable.\textsuperscript{217}

B. Is International Different?

Is there something different about international tribunals that changes the analysis? Scholars and courts have listed a number of factors that distinguish bail in international criminal tribunals from bail in domestic jurisdictions, including the gravity of the

\textsuperscript{Note:} } \textsuperscript{213} As noted above, the ECtHR seems implicitly to have found that the threat to the public order may stem from the crime alone. \textit{See supra note 192.}

\textsuperscript{Note:} } \textsuperscript{214} \textit{Cf.} \textit{Salerno,} 481 U.S. at 763–64 (Marshall, J., dissenting) (summarizing the problem with detaining defendants on the basis of danger to the community). In his dissent, Justice Marshall states:  

\begin{quote}

The statute does not authorize the Government to imprison anyone it has evidence is dangerous; indictment is necessary... Under this statute an untried indictment somehow acts to permit a detention, based on other charges, which after an acquittal would be unconstitutional. The conclusion is inescapable that the indictment has been turned into evidence, if not that the defendant is guilty of the crime charged, then that left to his own devices he will soon be guilty of something else. “If it suffices to accuse, what will become of the innocent?” (quoting \textit{Coffin v. United States}, 156 U.S. 432, 455 (1895) (quoting \textit{Rerum Gestarum, L. XVIII, c. 1}]).
\end{quote}

\textit{Id.}

\textsuperscript{Note:} } \textsuperscript{215} \textit{Id.}

\textsuperscript{Note:} } \textsuperscript{216} \textit{See Fairlie, supra note 5, at 1170–73.}

\textsuperscript{Note:} } \textsuperscript{217} \textit{See infra Part IV(C)(2).}
crimes, the lack of a police force, the security situation in the affected region, the danger and difficulty of apprehending defendants, and the vulnerability of witnesses and evidence due to the positions of influence of defendants and liberal discovery rules. Other than the gravity of the crimes and the security situation in the affected region, though, these differences speak only to an increased risk of flight and danger posed by the defendant to the community, which are already addressed in existing international bail provisions.

Arguably, the gravity of international crimes means that the ordinary rules go out the window. As is oft noted, “international criminal law takes cognizance only of the most heinous crimes known to mankind—namely genocide, crimes against humanity, and the


219. See Ademi, Case No. IT-01-46-PT, Order on Motion for Provisional Release, ¶ 24; Sesay, Case No. SCSL-04-15-AR65, Decision on Appeal Against Refusal of Bail, ¶¶ 28, 36–37; Prosecutor v. Krajsnik, Case No. IT-00-39- & 40-PT, Decision on Momcilo Krajsnik's Notice of Motion for Provisional Release, ¶ 10 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 8, 2001) (Robinson, J., dissenting) (“The Tribunal's jurisprudence is that the lack of a police force, and its dependence on domestic enforcement mechanisms to enforce its arrest warrants, justify a stricter approach to applications for provisional release than is the case with applications for bail in domestic jurisdictions”); Prosecutor v. Brdjanin, Case No. IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Tacic, ¶ 18 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 28, 2001); Wald & Martinez, supra note 5, at 236.

220. Wald & Martinez, supra note 5, at 235.

221. Id. at 237.

222. The gravity of the crimes is also relevant to both risk of flight and danger—the worse the crime, the longer the possible sentence and the greater the incentive to flee. Some would argue the worse the crime, the greater the potential danger the defendant poses to society if he recidivates on release. Of course, using the indictment as evidence that the defendant is likely to commit a crime again or be a danger to the community at all is controversial. See supra text accompanying notes 121–22.

most serious of war crimes. However, as noted above, the ECtHR has held that gravity alone does not justify detention of a criminal defendant. Moreover, the risk of flight and, arguably, the danger to the community grounds for detention already take into account the gravity of the crime for which the defendant is charged.

If the institutional peculiarities of international tribunals and the gravity of crimes do not set international tribunals apart from domestic courts on the issue of using public repute discourse to decide bail, do social or security conditions in the region? Are the social conditions of the publics of international criminal tribunals more like those of South Africa, where even the dissent to the Supreme Court of Canada’s Hall decision found detaining based on the public’s potential reaction potentially justified?

A blanket rule seems elusive. Much may depend on the time that has elapsed since the commission of the crimes. The social conditions and the challenges to peace and security in Bosnia and Herzegovina, for example, look rather different today than they did in, say, 1994. The ICTY has existed at both times, but, in 1994, the conflict was ongoing and the fall of Srebrenica and ensuing atrocities, the war in Kosovo, and many other events had yet to occur. It would


225. See supra note 11. Although international tribunals technically may not be bound by international human rights instruments, they should adhere to them anyway to fulfill their critical function of promoting respect for human rights. See Davidson, supra note 3, at 30–35. The ICC’s statute even states explicitly that it must be applied and interpreted in a manner consistent with international human rights norms. Rome Statute, supra note 16, art. 21(3).

226. It is uncontroversial that a person facing a long sentence for a serious charge is deemed to present a greater flight risk than someone facing a short sentence or none at all. See Prosecutor v. Lukic, Case No. IT-98-32/1-AR65.1, Decision on Defence Appeal Against Trial Chamber’s Decision on Sredoje Lukic’s Motion for Provisional Release, ¶ 19 (Apr. 16, 2007) (quoting Prosecutor v. Galic, Case No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galic, ¶ 6 (Mar. 23, 2005)) (“With regard to the seriousness of the crimes charged, the Appeals Chamber has repeatedly recognised that ‘the more severe the sentence, the greater the incentive to flee’”); Prosecutor v. Pandurevic, Case No. IT-05-86-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vinko Pandurevic’s Application for Provisional Release, ¶ 5 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 3, 2005). It is a more controversial proposition to say that a defendant facing serious charges is more likely to be a danger to the community since he or she is more likely to commit serious crimes if released, since this arguably violates the presumption of innocence. See supra note 214; Fairlie, supra note 5, at 1168–70.

227. See supra text accompanying note 173.
be fair to describe the social conditions at that time as fragile and the need to ensure public safety and avoid public disorder as high. Today, the social and security conditions look considerably better. The potential for post-conflict instability and public violence may justify detention based on public order or “public safety” in certain circumstances, but may not apply at all times to all countries from which international criminal defendants are drawn.

Moreover, unlike with a narrow public order provision focused on a risk to public safety, the peculiarities of international criminal justice and fragility of post-conflict societies do less to defend detention based on public confidence. The public confidence inquiry, already complicated and logically incoherent in the one domestic jurisdiction that uses it, Canada, is even more complicated for international tribunals than for domestic courts, because identifying the relevant public is more difficult still. Although the problem of defining the public at issue is always vexing, for international tribunals it goes beyond the selection between the informed and reasonable public and the uninformed, unreasonable one. As indicated by the ICTY and ECCC public confidence and public order decisions, for international tribunals, there are a number of potentially relevant publics, including, to name a few, global society, states, and the affected populations.

There is likely no one size fits all prescription to appeal to these publics. As Daniel Bodansky has explained, the bases of social legitimacy—that is, whether relevant actors view the institution as legitimate—“may not be universal” and “may differ between actors along a number of different lines.”

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229. Cf. deGuzman, supra note 18, at 1444 (discussing possible “legitimacy audiences” for the ICC). See also Bodansky, supra note 19, at 313 (“In the international arena, a particular issue arises as to whether, in studying social legitimacy, we should focus on the views of states or of individuals or of the public more generally.”).

230. Bodansky, supra note 19, at 314.
Governmental actors . . . may have different views about legitimacy than members of civil [or global] society. They may put a much greater premium on sovereignty and consent, while civil society organizations may place much greater emphasis on participation and transparency. As a result, factors that may help to legitimise an institution in the eyes of non-state actors may help to delegitimise it in the eyes of state-actors.231

Culture may also affect views on legitimacy.232 Bodansky notes, for example, that civilians and government officials in developing countries may have different views about legitimacy than those in developed countries.233

Another significant difference between international tribunals and domestic courts, at least in developed judicial systems, may be the fragility of the social legitimacy (or perceived legitimacy) of international tribunals, at least among some publics. In juxtaposition to Judge Hunt’s rosy view of public confidence in the ICTY,234 scholars have voiced concern over the social legitimacy of the ICC.235 There are indeed signs of weakness in the support for the ICC. Despite the more ICC-friendly policies of the Obama administration relative to its predecessors, the United States still has not re-signed or ratified the Rome Statute or joined the court.236 The Bemba appeals decision, in which the ICC Appeals Chamber reversed a pre-trial chamber’s order that the defendant be released, in part, due to the absence of any country willing to take the defendant, is likely another example of weak state support for the ICC specific to the bail context.237

231. Id.
232. Id.
233. Id.
234. See supra text accompanying note 83.
235. deGuzman, supra note 18, at 1441–42 (“As a new institution, the ICC does not yet enjoy broad diffuse support.”). See also Danner, supra note 18, at 510–11 (“Because of the high stakes of its subject matter and the threat that its decisions can pose to powerful international interests, the ICC will inevitably be subject to charges that it is a purely political institution, remote from both the rule of law and the places where the crimes it adjudicates occur.”).
Does the arguably weaker support for international tribunals make it necessary, if not ideal, to consider the potential public reaction in bail decisions? According to some legitimacy theorists, “institutions without a reservoir of good will may be limited in their ability to go against the preferences of the majority, even when it may be necessary or wise to do so.”\(^{238}\) Arguably, tribunals’ smaller reservoir of goodwill allows for less leeway to issue unpopular bail decisions before the public (however defined) gives up on them; therefore, there is a greater need to cater to public opinion.

Any argument that international tribunals’ smaller reservoir of goodwill necessitates compromising fair bail procedures and catering to public opinion in bail decisions must fail. To take an extreme example, what if acquitting an innocent defendant widely believed to be guilty could be shown to undermine social legitimacy, because, let’s say, the tribunal’s “reservoir of good will” was not big enough to accommodate the acquittal? Most would agree that the tribunals should not convict the person in an attempt to bolster social legitimacy.\(^{239}\) For the same reasons that courts should not convict the innocent to appease the public, courts should not detain a person without adequate and fair justification. If international criminal tribunals do not have the leeway to follow fair procedures and make fair decisions, tribunals may do more harm than good.

As this author has argued previously, teaching respect for human rights is one of international criminal justice’s primary functions.\(^{240}\) Or, to use Mirjam Damaska’s more elegant description, international tribunals “should aspire first and foremost to be moral teachers, and accord pride of place to the socio-pedagogic function that is so often mentioned among the goals of international criminal justice.”\(^{241}\) By “expos[ing] and stigmatiz[ing] in criminal judgments...
the basic inhumanity of those who are most responsible for mass atrocities,” international criminal justice strengthens accountability. 242

Damaska argues that “[i]f international judges are to be successful in delivering their moral messages, they must be trusted by their audiences as legitimate authority and be perceived by them as fair.” 243 The problem is that self-consciously trying to game legitimacy by catering to the potential public reaction to a bail decision is not only unjust, but is also unlikely to be successful. As explained above, defining and measuring public confidence and legitimacy have stymied legal scholars and social scientists for years. 244 Judges are unlikely to fare any better.

C. Considerations for a Limited Public Order Ground

If tribunals feel compelled by social conditions in the affected region to consider the potential danger due to public unrest and violence that may stem from a defendant’s release, the proposal of the ICPEF, which requires “direct and convincing” evidence of the threat to public safety from the defendant’s release, seems the best option, albeit an imperfect one. By focusing on “public safety” rather than “public order,” it is less likely to invite rule-makers or courts to


242. Damaska, The Competing Visions of Fairness, supra note 223, at 377. See also Sloane, supra note 241, at 85 (articulating the expressive function of punishment, by which “law-abiding citizens and states . . . benefit from the affirmation of a common commitment to international human rights norms and the rule of law”).

243. Damaska, The Competing Visions of Fairness, supra note 223, at 378 (arguing that the procedures of international criminal tribunal must at least meet minimal requirements of internationally-recognized human rights instruments, but that these instruments leave room for some flexibility). See also Daniel Bodansky, The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?, 93 Am. J. Int’l L. 596, 601 (1999) (stating that “persuasion is one of legitimacy’s functions (perhaps, even, its primary function!”).

244. See supra notes 19 and 203.
import vague notions of public confidence and public opinion into the bail calculus. Still, rule-makers would be wise to consider the strict requirements of the French model that the threat be “exceptional and persistent” and that less onerous conditions—such as judicial supervision or house arrest with electronic monitoring—be insufficient to meet the goal of protecting the public order. Moreover, since the risk to public safety or public order typically stems from the gravity of the alleged crimes alone, rather than any non-charge related conduct of the defendant, rule-makers should consider requiring a strong preliminary showing of the defendant’s guilt to detain on this basis.

1. Requiring a Strong Showing of the Threat to Public Order or Public Safety

The ECCC public order experience indicates that public order may be a tempting and easily abused ground, but the ECCC statute and rules provided judges with no guidance on the meaning of public order. Criteria are needed to constrain judges.

The French provision offers one model. As noted above, it requires: (1) precise facts (2) showing that detention is the only way to put an end to (3) a persistent and (4) exceptional disturbance (5) caused by the gravity of the crime, the circumstance of its commission, or the significance of the harm it has caused, and (6) the disturbance cannot result just from the media attention to the case.245

These requirements narrow the provision significantly and reduce the risk of abuse. The French test may do away with the problem of the many publics of international tribunals. If there is a disturbance among any public that rises to the level of “exceptional and persistent,” it is enough. Since it focuses on the need “to put an end to” a disturbance, this standard also requires that the disturbance already be in process. This avoids some of the speculation about a potential threat to the public order seen at the ECCC. The French limitation that media attention alone does not establish a risk of public disorder also seems a prudent one for international tribunals, lest newspapers or other media outlets, whatever their bias, wind up making international bail decisions for them.

The ICPEF proposal likewise offers useful narrowing criteria. Although it does not require an ongoing disturbance, it requires “direct and convincing evidence that the suspect’s liberty is likely to

245. See infra Part III.B.4.
directly endanger public safety and security” to issue an arrest warrant or detain on the basis of public safety.\footnote{ICPEF Recommendation, \textit{supra} note 61, at 17 (Recommendation 3.2(d)).}

Further, the ICPEF’s choice of the terms “public safety and security” over “public order,” even though the commentary makes clear that the drafters intended the ground to include what is known in many jurisdictions as public order, is wise. Unlike the term “public order,” which, as in the South African public order provision, invites inquiry into vague concerns about public confidence, a rule framed in terms of “public safety and security” keeps the focus on the more pressing and tangible concern of avoiding public violence.

2. Requiring a Strong Preliminary Showing of the Defendant’s Guilt

International rule-makers should consider narrowing any public safety ground further by requiring a strong preliminary showing of the defendant’s guilt,\footnote{Cf. Alschuler, \textit{supra} note 118, at 569 (arguing that the U.S. “Bail Reform Act of 1984 is unconstitutional in failing to require adequate preliminary proof of guilt or convictability as a predicate for extended detention”). Alschuler contends that preliminary proof of guilt was the cornerstone of bail throughout Anglo-American history. \textit{Id}. at 551–52. In 1682, the Pennsylvania Frame of Government reduced the formulation to the simple sentence: “All prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident or the presumption great.” This formulation served as the basic provision of American bail law for three hundred years and remains the law in most states. \textit{Id}. at 556 (“Ultimately the constitutions of forty states adopted the Pennsylvania formulation.”). Of course, this approach of detaining based on some heightened standard of proof could be used to limit either the public confidence or the public order ground, or to justify detention on its own. Indeed, the Canadian public confidence bail provision lists the strength of the evidence against the defendant among the factors to be considered in the public confidence bail determination. See Criminal Law Improvement Act, S.C. 1996, c. 18, s. 59 (Can.). Given the problems with the public confidence standard identified above, I do not advocate adoption of a public confidence ground even with such a limitation.} such as by clear and convincing evidence\footnote{Laura Pfeiffer, \textit{To Enhance or Not to Enhance}, 41 Val. U. L. Rev. 1685, 1734 n. 269 (2007) (citing Black’s Law Dictionary 596 (8th ed. 2004) (“Clear and convincing evidence is more than a preponderance but less than beyond a reasonable doubt,” requiring “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain”).} or even proof beyond a reasonable doubt.\footnote{Although in most cases it would be unrealistic, unworkable, and, indeed, pointless to demand that prosecutors show that a defendant is guilty beyond a reasonable doubt of all charges against him or her to detain on public

\footnote{246. ICPEF Recommendation, \textit{supra} note 61, at 17 (Recommendation 3.2(d)).} \footnote{247. Cf. Alschuler, \textit{supra} note 118, at 569 (arguing that the U.S. “Bail Reform Act of 1984 is unconstitutional in failing to require adequate preliminary proof of guilt or convictability as a predicate for extended detention”). Alschuler contends that preliminary proof of guilt was the cornerstone of bail throughout Anglo-American history. \textit{Id}. at 551–52. In 1682, the Pennsylvania Frame of Government reduced the formulation to the simple sentence: “All prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident or the presumption great.” This formulation served as the basic provision of American bail law for three hundred years and remains the law in most states. \textit{Id}. at 556 (“Ultimately the constitutions of forty states adopted the Pennsylvania formulation.”). Of course, this approach of detaining based on some heightened standard of proof could be used to limit either the public confidence or the public order ground, or to justify detention on its own. Indeed, the Canadian public confidence bail provision lists the strength of the evidence against the defendant among the factors to be considered in the public confidence bail determination. See Criminal Law Improvement Act, S.C. 1996, c. 18, s. 59 (Can.). Given the problems with the public confidence standard identified above, I do not advocate adoption of a public confidence ground even with such a limitation.}
example, to arrest someone, the bar on evidence of the person’s guilt is set rather low. The court must find only that there are “reasonable grounds to believe” the defendant committed an international crime. Given the centrality of the gravity of the charges to the justification for a public safety ground for detention, a somewhat stronger showing of evidence against the defendant seems appropriate.

This approach, while protecting a defendant more than allowing for detention based on public safety using the existing low standard of proof of guilt at the bail stage, arguably raises presumption of innocence problems. An inquiry into guilt or innocence at the bail stage, assuming it uses a standard of proof short of the beyond a reasonable doubt standard, arguably violates the presumption of innocence in that it essence allows the court to punish a defendant, by detaining him or her, absent a finding of guilt beyond a reasonable doubt.

In the context of preventive detention in the United States, however, Professor Alschuler defended his proposed requirement of order grounds, it is potentially feasible for a smaller subset of charges and is one way of addressing presumption of innocence concerns. Once the defendant is found guilty beyond a reasonable doubt on one charge, assuming that it is of sufficient severity that it yields a sentence long enough for trial on other charges, the presumption of innocence disappears. However, if prosecutors and courts are expending the resources on determining whether a defendant if guilty beyond a reasonable doubt, trying the defendant sequentially may be a better option than merely using the proof of guilt beyond a reasonable doubt to detain on public safety grounds. See Davidson, supra note 3, at 60 (discussing the possibility of trying defendants on charges sequentially as a way of avoiding prolonged detention without any finding of guilt).

250. Rome Statute, supra note 16, art. 58(1)(a). For the pre-trial chamber to confirm the charges, a requirement for the case to go forward under the ICC rules, there must be “substantial grounds to believe” that the defendant committed the crime. See Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges Against Jean-Pierre Bemba Gombo, ¶¶ 27–30 (June 15, 2009) (stating that “for the Prosecut[or] to meet [the] evidentiary burden, [he or she] must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [his] specific allegations); Johan D. van der Vyver, International Criminal Court Pretrial Decision on Burden of Proof and Mens Rea in Prosecutions Under the ICC Statute, 104 Am. J. Int’l L. 241, 241 (2010) (describing the ICC’s decision on the burdens of proof required by the Rome Statute).

251. Cf. Baradaran, supra note 122, at 727 (arguing that “the focus of pretrial protections for defendants should not be on obtaining the truth of a person’s guilt or innocence, but should protect defendants’ liberty until innocence or guilt can be proven at trial”).
stronger preliminary proof of a defendant’s guilt at the bail stage against this very criticism by arguing that the presumption of innocence has its limits:

When innumerable witnesses have seen a defendant rob and shoot his victim, however, the presumption of innocence does not require a denial of the evidence of one’s sense. The presumption is not a command to treat even the most obviously guilty defendant as innocent for all purposes until his guilty has formally been adjudicated.252

Alschuler subscribed to the view of presumption of innocence currently prevailing in the United States as “a rule of trial procedure” that “requires a finder of fact to acquit a defendant when the government has failed to establish his guilt beyond a reasonable doubt.”253

One need not give the presumption of innocence the parsimonious prevailing American reading to get where Alschuler is going. Finding it likely that the defendant is guilty and therefore should be detained does not necessarily contravene the presumption of innocence. As the Court of Appeals of British Columbia has noted, “the presumption is operative throughout the process but it must not be forgotten that it is a presumption.”254 The presumption can be rebutted. Again, the validity of this argument depends on one’s view on whether the presumption of innocence can be rebutted by anything short of proof beyond a reasonable doubt, which is beyond the scope of this article.

Even if one accepts that the presumption of innocence is rebuttable in the bail context by evidence short of proof beyond a reasonable doubt or that the public interest in public safety can in some instances outweigh the presumption of innocence such that detention is justified,255 the heightened preliminary proof of guilt

253. Id. at 550–51. This view is the dominant modern American conception of the presumption of innocence. See generally François Quintard-Morénas, The Presumption of Innocence in the French and Anglo-American Legal Traditions, 58 Am. J. Comp. L. 107, 149 (2010) (noting that the French conception of the presumption of innocence is “a rule of proof casting on the prosecution the burden of proving guilt,” whereas “Anglo-American jurisdictions tend to view the doctrine as a mere rule of proof without effect before trial”).
255. It bears recalling that, to justify detention pending trial on criminal charges, human rights law requires “specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence,
requirement is not without its problems. For one, it is unclear how significant a barrier is presented by even a clear and convincing evidence requirement. In the context of the American criminal justice system, Laurence Tribe has argued that, “[p]articularly in light of the long tradition of judicial deference to prosecutorial discretion at the charging stage, requiring a judicial finding of a ‘substantial probability’ [or other higher standard of proof] of guilt is unlikely to provide any real protection for the individual who finds himself unjustly accused.”

International tribunals may lack long traditions of anything, but, given the short tenure of international criminal judges, the political pressure to be tough on defendants alleged to have committed the most heinous crimes of all, and, often, the relative inexperience of judges in judging, it seems unlikely that they will be any stronger a barrier than are domestic judges.

Further, determining the strength of the evidence of guilt at the bail stage is difficult for courts, no matter the standard. As one Canadian court has noted, “[t]here are also many cases where the strength of the Crown’s case appears, at the pre-trial stage, to be overwhelming only to have it unravel as the trial progresses.”

The accuracy of the likelihood of guilt determination at the bail stage may prove even more challenging in international criminal cases. Particularly in leadership cases, the liability of a given defendant is complicated and requires evidence from a variety of witnesses. Courts and prosecutors could mitigate this problem by focusing the inquiry on the defendant’s guilt during the bail stage to one charge or region, rather than the entire case against the defendant.

A pre-trial determination of guilt at the bail stage also risks unfairly stigmatizing the defendant. As Tribe has argued, “such a


256. Tribe, supra note 118, at 381–82.


259. The case against former Yugoslav and, later, Serbian President Slobodan Milosevic, for example, took over four years and never reached completion due to the defendant’s death. See Comm’n’s. Serv., Int’l Crim. Trib. for the Former Yugoslavia, Case Information Sheet: Slobodan Milosevic 3, available at http://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan_en.pdf.
finding might well be detrimental to him, for it would induce the public to perceive his pre-trial incarceration as ‘beginning what is in substance a mandate of punishment.’

Despite these drawbacks, given the emphasis placed on the gravity of the charges to justify a public order or safety ground for detention and the absence of any requirement that the defendant do anything to jeopardize the public order, a requirement of a strong preliminary showing of the defendant’s guilt—such as by a clear and convincing evidence standard or even proof beyond a reasonable doubt of some charge or charges—is preferable to detaining someone on public order or safety grounds based only upon a finding that there are “reasonable grounds to believe” the defendant committed an international crime.

V. CONCLUSION

Despite the allure of using public confidence or public order in making bail decisions, for tribunals to achieve their critical function of promoting respect for human rights, detention based on the potential public reaction to the defendant’s release must be approached with great circumspection. Detaining international criminal defendants based on a desire to garner or maintain the confidence of some ill-defined public will undermine procedural fairness and, possibly, the legitimacy of international criminal justice. Despite resting on a more concrete public interest and entailing greater logical consistency, any rule allowing for detention of defendants based on public order runs the risk of doing the same. If international courts or rule-makers deem such a public order, or, better, “public safety” ground necessary, they should avoid the ECCC public order blank check and set out strict requirements. The ICPEF and the French models offer some useful guidance on requiring strict proof of an actual threat to public safety. A requirement that the prosecution make a strong preliminary showing—such as by clear and convincing evidence or proof beyond a reasonable doubt—of the defendant’s guilt would provide another.

260. Tribe, supra note 118, at 381–82 (quoting United States v. Alston, 420 F.2d 176, 180 (D.C. Cir. 1969)).
261. See discussion supra note 250.