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Relieved of All Punishment by Human Hands: The Status of International Criminal Convictions

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RELIEVED OF ALL PUNISHMENT BY HUMAN HANDS: THE STATUS OF INTERNATIONAL CRIMINAL CONVICTIONS

INTRODUCTION

- I. STATUS OF A CONVICTION UPON THE DEATH OF AN APPELLANT
 - A. *Overturning the Appellant's Conviction*
 1. *Abatement Ab Initio*
 2. *The Presumption of Innocence*
 - B. *Upholding the Appellant's Conviction*
 - C. *Mixed-Method Approaches*
 1. *Allowing the Appeal to Move Forward*
 2. *Neither Upholding nor Overturning the Conviction*
 3. *International Tribunals*
- II. THE IMPORTANCE OF ABATEMENT DECISIONS IN INTERNATIONAL CRIMINAL LAW
 - A. *The Purposes of International Criminal Law*
 - B. *The Age of International Criminal Defendants*
 - C. *Reparation Orders and the Status of Convictions*
- III. ARGUMENT FOR A MIXED-METHOD APPROACH
 - A. *Upholding a Conviction Violates Human Rights*
 - B. *A Mixed Method May Still Provide Reparations*
 - C. *The "Massachusetts Approach" Serves the Aims of International Criminal Law*
 - D. *The "Massachusetts Approach" Does Not Strain the Judiciary*

CONCLUSION

*The defendant in this case having died is relieved of all punishment by human hands and the determination of his guilt or innocence is now assumed by the ultimate arbiter of all human affairs.*¹

INTRODUCTION

The Khmer Rouge's chief ideologist quietly died in 2019.² After orchestrating the extermination of two million individuals, Nuon

1. Carver v. State, 398 S.W.2d 719, 720 (Tenn. 1966), *overruled by* State v. Mutory, 581 S.W.3d 741 (Tenn. 2019).

2. Seth Mydans, *Nuon Chea, Khmer Rouge's Chief Ideologist, Dies at 93*, N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/2019/08/04/obituaries/nuon-chea-dead-cambodia.html> [<https://perma.cc/J9RY-MHT6>].

Chea faced life imprisonment for crimes against humanity and acts of genocide.³ But Nuon Chea's death did not bring closure to the survivors of the Khmer Rouge or the international community.⁴ Instead, scholars and journalists questioned the status of his conviction,⁵ as Nuon Chea filed a notice of appeal with the Extraordinary Chambers in the Courts of Cambodia a few weeks before his death.⁶

Despite his passing, should the Supreme Court Chamber uphold the Trial Chamber judgment, convicting Nuon Chea of crimes against humanity and genocide, without a final determination of his appeal?⁷ Should he be presumed innocent?⁸ Or, as Nuon Chea hoped, should his appeal move forward, despite his death?⁹

Domestic, foreign, and international courts struggle to ensure justice when a criminal appellant dies before the court can make a final determination on the merits of the appeal.¹⁰ While some courts entirely abate the appellant's underlying conviction,¹¹ other courts uphold the appellant's conviction as final.¹² But some courts have found a middle ground between these two extremes.¹³

Throughout international criminal law, the decision to abate or uphold a conviction is unguided and consequential. The laws and rules of international courts and tribunals do not address the impact

3. *Id.*

4. Rachel Killean & Peter Manning, *Khmer Rouge genocide: Nuon Chea's Death has Major Implications for Justice in Cambodia*, THE CONVERSATION (Aug. 13, 2019, 8:22 AM), <https://theconversation.com/khmer-rouge-genocide-nuon-cheas-death-has-major-implications-for-justice-in-cambodia-121582> [<https://perma.cc/5XMK-FX46>].

5. *See Cambodia: Senior Khmer Rouge Leader Nuon Chea Dies at 93*, AL JAZEERA (Aug. 4, 2019), <https://www.aljazeera.com/news/asia-pacific/2019/08/cambodia-senior-khmer-rouge-leader-nuon-chea-dies-93-190804160328125.html> [<https://perma.cc/JZ9C-6FWD>].

6. Case No. 002/02, Nuon Chea's Notice of Appeal Against the Trial Judgement in Case 002/02, ¶ 1 (Extraordinary Chambers in the Cts. of Cambodia July 1, 2019).

7. *Nuon Chea Dies at 93, Ending Hopes of Closure for Cambodia's Victims of Khmer Rouge*, RADIO FREE ASIA (Aug. 5, 2019), <https://www.rfa.org/english/news/cambodia/death-08052019161903.html> [<https://perma.cc/P9PM-PTNA>].

8. Sopheng Cheang, *Khmer Rouge Ideologue Cremated, Appeal May be Stopped*, ASSOCIATED PRESS (Aug. 9, 2019), <https://www.apnews.com/96c19bd0b5ed4b96bda4a514aeb2154>.

9. Case No. 002/02, Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea's Death Prior to the Appeal Judgement, ¶ 1 (Extraordinary Chambers in the Cts. of Cambodia Aug. 6, 2019).

10. *See Commonwealth v. Hernandez*, 118 N.E.3d 107, 110–12, 116 (Mass. 2019); *see also* Killean & Manning, *supra* note 4.

11. *See United States v. Parsons*, 367 F.3d 409, 413 (5th Cir. 2004) (quoting *United States v. Asset*, 990 F.2d 208, 210 (5th Cir. 1993)) (noting that in the Fifth Circuit, the death of a criminal defendant extinguishes the entire proceeding).

12. *See Prosecutor v. Delić*, Case No. IT-04-83-A, Decision on the Outcome of the Proceedings, ¶ 11 n.32 (Int'l Crim. Trib. for the Former Yugoslavia June 29, 2010).

13. *See, e.g., Hernandez*, 118 N.E.3d at 121 (holding that the conviction will neither be upheld or vacated); *R. v. Whelan* (unreported, Dec. 17, 1996) (Eng.) (allowing the appeal of a deceased defendant to proceed).

that an appellant's death has on a conviction,¹⁴ and states do not have a consistent practice on this issue.¹⁵ Accordingly, judges are left to settle the status of a conviction when an appellant dies.¹⁶ Further, international courts and tribunals often issue reparation orders for victims alongside a defendant's conviction.¹⁷ By abating an appellant's conviction, tribunals may erase the reparations due to victims.¹⁸ By upholding a conviction, however, tribunals may erode a defendant's fair trial rights.¹⁹

This Note calls for a new approach in international criminal law. Instead of wholly abating or upholding a conviction, international criminal courts and tribunals should take a middle ground. By adopting the "Massachusetts approach" stemming from *Commonwealth v. Hernandez*, international courts and tribunals can ensure justice for victims while respecting the rights of criminal defendants.²⁰ This approach allows a court to dismiss an appeal as moot, and notes that while the defendant's presumption of innocence was destroyed through the conviction, the conviction was appealed and could be neither upheld nor overturned due to the appellant's death.²¹

This Note is organized into four parts following the Introduction. First, Part I examines the approaches that a court may take when a criminal defendant dies with his or her conviction on appeal. In particular, Part I explores the reasoning behind abating a conviction, upholding a conviction, and mixed-method approaches. Second, Part II addresses the reasons this doctrine has exceptional importance in the context of international criminal law—due to the aims of international criminal law, the increased age of international criminal defendants, and the issuance of reparation orders that depend on a criminal conviction. Next, Part III argues that international criminal tribunals should take a mixed-method approach if an appellant dies while his or her case is on appeal. This section also

14. Case No. 002/02, Decision to Terminate Proceedings Against Nuon Chea, ¶ 6 (Extraordinary Chambers in the Cts. of Cambodia Aug. 13, 2019); Tatiana Bachvarova, *Impact of the Death of a Convicted Person on Pending Proceedings before the International Criminal Court*, 10 J. Int'l Crim. Just. 547, 547–48 (2012).

15. *Delić*, Decision on the Outcome of Proceedings, ¶ 13.

16. *Id.* ¶ 11 n.32.

17. Case No. 001, Judgement, ¶ 635 (Extraordinary Chambers in the Cts. of Cambodia July 26, 2010); Prosecutor v. Al Mahdi, ICC-01/12-01/15, Reparations Order, ¶¶ 23–58 (Aug. 17, 2017).

18. See Killean & Manning, *supra* note 4.

19. See *United States v. Brooks*, 872 F.3d 78, 87 (2d Cir. 2017) (noting that an individual should not be convicted on a judgment that was never finalized).

20. *Commonwealth v. Hernandez*, 118 N.E.3d 107, 123 (Mass. 2019).

21. *Id.* at 110.

considers why the other approaches are inappropriate for the context of international criminal law. Finally, the closing paragraphs provide a brief conclusion.

I. STATUS OF A CONVICTION UPON THE DEATH OF AN APPELLANT

A. *Overturing the Appellant's Conviction*

Many common law and civil law courts will overturn a criminal conviction if an individual dies during his or her appeal.²² But there are different theories on why a conviction should be overturned.²³ Under the common law, a deceased appellant's conviction may be overturned through the abatement *ab initio* doctrine—dissolving the appellant's conviction and ensuring that the dead will not be punished by the state.²⁴ Conversely, many civil law courts note that the presumption of innocence does not end until an appeal is finalized, and accordingly, will overturn the conviction of a deceased appellant.²⁵

1. *Abatement Ab Initio*

When a criminal appellant dies while his or her case is on appeal, the common-law doctrine of abatement *ab initio* dictates that the appellant's conviction is erased.²⁶ The underlying conviction is not merely vacated, but “everything associated with the case is extinguished, leaving the defendant ‘as if he had never been indicted or convicted.’”²⁷

There are two rationales behind the doctrine of abatement *ab initio*.²⁸ First, the “finality principle” asserts that a conviction is not finalized until the appellate process has concluded.²⁹ An individual, therefore, should not die as a convicted criminal if the appellate court was unable to render a decision.³⁰ As criminal defendants hold a right to appeal,³¹ upholding a criminal conviction erodes the defendant's

22. See Michael Bohlander, *Death of an Appellant—The Termination of the Appellate Proceedings in the Case of Rasim Delic at the ICTY*, 21 CRIM. L.F., 495, 502 (2010) (noting that Australia is one of the few jurisdictions that allows the trial judgment to stand).

23. See *id.* at 501–02.

24. *Hernandez*, 118 N.E.3d at 117.

25. See Bohlander, *supra* note 22, at 504 n.12.

26. *United States v. Parsons*, 367 F.3d 409, 413 (5th Cir. 2004).

27. *Id.*

28. *Hernandez*, 118 N.E.3d at 117.

29. *Id.*

30. *Id.* (quoting *Parsons*, 367 F.3d at 413).

31. *Id.* at 118 (quoting *People v. Ekinici*, 743 N.Y.S.2d 651, 657 (N.Y. Sup. Ct. 2002)).

procedural protections.³² As such, “[n]either the state nor affected parties should enjoy the fruits of an untested conviction.”³³

Second, the “punishment principle” notes that the purpose of a conviction is to punish an individual.³⁴ The state, however, cannot successfully punish the dead.³⁵ Courts have also analyzed the impact of a conviction on the defendant’s family members and beneficiaries.³⁶ After an appellant dies, these parties may absorb the costs of the prosecution.³⁷ Without a final judgment, the punishment principle maintains that the state should not punish the family members and beneficiaries of the decedent by holding them accountable for court costs.³⁸

Although the traditional common-law doctrine calls for abatement of the criminal conviction, common-law courts have strayed from a strict adherence to the doctrine.³⁹ In the United States, federal courts abide by the doctrine, whereas many state courts have adopted other approaches.⁴⁰ Additionally, courts in other common-law countries, including the United Kingdom, Canada, and Australia, do not necessarily apply the abatement *ab initio* doctrine.⁴¹

2. *The Presumption of Innocence*

In many civil law countries, the presumption of innocence does not end until a court renders an unappealable, final judgment.⁴²

32. *State v. McDonald*, 424 N.W.2d 411, 413 (Wis. 1988) (“[A]n appeal plays an integral part in the judicial system for a final adjudication of guilt or innocence and that a defendant who dies pending appeal should not be deprived of the safeguards that an appeal provides.”).

33. *State v. Burrell*, 837 N.W.2d 459, 468 (Minn. 2013) (quoting *Parsons*, 367 F.3d at 414).

34. *Hernandez*, 118 N.E.3d at 119.

35. *Id.*

36. *Id.* at 120 (citing *State v. Campbell* 193 N.W.2d 571, 572 (Neb. 1972)).

37. *Id.*

38. *Id.*

39. *See, e.g., id.* at 113–14 (noting that “Abatement *ab initio* is far from the ‘general practice’”); Criminal Appeal Act (1968) c. 19, § 44A(3) (Eng.), <http://www.legislation.gov.uk/ukpga/1968/19/section/44A> [<https://perma.cc/NXV3-7J44>] (allowing the decedent’s appeal to continue through a person embraced by the court).

40. *See Hernandez*, 118 N.E.3d at 113–14 (explaining that state courts have between three to seven different approaches when a criminal defendant dies during his or her appeal).

41. *Prosecutor v. Delić*, Case No. IT-04-83-A, Decision on the Outcome of the Proceedings, ¶ 12 n.33 (Int’l Crim. Trib. for the Former Yugoslavia June 29, 2010) (discussing that Canadian Courts may hear the appeal after the death of an appellant); Bohlander, *supra* note 22, at 504 n.12 (noting that Austria allows the conviction to stand after the death of an appellant and the United Kingdom allows the appeal to continue after the death of an appellant).

42. Bohlander, *supra* note 22, at 504 n.12 (exploring the civil law jurisdictions where the presumption of innocence does not end until there is a finalized judgment that cannot be appealed); *see, e.g.,* Thomas Weigend, *Assuming that the Defendant is Not*

This marks a divide between civil and common law countries.⁴³ Because the presumption of innocence does not end until a case is finalized, an appellate court must vacate a conviction that occurs in the court of first instance if an appellant dies amidst an appeal.⁴⁴

The right to be presumed innocent throughout the appellate process has deep historical roots.⁴⁵ In Ancient Roman law, criminal defendants retained their innocence through the appellate proceedings.⁴⁶ If the criminal appellant died before the conclusion of the proceedings, the state could not seize the individual's property.⁴⁷ Eighteenth-century France features these ideals, as well.⁴⁸ King Louis the XVI, in his Declaration relating to Criminal Order, proclaimed that "the first of all principles in criminal matters that provides that an accused, even if sentenced to death in the first instance, is always presumed innocent in the eye of the Law until his sentence is confirmed on appeal."⁴⁹

Today, this right is protected constitutionally and statutorily.⁵⁰ Italy's constitution extends the presumption of innocence to defendants until a "final sentence" is issued.⁵¹ Similarly, the Constitution of the Czech Republic preserves the presumption of innocence until a "court's final judgment of conviction" is ordered.⁵² In modern France, the Criminal Procedural Code reaffirms that an appellant's death halts the prosecution of the individual and extinguishes the individual's punishment.⁵³

B. Upholding the Appellant's Conviction

While federal courts in the United States follow the abatement *ab initio* doctrine, only eighteen of the fifty states and the District

Guilty: The Presumption of Innocence in the German System of Criminal Justice, 8 CRIM. L. & PHIL., 285, 291 n.25 (2013) (stating that the majority of German authors agree that the presumption of innocence ends only when all appeals are completed).

43. Bohlander, *supra* note 22, at 504–05 n.12.

44. *Id.*

45. François Quintard-Moréas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. COMP. L., 107, 112–13 (2010).

46. *Id.*

47. *Id.* at 113.

48. *Id.* at 122.

49. *Id.* at 122 n.146.

50. *See infra* notes 51–53.

51. Art. 27 Costituzione [Cost.] (It.).

52. Ústavní zákon č. 40/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic].

53. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 6 (Fr.) ("L'action publique pour l'application de la peine s'éteint par la mort du prévenu, la prescription, l'amnistie, l'abrogation de la loi pénale et la chose jugée.").

of Columbia abide by the doctrine.⁵⁴ Many states have adopted other approaches. One approach is to dismiss the appeal, and uphold the conviction as final.⁵⁵ In order to uphold the conviction, these courts have looked to the presumption of innocence.⁵⁶ Citing to the United States Supreme Court, the Supreme Court of Montana asserted that the presumption of innocence is lost the moment a conviction is entered by a trial court and an appealed conviction does not restore the defendant's presumption of innocence.⁵⁷

As the presumption of innocence is destroyed by a conviction, the death of an appellant does not impact the validity of the trial court's conviction.⁵⁸ Courts that affirm the conviction of the decedent, however, do not allow the appellate proceedings to continue as there is no longer a present controversy for the court to decide.⁵⁹ Furthermore, by upholding a conviction, courts are able to ensure that victims are not "den[ie]d] the . . . fairness, respect and dignity guaranteed by [the] laws by preventing the finality and closure they are designed to provide."⁶⁰

C. *Mixed-Method Approaches*

In addition to completely upholding or overturning a conviction, a court may allow an appeal to continue until a decision is reached, or the court may neither uphold nor overturn the appellant's conviction.⁶¹

1. *Allowing the Appeal to Move Forward*

Several jurisdictions allow a criminal defendant's appeal to continue, even if the defendant dies before the appeal can be finalized.⁶² When the appellant dies, the court may allow an individual to substitute in for the original appellant,⁶³ or let the appeal proceed without a substituted party.⁶⁴ This approach allows the "presumptive validity of the judgment" to stand, while preserving the defendant's right

54. *Commonwealth v. Hernandez*, 118 N.E.3d 107, 114 (2019).

55. *Id.* at 114–15.

56. *State v. Benn*, 274 P.3d 47, 49 (Mont. 2012).

57. *Id.* (quoting *McCoy v. Ct. of Appeals of Wis., Dist. 1*, 486 U.S. 429, 436 (1988)).

58. *Id.*

59. *State v. Burrell*, 837 N.W.2d 459, 464–65 (Minn. 2013).

60. *State v. Korsen*, 111 P.3d 130, 135 (Idaho 2005).

61. See *infra* notes 62–91 and accompanying text.

62. *Burrell*, 837 N.W.2d at 465 (stating that in 2013, at least fourteen states in the United States of America "do not preclude appellate courts from considering the merits of a deceased criminal defendant's appeal").

63. *State v. Webb*, 219 P.3d 695, 699 (Wash. 2009).

64. *State v. Gartland*, 694 A.2d 564, 568 (N.J. 1997).

to a review of his or her criminal conviction.⁶⁵ Criminal defendants are not considered disadvantaged in this context if they had the opportunity to participate in the proceedings while they were alive.⁶⁶

Allowing an appeal to move forward allows for the resolution of, what may still be, a “present, live controversy.”⁶⁷ A criminal case that has not come to a final determination can still be a “present, live controversy” for three reasons. First, there may be financial burdens placed on the defendant’s estate that occur after the defendant passes away.⁶⁸ Next, an appeal is controversial after a criminal appellant dies as “the victim and the community’s interest in condemning the offender persist.”⁶⁹ Finally, a case may be a present controversy if persistent errors are not identified and corrected.⁷⁰

In addition to the United States, courts in Canada and the United Kingdom may hear an appeal from a deceased criminal defendant.⁷¹ In Canada, an appeal will only continue if it is “in the interests of justice.”⁷² But this is an extraordinary circumstance.⁷³ The Canadian Supreme Court lists several factors that are considered in determining if something is “in the interests of justice,” including the plausibility that the appeal will succeed, the public importance of the issue, or the effects the conviction would have on the defendant’s family.⁷⁴

Such extraordinary circumstances occurred in *Regina v. Poulin*.⁷⁵ In that case, the Supreme Court of Canada allowed a posthumous appeal to proceed.⁷⁶ The appellant in that case was convicted in 2016 for “historical sexual offences” for conduct occurring from 1979–1987.⁷⁷ The court imposed a conditional sentence—a punishment that was neither available when the defendant committed the acts, nor when the defendant was actually sentenced.⁷⁸ The Canadian Supreme Court

65. *Burrell*, 837 N.W.2d at 466.

66. *Id.* at 466–67.

67. *State v. Carlin*, 249 P.3d 752, 764 (Alaska 2011).

68. *Id.*

69. *Id.*

70. *Burrell*, 837 N.W.2d at 467 (quoting *Gollott v. State*, 646 So.2d 1297, 1304 (Miss. 1994)) (“Leaving convictions intact without review by this Court potentially leaves errors uncorrected which will ultimately work to the detriment of the justice system.”).

71. See *R. v. Smith*, [2004] 1 S.C.R. 385 (Can.); *R. v. Whelan* (unreported, Dec. 17, 1996) (Eng.).

72. *R. v. Smith*, [2004] 1 S.C.R. 385 (Can.); Supreme Court Act, R.S.C. 1985, c S-19, §§ 72–78 (Can.).

73. *R. v. Smith*, [2004] 1 S.C.R. 385 (Can.); Supreme Court Act, R.S.C. 1985, c S-19, §§ 72–78 (Can.).

74. *R. v. Smith*, [2004] 1 S.C.R. 385 (Can.); Supreme Court Act, R.S.C. 1985, c S-19, §§ 72–78 (Can.).

75. *R. v. Poulin*, [2019] S.C.C. 47 (Can.).

76. *Id.*

77. *Id.*

78. *Id.*

allowed the appeal to continue after the defendant died to determine if the defendant could be sentenced to the most lenient punishment that was available any time between the commission of the crime and the sentencing of the individual.⁷⁹ As the issue was a constitutional question that had received little adjudication, was significant to the public, and “outweigh[ed] any concerns about limited judicial resources,” the Supreme Court decided to hear the case.⁸⁰

In the United Kingdom, the Court of Criminal Appeals considered an appeal from a defendant’s wife on behalf of the deceased defendant.⁸¹ In deciding whether or not to take the appeal, the court considered that the appeal was initiated by the defendant himself and that the substituted party—the defendant’s wife—had had a legitimate reason to preserve the defendant’s intentions.⁸² Moreover, the court considered that “seeking to clear the name of the deceased” was a “legitimate objective” for hearing an appeal.⁸³

2. *Neither Upholding nor Overturning the Conviction*

The Supreme Courts of Massachusetts and Alabama have embraced the decision to neither abate a deceased appellant’s conviction nor to uphold the conviction as valid.⁸⁴ In a type of compromise, these courts have not let the appeal continue, but with the death of an appellant, the trial court is “instructed to place in the record a notation stating that the defendant’s conviction removed the defendant’s presumption of innocence, but that the conviction was appealed from and it was neither affirmed nor reversed on appeal because the defendant died while the appeal was pending and the appeal was dismissed.”⁸⁵

This approach seeks to find the midpoint of two problematic doctrines.⁸⁶ Abating a conviction assumes that an appeal would result in an acquittal, whereas upholding a conviction presupposes that a defendant would have failed.⁸⁷ The Alabama Supreme Court also discussed that a vacated conviction has a serious impact on victims—who have rights protected by the Alabama Constitution.⁸⁸ This

79. *Id.*

80. *Id.*

81. *R. v. Whelan* (unreported, Dec. 17, 1996) (Eng.).

82. *Id.*

83. *Id.*

84. *Commonwealth v. Hernandez*, 118 N.E.3d 107, 116, 121 (Mass. 2019).

85. *Id.* at 121.

86. *State v. Wheat*, 907 So.2d 461, 462 (Ala. 2005).

87. *Id.*

88. *Id.* at 463–64.

mixed-method approach thus preserves the rights of a defendant while recognizing the rights of victims.⁸⁹

When the Supreme Court of Massachusetts adopted this doctrine, they asserted that the “Massachusetts approach” assures criminal defendant’s procedural rights.⁹⁰ Moreover, by dismissing the appeal and neither upholding nor reversing a conviction, the record preserves the historical moment of the appellant’s death.⁹¹

3. *International Tribunals*

When Rasim Delić—Commander of the Army of the Republic of Bosnia and Herzegovina—died,⁹² he was the first appellant to die in the midst of an appeal before an international criminal tribunal.⁹³ As the International Criminal Tribunal for the Former Yugoslavia (ICTY) had neither precedent nor procedural rules for this situation, the tribunal was left to decide the finality of the trial judgment.⁹⁴

The ICTY Appeals Chamber noted that there was no general principle of law or consistent state practice that dictated the finality of a trial judgment when an appellant died before an appeal judgment is rendered.⁹⁵ To determine if Delić’s appeal should continue despite his death, the Chamber first turned to the plain language of the Statute of the ICTY.⁹⁶ Using the Statute, the Chamber deduced three reasons that the appellate proceedings should end with death. First, the Chamber listed that Article 6 of the Statute restricts personal jurisdiction to “natural persons.”⁹⁷ A “natural person[,]” the Chamber reasoned, was a living person.⁹⁸ Next, the Chamber examined Article 25 of the Statute, which articulates that only the convicted person and the Prosecutor can effectuate an appeal.⁹⁹ The Chamber used Article 25 to assert that an outside person cannot be substituted to finalize an appeal.¹⁰⁰ Finally, the Chamber stated that there are no provisions that extend the personal jurisdiction of

89. *See id.* at 462.

90. *Hernandez*, 118 N.E.3d at 116, 123.

91. *Id.*

92. *Prosecutor v. Delić*, Case No. IT-04-83-PT, Amended Indictment, ¶ 3 (Int’l Crim. Trib. for the Former Yugoslavia July 14, 2006).

93. *Prosecutor v. Delić*, Case No. IT-04-83-A, Decision on the Outcome of Proceedings, ¶ 5 (Int’l Crim. Trib. for the Former Yugoslavia June 29, 2010).

94. *Id.* ¶¶ 5, 9.

95. *Id.* ¶ 13.

96. *Id.* ¶ 6.

97. *Id.*

98. *Delić*, Decision on the Outcome of Proceedings, ¶ 6.

99. *Id.*

100. *Id.*

the Tribunal to a “convicted person’s heirs or victims.”¹⁰¹ As such, the Tribunal terminated Delić’s appeal.¹⁰²

To determine the finality of the conviction, the Chamber took into account the “realities of . . . th[e] Tribunal,”¹⁰³ and “the essence of the appellate proceedings.”¹⁰⁴ The Appeals Chamber then concluded that the Trial Chamber’s judgment would be considered final.¹⁰⁵ To reach this conclusion, the Appeals Chamber emphasized that the presumption of innocence ends once a conviction is entered by the court of first instance and affirmed that nothing undermined the validity of the trial judgment.¹⁰⁶

The Delić approach was subsequently followed in another case before the ICTY.¹⁰⁷ Citing the language from the Delić case, the Appeals Chamber of the ICTY in *Prosecutor v. Popović et al.*, terminated Milan Gvero’s appeal and upheld Gvero’s conviction.¹⁰⁸ The Assistant Commander for the Bosnian Serb Army,¹⁰⁹ therefore, remained convicted of the crimes against humanity of persecution and the other inhumane act of forcible transfer.¹¹⁰

Before the Extraordinary Chambers in the Courts of Cambodia (ECCC), Nuon Chea died after appealing his second conviction.¹¹¹ In Case 002/02, Nuon Chea was convicted of crimes against humanity, genocide, and grave breaches of the Geneva Conventions.¹¹² While Nuon Chea had filed his notice of appeal, he died before filing his appellate brief.¹¹³ The Supreme Court Chamber relied on Cambodian law and the ECCC’s Internal Rules to determine that the appeal should be terminated.¹¹⁴ Under the Cambodian Code of Criminal Procedure, the death of a defendant ends all criminal proceedings against the defendant.¹¹⁵ Moreover, Internal Rule 23*bis*(6) dictates that the

101. *Id.*

102. *Id.* ¶ 8.

103. *Id.* ¶ 13.

104. *Delić*, Decision on the Outcome of Proceedings, ¶ 14.

105. *Id.* ¶ 15.

106. *Id.* ¶¶ 14–15.

107. *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Decision Terminating Appellate Proceedings in Relation to Milan Gvero, ¶¶ 6–7 (Int’l Crim. Trib. for the Former Yugoslavia March 7, 2013).

108. *Id.*

109. *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Indictment, ¶ 12 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 04, 2006).

110. *Popović*, Decision Terminating Appellate Proceedings in Relation to Milan Gvero, ¶¶ 2, 6.

111. Case No. 002/02, Decision to Terminate Proceedings Against NUON Chea, ¶ 3 (Extraordinary Chambers in the Cts. of Cambodia Aug. 13, 2019).

112. *Id.* ¶ 2.

113. *Id.* ¶ 6.

114. *Id.* ¶ 5.

115. *Id.*

death of an accused person terminates all civil proceedings against a defendant.¹¹⁶ Viewing these provisions in conjunction, the Supreme Court Chamber terminated Nuon Chea's appeal with his death.¹¹⁷

Furthermore, the Supreme Court Chamber of the ECCC upheld the Trial Court's Conviction against Nuon Chea as a final, valid judgment.¹¹⁸ The Chamber concluded that the decision to vacate a judgment was so significant that it would be incorporated into the Law of the Extraordinary Courts of the Chambers of Cambodia, the Internal Rules, or Cambodian law if it was actually intended.¹¹⁹ In reaching this determination, the Chamber looked to the precedent set by the ICTY in *Delić* and *Popović et al.*, and ruled that the doctrine of abatement *ab initio* was not appropriate for international tribunals.¹²⁰

The Chamber also considered the impact that the presumption of innocence had on the decision to uphold the Trial Chamber's judgment as final.¹²¹ In Cambodia, the presumption of innocence is guaranteed by the constitution and lasts "up to the *final verdict* of the court."¹²² The Chamber articulated the differences between trial and appellate proceedings and stated that the presumption of innocence does not equate to being found not guilty.¹²³ The Chamber averred that "[t]he appellant does not undergo a rebirth as an innocent accused," and Nuon Chea's passing "d[id] not convert a guilty finding at trial into a not guilty finding."¹²⁴ As the Trial Chamber's judgment stood as final, Nuon Chea's death did not undermine the reparations awarded to the Civil Parties.¹²⁵

II. THE IMPORTANCE OF ABATEMENT DECISIONS IN INTERNATIONAL CRIMINAL LAW

This section provides an introduction to international criminal courts and tribunals, to elucidate the importance of abatement decisions in international criminal proceedings. First, this segment

116. *Id.*

117. Case No. 002/02, Decision to Terminate Proceedings Against NUON Chea, ¶¶ 6–7.

118. Case No. 002/02, Decision on Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea's Death Prior to the Appeal Judgement, ¶ 86 (Extraordinary Chambers in the Cts. of Cambodia Nov. 22, 2019).

119. *Id.* ¶ 37.

120. *Id.* ¶¶ 43–44.

121. *Id.* ¶¶ 59–69.

122. *Id.* ¶ 60.

123. *Id.* ¶¶ 67–69.

124. Case No. 002/02, Decision on Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea's Death Prior to the Appeal Judgement, ¶ 69.

125. *Id.* ¶ 85.

provides an overview of the purposes of international criminal law to examine what aims are furthered or hindered by the decision to uphold an appellant's conviction. Next, this section describes the age of international criminal defendants, to highlight the fact that death before international tribunals is likely to occur. Finally, this section gives a background to the reparation schemes in international criminal law to underscore the importance of a conviction to victims.

A. *The Purposes of International Criminal Law*

Domestic criminal law has a variety of aims.¹²⁶ Consequentialist goals of criminal law seek to punish wrongdoers on theories of retribution.¹²⁷ The purpose of criminal law through the lens of deontological theorists, however, is to deter prospective offenders, incapacitate the current offender, and rehabilitate the offender to prevent repeated violations.¹²⁸

International criminal law not only encapsulates the aims of domestic criminal law, but also incorporates its own set of unique objectives.¹²⁹ There are a multitude of ideals behind international criminal law—these courts and tribunals seek to end impunity of world leaders,¹³⁰ produce a historical archive of mass atrocities,¹³¹ end ongoing incidents of systematic violence,¹³² provide a platform for victims,¹³³ deter future leaders from committing mass atrocities,¹³⁴ and enforce the norms of international human rights law.¹³⁵ International courts and tribunals consistently hold that the purpose of sentencing is to establish retribution and deterrence.¹³⁶

126. NORA V. DEMLEITNER, DOUGLAS A. BERMAN, MARC L. MILLER & RONALD F. WRIGHT, *SENTENCING LAW AND POLICY: CASES, STATUTES AND GUIDELINES 2* (4th ed. 2018).

127. *Id.*

128. *Id.*

129. See Patrick J. Keenan, *The Problem of Purpose in International Criminal Law*, 37 MICH. J. INT'L L. 421, 422–23 (2016); Mirjan R. Damaska, *What Is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 331 (2008).

130. Geoffrey Robertson, *Ending Impunity: How International Criminal Law Can Put Tyrants on Trial*, 38 CORNELL INT'L L.J. 649, 650 (2005); see also Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], <https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf> (stating that the International Criminal Court is “[d]etermined to put an end to impunity for the perpetrators of [international] crimes”).

131. Damaska, *supra* note 129; see also Keenan, *supra* note 129, at 424.

132. Keenan, *supra* note 129, at 424; Damaska, *supra* note 129, at 331–32.

133. Keenan, *supra* note 129, at 424; Damaska, *supra* note 129.

134. Damaska, *supra* note 129, at 344.

135. *Id.* at 331.

136. See *Prosecutor v. Al Mahdi*, ICC-01/12-01/15, Judgment and Sentence, ¶ 66 (Sept. 27, 2016) (holding that deterrence and retribution are the “primary objectives of punishment at the ICC”); *Prosecutor v. Tadić*, Case No. IT-91-1-Tbis-R117, Sentencing Judgment, ¶¶ 7–8 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 11, 1999) (holding that

The lofty aims of international criminal law lead to conflicting priorities.¹³⁷ The desire to stop a lasting conflict may be at odds with the goal of holding leaders accountable for their crimes.¹³⁸ The aim of producing a historical record may clash against the hope of criminalizing individual conduct.¹³⁹ Furthermore, and perhaps most importantly, the desire to award victims reparations and restitution may be discordant with the procedural and human rights of the accused.¹⁴⁰

B. The Age of International Criminal Defendants

The average age of defendants before international criminal tribunals necessitates a clear doctrine relating to the death of appellants. International criminal law not only prosecutes the direct perpetrators of international crimes, but seeks to hold senior leaders accountable.¹⁴¹ Leaders, however, are older than the direct perpetrators of crimes,¹⁴² and are often older than the average violent offenders in national jurisdictions.¹⁴³ In his survey of the ICTY, Stuart Ford noted that in 1995, the age range of indicted persons spanned from the age of 21 to 76.¹⁴⁴ By examining 161 indictments,¹⁴⁵ Ford demonstrated that senior leaders with “political and military hierarchy” tend to be older than direct perpetrators.¹⁴⁶

The advanced age of international criminal defendants is starkly evident by the time of their appeals. The ECCC exemplifies this principle. Defendant Duch was sixty-eight years old when he filed his notice of appeal in Case 001 before the ECCC.¹⁴⁷ The notice of

the retribution and deterrence are the main reasons for punishment at both the ICTY and the ICTR); *Prosecutor v. Taylor*, SCSL-03-01-T, Sentencing Judgement, ¶ 13 (Special Court for Sierra Leone May 30, 2010) (reiterating that the objective of sentencing before the Special Court for Sierra Leone is retribution and deterrence).

137. Damaska, *supra* note 129, at 331.

138. *Id.* at 331–32.

139. *Id.* at 332–33.

140. *Id.* at 333–34.

141. Rome Statute, *supra* note 130, at art. 28 (describing the criminal responsibility that “commanders and other superiors” face); S.C. Res. 1534 ¶ 5 (Mar. 26, 2004) (urging the ICTY and ICTR to ensure that “indictments concentrate on the most senior leaders suspected of being most responsible for crimes”); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, ch. I, art. 1 (Oct. 27, 2004) (giving the tribunal jurisdiction over “senior leaders . . . and those who were most responsible” for the Khmer Rouge’s crimes).

142. Stuart Ford, *Fairness and Politics at the ICTY: Evidence from the Indictments*, 39 N.C.J. INT’L L. & COM. REG. 45, 64–66 (2013).

143. *Id.* at 65.

144. *Id.* at 64.

145. *Id.* at 63.

146. *Id.* at 65.

147. See CASE 001: DUCH, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (2013), https://www.eccc.gov.kh/sites/default/files/Case%20001%20Duch_OCT%202013

appeal in Case 002/01—the first case against Nuon Chea and Khieu Samphân—was filed in September of 2014.¹⁴⁸ Nuon Chea was eighty-eight years old and Khieu Samphân was eighty-one years old.¹⁴⁹ The notices of appeal for Case 002/02—the second case against the two accused—were filed in June and July of 2019,¹⁵⁰ when Nuon Chea and Khieu Samphân were weeks away from turning ninety-three and eighty-eight years old, respectively.¹⁵¹ Because international criminal defendants are often older than domestic criminal defendants,¹⁵² international courts and tribunals must be prepared for the death of defendants, especially by the time the defendants appeal their convictions.

C. Reparation Orders and the Status of Convictions

Under international law, victims of crimes and gross human rights violations have a right to reparations.¹⁵³ While scholars and lawyers agree that there is a right to reparations, the right is broad and undefined.¹⁵⁴ The Permanent Court of International Justice recognized that “reparation[s] must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”¹⁵⁵ In accordance with this goal, courts and tribunals have awarded individual or collective reparations to reconcile, rehabilitate, and compensate victims.¹⁵⁶

_EN.pdf [https://perma.cc/4AKV-C5VN] (stating that Kaing Guek Eav, alias Duch, was born on November 17, 1942, and his notice of appeal was not filed until August 24, 2010).

148. Case No. 002/01, Notice of Appeal Against the Judgment in Case 002/01 (Extraordinary Chambers in the Cts. of Cambodia Sept. 29, 2014).

149. *Five Faces of Cambodia’s Khmer Rouge*, CNN (2014) [hereinafter *Five Faces*], <https://www.cnn.com/interactive/2014/08/world/khmer-rouge/index.html> [https://perma.cc/K88X-V247] (reporting that Nuon Chea was born on July 7, 1926 and Khieu Samphân was born on July 28, 1931).

150. Case No. 002/02, Co-Prosecutors’ Notice of Appeal of the Trial Judgement in Case 002/02 (Extraordinary Chambers in the Cts. of Cambodia June 21, 2019); Case No. 002/02, Khieu Samphân’s Notice of Appeal (002/02) (Extraordinary Chambers in the Cts. of Cambodia July 1, 2019); Case No. 002/02, Nuon Chea’s Notice of Appeal Against the Trial Judgement in Case 002/02 (Extraordinary Chambers in the Cts. of Cambodia July 1, 2019).

151. See *Five Faces*, *supra* note 149.

152. Ford, *supra* note 142, at 64–65.

153. International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171; Universal Declaration of Human Rights art. 8, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60 (III), U.N. Doc. 1/60/509/Add.1 (III) (Dec. 16, 2005).

154. Toni Holness & Jaya Ramji-Nogales, *Participation as Reparations: The ECCC and Healing in Cambodia*, LEGAL STUD. RSCH. PAPER SERIES, Sept. 29, 2011, at 1, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1883548.

155. *The Factory at Chorzow (Claim for Indemnity) (Ger. v. Pol.)*, Judgment, 1928 P.C.I.J. No. 17, at 47 (Sept. 13).

156. Holness & Ramji-Nogales, *supra* note 154, at 1–2.

The International Criminal Court was the first international criminal court to provide a reparations scheme.¹⁵⁷ The other ad hoc tribunals did not provide for reparations, with the exception of the ECCC.¹⁵⁸ In proceedings before the ICC, the court may award reparations in the form of restitution, compensation, or rehabilitation.¹⁵⁹ The Cambodian tribunal may award victims “only collective and moral reparations.”¹⁶⁰

The ICC convicted Thomas Lubanga Dyilo and Germain Katanga and ordered them to pay reparations for their conduct in the Democratic Republic of the Congo.¹⁶¹ Lubanga—who was convicted of war crimes relating to the use of child soldiers¹⁶²—was found liable to 425 victims.¹⁶³ The Trial Chamber issued a reparations order against Lubanga for \$10 million¹⁶⁴ for “symbolic and serviced-based collective reparations.”¹⁶⁵ As Lubanga established his indigency, the ICC’s Trust Fund for Victims dispersed €1 million for the victims in the Democratic Republic of the Congo.¹⁶⁶ The symbolic reparations included commemoration centers while the collective reparations were used to fund psychological and physical rehabilitation and socio-economic initiatives.¹⁶⁷

After Germain Katanga was convicted for crimes against humanity and war crimes occurring in the Democratic Republic of the Congo, the Appeals Chamber largely upheld a reparations order issued against him.¹⁶⁸ Similarly, Katanga was found to be indigent, but the Trust Fund for Victims allocated \$1 million in reparations

157. Elisabeth Lambert, *The ICC Regime of Victims’ Reparations: More Uncertainties and Inconsistencies Brought to Light by Recent Cases*, 23 AUSTL. INT’L L.J. 1, 1 (2017).

158. Bryan Barnett Miller, *A Model of Victims’ Reparations in the International Criminal Court*, 33 U. LA VERNE L. REV. 255, 255–56 (2012).

159. Rome Statute, *supra* note 130, at art. 75(1).

160. Internal Rules of the ECCC (Jan. 2015), r. 23 *quinquies*(1).

161. *Overview of Activities*, TRUST FUND FOR VICTIMS, <https://www.trustfundforvictims.org/sites/default/files/Trust%20Fund%20for%20Victims-%20Overview%20of%20Activities%20ENG.pdf> [<https://perma.cc/KE37-ZXCX>].

162. Prosecutor v. Lubanga, ICC-01/04-01/06, Judgment on the Appeals Against Trial Chamber II’s ‘Decision Setting the Size of Reparations Award for Which Thomas Lubanga Dyilo is Liable,’ ¶ 6 (July 18, 2019).

163. *Id.* ¶ 7.

164. *Id.*

165. *Reparation Orders*, TRUST FUND FOR VICTIMS, <https://www.trustfundforvictims.org/en/what-we-do/reparation-orders> [<https://perma.cc/BTR8-8KXM>].

166. Wairagala Wakabi, *How the Trust Fund for Victims Will Spend €1 Million on Collective Reparations in Congo*, INT’L J. MONITOR (Feb. 15, 2017), <https://www.ijmonitor.org/2017/02/how-the-trust-fund-for-victims-will-spend-e1-million-on-collective-reparations-in-congo> [<https://perma.cc/4LAV-U92J>].

167. *Id.*

168. Prosecutor v. Katanga, ICC-01/04-01/07, Judgment on the Appeals Against the Order of Trial Chamber II of 24 March 2017 Entitled “Order for Reparations Pursuant Article 75 of the Statute,” ¶¶ 1–2 (Mar. 8, 2018).

for 297 victims.¹⁶⁹ In terms of symbolic reparations, each victim received \$250.¹⁷⁰ For collective reparations, the court awarded housing or education assistance, psychological rehabilitation, and “income-generating activities.”¹⁷¹ Most victims selected income-generating assistance or housing support.¹⁷²

The ECCC convicted Kaing Guek Eav (or Comrade Duch) for crimes against humanity and grave breaches of the Geneva Conventions of 1949.¹⁷³ The ECCC awarded modest reparations¹⁷⁴ in a highly criticized opinion.¹⁷⁵ The ECCC determined it would acknowledge all the victims that the defendant harmed, and would “compile all statements of apology and acknowledgements of responsibility made by Kaing Guek Eav during the course of the trial.”¹⁷⁶

In the second case before the Khmer Rouge tribunal, the ECCC awarded tangible reparations.¹⁷⁷ After convicting Nuon Chea and Khieu Samphân of crimes against humanity, the Trial Chamber awarded moral and collective reparations.¹⁷⁸ The reparations concerned remembrance and memorialization, therapy and psychological assistance, and documentation and education.¹⁷⁹ In light of the reparations ordered, the Royal Government of Cambodia announced a public holiday for remembrance.¹⁸⁰ However, the cost of the reparation order was approximately \$2.5 million, and the civil party lawyers encountered problems raising funds for the 3,866 victims.¹⁸¹

III. ARGUMENT FOR A MIXED-METHOD APPROACH

This section argues that international criminal courts and tribunals should adopt the “Massachusetts approach” when appellants

169. Wairagala Wakabi, *Most Victims in Katanga Case Opt for Housing or Income Generation Support as Reparations*, INT’L J. MONITOR (May 24, 2018), <https://www.ijmonitor.org/2018/05/most-victims-in-katanga-case-opt-for-housing-or-income-generation-support-as-reparations> [<https://perma.cc/W285-23AX>].

170. *Id.*

171. *Id.*

172. *Id.*

173. Case No. 001, Judgement, ¶ 677 (Extraordinary Chambers in the Cts. of Cambodia, July 26, 2010).

174. *See id.* ¶ 683.

175. Heather Ryan, *What Makes for Justice in Cambodia?*, OPEN SOCIETY J. INITIATIVE (July 28, 2010), <https://www.justiceinitiative.org/voices/what-makes-justice-cambodia> [<https://perma.cc/G8NF-NGSF>].

176. Case No. 001, Judgement, ¶ 683.

177. Case No. 002/01, Judgement, ¶¶ 1151–60 (Extraordinary Chambers in the Cts. of Cambodia Nov. 21, 2014).

178. *Id.* ¶ 1151.

179. *Id.* ¶¶ 1151–60.

180. *Id.* ¶ 1153.

181. Jonathan Birchall, *The Funding Challenge for Reparations in Cambodia*, INT’L J. MONITOR (Sept. 10, 2013), <https://www.ijmonitor.org/2013/09/the-funding-challenge-for-reparations-in-cambodia> [<https://perma.cc/73K6-2N2P>].

die amidst their appeals for four main reasons. First, convictions should not be wholly upheld because the right to an appeal is a human right. Second, courts should not uphold convictions just to obtain reparation orders for victims, as reparations may be issued even if the court applies a mixed-method doctrine. Next, the “Massachusetts approach” furthers the aims of international criminal law. Last, this approach will not add to the judiciary’s burden.

A. Upholding a Conviction Violates Human Rights

International courts and tribunals have a paramount duty to uphold fair trial rights enshrined in international human rights law.¹⁸² Moreover, these courts and tribunals work to ensure that international human rights law is respected.¹⁸³ But by upholding a trial court’s conviction as final, international courts and tribunals are infringing upon the right to appeal.

Regional human rights conventions, including the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and People’s Rights, have codified the right to appeal as a human right,¹⁸⁴ especially in a criminal case.¹⁸⁵ Scholars have argued that a right to an appeal can also be found in international human-rights treaties through fair-trial provisions.¹⁸⁶ Moreover, countries protect the right to an appeal through their state constitutions.¹⁸⁷ While appeals serve many functions,¹⁸⁸ the

182. Stuart Beresford, *Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals*, 96 AM. J. INT’L L. 628, 628 (2002).

183. Damaska, *supra* note 129, at 331.

184. American Convention on Human Rights art.8(h), Nov. 22, 1969, 1144 U.N.T.S. 141; African (Banjul) Charter on Human and Peoples’ Rights art. 7(1)(a), June 27, 1981, 1520 U.N.T.S. 217.

185. European Convention on Human Rights Additional Protocol 7 art. 2, Nov. 1, 1998, E.T.S. 117.

186. Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22 DUKE J. COMP. & INT’LL. 1, 2 (2011); Vilar Bytyqi, *The Right to Appeal as a Fundamental Right under International Acts and Jurisprudence, with Special Emphasis on Criminal Procedure*, 13 ACTA UNIVERSITATIS DANUBIUS JURIDICA 130, 133–34 (2017) (arguing that the right to appeal is guaranteed through article 2 of the International Convention on Civil and Political Rights which ensures that right to an effective remedy); Richard Nobles & David Schiff, *The Right to Appeal and Workable Systems of Justice*, 65 MOD. L.R. 676, 699 (2002) (arguing that although there is not right to appeal in general human rights treaties, it can be found through the right to a fair trial).

187. Marshall, *supra* note 186, at 27–29 (highlighting that the right to appeal is protected by section 35(3) of South Africa’s Constitution); *see, e.g.*, KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [Constitution] art. 33 (Russ.); BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101 art. 32, para. 3 (Switz.); TEKST KONSTYTUCJI RZECZYPOSPOLITEJ POLSKIEJ OGŁOSZONO [Constitution] w Dz.U. 1997, NR 78 poz. 483, art. 41 (Pol.).

188. Marshall, *supra* note 186, at 3–4 (outlining that appeals prevent unjust outcomes, ensure that trial courts apply the law fairly, preserve legitimacy, and resolve novel legal issues).

right to an appeal as a human right ensures “that justice is done in each case” and protects the rights of criminal defendants.¹⁸⁹

While international courts and tribunals are entrusted to conform to human-rights standards, these rights can be infringed by the desire to provide redress to victims of war crimes, crimes against humanity, and genocide.¹⁹⁰ This tension is exemplified in discussions on the death of an appellant.¹⁹¹ Author Tatiana Bachvarova argues that upholding a decedent’s criminal conviction can demoralize the accused’s family and may have a pecuniary impact on the accused’s estate.¹⁹² Posthumously overturning a conviction, however, may have an impact on victims.¹⁹³

A mixed-method approach to the death of an appellant may mitigate the tension between the rights of criminal defendants and the rights of victims of mass atrocities, while upholding standards enshrined by human rights treaties. Specifically, the “Massachusetts approach”—which neither upholds nor overturns the court of first instance’s judgment¹⁹⁴—can balance these competing interests.

The “Massachusetts approach” embraces the precedent of the international tribunals that the presumption of innocence ends while a defendant’s case is on appeal. The Massachusetts Supreme Court reaffirmed that in American courts, the presumption of innocence ends the moment a conviction is entered.¹⁹⁵ Similarly, the three international tribunals that have confronted the death of a criminal appellant held that the presumption of innocence does not apply to persons before Appeals Chambers or Supreme Court Chambers.¹⁹⁶ The Supreme Court Chamber of the ECCC gave considerable reflection to the parties’ arguments regarding the presumption of innocence.¹⁹⁷ The Chamber looked to the International Convention of Civil and Political Rights (ICCPR) and the ICCPR’s guarantee of the presumption of innocence, and noted that there are distinctions between trial

189. *Id.* at 3. *But see* Billotti v. Legursky, 975 F.2d 113, 115 (4th Cir. 1992) (holding that discretionary appeals in West Virginia do not violate the Due Process Clause).

190. Damaska, *supra* note 129, at 333–34.

191. Bachvarova, *supra* note 14, at 553.

192. *Id.* at 554–55.

193. *Id.*

194. Commonwealth v. Hernandez, 118 N.E.3d 107, 116, 121 (Mass. 2019).

195. *See id.* at 118–19.

196. Case No. 002/02, Decision on Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea’s Death Prior to the Appeal Judgement, ¶ 86 (Extraordinary Chambers in the Cts. of Cambodia, Nov. 22, 2019); Prosecutor v. Popović, Case No. IT-05-88-A, Decision Terminating Appellate Proceedings in Relation to Milan Gvero, ¶¶ 6–7 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 7, 2013) (following the decision in *Delić*); Prosecutor v. Delić, Case No. IT-04-83-A, Decision on the Outcome of the Proceedings, ¶ 14 (Int’l Crim. Trib. for the Former Yugoslavia June 29, 2010).

197. *See* Case No. 002/02, Decision on Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea’s Death Prior to the Appeal Judgement, at ¶¶ 46–69.

rights and appellate rights.¹⁹⁸ Moreover, the Chamber cited *Delić* to reinforce that “the appealing party has the burden of showing an error of law or of fact that invalidates the trial judgement, or leads to a miscarriage of justice, rather than attempting to initiate a trial *de novo*.”¹⁹⁹ While a mixed-method approach would divert from the three previous cases before international tribunals, both approaches would embrace the fact that a criminal appellant does not “undergo a rebirth as an innocent accused.”²⁰⁰

Additionally, the “Massachusetts approach” recognizes the rights of victims. The Supreme Court of Massachusetts noted that “[w]hen a serious crime has been committed, the victims and survivors, witnesses, and the public have an interest [not only] that the guilty . . . be punished but that the community express its condemnation with firmness and confidence.”²⁰¹ By completely abating an appellant’s conviction, courts risk alienating victims and denying the victims reparations.²⁰²

B. A Mixed Method May Still Provide Reparations

Courts and tribunals may be disincentivized to overturn a conviction or apply a mixed-method approach because doing so may jeopardize the rights of victims to reparations.²⁰³ Currently, two internationalized courts have reparations provisions—the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia.²⁰⁴ Usually, a defendant’s conviction is a prerequisite for victims to receive reparations.²⁰⁵ But because of the unique nature of international criminal law, internationalized courts have created additional avenues for victims to obtain reparations.²⁰⁶

198. *Id.* ¶¶ 62–63.

199. *Id.* ¶ 65 (quoting *Delić*, Decision on the Outcome of Proceedings, ¶ 14).

200. *Id.* ¶ 69.

201. *Hernandez*, 118 N.E.3d at 120 (quoting *Commonwealth v. Amirault*, 677 N.E.2d 652, 655 (Mass. 1997)).

202. *See id.*; Bachvarova, *supra* note 14, at 554–55.

203. *See* Bachvarova, *supra* note 14, at 558.

204. Rome Statute, *supra* note 130, art. 75 ¶¶ 1–6; Law on The Establishment of Extraordinary Chambers in The Courts of Cambodia for The Prosecution of Crimes Committed during The Period of Democratic Kampuchea, art. 39.

205. Bachvarova, *supra* note 14, at 558 (stating that “a conviction is an absolute precondition for reparations” at the ICC); Case No. 002/02, Decision on Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea’s Death Prior to the Appeal Judgement, ¶ 81 n.152 (Extraordinary Chambers in the Cts. of Cambodia Nov. 22, 2019) (noting until 2010, reparations were contingent on a conviction).

206. *See* Bachvarova, *supra* note 14, at 558; Case No. 002/02, Decision on Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea’s Death Prior to the Appeal Judgement, ¶¶ 80–81 (Extraordinary Chambers in the Cts. of Cambodia, Nov. 22, 2019).

While the ICC has not encountered the death of an appellant,²⁰⁷ the Appeals Chamber's decision to acquit Jean-Pierre Bemba created ambiguity for the status of the Reparations Order issuing reparations for victims in the Central African Republic.²⁰⁸ While the Trial Chamber ended formal reparation proceedings against Bemba through his acquittal, the ICC's Trust Fund for Victim was able to continue assisting victims in the Central African Republic.²⁰⁹ In its Final Decision on the Reparations Proceedings, the Trial Chamber first acknowledged the harm and adversity that victims in the Central African Republic encountered.²¹⁰ Then, the Trial Chamber encouraged the Trust Fund for Victims to implement an assistance program for victims.²¹¹ As the Trust Fund for Victims collects donations outside of the fines imposed on a convicted individual,²¹² the Trust Fund "do[es] not require the conviction or even the identification of the perpetrator(s) of the harms suffered by victims."²¹³ Accordingly, the Trust Fund for Victims could redress victims suffering, even if an appellant dies, and his or her conviction is not upheld.²¹⁴

Similarly, the ECCC provides methods of redress for victims that are not dependent on a conviction.²¹⁵ After his death, Nuon Chea's conviction was upheld by the Supreme Court Chamber.²¹⁶ In its decision to uphold the conviction, the Supreme Court Chamber offered clarification on the ECCC's reparation scheme.²¹⁷ The ECCC Internal Rules offer two reparation avenues.²¹⁸ The first avenue places the cost of reparations on the convicted person.²¹⁹ The second avenue allows the lead co-lawyers to collect external funding for a reparation

207. Bachvarova, *supra* note 14, at 551.

208. Wairagala Wakabi, *Bemba's Acquittal Raises Concerns on Reparations to Victims in the Central African Republic*, INT'L JUST. MONITOR (July 18, 2018), <https://www.ijmonitor.org/2018/07/bembas-acquittal-raises-concerns-on-reparations-to-victims-in-the-central-african-republic> [<https://perma.cc/PY6F-FWVP>].

209. Prosecutor v. Bemba, ICC-01/05-01/08, Final Decision on the Reparation Proceedings, ¶ 11 (Aug. 3, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_03967.PDF [<https://perma.cc/WHQ6-YCXZ>].

210. *Id.* ¶¶ 5–7.

211. *Id.* ¶ 11.

212. Bachvarova, *supra* note 14, at 558.

213. *Bemba*, ICC-01/05-01/08, ¶ 11. The Trial Chamber, however, did not issue a principle of reparations that is wholly applicable in further cases. *Id.* ¶ 16. Instead, the Chamber noted that reparation determinations are fact specific inquiries. *Id.*

214. *See* Bachvarova, *supra* note 14, at 558.

215. *See* Case No. 002/02, Decision on Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea's Death Prior to the Appeal Judgement, ¶ 81, n.152 (Extraordinary Chambers in the Cts. of Cambodia Nov. 22, 2019).

216. *Id.* ¶ 86.

217. *See id.* ¶¶ 80–82.

218. Internal Rules of the ECCC (Jan. 2015), r. 23 *quinqies* (3).

219. *Id.* at r. 23 *quinqies* (3)(a).

project.²²⁰ The second avenue “do[es] not result in enforceable claims against an accused, and may be developed in parallel with the trial.”²²¹ Moreover, the Chamber noted that while a conviction is a necessary condition for implementing reparations, if a project has begun prior to appellate review, the reparations should be realized.²²²

Alternate reparation schemes dismantle a barrier to abating a conviction on appeal or applying a mixed-method approach when an appellant dies before the end of appellate review. As current international tribunals may still award victims collective or moral reparations, the tangible impact on victims is lessened if a court does not uphold the appellant’s conviction.²²³ Before the ICC, or future ad hoc tribunals with similar reparation schemes, Appellant Chambers can implement a doctrine that both respects the human right to appeal a criminal conviction and awards reparations to victims of mass atrocities.

As discussed above, victims may feel an emotional impact if a court or tribunal does not wholly uphold an appellant’s conviction.²²⁴ But monetary or symbolic reparations may alleviate a portion of this unease. Further, as argued by Tatiana Bachvarova, when a person is admitted as a victim before the ICC, the ICC recognizes the victim’s hardship as a result of the mass atrocity.²²⁵ This acknowledgement, coupled with the opportunity to be heard as a victim throughout the defendant’s trial and possible reparations, can further victims’ interests and assuage hardships.²²⁶

C. The “Massachusetts Approach” Serves the Aims of International Criminal Law

While international criminal law has a plethora of competing aims, the “Massachusetts approach” furthers several of these goals. First, and foremost, the “Massachusetts approach” would not undermine the aim of ending impunity. This mixed-method approach affirms that the defendant’s presumption of innocence ended with a conviction,²²⁷ and holds that “the appellant does not undergo a rebirth

220. *Id.* at r. *quinqüies* (3)(b).

221. Case No. 002/02, Decision on Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea’s Death Prior to the Appeal Judgment, ¶ 81 (Extraordinary Chambers in the Courts of Cambodia Nov. 22, 2019).

222. *See id.* ¶ 82.

223. *See* Bachvarova, *supra* note 14, at 558–59.

224. *See supra* text accompanying notes 201–02.

225. Bachvarova, *supra* note 14, at 557.

226. *See id.* at 557–58.

227. *See* Commonwealth v. Hernandez, 118 N.E.3d 107, 124 (Mass. 2019).

as an innocent accused.”²²⁸ However, by not absolutely affirming the conviction, the Massachusetts method balances the aim of ending impunity with the aspiration of implementing human-rights law by respecting the defendant’s right of appellate review and the victim’s right to reparations.

Next, the “Massachusetts approach” furthers the purpose of establishing a historical record. In constructing its abatement approach, the Supreme Court of Massachusetts noted by neither upholding nor reversing the conviction, “[t]he record w[ould] accurately reflect the case as it was at the time of death; it . . . reflect[s] the status quo.”²²⁹ If international courts and tribunals adopted this approach, international criminal judgments could establish a historical record of mass conflicts and “accurately reflect” the history of the proceedings and the death of the appellant.

Finally, this mixed-method approach would not undermine the aim of general deterrence. The criminal law better deters prospective offenders as the likelihood of punishment increases.²³⁰ Thus, it is the probability of punishment, not the severity of punishment that achieves deterrence.²³¹ This theory overrides international criminal law as well as domestic criminal law.²³² As the “Massachusetts approach” does not impact the probability of punishment, and only alters the severity of punishment after death, it follows that neither affirming nor overturning an appellant’s conviction will not erode the goal of general deterrence in international criminal law.

D. The “Massachusetts Approach” Does Not Strain the Judiciary

Several jurisdictions allow a deceased defendant’s appeal to come to a final judgment, despite the defendant’s death.²³³ This allows courts to respect the right of appellate review and come to a final determination on the merits of the appellant’s claims.²³⁴ However, this approach is incompatible with international criminal justice due to the length and costs of proceedings.

228. Case No. 002/02, Decision on Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea’s Death Prior to the Appeal Judgment, ¶ 69 (Extraordinary Chambers in the Cts. of Cambodia Nov. 22, 2019).

229. *Hernandez*, 118 N.E.3d at 123.

230. Hyeran Jo & Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT’L ORG. 443, 447 (2016).

231. *Id.*

232. *See id.*

233. *See supra* text accompanying notes 62–83.

234. *Id.*

In 2009, author Jean Galbraith analyzed the length of international criminal proceedings.²³⁵ She calculated the time it took “from custody to completion.”²³⁶ Before the ICTY, a case took 4.7 years to reach a final judgment while a case before the ICTR took 5.9 years to complete.²³⁷ Tackling an appeal alone took over two years.²³⁸ Cases at the Special Court for Sierra Leone lasted for an average of 4.8 years.²³⁹ Additionally, the International Bar Association examined the time between opening statements and the trial judgment before the ICC.²⁴⁰ It took over three years to issue a trial judgment in the *Lubanga* case and four years and three months to render a decision in the *Katanga* case.²⁴¹ Further after nine years of proceedings and a four-year trial, the ICC Appeals Chamber acquitted Jean-Pierre Bemba in 2018.²⁴²

International courts and tribunals also have high operating costs.²⁴³ In 2009, the ICTY cost \$174 million a year to operate while the ICTR budget was set at \$134 million a year.²⁴⁴ The Assembly of States Parties for the ICC set the 2020 budget at €149,205,600.²⁴⁵ From 2006 to 2017, the ECCC cost \$300 million,²⁴⁶ or approximately \$27.272 million a year.

International courts and tribunals are under considerable pressure to expediate proceedings.²⁴⁷ Because of the length of proceedings before these mechanisms, hearing the appeals of deceased appellants would be costly and disfavored. While allowing appellate

235. Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT'L L. 79, 116–21 (2009).

236. *Id.* at 120.

237. *Id.*

238. *Id.*

239. *Id.*

240. INT'L BAR ASS'N, EVIDENCE MATTERS IN ICC TRIALS 12 (2016), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=B9B8DC23-6616-41BA-8EF2-3D209398BDBD> [<https://perma.cc/2KRP-DCB6>].

241. *Id.*

242. See Benjamin Gumpert & Yulia Nuzban, *Part II: What Can Be Done About the Length of Proceedings at the ICC?*, EJIL TALK (Nov. 18, 2019), <https://www.ejiltalk.org/part-ii-what-can-be-done-about-the-length-of-proceedings-at-the-icc> [<https://perma.cc/G98F-S5TJ>].

243. See Galbraith, *supra* note 235, at 80.

244. *Id.* at 80 n.7.

245. Int'l Crim. Ct. Assembly of States Parties, *Resolution of the Assembly of States Parties on the Proposed Programme Budget for 2020, The Working Capital Fund for 2020, The Scale Of Assessment for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for 2020 and The Contingency Fund*, ¶ 1, ICC-ASP/18/Res.1 (Dec. 6, 2019).

246. Seth Mydans, *11 Years, \$300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html> [<https://perma.cc/2Z26-5ZVQ>].

247. See, e.g., Gumpert & Nuzban, *supra* note 242.

chambers to reach decisions on the merits of an appeal, litigating the claims of deceased appellants risks further overburdening the judiciary of these courts and further delaying cases with living defendants. Because reaching a final appellate judgment in these cases would be impractical, adopting the “Massachusetts approach” is the best method to safeguard the procedural rights of the accused and ensure justice to victims.

CONCLUSION

International courts and tribunals should adopt a mixed-method approach when an appellant dies amidst an appeal. Instead of wholly upholding the appellant’s conviction, courts and tribunals should apply the “Massachusetts approach” which allows a court to dismiss an appeal as moot, affirms that the defendant’s presumption of innocence was destroyed, and notes that the conviction was appealed and could neither be upheld nor reversed due to the appellant’s death.²⁴⁸

First, international courts and tribunals should utilize this method because it ensures that the procedural and human rights of defendants are not infringed. Second, victims may still receive reparations even if courts adopt a mixed-method approach, assuaging the fear of alienating victims. Next, the “Massachusetts approach” furthers the varied aims of international criminal law. Finally, this doctrine will not overburden the judiciary of these tribunals. This compromise relieves the defendant from punishment by human hands, but still works to achieve justice for all.

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248. *Commonwealth v. Hernandez*, 118 N.E.3d 107, 110 (Mass. 2019).

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