Misidentification of Victims under International Criminal Law

An Attempted Offence?

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Abstract

Identity of the victim often constitutes an element of the crime in international offences. For instance, victims of genocide are members of one of certain listed protected groups; civilians are protected individuals under crimes against humanity and war crimes; peacekeeping personnel and prisoners of war are protected persons for certain war crimes. A question then arises what should be the legal outcome in cases where the perpetrator commits one of the underlying crimes with a clear intent to harm the protected group or its members yet misidentifies his victim and harms a person who is not actually a member of this group. The article suggests that in such cases, perpetrators may be convicted of an attempted offence (e.g. attempted genocide) against the protected group (the intended victim) and also of a completed offence against the actual victim, when this is possible. Such a legal outcome would assist in expressing accurately the culpability and the wrongfulness of the perpetrator’s acts. Therefore, this article analyses the international legal sources in order to understand whether this outcome is possible and justifiable.

1. Introduction

In the course of the genocide that took place in Rwanda in 1994, a Hutu perpetrator named Mikaeli Muhimana raped a Hutu woman mistakenly believing that she was a Tutsi. Insofar as the intention of the perpetrator was to commit genocide of the Tutsi people, he later apologized to this woman for his...
wrongdoing. The International Criminal Tribunal for Rwanda (ICTR) affirmed that the perpetrator raped with the intent to destroy the Tutsi group or part of it by inflicting ‘severe bodily or mental harm’ on its members. Moreover, the rape of the Hutu woman was explicitly used to prove the special intent of the perpetrator. However, the Tribunal did not take into account this rape as part of the *actus reus* of genocide since the actual victim did not belong to the protected group. This specific conduct, among other actions, served as a basis for convicting the perpetrator of crime against humanity.

The present article offers an alternative legal framework for similar international cases where the victims of the perpetration are misidentified. It is suggested that when the perpetrator commits the *actus reus* with the genocidal special intent, but mistakenly identifies the victim as belonging to the protected group, he should be convicted of an attempted genocide against the protected group, and for a completed crime against the actual victim. In the *Muhimana* judgment, for instance, the rape would constitute the basis for convicting the offender of attempted genocide of the Tutsi people (Articles 6(b) and 25(3)(f) ICC Statute), and of crimes against humanity against the raped Hutu victim (Article 7(1)(g) ICC Statute). This legal framework may extend to any case of misidentification of victims under international criminal law, when identity constitutes an element of the crime. Those cases include, inter alia, persecution of people mistakenly believing they belong to one of the protected groups with the intention to discriminate against this group; attacking combatants in an armed conflict mistakenly believing they are peacekeeping personnel or civilians, with the intention to harm peacekeepers or civilians, respectively. For simplicity, this article first analyses generally the offered legal framework with respect to the crime of genocide. Subsequently, other potential misidentification cases under international criminal law are discussed and the suggested legal framework is extended to them.

Multiple convictions for a single act is a known phenomenon in international criminal law and it is justified, under certain conditions, in order to

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2 Ibid., §§ 512–518.
3 Ibid., §§ 552, 561–563.
4 Hereafter ‘misidentification cases’.
6 Art. 7(1)(b) ICCSt.
7 Art. 8(2)(b)(iii) ICCSt.
8 Art. 8(2)(b)(i) ICCSt.
9 Throughout this article, it is assumed that the other elements of the *actus reus* and the required element of the *mens rea* are in place. The only missing element is the correct identity of the victim, i.e. his membership in the protected group.
10 See discussion infra, Section 3. The approach adopted by the International Criminal Court (ICC) can be found in the following cases: Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, *Bemba Gombo* (ICC-01/05-01/08-424), Pre-Trial Chamber II, 15 June 2009, § 202 with fn. 277; Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Ruto et al.* (ICC-01/09-01/11-373), Pre-Trial Chamber II, 23 January 2012, §§ 280–281.
adequately ‘express the wrongfulness and culpability’ of the offence and the offender.\textsuperscript{11} To illustrate this matter, a hypothetical case can be considered. A perpetrator is killing hundreds of people mistakenly believing they belong to a protected group he wishes to destroy. His intention is clear, but the actual victims of his atrocities do not belong to any protected group. Following the \textit{Muhimana} judgment, and assuming the perpetrator acted in a widespread or systematic context, the perpetrator would be convicted of crimes against humanity for all the murders. However, this conviction ignores his true intention and diminishes the dreadfulness of his actions.\textsuperscript{12} On the other hand, convicting him of attempted genocide for trying to destroy the protected group and for crimes against humanity for killing the actual victims might capture better the complete wrongfulness of his actions. Furthermore, this approach is aligned with the ICC’s emphasis on justice for victims and the search for the truth.\textsuperscript{13} Cumulative convictions as presented above express the harm that was caused to the group (an attempt to destroy them as a group) and to the actual (misidentified) victims.

To the best of my knowledge, to date, there has been no systematic analysis of the legal situation and proposed solution presented above, but only a handful of sources briefly mentioning the possibility of treating mistaken identity in international crimes cases as an attempted offence.\textsuperscript{14} Nevertheless, this idea has not been further developed and the possibility of cumulative convictions in this context has not been analysed.

Section 2 of this article tries to answer the question whether misidentification of victims may legally qualify as an attempted offence. This is done by

\begin{itemize}
  \item \textsuperscript{12} Although there is a dispute in international case law regarding the existence of hierarchy between crimes against humanity and war crimes, there is a general agreement that genocide is the gravest crime of all. Ambos, \textit{Treatise Vol. II, supra} note 11, at 252; \textit{Judgment and Sentence, Kambanda} (ICTR-97-23-S), Trial Chamber I, 4 September 1998, § 16. Furthermore, an empirical investigation of the sentencing practices of ICTY and ICTR suggests that there is a hierarchy between crimes. Namely, genocide is considered the gravest crime, followed by crimes against humanity. See B. Holá, A. Smeulers and C. Bijleveld, ‘International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR, 9 \textit{Journal of International Criminal Justice (JICJ)} (2011) 411, at 421–423.
\end{itemize}
analysing the development of an attempt offence in international law in general, and the relevant rules guiding the ICC in particular. In addition, it demonstrates how the proposed legal framework can be extended to other international crimes, besides genocide, where the identity of the victim is an element of the crime. Finally, this section addresses possible objections to the suggested approach, namely, the mistaken identity doctrine and the impossibility defence. Section 3 analyses the suggested legal framework with respect to the conditions for the accumulation of convictions set by the ICC, ICTR and the International Criminal Tribunal for the former Yugoslavia (ICTY). Section 4 presents the subjective theory that might obviate the need for the proposed legal framework. Finally, Section 5 offers some concluding remarks.

2. The Criminal Attempt

An attempt to commit genocide, or any other crime, belongs to the category of inchoate offences, which include also conspiracy and incitement. An inchoate offence is punishable even though the primary crime attempted was not completed and harm was not inflicted.\(^{\text{15}}\) In order to analyse the feasibility of the proposed legal framework, this article first investigates the criminalization of attempt under international criminal law.

A. Attempts in International Criminal Law: Before Rome

Attempt was not criminalized in the Nuremberg Charter.\(^{\text{16}}\) Nevertheless, Article 6(a) of the Charter criminalized preliminary acts, which could implicitly amount to an attempt.\(^{\text{17}}\) Furthermore, in some rare cases, offenders were convicted for attempted offences in the national post-WWII trials of war criminals (France, Norway, Germany, Canada).\(^{\text{18}}\)

The first international legal source explicitly criminalizing attempts was the Genocide Convention.\(^{\text{19}}\) This inchoate offence was later adopted by the statutes


\(^{\text{16}}\) The Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTC 280, 8 August 1945.

\(^{\text{17}}\) Art. 6(a) reads ‘Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression ...’. The same formulation may be found in Art. 5(a) of The International Military Tribunal for the Far East Charter, 19 January 1946, and a similar wording in Art. II(1)(a) of Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945.


of the ad hoc Tribunals. However, in the ICTY and ICTR Statutes, attempt was not yet defined and related solely to the crime of genocide. An attempt to commit any of the other international crimes was therefore not under the jurisdiction of the ICTY and the ICTR. The Akayesu Trial Chamber stated that the fact the ICTR Statute criminalizes an attempt only in connection to genocide means that a person may not be held criminally liable for the other crimes if they were not completed. In ICTY cases, attempted murder was occasionally charged under other completed offences. For instance, in Vasiljević, the prosecution charged the defendants with ‘inhumane acts’ (Article 5(i) ICTY Statute) and ‘violence to life and person’ (Common Article 3 of the Geneva Conventions) for the attempted murder of two men. For those actions, the Trial Chamber convicted the offenders of ‘inhumane acts’ but acquitted them of ‘violence to life and person’ stating that this was not part of customary law. Similarly, in Mrđa, the defendant was prosecuted and sentenced (after pleading guilty) for ‘inhumane acts’ committed through the attempted murder of twelve men.

The International Law Committee (ILC) was the first to discuss criminalization of attempts beyond the crime of genocide in 1951. The suggested formulation was introduced in Article 2(13)(iv) of the 1954 Draft Code of Offences against the Peace and Security of Mankind: ‘Attempts to commit any of the offences defined in the preceding paragraphs of this article’. The justification for broadening the scope of ‘attempt’ was the gravity of international crimes. At this stage, the concept of ‘attempt’ was still vague and lacked a definition. Only in the 1991 Draft Code did the ILC include a definition of attempt. Article 3(3) read:

An individual who commits an act constituting an attempt to commit a crime against the peace and security of mankind (as set out in arts...) is responsible therefor and is liable to punishment. Attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator’s intention.

20 Art. 4(3)(d) ICTYSst.; Art. 2(3)(d) ICTRSst.
21 Judgment, Akayesu (ICTR-96-4-T), Trial Chamber, 2 September 1998, § 473.
The final version of the attempt provision was presented in the 1996 Draft Code in Article 2(3)(g) —

3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual: ... (g) Attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions. 29

One issue raised during the negotiations of the drafts was the applicability of attempt to all international crimes. Many members of the ILC rejected the possibility of attempting the crime of aggression. A common suggestion was to limit the criminalization of attempt only to genocide and crimes against humanity. 30 As indicated above, in the final draft code of the ILC, attempt was introduced in the context of all the enumerated crimes aside from aggression. The second question was whether an attempt should be a crime in itself or whether it should be included in the general part of the draft. 31 Following the negotiations on that matter, attempt was included in the general part of the 1991 and 1996 Draft Codes.

B. Attempt under the ICC Statute and Misidentified Victims

The primary source to be analysed in order to understand whether misidentification of victims may constitute an attempt to commit an international crime is the ICC Statute. An attempt is criminalized and defined in Article 25(3)(f) ICC Statute:

Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment.

under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

The best way to understand this Article would be to refer to the intention of the drafters and to review the case law on this subject. However, with the purpose of saving time, the Preparatory Committee on the Establishment of an International Criminal Court (the Preparatory Committee) decided not to document in detail the negotiations of the draft statute. As a result, the travaux préparatoires of this statute do not assist in interpreting the different elements of attempt. The limited records of the Preparatory Committee's work refer very briefly to certain issues related to an attempt offence. Those issues include, among others: the necessity to provide a definition of attempt in the statute while reconciling the different meanings and definitions in national laws; a suggestion that a crime of attempt should include something more than mere preparation, or a requirement that the offender commenced the execution of the offence but 'failed to complete it'; the need to discuss the possibility of voluntary abandonment, as a defence or in connection to penalties; and an option to include a provision regarding an attempt in the General Part of the Statute. Nevertheless, as stated before, documentation of the discussions that led to the choice of the specific definition of attempt is not available.

The case law on Article 25(3)(f) ICC Statute is also scarce and provides only limited interpretation of the different elements of the attempt offence. This could be expected due to the gravity of international crimes and the limited resources available to the prosecution. In these circumstances, the prosecution prefers to focus on the gravest completed crimes and not to 'waste' resources.

35 A/AC.249/CRP.3/Add.1, ibid., § 15; A/AC.249/1, ibid., § 100.
36 Decisions Taken by the Preparatory Committee at its Session held from 11 to 21 February 1997, Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.249/1997/L.5 (12 March 1997), Annex III, note 50. Abandonment was eventually included in the ICCSt. as a defence from liability. This defence was added based on the proposal of the Japanese delegation without an extensive debate. See P. Saland, 'International Criminal Law Principles', in R.S. Lee (ed.), The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results (Kluwer Law International, 1999) 189, at 200. Due to the limited scope of the article, and the irrelevance of this part for the analysis, this part is not further discussed.
37 Annex I of A/AC.249/CRP.3/Add.1, supra note 34, note e.
38 For this justification in the context of the ad hoc Tribunals, see G. Mettraux, International Crimes and the ad hoc Tribunals (Oxford University Press, 2005), at 257.
on offenders who ‘just’ attempted to commit the crimes. One question that was
discussed by the ICC is whether the mental element required for the attempt
is the same as for the completed crime, or whether it must always be intent
(and not, for example, recklessness). 39 It seems that, in the Katanga case, the
ICC adopted the former approach, stating that the dolus required for an attempt
is the same as for the completed crime. In this case, the prosecution charged
the defendants with inhumane acts for the ‘infliction of serious injuries upon
civilian residents’. The Chamber rejected the charge of ‘inhumane acts’ and
stated that the correct charge would be an attempt to commit crimes against
humanity through the attempted murder of civilians. 40

An additional case before the ICC that dealt with an attempted murder con-
firms the importance of criminalizing only acts which go ‘beyond mere pre-
paratory acts.’ In the Banda case, the Pre-Trial Chamber confirmed the
charges of attempted war crimes according to Article 25(3)(f) ICC Statute. The
conduct at hand was the injury and attempted murder of the African Union
Mission in Sudan (AMIS) peacekeeping personnel. The Pre-Trial Chamber
stated that in order for an act to be considered an attempt, the act has to
reach a ‘concrete stage’ of the conduct and may not be merely a preparation
for committing the crime. 41

The above-mentioned sources are relevant to the attempted offence under
the ICC Statute. Nevertheless, it does not provide clarification of the different
elements of this offence in a way that would advance the analysis of the legal
framework suggested in this article. Therefore, the remainder of this section
refers to commentaries on the ICC Statute in order to try to understand the in-
tention of the drafters at Rome.

1. The Objective Requirement

Article 25(3)(f) ICC Statute is a combination of the French and American legal
definitions of attempt. 42 The French Penal Code sets the threshold of an act
that amounts to an attempt at ‘le commencement d’execution’. 43 An attempt
provision in the American Model Penal Code, which was adopted by many

39 This question was also raised in the literature. See Ambos, Treatise Vol. I, supra note 14, at
Commentary on the Rome Statute of the International Criminal Court (2nd edn., Beck/Hart,
2008) 743, at 764; Eser, supra note 14, at 811; J.D. Ohlin, Attempt, Conspiracy, and Incitement
to Commit Genocide, Cornell Law Faculty Publications, Paper 24, (2009) 173, at 177–178,
http://scholarship.law.cornell.edu/facpub/24 (visited 12 March 2017); A. Cassese and P. Gaeta,
Cassese’s International Criminal Law (3rd edn., Oxford University Press, 2013), at 200; Cassese,
supra note 18, at 225.
40 Decision on the Confirmation of Charges, Katanga and Ngudjolo Chui (ICC-01/04-01/07-717),
41 Situation in Darfur, Corrigendum of the Decision on the Confirmation of Charges, Banda and
Jerbo (ICC-02/05-03/09), Pre-Trial Chamber I, 7 March 2011, §§ 95–100.
42 Ambos, Article 25, supra note 39, at 764.
US states, requires a ‘substantial step’ in order for an act to qualify as an attempt. Both thresholds appear in the ICC Statute definition of an attempt. The travaux préparatoires, as stated before, merely stress that preparatory acts do not constitute an attempt. However, it is not clear what the minimum conduct that constitutes an attempt is. One commentator on the ICC Statute, Kai Ambos, suggests that the phrase ‘commences its execution’ does not require even partial execution, but rather refers to an act that precedes the actual commission of the crime. Furthermore, the ‘substantial step’ implies that there might be other necessary acts in order to complete the crime. Therefore, the combination of those two notions implies that not all actions need to be completed (based on the perpetrator’s perception) in order to constitute an attempt offence, but that some steps might still be missing. This view is partially supported by the ICC case law. In the Katanga case, the Pre-Trial Chamber stated that in an attempted offence the subjective element (intent) must be complete but not the objective elements. This approach was later repeated in the Banda case.

Another commentator, Albin Eser, asserts that commencement of execution provides the ‘doctrinal basis’ to distinguish attempted crime from preparatory acts. The ‘substantial step’, on the other hand, serves as evidence for the commencement of the crime. However, since the ICC Statute does not specify which acts constitute a substantial step, this should be decided based on the question of whether the relevant act endangers the protected interest. Similar to Ambos, Eser asserts that there is no requirement even for a partial completion of ‘the definitional elements of the crime’. In any case, considering the gravity of international crimes and the protected legal interests at hand, the threshold for deciding which action constitutes an attempt should not be too high.

Attempts under this article’s proposed legal framework belong to the category of completed attempts. The perpetrator in the relevant cases fulfils all the actions he planned in order to execute the primary offence. Yet, his end goal is not achieved due to incomplete actus reus. The example of the Muhimana case can be analysed in this context. The relevant underlying offence is against the prohibition in Article 6(b) ICC Statute — ‘Causing serious bodily or mental harm. Therefore, the first part of the actus reus that is required for proving genocide through rape, is the actus reus of a rape. Assuming that this is demonstrated, the second element that needs to be proven is the identity of the victim — ‘to members of the group’ (Article 6(b) ICC Statute). The actus

45 Art. 5.01(1)(c) of the Model Penal Code (1962).
46 Schabas, supra note 33, at 336.
48 Katanga, supra note 40, § 460.
49 Banda, supra note 41, § 106.
50 Eser, supra note 14, at 812.
**reus** of genocide may be completed only if the victim is an *actual* member of the group.\(^{52}\)

The above-mentioned case law and literature suggest that there is no requirement to prove the fulfilment of all the objective elements of the act in order to meet the condition of commencement of execution with a substantial step. In the context of this article, what is attempted is the act of genocide, and not the underlying offence(s).\(^{53}\) It should be kept in mind that the principal victim in genocide is the group. The mental element of genocide requires that the perpetrator target the group ‘as such’. In other words, the person who commits genocide does not want to harm the victim because of that victim’s individual characteristics. Rather, it is the destruction of the group (or part of it) that drives the person to commit offences against its members.\(^{54}\) There is no requirement that the victimization of the specific victim must in fact have an impact on the destruction of the group, but just that the perpetrator intended it to be so.\(^{55}\) Therefore, the harmed individuals are the means to achieve the goal of destroying the group (or part of it),\(^{56}\) and attacking misidentified individuals while believing they belong to the protected group equals to using the wrong means to achieve the same goal. Based on this analysis, and given the existence of the special intent, it may be possible to assert that the perpetrator in *Muhimana*, or in similar cases, commenced the execution of genocide by the substantial step of raping a girl he believed to be a Tutsi.

This may be contrasted with an attempt to commit the underlying offence. In order to constitute an attempt the offender would need to commence his attack against the intended victim. In these circumstances, only the physical attempt to rape the actual member of the group may constitute an attempt to commit the underlying offence. Thus, an attack against a non-member of the group may not constitute commencement of execution of the crime against the actual member. Attempting to commit an underlying offence is the situation in the *Katanga* and *Banda* cases where the perpetrators allegedly injured the ‘properly identified’ victims while having the intention to kill them. Thus, the Pre-Trial Chamber confirmed the charges of attempted murder against these alleged perpetrators.\(^{57}\)

\(^{52}\) See for instance, Judgment and Sentence, *Semanza* (ICTR-97-20-T), Trial Chamber III, 15 May 2003, § 319. For a different view, the subjective approach, which places emphasis on the perception of the offender rather than the objective identity of the victim, see discussion infra Section 4.

\(^{53}\) For the possibility of interpreting the attempt offence under the ICCSt. as an attempt to commit the substantive crime rather than just the underlying offences see Ohlin, *supra* note 39, at 174–177.


\(^{57}\) *Katanga*, *supra* note 40, § 458; *Banda*, *supra* note 41, § 98.
2. Incompleteness of the Crime

Article 25(3)(f) ICC Statute provides that a person is liable only if ‘the crime does not occur because of circumstances ‘independent of the person’s intentions’.

This part also resembles article 121-5 of the French Penal Code. In other words, if the crime was not completed as a result of the perpetrator’s intention and actions, he would not be liable for his attempt. As stated before, the travaux préparatoires and ICC case law do not provide an interpretation of this part and thus do not assist in understanding which circumstances are independent from the perpetrator’s intentions. However, some commentators that served as members of the Rome Conference delegations offer a possible interpretation. For instance, Eser enumerated the circumstances that can constitute the ‘objective failure’ that would make an attempt punishable:

[T]he inaptitude of the means (e.g. use of inefficient tools), unsuitability of the object (e.g. if in case of a war crime military objects were mistaken for civilian ones), the inability of the perpetrator (if, for instance, an ordinary soldier, wrongly considering himself a commander, attempts to ‘order’ a genocidal action), or, though in rather exceptional cases, on grounds of justification (or some other circumstance negating the fulfilment of the definitional elements of the crime) the perpetrator did not know of (as for instance, if the victim to be deported in fact wished to leave this region without letting the perpetrator know).

The circumstances of misidentification cases fall under the category of ‘unsuitability of the object’. The object of the perpetrator’s crime is the protected group and its members. When the victim is misidentified as a member of the protected group, he becomes the unsuitable object for committing genocide. Therefore, if one chooses to follow this approach, the perpetrator fails to complete his intended crime — genocide — due to circumstances independent of his intentions — the fact that the victims is ‘unsuitable’ to perpetrate that crime.

The approach of treating misidentification of genocide victims as an attempted genocide can be found also in the literature. Moreover, the ICTY Trial Chamber in Krnojelac mentioned in obiter dicta the possibility of convicting a person for attempted persecution in case he mistakenly targeted a non-member of the protected group. The reason why this legal outcome was not further developed is the fact that attempted persecution was not under the jurisdiction of the ICTY:

58 Art. 121–5 of the French Code Pénal: ‘La tentative est constituée dès lors que, manifestée par un commencement d’exécution, elle n’a été suspendue ou n’a manqué son effet qu’en raison de circonstances indépendantes de la volonté de son auteur.’ (emphasis added).
59 Ambos, Article 25, supra note 39, at 764.
61 Eser, supra note 14, at 810 (emphasis added). Those circumstances were later on repeated by
62 Ambos, ibid., at 256.
63 Krnojelac, supra note 14, ft. 1292.
The existence of a mistaken belief that the intended victim will be discriminated against, together with an intention to discriminate against that person because of that mistaken belief, may in some circumstances amount to the inchoate offence of attempted persecution, but no such crime falls within the jurisdiction of this Tribunal. 64

C. Misidentification of Victims of International Crimes

The possible misidentification of victims is not limited to members of the protected groups under the crime of genocide. The identity of the victims is an element of other international crimes. Therefore, if the legal framework for misidentification cases is accepted with respect to the crime of genocide, its application may be reasonably extended to any crime (under the jurisdiction of the ICC) that includes the identity of the victim as an element of the crime.

Under the crime of genocide, the perpetrator may misidentify not only the ‘members of the group’ according to Articles 6(a) and 6(b) ICC Statute, but also the children of the group when forcibly transferring them to another group (Article 6(e) ICC Statute) with the criminal intent to destroy, in whole or in part, the target group. This provision requires that the children belong to the victim group and are transferred to a different group. 65 Therefore, if those children do not actually belong to the protected group, but all other elements of the crime are fulfilled, this conduct can be regarded as an attempt to commit genocide through the underlying act of forcible transfer of children.

Crimes against humanity also raise some possibilities for incorrect identification of the victims of the offence. First, the chapeau of Article 7 ICC Statute (dealing with crimes against humanity) states that the population object of the attack must be civilian. Even though ‘civilian population’ is not defined in the ICC Statute, it is well established in the international humanitarian law and supported by international case law that ‘civilian population comprises ... all persons who are civilians as opposed to members of the armed forces and other legitimate combatants.’ 66 Therefore, cases where the perpetrator commits the underlying offences enumerated in Articles 7(1)(a)–(h) ICC Statute against combatants while believing they are civilians could be treated as attempts to commit crimes against humanity against civilians.

The second conduct under crimes against humanity that poses a potential for misidentification of the victims is the crime of persecution (Article 7(1)(h) ICC Statute). Persecution requires special intent (dol spécial) to discriminate against a person or a group 67 based on the listed prohibited grounds through the commission of one of the underlying offences listed under crimes against

64 Ibid.
65 Schabas, supra note 33, at 202.
66 Judgment, Kunarac et al. (IT-96-23 & IT-96-23/1-A), Trial Chamber, 22 February 2001, § 425; Bemba, supra note 10, § 78. It should be stressed however, that the target of the attack must be the civilian population (even if not entire) and not merely ‘limited and randomly selected group of individuals’. Ibid., Bemba, §§ 76–77.
67 Cassese (2008), supra note 18, at 115.
humanity, or other acts of the same gravity.\textsuperscript{68} The \textit{actus reus} in this context has to be against actual members of the protected group (‘against any identifiable group’).\textsuperscript{69} Therefore, in the circumstances where the perpetrator erroneously engages in ‘severe deprivation of fundamental rights’\textsuperscript{70} of a non-member of the protected group, the missing element is the victim’s actual membership in this group. However, committing the physical act with the required intent may be regarded as a substantial step towards the execution of the crime. Consequently, this situation might be regarded as an attempted persecution.

The third conduct under crimes against humanity where the identity of the victim is an element of the crime is forced pregnancy (Articles 7(1)(h) and 7(2)(f) ICC Statute).\textsuperscript{71} In order to be liable for committing crimes against humanity through the underlying conduct of forced pregnancy the prosecution must prove, inter alia, that a pregnant woman was confined with the intent of affecting the ethnic composition of a certain population.\textsuperscript{72} This specific intent suggests that the perpetrator and the victim must be members of different ethnic groups.\textsuperscript{73} Therefore, if a perpetrator forcibly confines a pregnant woman of his ethnic group erroneously believing she belongs to the target (i.e., different ethnically) group and intends by his actions to affect the ethnic composition of the target population, his conduct can be regarded as an attempt to commit crimes against humanity against the target population.\textsuperscript{74}

The identity of the victim is an element of the crime in some provisions of war crimes as well. First, as with crimes against humanity, civilians are also protected as a group under war crimes\textsuperscript{75} and, therefore, misidentification of those victims might result in a conviction for attempted war crimes.\textsuperscript{76} Other underlying offences of war crimes that include identity as an element of the crime refer to protected persons under the Geneva Conventions or ‘person taking no active part in the hostilities’;\textsuperscript{77} peacekeepers or other personnel who are ‘involved in humanitarian assistance’;\textsuperscript{78} nationals of the hostile

\textsuperscript{68} Judgment, Kupreškić et al. (IT-95-16), Trial Chamber, 14 January 2000, § 621.
\textsuperscript{69} See for example, Krnojelac (TC), supra note 14, §§ 431–432 (persecution). For a different approach see infra Section 4.
\textsuperscript{70} Art. 7(2)(g) ICCSt.
\textsuperscript{71} This prohibition exists also under war crimes, Art. 8(2)(b)(xxii) ICCSt. Thus, a similar analysis applies to that provision.
\textsuperscript{73} Ibid.
\textsuperscript{74} It should be noted that in this particular case the proposed solution is not necessary since the alternate intent in the article is broader and allows a prosecution for forced pregnancy also when committed with a general intent to commit ‘grave violations of international law’. See Art. 7(2)(f) ICCSt. and Boon, ibid., at 665. It is merely discussed for illustrative purposes.
\textsuperscript{75} Arts 8(2)(b)(i), (iv), (xxv), and (e)(i)(viii) ICCSt.
\textsuperscript{76} Namely, attacking combatants believing they are civilians, and intending to harm civilians, can be regarded as the independent circumstance that led to the failure of completing the crime, and constitute an attempted war crime. See Eser, supra note 14, at 810.
\textsuperscript{77} Arts 8(2)(a) and (c) ICCSt.
\textsuperscript{78} Arts 8(2)(b)(iii) and (e)(iii) ICCSt.
party; and children under the age of fifteen. Commission of any of the relevant underlying offences against misidentified victims, in the belief that they belong to those protected groups (and intending to harm those groups), may constitute the offence of an attempt to commit war crimes against the intended victims.

D. Possible Objections and Proposed Solutions

This section presents two possible, yet opposite, objections to the legal framework of treating misidentification of victims as an attempted offence.

1. Error in Persona (Mistaken Identity)

The situation where a person intends to commit a crime, e.g. murder, against A but kills B mistakenly believing he is A, is covered under national laws by the ‘error in persona’ or mistaken identity doctrine. The general rule in these circumstances is that the mistake regarding the identity of the victim is irrelevant for the liability of the offender for the completed offence. The condition is, however, that both victims are of the same nature. For instance, the offence of murder protects the life of any human being. Thus, the offender would be convicted for the murder of the actual victim even though he intended to kill someone else, since both victims are ‘human beings’.

Article 32(1) ICC Statute is the source that provides the legal rule for mistake of fact under the ICC jurisdiction: ‘A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime’. This Article does not cover explicitly the situation of mistaken identity as described above. Nevertheless, careful reading of the Article leads
to the conclusion that also under international law, when identity is not part of the crime’s material elements, a mistake regarding the object of the offence does not exclude criminal responsibility. Killing one person, while mistaking him for another, is an irrelevant mistake that does not negate the perpetrator’s criminal intent. Both victims are human beings and all the material elements of murder are fulfilled (bringing the death of a human being/civilian).84

Based on the *error in persona* doctrine, one might also argue that in situations of mistaken identity as discussed in this article, the mistake should be irrelevant for criminal responsibility of the complete offence. Thus for instance, in the *Muhimana* case, the intent of the perpetrator to harm actual members of the group in order to destroy the group should be ‘transferred’ to the actual victim. As a result, the legal outcome should have been a conviction of Muhimana for genocide also based on the *actus reus* of the rape of the Hutu girl.

This argument is incorrect. The underlying condition for the *error in persona* doctrine to be applied is that the victims are *of the same nature* based on the material elements of the crime. When identity is a constituent element of the crime, the misidentified victim and the intended victim are no longer of the same nature. The international crimes enumerated in this article treat the identity of victims as a material element of the offence. For example, the crime of genocide, as defined in Article 6 ICC Statute, is not meant to protect the lives of all human beings as such. Rather, the protected interest is the existence of the four specified groups, i.e. national, ethnical, racial or religious. Therefore, in order to constitute a crime of genocide, the underlying offences enumerated in Articles 6(a)–6(e) must be committed against *actual* members of the protected group.85 Consequently, a mistake with respect to the identity of the victim as belonging to the protected group is relevant for criminal liability for genocide.

A similar example may be taken from a national jurisdiction. The Philippines Penal Code criminalizes the crime of parricide, killing one’s own parents or other close relatives, as a distinct crime from a general homicide. This distinction is even expressed in the prescribed sanction. The maximum available penalty for parricide is a death penalty, and for homicide it is imprisonment.86 One of the material elements of the crime of parricide is that the victim is a ‘... father, mother, or child, whether legitimate or illegitimate, or any of [the offender’s] ascendants, or descendants, or his spouse ...’87 Therefore, if a person murders another, mistakenly believing the victim to be, for instance, his parent,

85 Art. 6 ICCSt.: ‘(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.’ (Emphasis added).
87 Art. 246 of *The Revised Penal Code of the Philippines* -1930.
he would not be convicted for parricide, but for a ‘regular’ murder. The reason is that it is not feasible to transfer the intent to kill a parent to a random victim. The protected interest in criminalizing parricide is the inviolability of life of one’s family members and not the life of all people.

Furthermore in the context of genocide, allowing for a ‘transfer’ of intent may theoretically create a situation whereby a person is convicted for committing the (complete) crime of genocide, the ‘crime of crimes’, without harming even a single member of the protected group, but merely for intending to do so.

2. Impossibility Defence

Another plausible counterargument to the proposed legal solution of treating misidentification of victims as an attempted offence is the impossibility defence. Under this defence, if a person performed the *actus reus* with the required intent but, due to some error, the completion of the offence was impossible, he is not liable for the attempted offence. Examples of impossible attempts are: trying to steal from an empty pocket; to murder a corpse believing the victim is alive; trying to poison with a harmless substance believed to be poison, etc. In the context of this article, harming misidentified victims who do not belong to one of the protected groups, as was the case in *Muhimana*, makes the completion of genocide impossible.

The ICC Statute is silent on the matter of impossible attempts. Similarly, the *travaux préparatoires* of the Statute do not offer any discussion on the ‘punish-ability’ of impossible attempts. In addition, to date, this question was not raised by the case law. This might be understandable since impossible attempts are a sub-category of general attempts, which as stated before, are rarely prosecuted at all. In these circumstances, when the international sources do not provide with an answer to a legal question, international tribunals occasionally turn to domestic practices in order to understand better certain concepts. Such an approach can also be found in the commentaries on the ICC Statute. Based on this practice, the following discussion presents briefly the approaches adopted by some of the jurisdictions of the two major legal systems,

88 For a similar conclusion with respect to the hypothetical crime of parricide see Schabas, *supra* note 33, at 128.


91 See *supra* notes 32–33 and the accompanying text.

92 Mettraux, *supra* note 38, and the accompanying text.


common and civil law. This discussion is not exhaustive due to the limited scope of this article, and it does not presume to unveil a customary rule. Instead, it provides limited information regarding the question of whether there is a consensus with respect to the ‘punishability’ of impossible attempts under different domestic laws.

Under national criminal justice systems, there are two main approaches to impossible attempts. The objective approach warrants punishment of attempts only if the actions of the offender would actually result in the intended outcome had it not been interrupted. In other words, the completion of the crime must be objectively possible in order to constitute an attempt. The mistaken perception of the offender regarding the suitability of his actions is irrelevant to his liability. On the contrary, the subjective approach focuses on the belief of the offender. Thus, if the offender executes his conduct with the intention of committing a crime and the belief that his actions would bring about this outcome, he should be liable for an attempted offence even if objectively the completion of the crime is impossible.

In the context of this article, the objective approach would lead to the conclusion that the perpetrator may not be liable for an attempted offence since based on actual facts his conduct could not result in his intended outcome. On the other hand, the subjective approach would exclude this defence. For instance, in Muhimana, what matters under the subjective approach is that the perpetrator raped with the intention of committing genocide against the Tutsi, believing that his actions would bring about this result. His mistake regarding the true identity of the victim is thus irrelevant to his culpability.

Although in the past the objective approach to attempts was predominant, nowadays all the major common law legal systems and some of the major
civil law legal systems,100 criminalize impossible attempts. According to Section 5.01 of the American Model Penal Code:

A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he ... purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime (emphasis added).

According to the explanatory note of the Model Penal Code, the emphasis is on the circumstances as perceived by the perpetrator and not those that actually exist, thus, rejecting the impossibility defence.101 This approach was confirmed by the United States Court of Military Appeals in the case United States v. Thomas. In this case, two men raped a woman they believed to be unconscious. In fact, the woman had died a few minutes before the rape. Since the rape can only be carried out against a living human being, this mistake made the offence of rape impossible. However, the court confirmed the perpetrators’ conviction for attempted rape since, according to what they thought, they were raping a drunken, unconscious woman without her consent. Insofar as the perception of the offender is the important element of the attempt crime, they could not enjoy the impossibility defence.102

Similarly, the Criminal Attempts Act 1981 (England and Wales) states that ‘[a] person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.’103 This Act resolved the controversy in the English case law between the objective and the subjective approaches. In the case R v Shivpuri, which followed the introduction of the Act, the House of Lords implemented the subjective approach when they confirmed a conviction for transporting drugs based on the offender’s belief that the substance he was transporting was heroin, even though it was not.104

Likewise, the German Criminal Code provides that [a] person attempts to commit an offence if he takes steps which will immediately lead to the

100 France and Germany, as discussed infra in notes 105–109 and the accompanying text. There are more civil law countries that criminalize impossible attempts, e.g. China: Art. 23 of the Criminal Law of the People’s Republic of China states ‘Criminal attempt occurs when a crime has already begun to be carried out but is not consummated because of factors independent of the will of the criminal element.’ In Sieber and Cornils, ibid., at 803, it is explained that the case law in China treats impossible attempts due to unsuitable object or means as punishable; Poland: Art. 13(2) of the Polish Criminal Code explicitly provides that An attempt also occurs when the perpetrator is not himself aware of the fact that committing it is impossible because of the lack of a suitable object on which to perpetrate the prohibited act or because of the use of means not suitable for perpetrating this prohibited act.’
101 Model Penal Code, at 76. All of the American states have adopted this approach and abolished the imposibility defence. See Fletcher, supra note 98, at 169.
103 Art. 2 of the Criminal Attempts Act 1981 (emphasis added).
completion of the offence as envisaged by him.\textsuperscript{105} Impossible attempts due to unsuitable object or insufficient means were punishable even before the introduction of this section in 1969. The rule on that matter was developed by the courts.\textsuperscript{106} The French provision of the \textit{Code Pénal} on attempts is not explicit on the question of impossible attempts. However, already in 1928 the Court of Cassation determined that all impossible attempts are punishable.\textsuperscript{107} In that case, the defendants tried to cause an abortion by using a substance that under no circumstances could have achieved this goal. The court treated this as an impossible attempt, but stated that this (completed) conduct constituted the commencement of execution to perform an abortion. Furthermore, the court decided that insufficiency of the means is a circumstance beyond the offenders’ control due to which the attempt has failed. Thus, the conviction of the defendants (appellants) for attempted abortion was confirmed.\textsuperscript{108} This approach was later practiced in other cases as well.\textsuperscript{109} The example of France is especially interesting since the first part of the definition of an attempt under the ICC Statute is almost identical to the definition in the French \textit{Code Pénal}.

The widespread adoption of the subjective approach with respect to impossible attempts in national laws might suggest that a conceivable interpretation of Article 25(3)(f) ICC Statute includes impossible attempts. However, the fact that there are still legal systems that do not punish impossible attempts, such as Italy, Spain and Austria,\textsuperscript{110} makes it difficult to derive strict interpretation of an attempted offence under the ICC Statute only based on national practices. Therefore, other ways of interpretation ought to be used in order to see if the subjective approach to impossible attempts may be supported under international criminal law.

One possibility for deciding whether impossible attempts are punishable under international law is to resort to the rationale behind criminalizing attempts in general.\textsuperscript{111} If the attempt provision is destined to protect a certain object (e.g. the specific harmed victim), then impossible attempts should not be punishable. In such circumstances, there is no endangerment of the protected interests and, therefore no justification to punish the act. On the other hand, if the prohibition of attempts is designed to punish mere wrongful intentions, then all impossible attempts should be punishable, even using witchcraft when attempting to complete a crime.\textsuperscript{112}

\textsuperscript{105} Art. 22 of the German \textit{Criminal Code} (Strafgesetzbuch, StGB) (emphasis added).
\textsuperscript{106} Law Commission, \textit{supra} note 98, at 45; Bohlander, \textit{supra} note 81, at 144.
\textsuperscript{107} Cass. crim., 9 November 1928, Fleury, D., 1929.I.97.
\textsuperscript{108} \textit{Ibid.}; Elliot, \textit{supra} note 81, at 99.
\textsuperscript{109} For example, Cass. crim., 16 January. 1986, Bull.crim. n° 25. In this case, the offender was convicted for an attempted murder for trying to kill an already dead person (not knowing he was dead). Hence, even though the murder offence was impossible to complete since the victim was dead, the Court of Cassation still found the offender liable for an attempt. Elliot, \textit{ibid.}, at 100.
\textsuperscript{111} Eser, \textit{supra} note 14, at 813.
\textsuperscript{112} \textit{Ibid.}
The best source that could provide the intention of the drafters in criminalizing attempts is the *travaux préparatoires* of the ICC Statute. However, since there is no available documentation of the negotiations,\textsuperscript{113} there is no reference to the reason why the drafters chose the definition of Article 25(3)(f) ICC Statute. The case law of the ICC also does not discuss the justifications for punishing attempts. The next best thing is therefore to resort to the ILC commentary.

The chosen wording in the ICC Statute definition of attempt heavily relies on the ILC Draft of 1996 as can be seen from the similarities. There are only two differences. First, the explicit definition in the ILC Draft does not include the words 'substantial step'. However, in the ILC commentary, it is clearly stated that the existence of a substantial step is required in order to convict for an attempt.\textsuperscript{114} Second, the ILC Draft does not include the abandonment defence. Nevertheless, this sentence might be viewed as redundant since the previous sentence of Article 25(3)(f) ICC Statute — ‘the crime does not occur because of circumstances independent of the person’s intentions’ — already covers the abandonment defence. In other words, in case the crime was not completed as a result of the perpetrator’s intention and actions, he would anyway not be liable for his attempt.\textsuperscript{115} Furthermore, the ILC indirectly refers to abandonment in its commentary as excluding criminal responsibility for a criminal attempt.\textsuperscript{116} Therefore, reviewing the explanation of the ILC drafters regarding the rationale to make attempts punishable can shed some light on the purpose of Article 25(3)(f) ICC Statute. The use of ILC commentaries to clarify different issues raised in the ICC work is found also in the literature.\textsuperscript{117}

The ILC offered two justifications for the inclusion of attempt as a crime under the jurisdiction of the ICC. First, the perpetrator did not complete the commission of the crime *despite* his intent and therefore has a high degree of blameworthiness. Second, the significant step taken by the perpetrator to execute one of the gravest crimes by itself poses a threat to international security.\textsuperscript{118}

The justifications advanced by the ILC for criminalizing an attempt support the suggested legal solution. Namely, in misidentification cases the perpetrator does not complete the primary offence only due to a mistake in identity, and despite his intent. This implies that he can be assigned a high degree of blameworthiness, which is the same as for the completed crime. Furthermore, this conduct in itself presents a threat to international security since the perpetrator did everything in his power to commit such grave crimes as genocide: he did not succeed only due to a factor that did not depend on his intention (as opposed to cases of voluntary abandonment).

\textsuperscript{113} Bos, *supra* note 32, at 51.
\textsuperscript{115} Ambos, *Article 25*, supra note 39, at 764.
A support for this view can be found also in ICTY and ICTR case law. Different trial and appeal chambers of the two ad hoc tribunals expressed the view that making inchoate offences punishable is justified due to the need for early prevention of the substantive crimes.\textsuperscript{119}

Under national laws, criminalization of a complete attempt is perceived as more justifiable as compared to incomplete attempts. An incomplete attempt refers to a situation where the individual did not perform all the acts he intended to in order to execute the primary crime. On the other hand, a complete attempt suggests that the person did everything he planned in order to bring about the completion of the primary offence, but his conduct nonetheless did not result in the harm he wished for. For example, putting a harmless substance in another person's drink believing it to be poisonous.\textsuperscript{120}

The culpability of a person engaging in such a completed attempt equals the blameworthiness of an offender who completed the primary offence. The result did not occur only due to random events and, arguably, chance should not be a factor in criminal law. On the other hand, when the individual did not commit all the acts he intended to, there is a chance he would have regretted and not committed the crime if he had not been stopped.\textsuperscript{121}

Furthermore, letting complete attempts, which did not succeed only due to a mistake in circumstances, go unpunished might encourage the offender to 'do better' the next time.\textsuperscript{122} Similar reasoning can apply in the context of the proposed legal outcome of misidentification cases. In these circumstances, the perpetrator completed all the intended acts in order to execute his plan of committing the crime in question. The only reason he failed was the fact that he made a mistake of identity. This should not exclude his criminal liability for attempting to commit the primary crime since his culpability from a subjective perspective is the same as in the case where he would not have made such mistake.


\textsuperscript{120} A. Ashworth, ‘Attempts’, in J. Deigh and D. Dolinko (eds), \textit{The Oxford Handbook of Philosophy of Criminal Law} (1st edn., Oxford University Press, 2011) 125, at 137. It should be stressed that the differentiation between a complete and incomplete attempt is not the same as possible and impossible attempt. An attempt can be incomplete but possible (for instance, a person trying to rape a woman and does not succeed because the woman escapes). In this case, the attempt was possible (if the woman did not escape, she would have been raped). At the same time, the attempt was incomplete, the woman escaped before the perpetrator penetrated her. An attempt can also be impossible but complete, e.g. casting a spell on a person with the intention to kill him. The person completed all the actions he intended (casting the spell) but the victim did not die because magic does not really work, making the attempt impossible.

\textsuperscript{121} Ashworth, \textit{ibid.}, at 138; Ashworth and Horder, supra note 15, at 456.

\textsuperscript{122} The Law Commission, \textit{supra} note 98, at 51.
3. Misidentified Victims and Cumulative Convictions

If one accepts the legal outcome of convicting perpetrators of an attempted offence in misidentification cases, the second step is to determine whether cumulative convictions are legally plausible and justifiable in such cases. As explained in the introduction, the present article suggests that it is possible to convict perpetrators in misidentification cases of attempted offences against the intended victims and to convict them of a completed crime actually committed against the actual victim. Therefore, in the Muhimana case mentioned at the onset, the perpetrator should have been convicted of attempted genocide against Tutsi, and of crimes against humanity against the raped Hutu girl.

The practice of cumulative convictions based on the same act is not new in international criminal case law. This topic received explicit attention from the ad hoc Tribunals and the ICC.123 The main problem with cumulative convictions is the prohibition of double jeopardy, the rule according to which a person may not be convicted twice for the same act.124 However, the ICTY developed a test, known as the Čelebići test,125 to decide when cumulative convictions are permitted. This test was also followed by the ICTR and adopted by the ICC.126 The Čelebići test states that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.127

For instance, it was decided that a person could not be convicted, based on the same act, for wilful killing under both Article 2 ICTY Statute and Common Article 3 of the Geneva Conventions (pursuant to Article 3 ICTY Statute). Based on the Čelebići test, Article 2 ICTY Statute requires proof that the victim was a 'protected person'. This element is not a prerequisite under Common Article 3. However, there is no element required by Common Article 3, which would not also be required under Article 2. Therefore, in such cases, a defendant can be convicted only for wilful killing under Article 2, since the

123 See infra notes 126–132 and the accompanying text.
125 Čelebići, supra note 93, §§ 412–413.
127 Čelebići, supra note 93, § 412.
other offence is subsumed by this conviction.\textsuperscript{128} On the other hand, a defendant can be convicted, based on the same conduct, for murder as a war crime and for the same murder as a crime against humanity. War crimes necessitate the element of ‘armed conflict’ in order for a conviction to ensue, but this element is not required under crimes against humanity. Conversely, the element of a widespread or systematic attack is essential for the proof of crimes against humanity, but not for war crimes. Therefore, the Čelebići condition of the existence of different elements is met, and a cumulative conviction is permissible.\textsuperscript{129}

Since there is an overlap in the \textit{actus reus} of genocide and crimes against humanity, 12 convolution of convictions for those types of crimes was specifically addressed in case law. The ad hoc Tribunals reached a consensus that defendants can be convicted for both crimes against humanity and genocide based on the same conduct. The Čelebići condition for cumulative convictions is fulfilled since genocide includes the special element of intent to destroy, in whole or in part, one of the protected groups (an element that does not appear in crimes against humanity). Crimes against humanity, on the other hand require proof of a widespread or systematic attack against a civilian population, an element not included in genocide.\textsuperscript{130} Finally, the ICTY and the ICTR approved cumulative convictions for inchoate offences (genocide) and completed offences (crimes against humanity) based on the same acts.\textsuperscript{131} The reason is that the required special intent for genocide is the same for completed crime and for the inchoate offences.\textsuperscript{132}

The Čelebići test can also be applied to misidentification cases. A conviction for attempted genocide, based on Articles 6 and 25(3)(f) ICC Statute, entails the proof of a special ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group’. This intent is not part of the elements of crimes against humanity. On the other hand, the perpetrator needs to have knowledge about the context of ‘widespread or systematic attack directed against any civilian population’ in order to be convicted for crimes against humanity based on his completion of one of the underlying offences (Article 7 ICC Statute). This element is not necessary for a conviction of attempted genocide.\textsuperscript{133}

In theory, the targeted victims of genocide do not even have to be civilians.\textsuperscript{134}

\textsuperscript{128} Ibid., § 422–423.
\textsuperscript{129} Jelisić, supra note 126, § 82; Kupreškić et al., supra note 126, § 387–388; Popović et al., supra note 119, § 2112; Blagojević and Jokić, supra note 126, § 800.
\textsuperscript{130} Popović et al., ibid., § 2115; Ntakurutimana and Ntakurutimana, supra note 126, § 864; Kristić, supra note 11, §§ 218, 219, 223, 229; Musema, supra note 126, §§ 365–367; Ntagerura et al., supra note 126, §§ 425–426; Semanza, supra note 126, §§ 315, 318; Gatete, supra note 126, § 663; Ndahimana, supra note 126, §§ 846–847; Nahimana et al., supra note 119, §§ 1029–1030, 1032; A. Cassese, ‘Genocide’, in The Rome Statute Commentary, supra note 11, at 335–351.
\textsuperscript{131} Popović et al., ibid., § 2117; Nahimana et al., ibid., §§ 1034–1036.
\textsuperscript{132} Popović et al., ibid.
\textsuperscript{133} Judgment, Kordić and Čerkez (IT-95-14/2-A), Appeals Chamber, 17 December 2004, § 1040. Therefore, in practice the perpetrator may have special intent to destroy (genocide), but at the same time also knowledge of the ongoing widespread or systematic attack (crimes against humanity); this does not prevent a cumulative conviction.
\textsuperscript{134} Kristić, supra note 11, § 226.
Consequently, based on international case law analysis, there is nothing in principle preventing a conviction of a perpetrator for attempted genocide against the intended victim and for a completed crime against humanity against the actual victim. With regard to other cases of misidentified victims described above in Section 2.C, the question of cumulative convictions would depend on the nature of the offences. The condition of the Čelebići test would need to be reviewed in each case in order to determine the legal outcome.

4. Misidentification and the Subjective Theory

The analysis thus far has followed the objective theory of international crimes. That is to say, victims of international crimes must be identified according to objective criteria. For instance, in order to constitute the crime of genocide, the victims must actually belong to the protected group. However, both the literature and case law also discuss the subjective theory, where the emphasis is on the perception of the perpetrator. This approach would obviate the need for the suggested legal framework forasmuch as the offender can be convicted for the intended completed offence even if the victim was misidentified by him. In order to better understand the subjective approach, this section presents the debate between the objective and the subjective perspectives on the misidentification of victims.135

There is disagreement among scholars and practitioners about which approach — objective or subjective — should prevail when trying to identify members of a protected group (whether under the crime of genocide or

135 The subjective versus objective discourse on the identification of members of a protected group was preceded by a broader discussion on the identification of the group in specific cases. This subject is addressed in case law as well as in academic literature and in other official documents. The objective approach, which requires the identification of the group to be based on scientific features, was rejected due to the lack of a clear commonly accepted definition of those features. The subjective approach, on the other hand, has been accepted by the Tribunals in some cases. Based on the latter concept, it is sufficient to demonstrate that the perpetrator identified the targeted group as constituting a national, racial, ethnic or religious group. The main criticism against this approach is that it might lead to the protection of an objectively non-existent group. Inasmuch as both the objective and the subjective approaches have their drawbacks, the international case law adopted a hybrid approach. Therefore, the question whether a group of victims is protected by the crime of genocide is decided on a ‘case-by-case’ approach taking into account both the objective and the subjective features. For the different arguments see, Schabas, supra note 33, at 129; Judgment, Krstić (IT-98-33-T), Trial Chamber, 2 August 2001, § 556; Judgment, Gacumbatsi (ICTR-2001-64-T), Trial Chamber III, 17 June 2004, § 254; Judgment and Sentence, Kajelijeli (ICTR-98-44A-T), Trial Chamber II, 1 December 2003, § 811; Judgment, Kamuhanda (ICTR-95-54A-T), Trial Chamber II, 22 January 2004, § 630; Judgment and Sentence, Rutaganda (ICTR-96-3-T), Trial Chamber I, 6 December 1999, §§ 56–58; Judgment and Sentence, Semanza, supra note 52, § 317; Judgment and Sentence, Musema, supra note 119, §§ 161–163; Judgment, Seromba (ICTR-2001-66-I), Trial Chamber I, 13 December 2006, § 318; Judgment, Blagojević and Jokić (IT-02-06-T), Trial Chamber I, Section A, 17 January 2005, § 667; Judgment, Brdanin (IT-99-36-T), Trial Chamber II, 1 September 2004, § 684.
The proponents of the former approach assert that the wording of the crime of genocide and persecution appears to clearly refer to objectively identified members of a group. Therefore, only crimes committed against those victims who actually belong to the protected group can constitute genocide or persecution. For instance, in the context of persecution, some courts and scholars assert that the requirement of ‘discrimination in fact’ necessitates a proof that actual members of the target group were discriminated against. Similarly, in cases of genocide, the prosecution must demonstrate that the victim of the underlying offences actually belonged to one of the four protected groups. On the other hand, the proponents of the subjective approach assert that the identification by the perpetrator should be taken into account. In other words, crimes committed against victims who are not actual members of the protected group, but are nonetheless perceived by the offender as part of that group (whether erroneously or intentionally) may constitute genocide or persecution as well.

The above-mentioned controversy arises mainly in two situations. First, it may occur when the perpetrator harms individuals who are perceived as supporting members of the protected group, without belonging themselves to this group. In this context, the court in several occasions adopted the subjective approach suggesting that the definition of the targeted group should be broad. For instance, in the Kvočka Judgment the Trial Chamber stated:

Indeed, the Trial Chamber notes that persons suspected of being members of these groups are also covered as possible victims of discrimination. For example, if a Bosnian Serb was targeted on suspicion of sympathizing with Bosnian Muslims, that attack could be classified as persecutory.

In the Naletilić and Martinović case, the Trial Chamber confirmed this approach:

The targeted group must be interpreted broadly, and may, in particular, include such persons who are defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group. The Chamber finds this interpretation consistent with the underlying ratio of the provision prohibiting persecution, as it is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status. The Chamber finds that in such cases, a factual discrimination is given as the victims are discriminated in fact for who or what they are on the basis of the perception of the perpetrator.142

The second situation is when the perpetrator attacks a victim with a genocidal intent, or persecutes him, mistakenly believing this victim to belong to the protected group, when in fact he is not.143 In the context of genocide, the adoption of the subjective approach can be found in several judgments. For instance, in the Bagilishema judgment the Trial Chamber asserted that even if based on objective features a person does not seem to belong to the protected group, the Chamber may consider him as a member of such group if the perpetrator perceived him as belonging.144 Similarly, in the Ndindabahizi case the Chamber concluded that ‘if the perpetrator perceived the victim as a member of the protected group, then the trial should also treat this victim as protected for the purpose of genocide.’145 Finally, in the Kajelijeli case, the Chamber pointed out that for the crime of genocide, the evidence must show that the victim either belonged to the protected group, or was perceived by the perpetrator as belonging to this group.146

In the context of persecution, the Chamber in the Kvočka case stated that ‘if a person was targeted for abuse because she was suspected of belonging to the Muslim group, the discrimination element is met even if the suspicion proves inaccurate.’147 The same approach was explicitly adopted by the Appeals Chamber in Krnojelac, stating that even if a Serb was persecuted under the false belief that he is a Muslim, the act constitutes discrimination in fact as required by the crime elements.148

Another closely related framework to the subjective theory was proposed by Monika Ambrus. According to Ambrus, since there is a clear link between genocide and discrimination, theoretical considerations of discrimination law149 can provide the legal framework for the identification of victims of such crimes. That is to say, the perpetrator should be found guilty of genocide

142 See Judgment, Naletilić and Martinović (IT-98-34-T), Trial Chamber, 31 March 2003, § 636 and also ft. 1572. On the other hand, for the objective approach which protects only actual members of the group see, Nahimana et al., supra note 119, §§ 493–496; Judgment and Sentence, Nchamihigo (ICTR-01-63-T), Trial Chamber III, 12 November 2008, §§ 337–338.

143 For the objective approach see, Muhimana, supra note 1, §§ 513–517; Krnojelac (TC), supra note 14, §§ 431–432 (persecution); Mettraux, supra note 38, at 185. For the subjective approach see, Krnojelac (AC), supra note 140, § 185 (persecution); Nchamihigo, ibid., § 360.

144 Bagilishema, supra note 140, § 65.

145 Ndindabahizi, supra note 140, §§ 466–469. The conviction was later overturned on factual grounds.

146 Kajelijeli, supra note 16, § 813.

147 Kvočka et al., supra note 141, § 195.

148 Krnojelac (AC), supra note 140, § 185.
if a link between his discrimination against the victim (based on the latter’s perceived membership in the protected group) and the forbidden act is proven, even if the victim does not actually belong to the protected group. The justification for this proposal is that the required intent in the crime of genocide contains discrimination against a specific group. Furthermore, the actus reus of genocide constitutes actual discrimination since it is performed against members of the protected group. Therefore, the focus should be on the causal link between the harm and the protected grounds, rather than on the question of whether the victim is objectively a member of the protected group.

Even though the subjective approach has its merits, it has not been adopted as a rule by international courts. Therefore, there is a room to consider the suggested legal framework that offers an alternative solution for international cases of misidentified victims.

5. Concluding Remarks

The present article discusses a possible legal solution for cases where the identity of the victim is an element of the crime, and the victim is misidentified. The proposed legal framework for those cases is to convict the perpetrator of an attempted offence against the intended victim, and a (different) completed offence against the actual victim.

The international doctrine regarding attempted offence remains underdeveloped, also due to the limited number of prosecutions related to such type of offences. The travaux préparatoires of the ICC Statute also provide only limited reference to the issues raised during the negotiations regarding attempted offences. Therefore, this article is based on commentaries on the ICC Statute by participants to the Rome Conference and on the general rationale of criminalizing attempts in order to investigate whether the proposed legal framework can be derived from Article 25(3)(f). The international verdict itself (the conviction)

151 Ibid. The author proposes to apply a similar legal framework also to the crime of persecution under crimes against humanity.
152 For the objective approach see for example, Muhimana, supra note 1, §§ 513–517; Krnojelac (TC), supra note 14, §§ 431–432. See also Schabas, supra note 33, at 127–128; Mettraux, supra note 38, at 185; C. Kreß, ‘The Crime of Genocide under International Law’, 6 International Criminal Law Review (ICLR) (2006) 461, at 473. It should be noted that there is a movement from the entirely objective approach to a subjective or a hybrid approach when it concerns the question of identifying the group. See Ambrus, supra note 150, at 945; Cassese, supra note 18, at 138; R. Young, ‘How Do We Know Them When We See Them? The Subjective Evolution in the Identification of Victim Groups for the Purpose of Genocide’, 10 ICLR (2010) 1, at 2–3. However, the issue of identification of individual members of the protected group is more controversial.
has an expressive function.\textsuperscript{153} In misidentification cases there are two victims, or two protected interests, that are harmed. Therefore, convicting the perpetrator for what he tried to do against one victim and what he actually did to another victim might have an important role in conveying the true extent and full wrongfulness of the offender’s actions. Considerations of fairness towards the offender, which might be raised due to the concurrent convictions based on a single act, can be addressed at the sentencing stage. For instance, in some cases, the court may decide to impose concurrent sentences.

There is a discussion in the literature and case law suggesting that victims of international crimes should be determined subjectively. In other words, the crucial component of the crime would not be that the victim objectively belonged to one of the protected groups, but that the perpetrator perceived him as such.\textsuperscript{154} This approach would lead to the outcome that, in misidentification cases, the offender would always be convicted for the completed intended offence. Nevertheless, the subjective approach is not fully adopted as a rule by international case law.\textsuperscript{155} Furthermore, the wording of the ICC Statute refers to ‘members of the group’ rather than people that are perceived to be members of the group.\textsuperscript{156} Therefore, one might argue that in order to remain faithful to the language of the law, this approach should not be adopted. Finally, an opinion exists, and should be considered carefully, that expanding the protection of the genocide provision ‘risks trivializing the horror of the real crime when it is committed.’\textsuperscript{157} In theory, the subjective approach may lead to the situation where a person is convicted for genocide without killing even one member of the protected group (if he misidentifies all his victims, for instance).

Consequently, the appeal of the suggested approach is in the compromise between the objective and the subjective theories of victims’ misidentification. On the one hand, the proposal to treat misidentification of victims as an attempt to commit the intended crime against the protected group, and the actual crime against the victim at hand, follows the objective point of view. This model suggests punishing the perpetrator for precisely the crimes he intended and actually committed and does not expand the protection provided by the ICC Statute beyond what the relevant articles actually state. On the other hand, the proposed model reaches an outcome that is closer to the subjective approach in as much as the perpetrator’s subjective perception is taken into account in the conviction.

\textsuperscript{153} See the sources cited supra in note 11.
\textsuperscript{154} See supra Section 4.
\textsuperscript{155} See supra note 152, and the accompanying text.
\textsuperscript{156} See for example Art. 6(a) ICCSt.