

NEW ENGLAND SCHOOL OF LAW  
RWANDA GENOCIDE PROSECUTION PROJECT

INTERNATIONAL COMPARTIVE STUDY OF  
BAIL FOR SERIOUS CRIMES

PREPARED BY EDWARD HART

FOR ONE CREDIT AND UCWR

9 DECEMBER 1997

Comparative Study of Legislation and Practice of Bail in Cases of Serious Crimes  
Against the Person and Against the State.

Prepared by:

Edward Hart

115 Mt. Auburn ST, APT 3

Cambridge, MA 02138

United States

Tel: (617) 876-0890

email: [ehart@nesl.edu](mailto:ehart@nesl.edu)

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- John Hatchard, *Bail and Public Security in Some African Jurisdictions*, 37 *Int'l & Comp. L.Q.* 952 (1988). See tab in 10.
- John Hatchard, Barbara Huber, & Richard Vogler eds., *Comparative Criminal Procedure* (1996). See tab in 11.
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- Zaim M. Nedjati, *Human Rights under the European Convention* (1978). See tab 18.

## I. Introduction and Summary Conclusion

From the beginning let us settle on the definition of bail. The sixth edition of Black's Law Dictionary has the following entry for the term: "Monetary amount for or condition of pretrial release from custody, normally set by a judge at the initial appearance. The purpose of bail is to ensure the return of the accused at subsequent proceedings."<sup>1</sup> This definition seems fairly consistent across the spectrum of law and states.

Bail has been an element of the law for many centuries as a method to release individuals from detention while awaiting their trial. In some nations it is a right and in others there is no bail. Where it exists it takes many forms ranging from cash bonds to property liens to a simple promise given by the detainee or by someone else the court respects. Judges can also limit the accused movement. Under many national laws where there is a presumption of bail. This presumption is easily rebutted and in most nations bail is often denied in cases concerning serious crimes. In other countries there is no right to bail and the presumption is on the accused to rebut continued detention. Reasons authorities give for not allowing bail is because of fears of flight by the accused or to protect the community.

In the following material the legislation and practice of several countries will be examined and compared to develop a single rule on bail. In cases dealing with serious crimes against individuals and the state, bail is not a right and can be denied with enough proof to show more likely than not that the accused is a risk of flight or a risk to himself or the community.

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<sup>1</sup>See BLACK'S LAW DICTIONARY, 140 (6th 1990)

## II. Factual Background

The International Criminal Tribunal For Rwanda has the jurisdiction to hear cases that deal with the genocide of hundreds of thousands that took place between 1 January 1994 and 31 December 1994 within the borders of the state of Rwanda.<sup>2</sup> This jurisdiction was granted by the Security Council of the United Nations in Resolution 955 on 8 November 1994.<sup>3</sup> The Tribunal is to judge the accused instigators of this serious crisis in Rwanda that began with the assassination of the President of Rwanda Juvenal Habarimana, who was killed when his airplane was shot down by an surface-to-air missile in 1993. His death set off a crisis that led to the wholesale slaughter of between 500,000 and one million citizens of the state. The ethnic group, Tutsi, were the primary target. Nearly seventy-five percent of the Tutsi population was exterminated at a rate of death faster than that suffered by the Jews during the Holocaust in Germany.<sup>4</sup> This genocide was carried out by the majority ethnic group of Rwanda, the Hutus.<sup>5</sup> From the Hutus would come the violence that brought about this mass destruction of almost an entire people. The leaders of the Hutus would be called upon to account for their role in the genocide of the Tutsis people. Today, several of these leaders are detained under the authority of the Tribunal awaiting trial by the international judges appointed to hear their case.

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<sup>2</sup>See VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDERS GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 77 (1997)

<sup>3</sup>See *id.*, 77

<sup>4</sup>See *id.*, 49.

<sup>5</sup>See *id.*

### III. Legal Discussion

The question some of these detainees are probably asking their defense counsel and the Tribunal is: what right do I have to provisional release? Under the rules adopted by the Tribunal there is a provision for release while awaiting trial. This is covered in Rule 65 of the Rules of Procedure and Evidence as adopted on 5 July 1996. The rule lays the following for provisional release:

(A) Once detained, an accused may not be released except upon an order of a Trial Chamber.

(B) Release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only 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.

(C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure his presence for trial and the protection of others.

(D) If necessary, the Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been released or is for any other reason at liberty.<sup>6</sup>

The legal discussion of pretrial release and/or bail for the detainees of the Tribunal can be examined in a comparative study of the international law and the legislative and judicial opinions of common law and civil law. In this memo they will be covered in the following order. First, international law and customary international law will be reviewed to determine what is required of the state and international bodies to protect the human rights of the individuals. Second, the national laws of common law

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<sup>6</sup>See I.C.T.R. R. P and EVID 65. Adopted in ICTR/3.Rev.2, adopted 5 July 1996 and amended 6 June 1997.

countries will be examined to determine the rights and privileges of the accused under these regimes. Third, the same type of examination will be taken of some states that follow the civil code tradition. Fourth, the application of bail law in a few African states will be discussed. In the conclusion these examinations will be drawn together to develop a common rule that can be applied to the detainees of the Tribunal.

#### A. International Law

International law forbids detaining individuals without charging them with their crimes and providing the chance for pretrial release. The primary source of international law on this issue can be found in the International Covenant on Civil and Political Rights.<sup>7</sup> In paragraph three of article nine of the treaty, it states, "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."<sup>8</sup> According to this language the presumption is that release will be allowed. But release is not always allowed in the states which are a party to this treaty. In fact practice in the case of serious crimes like murder is that bail will not be granted.

The European Convention on Human Rights is another example of international law that presumes the release of the detainee before trial. Article 5(3) states: "Everyone arrested or detained ... shall be brought promptly before a judge ... and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."<sup>9</sup> This provision was reviewed in the Neumesiter Case.<sup>10</sup>

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<sup>7</sup>999 U.N.T.S. 171, 6 I.L.M. 368 (1967)

<sup>8</sup>*See id.*

<sup>9</sup>*See* Convention for the Protection of Human Rights and Fundamental Freedoms, Article 5(3) (1990) as reprinted in A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN

The Neumesiter Case was heard by the European Court of Human Rights and judgment was handed down on 27 June 1968. The case deals with the prolonged detention of Fritz Neumeister, who was being investigated by Austrian authorities and was detained by the national authorities on several occasions. He was denied provisional release even on bail.<sup>11</sup> In his book *Human Rights under the European Convention*, Zaim M. Nedjati explains that the decision put forward, "a genuine requirement of public interest justifying a departure from the rule of respect for individual liberty."<sup>12</sup> The purpose of this provision of the Convention was to require release of the individual once there was no longer any reasonable cause to detain.<sup>13</sup> The result of this was that on reasonable grounds the accused could be detained.

#### B. Common Law

This section and the next look at some practical applications of pretrial release under common law and the civil code. We look especially at the cases of alleged criminals charged with serious crimes that carry long term imprisonment or death as punishment. These crimes can include crimes against the person and the state.

Common law countries are typically those that have come under the influence of the United Kingdom or its prodigy the United States. These countries maintain a foundation of customs and usage that provide for the leadership of the government while at the same time guaranteeing the people's rights. There has developed over time through

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EUROPE (1993).

<sup>10</sup>See VINCENT BERGER, *CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS* 26-30 (1989).

<sup>11</sup>See *id.*

<sup>12</sup>See ZAIM M. NEDJATI, *HUMAN RIGHTS UNDER THE EUROPEAN CONVENTION* 96-97 (1978).

<sup>13</sup>See *id.*

the adoption of statutes and the decisions of the courts interpreting the law of their states a common law of bail.

### 1. United States

Bail in the United States has been thought of as a constitutional right under the Eighth Amendment of the Constitution which limits the government from imposing bail and punishment which is excessive.<sup>14</sup> The bail clause simply reads, "Excessive bail shall be required."<sup>15</sup> It was taken from the English Bill of Rights Act.<sup>16</sup> In England,

that [bail] clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our [United States] Bill of Rights, nothing was said that indicted any different concept. The eighth amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in the country.<sup>17</sup>

This idea was overturned in the decision in *United States v. Salerno*.<sup>18</sup> The clause says nothing about the actual right to bail itself. Chief Justice Rehnquist's opinion was "While we agree that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release."<sup>19</sup>

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<sup>14</sup>See Kenneth F. Berg, *The Bail Reform Act of 1984*, 34 EMORY L.J. 685, 694 (1985).

<sup>15</sup>See U.S. CONST. amend 8.

<sup>16</sup>See Berg, 694.

<sup>17</sup>See *Carlson v. Landon*, 342 U.S. 524, 545 (1952)

<sup>18</sup>*United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) as reprinted in YALE KAMISAR, WAYNE R. LAFAYE, & JEROLD H. ISREAL, MODERN CRIMINAL PROCEDURE 877-889 (8th ed.) (1994).

<sup>19</sup>See *id.*, p883.

The history of bail in the United States goes back at least as far as 1789 to the Judiciary Act. This act "granted a statutory right to bail to all alleged noncapital offenders, release pending trial of all alleged capital offenders was subject to the discretion of higher federal courts."<sup>20</sup> The reason for this distinction between noncapital and capital defendants has not been settled by scholars, but many put forward the idea that bail was not a right for alleged capital offenders in order to protect the community. The current bail law follows similar reasons in its denial of the right to bail.<sup>21</sup>

The latest Federal bail law is the Reform Bail Act of 1984 with its amendments. The act has been codified and can now be found at 18 U.S.C. 3142 in the official version or at 18 U.S.C.A. 3142 in the unofficial version published by West Publishing. It is the latter version that will be used in this comparative study because of its ease of use and annotations.

The Reform Bail Act carries the presumption that bail will be granted unless some cause can be given by the prosecuting authority. The arrestee is brought before a judicial officer for a detention hearing within a timely manner after arrest.<sup>22</sup> Motions can be made by either the government or the arrestee for the grant of bail or pretrial release. The government can move for no bail on several grounds including arrestee's current status as a criminal defendant, not a citizen, or danger posed by the arrestee of fleeing or being a threat to the community.<sup>23</sup> The judicial officer is to weigh several considerations including "the nature and circumstances of the offense charged, ... weight

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<sup>20</sup>See Berg, 687 (1985).

<sup>21</sup>See *id.*

<sup>22</sup>See Bail Reform Act, 18 U.S.C.A. 3142(f) (1984).

<sup>23</sup>See 18 U.S.C.A. 3142(d).

of the evidence, ... history and characteristics of the person, ... and the nature and seriousness of the danger to any person or the community that would be posed by the person's release."<sup>24</sup>

The United States Supreme Court upheld the bail act in the case of *United States v. Salerno* that pretrial detention without grant of bail was allowed.<sup>25</sup> Chief Justice Rehnquist wrote for the majority, "The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel."<sup>26</sup> This grant of power to the courts to deny bail was limited by the act with the establishment of points that the judicial officer was to weigh in coming to a decision on bail. These conditions include, "the nature and seriousness of the charges, the substantiality of the government's evidence against the arrestee, the arrestee's background and characteristics, and the nature and seriousness of danger posed by the suspect's release."<sup>27</sup> The denial of bail was not intended as a punishment by the legislators who adopted the act but as a means of protecting the community from the release of a dangerous individual who is most likely in an anger against society or other individuals.

The dissents in the case criticized the majority's blindness to the apparently plain language in the Eighth Amendment that "[e]xcessive bail shall not be required."<sup>28</sup> They felt that the Eight Amendment was written to protect Americans from the unjust

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<sup>24</sup>See 18 U.S.C.A. section 3142(g)

<sup>25</sup>See *Salerno*, 877.

<sup>26</sup>See *Salerno* at 884.

<sup>27</sup>See *id.* at 878. See also 18 U.S.C. section 3142(g).

<sup>28</sup>See *id.* at 886.

detention that occurs commonly around the world on the mere assertion of dangerousness.<sup>29</sup> Justice Marshall held that the ability to deny bail was a demolition of the right of bail as held under the United States Constitution. Justice Stevens wrote in his own dissent that the presumption of innocence and the denial of bail were irreconcilable.<sup>30</sup>

## 2. United Kingdom

British law has a great influence on common law countries, since it was the founder of the common law tradition and because of its role as a colonial power exporting much of its traditions and law to its former possessions including those in Africa. Britain does not have a written constitution like the United States or many of its former colonies. Its laws are passed by Parliament and enforced by the courts with the House of Lords, the second house of Parliament, acting as the final court of appeals. This has led to the enriched heritage of common law that is looked upon by the rest of the world as a yard stick to measure developments in rights and privileges including bail.

The current law on statute on bail is the Bail Act of 1976. It makes provision for the release on bail in connection to criminal proceedings in England and Wales. It even lays out the requirement for legal aid to those in need during the judicial hearing determining eligibility for release and the condition for that release. The general provisions for bail are contained in section 3 of the statute. Before release the accused may be required to provide a surety or sureties to secure any future requirement of return to custody. In addition if there is concern that the accused may leave Great Britain, a security may be required to insure his surrender.<sup>31</sup> Bail is considered a right except for

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<sup>29</sup>*See id.* at 889.

<sup>30</sup>*Id.*

<sup>31</sup>*See* Bail Act, s. 3 (1976) (U.K.) as reprinted in 12 HALSBURY'S STATUTES OF ENGLAND AND WALES 639-642 (Butterworths 1997) (1929).

those individuals falling under the scheme set out in Schedule 1 of the act which lists the conditions for which bail need not be granted.<sup>32</sup> Bail is not a right for those defendants accused or convicted of imprisonable offenses. The list of these exceptions can be found in Part I of the schedule. Paragraph 2 reads:

The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would-

(a) fail to surrender to custody, or

(b) commit an offence while on bail, or

(c) interfere with the witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.<sup>33</sup>

While there is no right to bail, the defendant may be released by discretion of the court. There are several considerations that the court should weigh in determining bail including the seriousness of the crime committed and its possible punishment, the character and ties of the defendant, defendant's record on previous releases under bail, and the strength of the evidence against the defendant.<sup>34</sup> The serious crimes that these requirements apply to are murder, manslaughter, rape, attempted murder, and attempted rape.<sup>35</sup>

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<sup>32</sup>*See id.* at 655-657.

<sup>33</sup>*See id.* at 655.

<sup>34</sup>*See id.* at 656.

<sup>35</sup>*Id.*

### 3. Other Common Law Countries: Canada and New Zealand

Other countries have followed in the traditions of Great Britain. Most of these were colonies of the British Empire and include Canada, Australia, New Zealand, and several African states including South Africa and Nigeria.

Canada's right to bail and pretrial release can be found in its Charter of Rights and Freedoms. Section 11(e) reads that in proceedings in criminal and penal matters, "Any person charged with an offense has the right not to be denied reasonable bail without just cause."<sup>36</sup> Under this charter it has been found that bail cannot be denied for just "public interest" but that protection or safety of the public was enough grounds to deny bail.<sup>37</sup> The Supreme Court of Canada made the above determination in two cases that came before it in 1992. The end rule was that the burden was reversed onto the arrestee to prove that bail was being denied without cause. The court held that it was okay in the narrow circumstances laid out in the Criminal Code.

Under the Criminal Code of Canada an accused is normally granted bail but there may be justification to deny release and remand the accused to custody. Section 515(10)(b) states no bail needs be granted when, "detention is necessary in the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offense or interfere with the administration of justice."<sup>38</sup> Under section 515(6)(d) of the Code the burden was on the accused to show

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<sup>36</sup>See Annotated Canadian Charter of Rights and Freedoms, section 11 (1997).

<sup>37</sup>See Regina v. Morales, [1992] 3 S.C.R. 711 at 713.

<sup>38</sup>Criminal Code s. 515(10)(b) as quoted in Regina v. Morales, [1992] 3 S.C.R. 711 at 713.

why bail should be granted.<sup>39</sup> The Canada Supreme Court examined the bail sections of the Criminal Code in the pair of cases *Regina v. Pearson* and *Regina v. Morales*.<sup>40</sup>

In *Pearson* the court was faced with an accused who was charged with five counts of drug importation under the controlled drug trafficking laws of Canada. *Pearson* was denied bail by the Superior Court because of the statute requirement in section 516(6)(d) due to the seriousness of the charges. On his appeal of *habeas corpus*, the Supreme Court upheld the lower court's denial of bail and affirmed that the section of the Criminal Code that allowed the detention.<sup>41</sup> The Charter of Rights was not violated by the requirement of the accused to show why bail should be granted.<sup>42</sup> Chief Justice Lamer wrote that bail could be denied notwithstanding the language in section 11(e) of the Charter of Rights because the accused was given the chance to have a judicial officer to hear his argument for bail. The government had stated its "just cause" as required in section 11(e) of the Charter of Rights and within the statutory requirements of the controlled drug act. The court reasoned that this decision are that it was within the narrow limits set out in statute and it prompts an orderly bail system that protects society.<sup>43</sup> There is protection built into the system which protects the accused from arbitrarily being detained. Exact conditions for bail are set out in the Criminal Code and the process is reviewable by higher courts.<sup>44</sup>

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<sup>39</sup>Criminal Code s. 515(6)(d) as quoted in *Regina v. Pearson*, [1992] 3 S.C.R. 665 at 667.

<sup>40</sup>*Pearson*, [1992] 3 S.C.R. 665, and *Morales* [1992] 3 S.C.R. 711.

<sup>41</sup>*See Pearson* [1992] 3 S.C.R. at 715.

<sup>42</sup>*Id.*

<sup>43</sup>*See R. v. Morales* at 668.

<sup>44</sup>*See id.* at 669.

Morales considered whether section 515(10)(b) which allowed the denial of bail on public safety grounds infringed the accused's rights under the Charter of Rights. Again Chief Justice Lamer wrote for the majority that there was no violation of the rights of the detained individual. Section 11(e) of the Charter allows bail to be denied with just cause in narrow circumstances and the promotion of the proper function of the bail system.<sup>45</sup> The public interest component of section 515(10)(b) was found to be an infringement since the courts had not settled on a precise definition. Public interest as a reason to deny bail is too vague.<sup>46</sup>

Another common law nation is New Zealand. It provides for bail under its Crimes Act of 1961, however bail is not a right for those charged with a crime that is punishable by death or imprisonment.<sup>47</sup> Specifically listed were crimes that include homicide and treason.

In summary, under the common law system bail can be denied to individuals accused of serious crimes. The reasons given for this denial vary a little but at the center are the three points that detention is warranted when there is reason to fear flight by the accused, fear that the individual might commit further crimes, or to protect victims and/or the course of justice.

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<sup>45</sup>*See id.* at 714.

<sup>46</sup>*See id.* at 715.

<sup>47</sup>*See Crimes Act, section 319 (1961). (N.Z.) (Aug. 31, 1997) <<http://www.knowledge-basket.co.nz/gpprint/acts/reprint/text/1961/se/043se319.html>>.*

## C. Civil Code Law

### 1. France

Civil code law is a tradition of the continental European powers. A good example is France where the civil law was promulgated in 1804. Civil code law is a systematic approach to lay out the law at one time. Its historical base is the Roman law of Justinian. The current concept of bail was introduced into the French system in 1970.<sup>48</sup>

Article 137 of the French Criminal Procedure Code, Revised, proclaims that the "accused shall remain free except that, for reasons of necessity of the investigation or measures of security ... or, for an exceptional reason ... according to the rules and conditions hereafter stated."<sup>49</sup> The examining magistrate can order either pretrial supervision or detention. Detention is warranted in cases of serious crimes. Pretrial detention is covered under article 144. The trigger for potential denial is the possible sentencing of the accused if found guilty is a sentence of more than one year of imprisonment and pretrial supervision will not meet the functions of article 137.<sup>50</sup> Pretrial detention can be ordered or maintained:

1. when pretrial detention of the defendant is the only means of conserving the proof or material evidence, or to prevent pressure on witnesses or victims, or a fraudulent conspiracy between defendants and accomplices;
2. when this detention is necessary to preserve the public order from the trouble caused by the offense or to protect the defendant, to put an end to

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<sup>48</sup>See JOHN HATCHARD et al eds., *COMPARATIVE CRIMINAL PROCEDURE* 44-45 (1996).

<sup>49</sup>See C. PR. PEN. art137 (Fr.).

<sup>50</sup>See *id.* art 144.

an offense or prevent its renewal or to guarantee the maintenance of the defendant at the disposition of justice.<sup>51</sup>

The revised code was an attempt to reinforce the presumption of innocence. Conditions could be imposed including surrender of passport, regular reports to police, or posting a money bail. Remand to detention can be ordered by the examining magistrate who is investigating the crime. Reasons for remand include the charge against the accused is a serious enough one to carry a penalty of at least one year. This continued detention is justified by either requirements of the *instructions* to prevent interference with potential witnesses or evidence or for security reasons such as protection of the defendant or to prevent further offenses.<sup>52</sup>

## 2. Germany

Germany is another state which the justice system is based upon civil law. The German Criminal Procedure Code allows the order of preliminary detention of the accused if there is a ground for an arrest. A ground of arrest exists if, on the basis of definite facts:

1. it is established that the accused has fled or is in hiding,
2. considering the circumstances of the individual case, especially the situation of the accused and the factors speaking against a flight, there is danger that the accused will avoid the proceedings against him (danger of flight), or
3. the accused's intention is discernible
  - (a) to destroy, alter, remove suppress or falsify evidence,

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<sup>51</sup>*Id.*

<sup>52</sup>See HATCHARD, COMPARTIVE CRIMINAL PROCEDURE 44-45.

(b) to improperly influence co-defendants, witnesses or experts, or

(c) to cause others to do so.<sup>53</sup>

Two other grounds for detention exist. First, those strongly suspected of a crime against morality and decency and there is provable danger that the accused will commit the crime again will be detained.<sup>54</sup> Second, those accused of a major crime against life will also be detained.<sup>55</sup>

In Germany detention is allowed as a security measure and not as punishment.<sup>56</sup> A formal procedure is required for the production of a written detention order by a judge. Three points to be considered for the issue of this order are:

- \* compelling suspicion that the accused has committed the offense;

- \* absconding, a risk of absconding, a risk of tampering with the evidence or the danger of re-offending;

- \* suspicion that the accused has committed a serious offense.<sup>57</sup>

The list of serious crimes that have been included in the last category are murder, manslaughter, serious bodily harm, and *genocide*[emphasis added].<sup>58</sup>

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<sup>53</sup>See s. 112, p.II StGB (Ger.)

<sup>54</sup>*Id.* par III.

<sup>55</sup>*Id.* at par. IV.

<sup>56</sup>See HATCHARD, COMPARTIVE CRIMINAL PROCEDURE at 121.

<sup>57</sup>See *id.* 121-122.

<sup>58</sup>See *id.* 122.

When bail is denied by a German court the accused is informed of the detention orders contents and a copy given to him. The accused is brought before a judge who informs the accused of the order, questions the accused, and determines whether detention should continue. If bail is granted, the judge has discretion as to the amount and conditions.<sup>59</sup>

Under civil law there are many similarities with the common law. Bail can be denied to those accused of serious crimes and detention allowed to continue. The accused is also still protected by the reviewability of the detention order by higher courts.

#### D. African Law

The states of Africa have come under the influence of many legal spheres of thought. During the colonial period and the transition to independence the colonial powers exported their legal systems to their possessions. Africa is like the rest of the globe divided between common law and civil law traditions. According to Professor John Hatchard\* there is no absolute right to bail for those accused of serious crimes.<sup>61</sup> In Zimbabwe that country's Supreme Court reviewed the right to bail in the case of *Bull v. Minister of Home Affairs*.<sup>62</sup> According to the court the constitutional position of bail

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<sup>59</sup>*Id.*

\*John Hatchard has previously taught law at universities in England, the United States, Zambia, and Zimbabwe. In 1996 he was the Senior Fellow at the British Institute of International and Comparative Law and Visiting Reader in Law at the School of Oriental and African Studies, University of London. He has been widely published on criminal law, procedure and evidence and is joint editor of the Journal of African Law.

<sup>61</sup>See John Hatchard, *Bail and Public Security in Some African Jurisdictions*, 37 INT'L & COMP. L.Q. 952, 953 (1988).

<sup>62</sup>*Bull v. Minister of Home Affairs*, 1987 L.R.C. (Const) 547, 550 found in Hatchard, *Bail and Public Security in Some African Jurisdictions*, 954.

was that when a "person is detained upon reasonable suspicion of having committed a criminal offence, it is permissible to detain him pending trial so long as this takes place within a reasonable time."<sup>63</sup> Only after the lapse of a reasonable time before trial did the accused become invested with the right of release. The problem is the definition of what is a reasonable time. Hatchard quotes another justice in the Bull opinion to say that this meant there was no constitutional right to bail.<sup>64</sup> Further infringement of the right to pretrial release comes from the Zimbabwe legislation which has retained the right to define bailable offenses. Crimes that carry capital punishment are not bailable.<sup>65</sup>

In Gambia there are similar provisions that a right to bail does not come about until the accused is not tried in a reasonable time. Pretrial release can only be had if special circumstances are fulfilled to the satisfaction of a magistrate. This procedure has been affirmed by the Privy Council of the United Kingdom hearing appeals from Gambia.<sup>66</sup> Lord Diplock stated in the Privy Council, "There is ... nothing in the constitution which invalidates a law imposing a total prohibition on the release on bail of a person reasonably suspected of having committed a criminal offence [sic], provided that he is brought to trial within a reasonable time after he has been arrested and detained."<sup>67</sup>

While bail is not a protected right in these African countries, the right of due process is. The requirement is the accused be tried in a reasonable time or there is a

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<sup>63</sup>See *id.*

<sup>64</sup>See *id.*

<sup>65</sup>See *id.* at 955.

<sup>66</sup>See *Id.*

<sup>67</sup>See *Id.*

judicial determination that there are indeed reasonable grounds for continued detention because of suspicion of violation of a serious crime of national security.<sup>68</sup>

#### E. Conclusion

Based on the research done so far the rule appears to be as follows under international law and the laws of nations. Accused individuals should be given a hearing to determine their rights and determine the conditions of pretrial release. Such release can be denied with some proof by the government that the individual is a risk of flight and will not return for trial or that the individual poses a risk to the community. The basic right of the accused is to have due process. This might entail a fair hearing that allows arguments to be heard from both the state and the defendant so that the grounds and conditions of bail or denial of release is known. Release on condition is not an absolute right of the accused facing allegations of serious crimes against others or the state.

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<sup>68</sup>*See id.* at 959.