

A LEGAL ANALYSIS OF THE CRIMEAN TATAR DEPORTATION OF 1944

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Abstract: *Over the past decade, Crimean Tatars started to express more robustly their requests for the international recognition of the 1944 Mass Deportation as the crime of genocide. While it can be said, even prima facie, that the 1944 Deportation falls under the scope of the current definition of crimes against humanity, making a similar kind of claim with the same immediateness is unlikely in terms of the crime of genocide owing to the narrowly constructed legal definition. Moreover, the principle of non-retroactivity of laws poses a further challenge in the consideration of both genocide and crimes against humanity. This paper will try to answer two interconnected questions: Is it a legally plausible case to characterize the 1944 Deportation as genocide or crimes against humanity? And, are there any differences between the legal characterization of 1944 Deportation as genocide or crimes against humanity in terms of their possible consequences?*

Keywords: *Crimean Tatars, Crimean Deportation, Genocide Law, Crimes Against Humanity, Non-retroactivity of Laws, International Criminal Law,*

1944 KIRIM TATAR SÜRGÜNÜ'NÜN HUKUKİ DEĞERLENDİRİLMESİ

Öz: *Son dönemde, Kırım Tatarları 1944 Büyük Sürgün'ünün soykırım suçu olarak tanınmasını ısrarlı bir şekilde talep etmektedir. 1944 Sürgün'ünün günümüzdeki anlamıyla insanlığa karşı suçlar kapsamına girdiği kolaylıkla tespit edilebilirken, soykırım suçu bakımından aynı iddiayı benzer bir rahatlıkla öne sürmek, soykırım suçunun tanımının darlığı nedeniyle mümkün olmamaktadır. Buna ilave olarak, kanunların*

geriye yürümezliđi ilkesi hem insanlıđa karřı suçlar hem de soykırım suçunun olay bakımından tartıřılmasında sorun teřkil etmektedir. Bu bađlamda bu çalıřma birbiri ile bađlantılı iki soruya cevap arayacaktır: Uluslararası hukuk kapsamında 1944 Sürgün'ünü soykırım suçu ya da insanlıđa karřı suç olarak nitelemek mümkün müdür? Ve bu eylemlerin soykırım suçu veya insanlıđa karřı suç olarak deđerlendirilmesinin yaratacađı olası sonuçlar bakımından herhangi bir fark var mıdır?

Anahtar Kelimeler: *Kırım Tatarları, Kırım Sürgünü, Soykırım, İnsanlıđa Karřı Suçlar, Kanunların Geriye Yürümezliđi İlkesi, Uluslararası Ceza Hukuku*

I. INTRODUCTION

The annexation of Crimea by the Russian Federation in March 2014 was disturbing for the international community, many states and international and regional organizations owing to the fact that the annexation was a violation of the international law and the rising aggressiveness in the Russian international policy started to pose a serious threat for international peace and security. But the annexation was particularly worrying for the Crimean Tatars due to the fear of reoccurrence of the repression and persecution that the Crimean Tatars were subjected to under the rule of Imperial Russia and Soviet Union.¹ In fact, the Crimean Tatars have been already raising their voices more robustly in the last decades for the international acknowledgment of the systematic maltreatment and persecution they had through under the rule of consecutive Russian States since 1783, the year that semi-independent Crimean Khanate was annexed.² Yet, their case started to receive more attention from international community on the account of the recent political developments in the region. Within this context, the most eminent historical claim of the Crimean Tatars is their case for the recognition of 1944 Mass Deportation a genocide (known as ‘*Sürgün*’ among Crimean Tatars).

Indeed, the Second World Congress of Crimean Tatar has very recently restated this claim once again.³ In its statement the Congress called on

- 1 After the annexation, many news sources and spokesman stated that the Russian occupation regime clearly threatens the existence of Crimean Tatars in the Peninsula. Indeed it is reported that, while the media outlets of Tatars such as ATR television silenced by bureaucratic means, some Tatar activists and leaders, such as Mustafa Dzhemilev and Refat Chubarov, are arrested or banned to enter to Peninsula. Also, the occupation regime proposed ‘Day of Joy’ instead of Crimean Tatar deportation anniversary. (see. ‘Back to The Exile’ in *The Economist*, available at <http://www.economist.com/news/international/21654671-life-mustafa-dzhemilev-parable-crimean-tatars-struggles-back-exile> (accessed on 24.12.2015); ‘Crimea’s Russia-Backed Court Issues Arrest Warrant For Tatar Leader’ in *Radio Liberty* available at <http://www.rferl.org/content/crimea-arrest-warrant-tatar-leader-dzhemilev/27501317.html> (accessed on 24.12.2015); ‘Occupation regime proposes ‘day of joy’ instead of Crimean Tatar deportation anniversary’ in *Kyiv Post* available at <http://www.kyivpost.com/opinion/oped/halya-coynash-occupation-regime-proposes-day-of-joy-instead-of-crimean-tatar-deportation-anniversary-385562.html> (accessed on 21.12.2015)
- 2 See for example the campaign that is run by the Mejlis of the Crimean Tatar People since 1991. Available at <http://qtmm.org/en> (accessed on 24.12.2015)
- 3 To see the full statement see (in Turkish).; Mejlis of the Crimean Tatar People, ‘Dünya Qırımtatar Kongresi II. Toplantısı -Netice Beyannamesi’ 1-2 August/Ankara available at: <http://qtmm.org/ru/%D0%BD%D0%BE%D0%B2%D0%BE%D1%81%D1%82%D0%B8/4893-d%C3%BCnya-qirimtatar-kongresi-ii-toplantisi-netice-beyannamesi-1-2-a%C4%9Fustos-2015-ankara> (accessed on 10.11.2015). The World Congress of Crimean Tatars is an initiative that aims to gather Crimean Tatars who live in abroad, Ukraine and Crimea and discuss strategic problems and steps for the near future. First held in 2009.

the international community and the United Nations to recognize the mass deportation of Crimean Tatars in 1944 as Genocide. Without a doubt, the 1944 Deportation, the expulsion of the Crimean Tatars from their native homeland to Uzbekistan and the Urals, is one of the human tragedies of the twentieth century. Dreadful conditions of the forced deportation⁴ caused thousands of casualties. Moreover, it had significant negative impacts on the culture of the Crimean Tatars since they stayed away from their homeland for decades and during this time they have been culturally suppressed, their families have been separated and lived in awful conditions.

From the viewpoint of contemporary international law, it can be said, even *prima facie*, that the 1944 Deportation falls under the scope of current definition of crimes against humanity, as there were widespread and systematic acts of deportation and persecution directed against a civilian population.⁵ However, such a view might get objections of being in contradiction with the non-retroactivity principle in criminal law since the legal definition of crimes against humanity was different back then and there was the requirement of establishing a nexus between crimes against humanity and armed conflict in order to consider an act as a crime against humanity. The problem of retroactivity is controversial and will be discussed in more detail. However, in any case, it is hardly challengeable that the contemporary concept of crimes against humanity is applicable to the Mass Deportations of the Crimean Tatars.

On the other hand, making a similar claim with the same immediateness is not possible for the crime of genocide. The reason is that the legal definition of genocide is significantly specific and narrow compared to crimes against humanity with respect to the scope of *acts reus* element, the narrowly defined *dolus specialis* element, and the notion of protected groups. That is, the crime of genocide can only be committed when one of the five described acts in the legal definition (see. Part III) is committed against one of the four protected group (national, racial, ethnic, religious) with the intent to destroy, in whole or in part, the group as such. Moreover, the invention and introduction of the concept of

4 Despite the fact that term deportation is constantly being used by the international community when the situation in 1944 is discussed, it is not a right use in terms of linguistics. The reason is that, deportation means to force someone to leave form a country, yet the Crimean Tatars were not forced to leave the Soviet Union. In this sense, term exile may be better fit to this situation. Yet as the term deportation is embedded in the literature, I preferred to use it. (I would like to thank to anonymous referee to bring this point up)

5 For the contemporary definition of crimes against humanity see. Rome Statute of the International Criminal Court (last amended 2010) (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90/37 ILM 1002 (1998)/[2002] ATS 15, art.7

genocide was after the tragedy that the Crimean Tatars had lived through, which makes retroactivity issue even more problematic compared to crimes against humanity.

Therefore, a possible topic of discussion is whether it might be more plausible to identify the legal statuses of the tragedy as crimes against humanity rather than genocide. However, there are conflicting views both among lawyers and social scientists as to whether considering an offence as a crime against humanity rather than genocide has a degrading effect on the legal status and perceived social seriousness of the offence. Recently, this issue has been receiving much attention from international adjudicative bodies, as well as scholars and it is seemingly one of the important discussion points in the case of Crimean Tatars' genocide claims since they might have a stronger case for crimes against humanity.

In this context, this article seeks to answer two interconnected questions. First, is it possible to characterize the 1944 Deportation as the crime of genocide or crimes against humanity? And second, are there any differences between the legal characterization of these acts as genocide or crimes against humanity in terms of their possible consequences? In order to examine these questions, the paper starts with a brief historical summary of events. Upon examining the concepts of genocide and crimes against humanity, the legal characterization of the 1944 Deportation that the Crimean Tatars experienced will be discussed.

II. A BRIEF HISTORICAL BACKGROUND

A. Crimean Tatars under the Rule of Russian Empire

The Crimean Tatars' presence in the Peninsula has a long history, but the ethnogenesis of the Crimean Tatars is still debateable. While the western and Russian sources usually associate Crimean Tatars with the Mongols and claim that they settled in the Peninsula as a result of the Mongol invasions in the thirteenth century, some researchers believe that they are the indigenous people (*korennoi narod*) of the Peninsula, whose history dates back to prehistoric and ancient tribes lived in the region such as Tavriis and Kimmerites.⁶ Yet, what is certain is that

⁶ For a detailed discussion see. Greta Lynn Uehling, *Beyond Memory: The Crimean Tatars' Deportation and Return* (New York: Palgrave Macmillan, 2004), pp.30-39; Brian Glyn Williams 'The Ethnogenesis of the Crimean Tatars. An Historical Reinterpretation' *Journal of the Royal Asiatic Society, Third Series, Vol. 11, (Nov., 2001), pp.329- 348*

Crimean Tatars are inhabitants of the Peninsula for a long time. On the other hand, if we set aside the ‘origins discussion’ and move on to the better-known and more related parts of their history, the Crimean Tatars first appeared as a nation during times of the Crimean Khanate, which was founded in the early fifteenth century and preserved its status until 1783, the year when Crimea was annexed by the Russian Empire under the rule of Catherine the Great.⁷

As a matter of fact, Crimean Peninsula carried high importance for both the Ottomans and the Russians owing to its economic and geopolitical significance. But the relationships of these two empires with the Crimean Tatars were considerably different. On the one hand, under the Ottoman rule, the Crimean Khanate had a great deal of autonomy as a vassal state and undertook important roles during the conquests of the Ottoman Empire as well as in the Empire’s defence. The Crimean Tatars always received utmost respect from the Ottoman rulers. On the other hand, their situation was completely different under the Tsarist rule. Except a short period in which the relationship between the Russian Empire (and subsequently the Soviet Union) and the Crimean Tatars were positive, the Crimean Tatars were usually subjected to discrimination and oppression. In fact, following its annexation of Crimea⁸, the Russian Empire aimed to change the Peninsula’s demographics by displacing Muslim Tatars and settling Russian speakers in the region.⁹ The reason of this policy was that the Tsarist rule did not believe that the Crimean Tatars as a national group would accept the integration to the Russian Empire. For this reason, for Russian rulers Crimean Tatars was a constant threat that needed to be oppressed.¹⁰

B. The Early Soviet Period

At the beginning of the twentieth century, the Russian Empire started to crumble owing to the growing disorder as a result of poverty, inequality and injustice. The combination of disappointment and dissolution with

7 For a detailed examination of history see. Brian Glyn Williams, *The Crimean Tatars: The Diaspora Experience and the Forging of a Nation* (Leiden: Brill, 2001), pp.39-73

8 The 1784 annexation was also a breach of international law and agreements. See. M. S. Anderson ‘The Great Powers and the Russian Annexation of the Crimea, 1783-4’, 37 *The Slavonic and East European Review* (Dec., 1958), pp. 17-41

9 See. Brian Glyn Williams, *The Crimean Tatars*, pp. 74-172 (*supra* note 7)

10 The World Congress of Crimean Tatars claim that approximately 1.5 million Crimean Tatars were subjected to forced deportation in nineteenth and twentieth centuries. Mejlis of the Crimean Tatar People, ‘Dünya Qırımtatar Kongresi II. Toplantısı -Netice Beyannamesi’. See, footnote 3.

the Marxist ideas led to one of the most consequential revolutions of modern history in 1917. The Bolshevik Revolution changed the situation of many minorities in the Russian Empire and the Crimean Tatars was just one of them. According to Greta Lynn Uehling;

the February 1917 Revolution resulted in an activation of national movements across the Soviet Union. (...) When the Russian Empire began dissolving in 1917, many peoples were thinking about how they would proceed in the new conditions. Crimean Tatars were prepared for action and convened a Kurultay or congress in the Crimea. (...) The Kurultay was designed to be an elected body based on universal suffrage. This first Kurultay had a tragic fate: in 1918 some members of the Mejlis were executed by the Bolsheviks and the Kurultay was destroyed.¹¹

Despite this tragic start of the relationship between the Soviet Russia and Crimean Tatars, when the Soviets ensured their control over the country, they recast their physical suppression with the integration policies that supported the cultural autonomy of national minorities within the vast Soviet territory. To this end, the Crimean Autonomous Soviet Socialist Republic was established in 1921.¹²

This was the beginning of a 'short-lived summer' for the Crimean Tatars. In this period, the Crimean Tatars, under the leadership of Veli Ibrahimov, endeavoured to revive cultural and political activities. For example, they gained representation rights in the Soviet government. Their language became one of the official languages of the Peninsula along with Russian. Also, their previously shut down national schools, cultural and scientific institutes were reopened. One of the crucial occurrences in this period was that Ibrahimov and the administration of Autonomous Republic strived to return lands that had confiscated before.¹³

This promising period lasted less than seven years. The raise of Joseph Stalin and the sharp policy change he brought along dramatically shifted the climate for the Crimean Tatars. The promotion of nationalist values

11 Greta Lynn Uehling, 'The Crimean Tatars as Victims of Communism', Research paper for International Committee for Crimea (10 January 2015), available at <http://www.iccrimea.org/scholarly/uehling-crimeantatars.html> (accessed on 02.12.2015). Also see. Greta Lynn Uehling, *Beyond Memory...*, p. 34 (*supra* note 6)

12 Ibid.

13 Alan Fisher, *The Crimean Tatars* (Stanford: Hoover Institution Press, 1978), pp.138-141

and private ownership paved the way for the doom of Crimean Tatars and Veli Ibrahimov himself, so much so that, when Stalin came into power in 1928 one of the first things that he did was to execute Ibrahimov by accusing him of being a bourgeois and nationalist. This put a factual end to the autonomy of the Crimean Tatars.¹⁴

C. Crimean Tatars under the Rule of Stalin

In order to grasp the temporary wellbeing of the Crimean Tatars and what changed afterwards, the 1917 Revolution and the economic situation in the early Soviet Union needs to be considered. The impact of the Bolshevik Revolution and the World War I was devastating for the Soviet economy. To overcome the economic depression, Lenin introduced an economic policy in which private and public sector co-existed to some extent, rather than following a completely centralized economic programme that socialism proscribes This 'New Economic Policy', also known as state capitalism¹⁵ allowed small private enterprises and some private landholdings. On the other hand, the reason of such policy was not merely providing the rapid economic growth, but also sidestepping from the likely resistance against the collectivization of farming.¹⁶

Despite the fact that Lenin himself described state capitalism as the interim last step before socialism, such a policy was seen as a serious drawback from socialist values by the radical Bolsheviks, such as the Left Opposition. According to them, it was just a different kind of capitalism that did not really serve to socialist ideas.¹⁷ These concerns were voiced by important figures of the Bolshevik Revolution such as Leon Trotsky.¹⁸ Interestingly, in his famous struggle for leadership against Trotsky, Stalin partially supported the New Economic Policy.

14 Ibid. pp. 139-142

15 See in general. Roger Pethybridge, *One Step Backwards, Two Steps Forward: Soviet Society and Politics under the New Economic Policy* (Oxford: Clarendon, 1990) pp. xi-453: Also see. Vladimir Lenin, "'Left-Wind' Childishness' in *Lenin's Collected Works*, 4th English Edition (Moscow: Progress Publishers, 1972 Volume 27, p. 323-334

16 Vladimir Bandera, 'New Economic Policy (NEP) as an Economic Policy', *The Journal of Political Economy* 71 no.3 (June, 1963), pp.265-270.

17 Sheldon Richman 'War Communism to NEP: The Road from Serfdom' *The Journal of Libertarian Studies* 5 vol.1 (Winter 1981) p.94.

18 See. Richard Day, *Leon Trotsky and the Politics of Economic Isolation* (Cambridge: Cambridge University Press, 1973) pp.47-69 For a different view see. Ernest Mandel, 'Trotsky's Economic Ideas and the Soviet Union Today' in *Revolutionary Marxism and Social Reality in the 20th Century: Collected Essays of Ernest Mandel* S.Bloom ed. (New Jersey: Humanities, 1994)

Yet, shortly after obtaining the power he revised his opinion, terminated New Economic Policy and started to introduce an extremely centralistic programme with his five-year plan.¹⁹

This sudden and radical change was proclaimed by Stalin himself as the 'Great Turn' in which industrialization and collectivization were the main economic means. Stalin believed that these two notions would serve better to becoming a major power in the world and enhancing the socialist worldview.²⁰ In this context, Stalin's plan introduced sharp discrepancies compared to the previous economic policy and a rapid industrialization plan was put into effect. Unlike New Economic Policy, complete collectivization of agriculture was targeted and private landholding was almost completely forbidden. Besides, cultural autonomies came to an end, and sovietization of national minorities was initiated.²¹

For the Crimean Tatars this change was the beginning of the doom. They were strongly devoted to their national identity and values, and the main source of livelihood at the Peninsula was agriculture. These two features, however, were in contradiction Stalin's policy and therefore the resistance to the change was unavoidable. Moreover, they committed a dreadful 'sin' by returning most of the lands that had confiscated before to their private owners during the application of New Economic Policy. As a result, the Crimean Tatars were unavoidably seen as counterrevolutionaries and from the beginning of his reign, Stalin proved that he was ruthless against any kind of opposition. After he gained the power, most of the Crimean Tatar intelligentsia was annihilated or imprisoned, the alphabet was changed from Arabic to Latin, Tatar schools, newspapers and other institutes were shut down or sovietized.

The next stage of Crimean Tatars' suffering was the era of hunger and extreme terror. First, as a major-grain producing region, they have partially suffered from the Great Famine (1931-1933).²² Historian Alan Fisher's findings show that between 1917 and 1933 approximately

19 See. Moshe Lewin, 'Society and the Stalinist State in the Period of the Five-Year Plans,' *Social History* 1, no. 2 pp.139-158

20 Lynne Viola, *Peasant Rebels Under Stalin*, (New York: Oxford University Press,1996) pp.24-29

21 Terry Martin 'Stalinist Forced Relocation Policies: Pattern, Causes, Consequences' in Myron Weiner/Sharon Stanton Russell, *Demography and National Security*, (New York: Berghahn Book, 2001) pp.309-314

22 The Great Famine was a manmade disaster that was a result of forced collectivization and dekulakization. It heavily affected Ukraine in which approximately 4 million people lost their lives. See. Frank Chalk and Kurt Johassohn, *The History and Sociology of Genocide*, (Yale University Press 1990), p.291

150.000 Crimean Tatar were killed or exiled.²³ Afterwards, the period that is known as the Great Purges came. In this period, the political repression in the Soviet Union was at its highest level, and due to aforementioned reasons the Crimean Tatars were targeted relentlessly. Their intellectuals were either killed or forced to leave, religious practices and language were either forbidden or limited. While total casualties in the period was around a million in the Soviet Union, thousands of Tatars were executed or deported with the accusations of being 'enemies of state'. This stage went on until another disaster, perhaps the greatest one of modern history, the Second World War.

D. Sürgün

Crimea was occupied by the Germans Forces in October 1941. Expectedly, the impact of war conditions on civilians was devastating. During the World War II, around 20.000 Crimean Tatars were recruited by the German Army, while many more of them fought for the Red Army.²⁴ It should be noted that such recruitments of German Army was a regular practice in World War II, however, after Crimea was taken back by the Soviets in early 1944, Crimean Tatars, as a whole, were accused collaboration with the Nazis. Hiding behind this reason, Stalin decided to get rid of the Crimean Tatars. In the early hours of May 18th, 1944, more than 32.000 Soviet NKVD troops ordered the Crimean Tatars to be ready in half an hour with their personal belongings. Soldiers gathered the victims at the stations in Simferopol and Bakhchysarai, and loaded them into cattle trains without sufficient food and water. This process was completed in two days and approximately 200.000 people began a horrible journey to Uzbekistan and the Urals. After the Crimean Tatars were transported, their cultural institutions such as mosques and schools were demolished and the cultural traces of the Crimean Tatars were literally wiped out from the Peninsula.²⁵ This shows that the aim of Soviet Government was not merely punishing the Crimean Tatars as individuals, but destroying their cultural heritage and sense of belonging to Crimea. When this is taken into consideration in conjunction with the conditions of forced deportation that will be explained below, these circumstantial evidences indicate that the total assimilation and the social dissolution of the group as an entity was the aim.

23 Alan Fisher, 'The Crimean...', p.145 (*supra note 13*)

24 Otto Pohl, 'The deportation and fate of the Crimean Tatars', (Paper presented at 5th Annual World Convention of the Association for the Study of Nationalities. 2000), p.1

25 Greta Lynn Uehling, *Beyond Memory...*, pp.88-92 (*supra note 6*)

Almost half of the Tatar population lost their lives either on the way or shortly after they had arrived their destinations due to hunger, thirst and diseases.²⁶ While the long journey with inhumane conditions cost many lives, in the regions that Tatars arrived there was no sufficient housing or food for them. They were put into settlement camps, which they could not leave, and many of them were employed as forced labour mostly in collective cotton farms. Their integration with the local population was also problematic, as they have been denounced as traitors by the Soviet authorities because of their alleged Nazi collaboration. Consequently they were not welcomed and threatened badly.²⁷ According to a survey, in three years following the deportation around 100.000 Crimean Tatars lost their lives, which is a little less than half of the whole Crimean Tatar population that was deported.²⁸ According to Brian Glyn Williams, the number of the victims was lesser. He claims that casualties were around 65.000 people.²⁹ In any case, Crimean Tatars suffered considerable losses as a result of forced deportation.

E. Afterwards

In 1968, 148 Crimean Tatar families were sent back to Crimea.³⁰ Yet it was merely an emblematical gesture and the Crimean Tatars as a group were not allowed to go back to their native soil, even as visitors, until late 1980's. After long struggles, they managed to come back to their homeland and today there are 270.000 Tatar who live in the Crimean Peninsula along with 1.5 million Russians and 600.000 Ukrainians.³¹ However, their culture and national identity was seriously wounded due

26 Ibid. p.81 Numbers are contentious. While Soviet documents indicated that casualties that deportation and afterwards caused the death around 25 per cent of the population. However, Uehling states that this number should be 46.2 per cent.

27 Ibid. p.90,91

28 Aurélie Campana, 'Sürgün: The Crimean Tatars' deportation and exile', Online Encyclopedia of Mass Violence, [online], first published on 16 June 2008, accessed on 12.12. 2015. Available at: <http://www.massviolence.org/Surgun-The-Crimean-Tatars-deportation-and-exile>; James Minahan, *One Europe, Many Nations: A Historical Dictionary of European National Groups* (US: Greenwood, 2000), p.189

29 Brian Glyn Williams, *The Crimean Tatars...*, p.401 (*supra note 7*)

30 Stanley Vardys, 'The Case of the Crimean Tartars'. *Russian Review*, vol.30 no.2 (apr.1971), p.105

31 For a detailed examination of return process see. Brian Glyn Williams, *The Crimean Tatars: From Soviet Genocide to Putin's Conquest*, (London: C.Hurst & Co., 2015), pp.117-161; For demographic numbers see. International Committee for Crimea, 'Ethnic Composition of Crimea, Online Source, 1999. Available at: <http://www.iccrimea.org/population.html> (accessed on 10.12.2015); Also see. Liana Fix and Eleanor Knott, 'In Crimea, time for pressure, not acceptance: why we cannot lose sight of the Crimean Tatars'. *DGAPkompakt* 16 (2014). p.2,3

to the *Sürgün*. It was not just because of the physical suffering and the material losses they had been through as a group but also because of constant attacks on their culture and identity. The Soviet Government aimed to assimilate the Crimean Tatars by destroying cultural institutions and assets, separating families, destroying books, prohibiting practices of language and religion, changing Tatar village and city names, and even banning the right of usage the word 'Crimean Tatar' as an ethnic self identifier.³² For these reasons, the Crimean Tatars insist that the *Sürgün* should be considered and recognized as genocide. Yet, as it is indicated in the introduction part, from a legal standpoint it is trickier than one thinks to claim that these acts were genocide. In fact, it might be easier to argue that they fall into the legal definition of crimes against humanity, which has a broader scope that leads fewer technical complications compare to genocide. In order to elaborate these points and discussions we need to clarify the legal concepts of genocide and crimes against humanity first.

III. LEGAL FRAMEWORK AND APPRAISALS

A. The Crime of Genocide

The crime of genocide has a technically distinctive nature in international law. The legal definition of genocide, which is exclusively reproduced³³ in every following international legal documents and conventions³⁴ as well as national legislations³⁵, was put forward in 1948

32 Alan Fisher, *The Crimean Tatars...*, p.141,142 (*supra* note 13)

33 According to Guglielmo Verdirame 'the permanence of the genocide definition over more than five decades is remarkable considering how much criticism has been directed against it since the adoption of the Genocide Convention in 1948.' He observes that while the stability of definition provides 'indubitable advantages', unresolved interpretative and fundamental questions that are originated from the ambiguities in the definition, particularly as to *mens rea* requirement and the definition and identification of four protected groups make the legal definition problematic. Guglielmo Verdirame, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals', *International and Comparative Law Quarterly* 49 (2000), p.578

34 For example, Article 4 of the ICTY Statute (SC res. 827, UN SCOR 48th sess., 3217th mtg. U.N. Doc. S/Res/827 (1993); 32 ILM 1159 (1993) (hereinafter 'ICTY Statute'); Article 2 of the ICTR Statute (SC res. 955, UN SCOR 49th sess., 3453rd mtg. U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994) (hereinafter 'ICTR Statute')), Article 6 of the ICC Statute (UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (hereinafter 'ICC Statute')); and Article 17 of Draft Code of Crimes against the Peace and Security of Mankind (51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532 (1996) (hereinafter 'Draft Code of Crimes against Peace')

35 Despite the fact that the definition widely reproduced in national legislations, there are few countries that modified the definition. For example while France *Code Pénal* defined genocide it had preferred to broaden the enumeration of protected groups by using the phrase '...a national, ethnic, racial or religious group, or of a group established by reference to by other

by Article II of the Convention for the Prevention and Punishment of the Crime of Genocide (hereinafter 'Genocide Convention') as follows;

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (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.³⁶*

One of the most notable things about the concept of genocide is the variance between its legal definition, social perception and the political use of the term. The popular conception of genocide usually consist millions of deaths, concentration camps like Auschwitz or death marches. Politically, on the other hand, genocide is some kind of a magical word that helps to get attention. For this reason, it is constantly used to refer to mass atrocities or acts of repression. However, the legal

arbitrary criterion...' (emphasis added) (available at <http://www.preventgenocide.org/fr/droit/codes/france.htm> (accessed on 02.10.2015)). Similarly, some countries like Peru, Cuba and Costa Rica included the other groups to the scope of their national definitions. See. Article 129 of the *Código Penal* of Peru; Article 361 of the *Código Penal* of Cuba; Article 127 of the *Código Penal* of Costa Rica (at <http://www.preventgenocide.org/law/domestic> (accessed on 02.10.2015)) Portugal initially included social groups to its national legislation yet in the revision of 1995 they turned back to the original version in the Genocide Convention. William Schabas, 'Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide' *Rutgers Law Review* 61 (2008), p.164. For a detailed examination of domestic practice of Genocide Convention and the legal definition of crime see. William Schabas, *Genocide in International Law* 2nd ed. (Cambridge: Cambridge University Press, 2009) pp.403-409

36 The Convention for the Prevention and Punishment of the Crime of Genocide, adopted Dec.9, 1948, 78. U.N.T.S. 277 (entered into force Jan. 12,1951)

definition of genocide describes a very specific and technically complex crime. In order to speak of genocide in legal terms, the presence of two essential elements of the crime need to be proven: *mens rea* (subjective element of the crime, 'guilty mind') and *actus reus* (material element of the crime, acts that are enumerated in Article II lit. (a)-(e)), 'acts of genocide'). The complex nature of genocide, on the other hand, emanates from the fact that the *mens rea* of crime consist of two components: the basic *mens rea* which refers to the "intent corresponding to the culprit's individual conduct and factual circumstances"³⁷, and the genocidal intent which refers to the specific *mens rea* (*dolus specialis*) to destroy a protected group, in whole or in part, as such.³⁸ Therefore, if a perpetrator intentionally carries out one of the listed acts of genocide (Article II lit. (a)-(e)) against even a part of a protected group (national, ethnical, racial or religious) with intent to destroy the group, as such, s/he should be convicted for the crime of genocide. The term 'as such' indicates that the perpetrator(s) targets individual victims not due to their personal characteristics or deeds but with the aim of exterminating a group.

With respect to the *Sürgün*, the *actus reus* and basic intent elements exist since the Soviet Union's acts satisfied the (a), (b) and, to some extent, (c) clauses in the legal definition and these acts were intentional. Moreover, the Crimean Tatars were clearly targeted as an ethnic group, which means it is a protected group in terms of the Genocide Convention. Yet the presence of genocidal intent (*dolus specialis*) is the point of controversy in the consideration of the *Sürgün*. In the simplest terms, the legal question is whether perpetrators were holding the specific intent to destroy the Crimean Tatars as such. Since no direct evidence has been discovered so far that can clearly prove such an intent, legal assessments have to rely on circumstantial evidences and consider whether it is possible to infer the existence of a specific intent from these evidences. However, the outcome of such an assessment is directly related to an important legal discussion as to the scope of specific intent, which is whether the specific intent only refers to intended physical and biological destruction or intended social dissolution also satisfies the specific intent element. This issue leads to lots of confusion and debate in international criminal law. Therefore, the scope of specific intent

37 Lars Berster, 'Article II' in *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, Christian Tams et.Al eds. (Oxford: Hart Publishing-2014) p.137

38 Prosecutor v. Jelisić, Case No.: IT-95-10-A, Judgement, 5 July 2001, para. 51. Also see. Paul Behrens, 'The *mens rea* of genocide' in *Elements of Genocide*, Paul Behrens and Ralph Henham eds., (Oxon: Routledge 2012), p.70,71)

needs to be examined in order to decide whether the legal characterizations of *Sürgün* should be genocide.

1. The Problem of Specific Intent

The specific intent requirement (*dolus specialis*) generates most of the theoretical and practical problems in the evaluation of mental element of the crime. However, the length of discussions regarding the specific intent makes a complete examination impossible within the scope of this paper. Therefore, it should be kept in mind that the following legal discussions are only the tip of the iceberg. There are four main discussion points as to the specific intent requirement, which is defined as “intent to destroy, in whole or in part, a protected group, as such.” If we start from the end, a protected group must be targeted ‘as such’. Mass murder, rape or torture by itself, even it is committed against the members of one of the protected groups, does not entail to mention of genocide if members of a protected group are targeted only because of hatred to one another.³⁹ That is to say, the object of crime is not merely the plural number of human individuals who belong to a particular human group but the human group itself.⁴⁰ As case law and *travaux préparatoires* (preparatory works) of the Genocide Convention indicate, the victim of crime is a group “as a separate and distinct entity.”⁴¹

Of course, the natural concomitant of protecting human groups ‘as such’ is the protection of individual members as constituents of human groups; yet genocide law presupposes that human groups have an existence and value beyond of its constituent members. This was the case right from the beginning, so much so that, while initiating the drafting process of the Genocide Convention, the United Nations General Assembly (UNGA) stated that:

39 Diana Amann, ‘Group Mentality, Expressivism, and Genocide’, *International Criminal Law Review* 2 (2002), p.93

40 However, ontological and epistemological status of groups are highly contentious and it is not exactly clear whether one can separate the value and rights of groups from the sum of individual members’ values and rights.

41 Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the Work of its Forty-Eighth Session, U.N. GAOR, 51st sess., U.N. Doc. A/51/10, Commentary (5) (1996), Yearbook of the International Law Commission, 1996, vol. II, Part Two, Art 17, p. 45, para.7 ‘...the intention must be to destroy the group “as such”, meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group. In this regard, the General Assembly distinguished between the crimes of genocide and homicide in describing genocide as the “denial of the right of existence of entire human groups” and homicide as the “denial of the right to live of individual human beings” in its resolution 96 (I).’

Genocide is a denial of the right of existence of entire human groups, as homicide in the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, result in great loses to humanity in the form of cultural and other contributions represented by these human groups.”⁴²

In respect of the *Sürgün* this point does not create any confusion since the Crimean Tatars targeted as an ethnic group as such.

Another interpretative problem emanates from the phrase “in whole or in part”. The phrase delineates that the intention of the perpetrator to realize even a partial destruction of a protected group is sufficient for the commission of the crime. In other words, regardless of the actual number of victims, a genocidal act will constitute the crime of genocide if a part of a protected group is targeted. However, the evaluation of “part” stands out as one of the most significant problems in genocide law and requires more attention. The reason is that if the text is plainly read, even a single person constitutes a part of a group. Such an interpretation, of course, contradicts with the nature of the crime and the purpose and the object of the Genocide Convention, yet there is still no lower limit in deciding on what constitutes a part in genocide law. In the face of this problem, international courts and tribunals stated that “part” should have a substantial nature, yet this did not resolve the problem because the substantiality is a subjective and vague assessment. In the *Sürgün*, Crimean Tatars are victimized as whole, and therefore this discussion is not creating a direct problem in terms of this specific case. However, the different interpretations of substantiality have important implications in terms of determining the scope of specific intent. For this reason, in the following paragraphs, this issue will be revisited.

The discussion as to the phrase “with intent to destroy” generates the most critical debates in relation to our cases. First of all, the particular threshold as to intent causes a great deal of controversy in genocide law. The contention point is whether cognitive standard is sufficient for the establishment of the genocidal intent or genocidal intent necessarily involves a volitional standard. To draw with an overly broad brush, proponents of volitional standard maintain that the genocidal acts should arise from a conscious will and reflect the particular desire of perpetrator

42 The UN General Assembly Resolution 96 (I), 11 December 1946

for the destruction of a protected group.⁴³ This approach in relation to the threshold of the specific intent is known as the purpose-based approach. Supporters of cognitive standard, on the other hand, claim that if a perpetrator knows that her/his acts would likely to bring about the destruction of the protected group, it is sufficient to talk about the presence of *dolus specialis*.⁴⁴ This view is named as the knowledge-based approach. That is, the purpose-based approach focuses to the personal genocidal intent of the individual perpetrator. In contrast, the knowledge-based approach primarily highlights the genocidal plan or policy and the collective dimension of crime.⁴⁵ Although the purpose-based approach has prevailed in international court and tribunal judgements, the knowledge-based approach has gained lots of ground in academic writings.⁴⁶ This discussion is an important one since there is no direct and clear evidence of Stalin's particular desire to destroy the Crimean Tatars, as such.

More importantly, there is an obvious ambiguity as to the word "destroy". The key debate is whether the term 'destroy' in the *mens rea* element of the crime refers to the intended social dissolution of the targeted group or merely to intended physical and biological destruction of individual members. It should be clearly emphasized here that this dilemma is solely about the *mens rea* element of the crime, not the *actus reus*. The reason is that, Article II and *travaux preparatoires* clearly indicate that cultural or economic destruction are excluded from the *actus reus* element of the crime (arguably except Article II lit. (e)). In terms of the *mens rea* element, on the other hand, no adjective that may restrict the scope of the term 'destroy' is used in the *chapeau* (contrary to Article II lit. (c) in which the clause deliberately narrows down the scope of specific intent element for that particular act by including the phrase "calculated to bring about its [the group's] physical destruction in whole or in part." Moreover, the issue was not specifically discussed in the *travaux preparatoires*.

43 See generally, William Schabas, *Genocide in International Law 2nd....*, pp. 243-270; (*supra* note 35); Paul Behrens, 'The *mens rea* of genocide', pp.76-80; (*supra* note 38); Claus Kreß, 'The Crime of Genocide under International Law', *International Criminal Law Review* vol.6 no.4 (2006), pp. 492-497

44 The cognitive, or 'knowledge-based' approach, on the other hand, has gained some support lately among scholars. See. Alexander Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation', *Columbia Law Review* 99 (1999), pp. 2259-2294; Claus Kreß, 'The Crime of Genocide under International Law', pp.493-498 (*supra* note 43); Hans Vest, 'A Structure Based Concept of Genocidal Intent', *Journal of International Criminal Justice* vol.5 no.4 (2007), pp 781-797

45 William Schabas, *Genocide in International Law 2nd ...*, p.242,243 (*supra* note 35)

46 Lars Berster, 'Article II', p.141 (with further citations) (*supra* note 37)

Both the wording of the legal definition and *travaux preparatoires* of the Convention, thereupon, technically render either of aforementioned interpretations possible. Such an ambiguity, however, inevitably led to different interpretations of law. For example, following to their examinations of the Genocide Convention and its *travaux preparatoires* William Schabas and Lars Berster reaches different conclusions. While Schabas states that the spirit of general discussions in the *travaux preparatoires* precludes the possibility of interpreting the term ‘destroy’ as the indented social dissolution,⁴⁷ Berster concludes that “by extending paragraph (b) to mental harm, the Sixth Committee consciously chose to widen the protective scope of Article II beyond the physical (and biological) existence of groups.”⁴⁸ Different interpretations also took place in the dictums of courts and tribunals. The broader interpretation of the term ‘destroy’ which submits that the notion of genocidal destruction refers to the intended social dissolution of the group was favoured by the high courts of Germany.⁴⁹ However, at least so far, the support for the broader interpretation has been considerably limited in international adjudication. At international courts and tribunals an argument in favour of this interpretation was put forward for the first time by Judge Shahabuddeen in his dissenting opinion on the ICTY Appeal Chamber Judgment in *Krstic*.⁵⁰ Subsequently, his views followed by The ICTY Trial Chamber in *Blagojevic* in 2005 by the following statement;

The Trial Chamber finds in this respect that the physical or biological destruction⁵¹ of a group is not necessarily the death of the group members. While killing large numbers of a group may be the most direct means of destroying a group, other acts or series

47 William Schabas, *Genocide in International Law 2nd ...*, p.271 (*supra note 35*)

48 Lars Berster, ‘Article II’, p.82 (*supra note 37*). He also stresses that this conclusion was discussed in the 81st meeting of the Sixth Committee.

49 Cited in Kai Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing*, (OUP- Oxford, 2014), p.39

50 Prosecutor v. Krstic, Case No. IT-98-33-A, partial dissenting opinion of Judge Shahabuddeen, (Apr. 19, 2004), para.48,55.

51 Kreß argues that ‘(t)he use of the words “physical and biological” in this citation is misleading and perhaps intended to conceal the substantial digression from the concept of physical/biological group destruction espoused by the Trial Chamber in Prosecutor v. Krstic’. Kreß, ‘The Crime of Genocide under International Law’, p.488 (*supra note 44*) Similarly, Van der Herik pointed out that the Trial Chamber was trying ‘to adhere formal obligation it had to respect legal precedents set by the Appeal Chamber’ Larissa Van der Herik, ‘The Meaning of the Word “Destroy” and its Implications for the Wider Understanding of the Concept of Genocide’ in H.G. van der Wilt [et al.] eds., *The Genocide Convention: the Legacy of 60 Years*, (Nijhoff,-Leiden, 2012), p.55

of acts, can also lead to the destruction of the group. A group is comprised of its individuals, but also of its history traditions, the relationship between its members, the relationship with other groups, the relationship with the land. (...) In such cases the Trial Chamber finds that the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was...⁵²

Nevertheless, international courts and tribunals usually prefer Schabas's view, and *Blagojevic* stands only as an exception, which is already overturned by the Appeals Chamber.⁵³ Indeed, the narrow interpretation of the term 'destroy' was favoured in the two very influential cases. First the ICTY in *Krstic*⁵⁴ preferred the narrow interpretation and argued that the term 'destroy' in the legal definition of genocide refers only to intended physical and biological destruction of group members. Then, by quoting this dictum, the ICJ explicitly endorsed the same view in *Bosnian Genocide*.⁵⁵

But even though the ICTY and the ICC rhetorically promoted the narrow interpretation very explicitly, their overall conclusion that genocide occurred in Srebrenica conflicted with this rhetoric. The reason is that in Srebrenica approximately 40.000 Bosnian Muslims inhabited at the time (in 1995). While the physical destruction of around 8.000 men and boys of military age was aimed by the perpetrators (which falls into the ambit of the *actus reus* element of genocide), rest of the population were subjected to the forced deportation (which is not included to the *actus reus*).⁵⁶ Clearly, it does not make much sense to argue that genocide is committed when only the twenty percent of the whole group is physically targeted while the rest was only deported. Yet, the ICTY concluded that the perpetrators had the intent to physically and biologically destroy the Bosnian Muslims in Srebrenica, as such. What paved the way to this conclusion was the interpretation of the term 'in

52 Prosecutor v. Blagojevic et al., IT-02-60-T, Judgment, (Jan, 17. 2005), para. 666

53 The Appeal Chamber stated that 'the Trial Chamber's conclusion to the contrary may have been based on a view that in removing a group from a particular location, the removers are "destroying" the group. The Appeals Chamber emphasizes, however, that displacement is not equivalent to destruction. Prosecutor v. Blagojevic and Jokic, Case No. IT-02-60-A, Judgement (May, 9. 2007 para. 123 (in footnote 337) (*references omitted*)

54 General Krstic was one of the commanders in charge during the Srebrenica massacre.

55 Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn.&Herz.v. Serb.&Mont.), ICJ Judgement, (Feb. 26, 2007), para.344; (Prosecutor v. Krstic, Case No. IT-98-33-T, Trial Chamber Judgment, (Aug.2. 2001), para. 580

56 Prosecutor v. Krstic, (Case No. IT-98-33-T), Judgement, (Aug. 2, 2001), para. 592,594

part' As aforementioned, the term 'in part' is considered as 'a substantial part of the targeted group' by international courts and tribunals. The reason was that the plain reading of the term 'in part' might lead to unwarranted lowering of the threshold for the crime and contradict with the stigmatic aspect of genocide. The word substantial, however, is interpreted in various ways. There are three prevalent approaches that offer different interpretations to the substantiality requirement. First, the quantitative approach maintains that substantiality refers to the numerical magnitude of the targeted part compare to the whole group. Second, according to the qualitative approach what matters in substantiality is the functional significance of the targeted part for the survival of whole group. Finally, under the geographical approach, a part of a group might be limited to a single region or community, which is geographically distinct or significant.⁵⁷

With respect to Srebrenica, the ICTY used geographical and qualitative approaches together. Therefore, the Tribunal took Srebrenica as a geographically distinct area and considered the 40.000 Bosnian Muslims as a distinct entity. Then it applied the qualitative approach. The qualitative approach, which is best exemplified by the Whitaker Report.⁵⁸ Accordingly some parts of a group, such as political leadership, might be considered as a functionally significant section due to its importance for the survival of the group as a whole, even if the leadership does not constitute a numerically large part of the whole group.⁵⁹ In Srebrenica, by considering that the perpetrators specifically targeted military aged men and boys, the ICTY Trial Chamber stated that:

this selective destruction of the group would have a lasting impact upon the entire group as the destruction of consecutive male generations in such a patriarchal society, *in conjunction with forced deportations*, will bring about devastating outcomes and it will also make the recapture of the territory impossible.⁶⁰

57 Paul Behrens, 'The Mens Rea in Genocide', p.88 (*supra note 37*)

58 The Whitaker Report (1985) is one of the two major studies on genocide that was prepared by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (presently the Sub-Commission on Promotion and Protection of Human Rights). The Whitaker Report is one of the main contributions of the commission in the interpretation and development of genocide law and it is frequently cited by international courts and tribunals as well as legal scholars. The other report is 1978 Ruhashyankiko Report.

59 U.N. Econ.& Soc. Council, Sub-Commission on Prevention of Discrimination & Protection of Minorities, U.N.Doc.E/CN.4/Sub.2/1985/6 (July 2,1985), para.29 ('Whitaker Report')

60 Prosecutor v. Krstic, (Case No. IT-98-33-T), Judgement, (Aug. 2, 2001), para. 595 (emphasis added).

However, if this reasoning is followed, it is unlikely to conclude that the perpetrators' intent was the physical or biological destruction of the Bosnian Muslim group in Srebrenica. Because, as Schabas neatly puts in his criticism of the ICTY's afore quoted dictum, "there is a world of difference between physical destruction of a group and 'a lasting impact' upon a community."⁶¹ That is, despite the fact that the perpetrators had opportunity to kill all Bosnian Muslims in the municipality, they physically targeted 8.000 people while rest of the population (32.000 people) were subject to forced deportation. Moreover, as not all male or female population was targeted, it is not plausible to argue that biological genocide was intended, as biological reproduction and continuity of the group was still possible. Therefore, if what really matters is physical or biological destruction of the group, the ICTY should have concluded that the genocidal intent of the perpetrators did not exist in Srebrenica. It should be also noted that, in terms of intended physical or biological destruction the following presence of survivors in the targeted geographical area is irrelevant, and for this reason the forced deportation does not indicate genocidal intent.⁶²

It is clear in this sense that Bosnian Muslims in Srebrenica were targeted as a social entity. That is, the perpetrators did not aim the physical and biological destruction of all Bosnian Muslims in the municipality, but targeted the social dissolution of victim group by strategically killing the military age men and deporting rest of the population. Consequently, even if the ICTY and the ICC professedly stated that they endorsed the conventional approach and read the term "intent to destroy" as intent to physically or biologically destroy, they implicitly applied the broader interpretation of the term 'destroy' in which the intended social dissolution of the group fulfils the specific intent requirement.⁶³ In

61 William Schabas, 'Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia', *Fordham International Law Journal* vol.25 no.1 (2001), p.47

62 Nina Jorgensen remarks this points as follows; 'he mathematical test was avoided in Krstić' because the effect of the actual killings was viewed together with the effect of the forcible transfer of the rest of the Bosnian Muslim group, including women and children, from Srebrenica to Kladanj. While this certainly resulted in the "physical disappearance" of the Bosnian Muslim population at Srebrenica, it may be questioned whether an intention to destroy the group as such was proved. Driving a group out of a geographical area does not necessarily demonstrate an intention to destroy the group. Nina Jorgensen, 'The Genocide Acquittal in the Sikirica Case Before the International Criminal Tribunal for the Former Yugoslavia and the Coming of Age of the Guilty Plea'. *Leiden Journal of International Law* 15, (2002) p. 395

63 Larissa Van der Herik, affirms this view by stating despite the fact of the ICTY Trial Chamber accepted the traditional understanding as to the extent of intended destruction in principle, in application 'the Chamber seemingly broadened the concept of physical destruction'. Larissa Van Der Herik, 'The Meaning of the Word "Destroy"' p.54 (*supra* note 51)

support of this view, Claus Kreß pointed out that, as a matter of fact the ICTY in *Krstić* applied the broader understanding pertinent to the intended genocidal destruction by using the term 'in part' as a backdoor.⁶⁴⁻⁶⁵

Nevertheless, this issue is an on-going debate that has not been settled yet. On the one hand, the dominant approach, which is followed by the majority of international courts and tribunals, the International Law Commission⁶⁶ and influential writers like Schabas or Paul Behrens⁶⁷ maintains that the social existence is not under the protection of the Convention since the word destroy means intended physical or biological destruction. They point out that during the preparatory works of the Genocide Convention the concept of intended genocidal destruction is thought in a considerably limited extent. On the other hand, this understanding drew serious criticisms on the grounds that there is not any real reason to argue that physical and biological destruction of human groups are the only means to bring about their destruction. Scholars like Gerhard Werle⁶⁸ and Lars Berster as well as recent verdicts of the German Courts⁶⁹ all agreed that the protection also covers social existence of a group since inclusion of the mental harms to the definition (Article II lit. (b)) serves to cover detrimental effects on a group's social texture.⁷⁰ It should also be reminded that according to articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties the *travaux préparatoires* is a supplementary instrument in the interpretation of a treaty while the object and purpose of a treaty is a primary. Therefore, it can be normatively argued that the broader interpretation of the term 'destroy' fits better to the object and purpose of the Genocide Convention. Moreover, the aforementioned decisions of the ICTY in relation to the Srebrenica situation, which are also followed

64 Claus Kreß, 'The Crime of Genocide under International Law', p.492 (*supra* note 43)

65 The impact of the term 'in part' over the core idea of the legal definition is also noticed by the Scott Straus who notes that as the word 'in part' stands opposite to the notion of group annihilation, the Genocide Convention 'does not posit intentional group annihilation as the core idea' Scott Straus, 'Contested meanings and conflicting imperatives: a conceptual analysis of genocide', *Journal of Genocide Research* 3 (2001) p.361

66 YILC 1996 II/2, Art 17, p. 45, 46, para.12 (*supra* note 41)

67 William Schabas, *Genocide in International Law 2nd ...*, p.271 (*supra* note 35); Paul Behrens, 'The Mens Rea in Genocide' p.70,82,83 (*supra* note 38)

68 Gerhard Werle, *Principals of International Criminal Law 2nd ed.* (Cambridge; Cambridge University Press 2005),

69 Lars Berster, 'Article II' p.81 (with further citations from German Courts) (*supra* note 37)

70 *Ibid.* p.81,82

by the ICJ⁷¹, implicitly broaden the scope of genocidal intent. Yet scholars who believe that such an interpretation contradict the drafters' intention, which was stated in preparatory works, are critical on the ICTY's and ICJ's judgement as to Srebrenica. Schabas, for instance, argued that the judgement should have been crimes against humanity rather than genocide.⁷²

2. A Case for Genocide?

The legal characterization of the *Sürgün* poses serious interpretative challenges to an international lawyer and there is no clear-cut answer. To begin with, the Crimean Tatars were clearly targeted as an ethnic group as such during the 1944 Deportation. When we consider the atrocious conditions of the deportation and casualties of these conditions caused; almost ten years that Crimean Tatars had spent in settlement camps and their losses due to the slave-like conditions; systematic extermination of Crimean Tatars' intelligentsia; and deliberate separation of families, the *actus reus* element of the crime (Article II lit. (a), (b)), of genocide were fulfilled.

The problematic side of the issue, however, is whether perpetrators *intended to destroy* Crimean Tatars as an ethnic group *as such* or only aimed to *punish* Crimean Tatar population for their unconformity with the Soviet policy and alleged Nazi co-operation. It should be kept in mind that motives of the perpetrator has no effect on the judgement of genocide. According to the legal understanding, whether the crime was committed for retaliation, financial profit or some kind of hatred does not matter in the consideration of genocidal intent. That is, even if the underlying motivation of Stalin (and other perpetrators) was retaliation or the punishment of Crimean Tatars for the alleged co-operation with Nazis, this does not indicate that the perpetrators held the genocidal intent.

Therefore, the problem is directly related with the interpretation of intended genocidal destruction. If conventional approach is followed, which maintains that only intended physical and biological destruction

71 Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Judgement, (Feb, 27. 2007), para.190

72 See. William Schabas, 'Was Genocide Committed in Bosnia and Herzegovina?' pp.46-49 (*supra* note 61)

satisfies the specific intent element, then, it is hard to make a case for genocide. This is because, historical evidences prove that even if there is a possibility to speak of genocidal acts and a significant numbers of deaths, the intent was seemingly transporting Crimean Tatars to faraway lands, separating families and most likely assimilating the Crimean Tatar ethnic group. The perpetrators, although their acts were egregious, did not aim at physical or biological destruction of the group. At most, they were reckless as to the possible deaths that the forced deportation and following processes may bring. On the other hand, if we follow the broader interpretation of the term ‘destroy’ and accept that intended social dissolution of a group satisfies the genocidal intent element, then, Crimean Tatars might come up with a serious case, as the inference of intended dissolution of the Crimean Tatars as a social entity is possible from the circumstantial evidences and acts of the perpetrators.

Nevertheless, even though with a *de lege ferenda* consideration it is more plausible to put an argument in favour of the broader interpretation of the term ‘destroy’ since such an interpretation appears to be more compatible with the purpose and object of the Genocide Convention; in the *de facto* situation, which is the minority view. Within the scope of *lex lata* in which, as it is *supra* indicated, narrow interpretation of the term ‘destroy’ is the dominant view. Despite the fact that in Srebrenica related cases in which international courts and tribunals implicitly applied the broader approach by relying on qualitative interpretation of substantiality as a backdoor; they felt the need to rhetorically follow the conventional approach. Consequently, in the *de facto* situation it would be more plausible and realistic to conclude that the *Sürgün* should qualify as crimes against humanity

B. Crimes Against Humanity

The contemporary definition of Crimes Against Humanity is put forward by Article 7 of the Rome Statute, as follows;

Article 7

Crimes Against Humanity

1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread

or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(...)

(d) Deportation or forcible transfer of population

(...)

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health;

2. For the purpose of paragraph 1:

(a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) 'Extermination' includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(...)

(d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(...)

(g) ‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(...)⁷³

It is rather clear from the content of the article that the *Sürgün* falls under the scope of the contemporary definition of crimes against humanity. As distinct from the crime of genocide, in crimes against humanity there is no specific intent requirement. Rather, the act should be committed in the scope of ‘widespread and systematic’ attacks against any victim groups. Moreover, in the legal definition of crimes against humanity the protected human groups are not limited with merely ethnic, racial, national and religious groups. Finally, the *actus reus* element of crimes against humanity is considerably broad compared to genocide. Acts, which do not fall into the ambit of the legal definition of genocide such as forced deportation are explicitly included in the legal definition of crimes against humanity. Moreover, the article also indicates that the listed acts are not exhaustive (Article 7, 1 lit. (k)). Within this context, forced deportation of Crimean Tatars falls under the contemporary definition of crimes against humanity. Yet, the non-retroactivity principle in law, which forbids the retroactive application of criminal laws, is the issue that poses a problem. Non-retroactivity of criminal laws as a principle have been a part of customary international law for a long time. It is also included in many important international legal documents such as the Universal Declaration of Human Rights (1948), and therefore it is clearly a solid counter argument in the case of the *Sürgün*. In fact, this principle poses an important challenge for both genocide and crimes against humanity claims and thus in the following section the issue of retroactive application is examined, first in terms of crimes against humanity, and then genocide.

C. The Problem of Non-Retroactivity

1. Crimes Against Humanity

The history of the term ‘crimes against humanity’ dates back to the 1899

⁷³ Article 7 of the ICC Statute (*supra note 34*)

and 1907 Hague Conventions.⁷⁴ However, the full term was first used in 1915 by the Joint Declaration of Allies in which they charged Ottoman Empire's Government of committing crimes against humanity against Christian minorities in the Empire.⁷⁵ Crimes against humanity, which has been part of customary international law since early 20th century, codified by the Article 6 of the Nuremberg Charter in 1945 as follows:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.⁷⁶

As seen, the main difference with the contemporary definition is that, back then, crimes against humanity could be committed only in execution of or in connection with crime against peace or war crimes. Starting from the 1960's there has been serious discussions in international law and various legal documents which have tried to exclude the war nexus requirement. Yet, the requirement also reproduced by Article 5 of the ICTY Statute in 1993 "...crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population"⁷⁷, but it was omitted just a year later in the Statute of International Criminal Tribunal for Rwanda (ICTR).⁷⁸ Nevertheless, it is quite clear that when Sürgün took place, the legal definition of the crime required a nexus with an armed conflict; However, such a conflict did not exist by that time. Thus, a counterargument that relies on non-retroactivity principle might be rightfully put forward.

A very similar argument was raised before the European Courts of Human Rights (ECtHR) in 2006. In the *Kolk and Kislyiy v. Estonia* Case the Court held that the conviction of two perpetrators for crimes against

74 Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899; Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907

75 William Schabas, *Genocide in International Law...*, p.16,17 (supra note 35)

76 United Nations, Charter of the International Military Tribunal-Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), , 82 UNTS 279; 59 Stat. 1544; (8 August 1945) art. 6

77 The ICTY Statute (*supra* note 34)

78 The ICTR Statute (*supra* note 34)

humanity by the Estonian courts on the account of their acts of forced deportation of the civilians from Estonia to the Soviet Union in 1949 was not a breach of non-retroactivity principle.⁷⁹ The applicants claimed that punishment was an application of laws retroactively since in 1949 there was the requirement of armed conflict nexus in terms of crimes against humanity and their acts was not committed before or during the war. In dismissing the applicants' objection of retroactive application, the Court held that

it is expressly stated in Article I (b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) that no statutory limitations shall apply to crimes against humanity, irrespective of the date of their commission and whether committed in time of war or in time of peace.⁸⁰

Accordingly the Court based its decision on the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (hereafter, 1968 Convention), which prescribes an exception to the general rule of non-retroactivity.⁸¹ However, this reasoning was subject to serious criticism. Antonio Cassese stresses that the Court,

neglected to note that in 1949 those 'principles' still applied only to crimes against humanity committed in connection with or in execution of war crimes or crimes against peace. In other words, the indispensable link between those crimes and war had not yet been severed. It is only later, in the late 1960s, that a general rule gradually began to evolve, prohibiting crimes against humanity even when committed in time of peace. Hence, the Court should have squarely faced this serious dilemma: either by holding that in 1949 the conduct attributed to the two applicants was not criminalized under international law, and consequently their application was to be upheld; or, by stating that those crimes were indeed included in the 'Nuremberg Principles' because they had been perpetrated in connection with, or in execution of, an

79 Kolk and Kislyiy v. Estonia (Application no.23052/04 & 24018/04), the ECtHR, Judgement (17 Jan, 2006), available at: <http://hudoc.echr.coe.int/eng?i=001-72404> (accessed on 15.12.2015)

80 Ibid., p.9

81 UN General Assembly, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, A/RES/2391(XXIII) annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (26 November 1968)

international crime imputable to the leaders of the Soviet Union and falling under the Nuremberg Charter.⁸²

On the other hand, Cassese agrees with the ultimate decision of the Court, which concluded that the conviction of crimes against humanity was not a breach of non-retroactivity in this particular case. However, he claims that the reasoning of the Court should have been different. According to Cassese, the decision of Estonian courts was not a breach of non-retroactivity because

that deportation fell under that category of crime, for it was clearly a consequence of, or a follow-up to, the crime of aggression perpetrated by the political leaders and the relevant military commanders of the Soviet Union when Soviet forces attacked and invaded Estonia (June 1940) and incorporated it into the USSR (Soviet Union). The international rules existing at that period did not require that the nexus between war crimes or aggression and crimes against humanity be close in time, thus implying that the lapse of nine years between the aggression and the deportation of civilians should not constitute an obstacle to the application of the rules on crimes against humanity to those deportations.⁸³

Cassese's consideration in relation to this case stands out as the preferable and accurate application of international law. The 1968 Convention on the Non-Applicability of Statutory Limitations has indeed abrogated the statute of limitation for crimes against humanity. Moreover, the main purpose of the 1968 Convention precluded invocation of statute of limitation objections in terms of Nazi criminals, who were not captured at that time. Thus, as is explicitly stated in Article I,⁸⁴ the 1968 Convention was retroactively applicable. In other words, even if a crime against humanity was committed before the 1968 Convention entered into force,⁸⁵ say in 1944, the statute of limitation was abolished for that crime. However, the 1968 Convention was only related with the applicability of the statute of limitations, not the definitions of the crimes. That is to say, it did not pave the way for

82 Antonio Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: The Kolk and Kislyiy v. Estonia Case before the ECHR', *Journal of International Criminal Justice* 4 (2006), p.413 (*footnotes omitted*)

83 *Ibid.* p.418 (*footnotes omitted*)

84 'No statutory limitation shall apply to the following crimes, irrespective of the date of their commission' Art I. (*Supra Note 81*)

85 Nov. 11, 1970

retroactive application of the more recent definitions of crimes against humanity to former situations. If an act did not qualify as a crime against humanity according to the definition at the time the act was committed, the 1968 Convention does not change this fact by applying further developments in the legal definition of the crime. In this respect, as Cassese emphasizes, crimes against humanity can only be committed during or in connection with the armed conflict in 1949. Consequently, by drawing on Cassese's examination, it is not possible to apply the contemporary definition of the crimes against humanity to the *Sürgün*.

This leaves us with the question of whether the *Sürgün* had connection with any armed conflict and thus can qualify as crimes against humanity according to the valid definition in 1944. Frankly, *Sürgün* provides even a more persuasive case compared to the one Cassese examined. The mass deportation took place in 1944 in connection with World War II, as the cloak for the deportation was the alleged collaboration with the Nazis, and in the context of Soviet aggression. Therefore, it is safe to conclude that the *Sürgün* qualified as crimes against humanity in 1944 and since the 1968 Convention had abolished the statute of limitation in terms of crimes against humanity a solid case can be pursued against perpetrators even today.

2. Genocide

The principle of non-retroactivity poses more severe problems in terms of the application of genocide law to the *Sürgün*, since the concept of genocide was coined in late 1944 and introduced to international law after 1946. That is, while crimes against humanity was defined and recognized as an international crime by law well before 1944 (although as is explained with a narrower definition compared to the present), the crime of genocide was not a part of international law. In international law there are two possible means to apply laws retroactively. First, if "a clear intention appears from the treaty" laws, it can be applied retroactively. This is the approach that was followed by the 1968 Convention in order to abrogate the statute of limitation for crimes committed by the Nazis.⁸⁶ The second possibility is if retroactive application was implicitly rendered possible, e.g mandated by the nature of the treaty or because of the treaty context.⁸⁷ However, the Genocide Convention clearly shows

⁸⁶ See. *Supra* note 84

⁸⁷ Christian Tams et.Al, 'General Introduction' in *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, Christian Tams et.Al (eds.) (Oxford: Hart Publishing-2014) pp. 24-26

that drafters had not expressed any clear intention to provide retroactive application. This eliminates the first possibility. With respect to the second possibility of non-retroactive application, in the drafting process it was stated several times by the representatives of State Parties that the Convention aims to punish future violations and it is not designed to interpret an earlier legal document such as the Nuremberg Charter.⁸⁸ Therefore, it is made clear that the Genocide Convention designed to be applied *ex nunc*.

A case that can be put forward in favour of the retroactive application of genocide law, and probably the most persuasive argument, is that the nature of Genocide Convention enables retroactive application. That is, humanitarian purposes and the gravity of the crime of genocide override the principle of non-retroactivity. However, the ICJ clearly rejected this argument, and reaffirmed that even the high values that are protected by genocide laws cannot override the significance of the non-retroactivity principle.⁸⁹ Indeed, the possible acceptance of retroactive application would create a vague and limitless application of law. Colonial settlers, ancient empires or tribes and many more might be subject to genocide accusations. This might lead to a peculiar conclusion in which the situations that happened hundreds of years ago are being judged according to the contemporary legal and moral understandings. In this sense, the application of the Genocide Convention to the *Sürgün* would be a breach of the non-retroactivity principle.

Of course, there is still the possibility for the recognition of the *Sürgün* as genocide in the political sphere. There are two possible options that can lead to legal-like consequences such as restitution and compensation. First, the Russian Federation, as the successor of the Soviet Union might recognize these acts as genocide and/or crimes against humanity. Second, the UN Security Council, whose resolutions are binding, might pass a resolution that recognizes the *Sürgün* as genocide. Yet this would be more of a political consideration and the legal merits of such an approach is highly questionable. In the end, genocide is a legal concept and any legal judgement that are made by the political bodies like the UN Security Council is problematic in terms of rule of law. Moreover, these two possibilities of political recognition are same in effect since Russia is one of the permanent members of the UN, which gives it the veto right. It is unlikely, however, that Russia will initiate or approve such an initiative in any near future.

88 Ibid. pp. 26-28

89 Croatian Genocide Case, I.C.J. Reports 2008, at p. 412, para. 123

IV. GENOCIDE OR CRIMES AGAINST HUMANITY, DOES IT REALLY MATTER?

In the introduction, it was stated that this study examines two interconnected questions. So far the paper tried to find an answer to the first question that concerns the characterization of the *Sürgün* in terms of international criminal law. The second question that was posed will be discussed in this final section: are there any differences between the legal characterization of the *Sürgün* as genocide or crimes against humanity in terms of their possible consequences? It is an undeniable fact that genocide is usually perceived as the biggest crime. The word has a magical impact and draws instant attention. In the legal sphere too, genocide is widely accepted as the crime of crimes, at first. For example, in both *Kambanda* and *Serushago*, the ICTR and in their seminal works Drost and Schabas described the crime of genocide as the crimes of crimes.⁹⁰ The ICTR in *Kambanda* stated that:

the crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime be committed with the intent to destroy in whole or in part, a national, ethnic, racial or religious group as such, as stipulated in Article 2 of the (ICTR) Statute; hence the Chamber is of the opinion that genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence.⁹¹

In support, Schabas observes ‘in any hierarchy something must sit at the top. The crime of genocide belongs at the apex of pyramid.’⁹² He also adds:

attacks on groups defined on the basis of race, nationality, ethnicity and religion have been elevated, by the Genocide Convention, to the apex of human rights atrocities, and with good reason. The definition (the legal definition of genocide) is a narrow one, it is true, but recent history has disproven the claim that it was too restrictive to be of any practical application. For

90 Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998), Para.16; Prosecutor v. Serushago,, Case No. ICTR 98-39-S, Sentence (Feb. 5, 1999) para.15; Pieter Drost, *The Crime of State: Genocide*, in introduction, (*supra note 55*); William Schabas, *Genocide in International Law: Crimes of Crimes* 2nd ed., sub-title of book (*supra note 35*)

91 Prosecutor v Kambanda *ibid*.

92 William Schabas, *Genocide in International Law* 1st ed. (Cambridge: Cambridge University Press, 2000) p.111

society to define a crime so heinous that it will occur only rarely is testimony to the value such a precise formulation.⁹³

However, this view has been refused in the following court and tribunal judgements and also by various scholars. For instance, in 2006, the ICTY Appeals Chamber in *Stakic* made the following comment: “the Appeals Chamber stresses that there is no hierarchy of the crimes within the jurisdiction of the Tribunal and that, contrary to what the Appellant alleges, the sentence of life imprisonment can be imposed in cases other than genocide.”⁹⁴ In a similar vein, scholars like Payam Akhavan and Larry May questioned the alleged position of genocide at the apex of the pyramid.⁹⁵ Akhavan argues that he cannot see any moral difference between the mass murders in Rwanda or Bosnia, which are sentenced as genocide, and, in the Soviet Union under the Stalin rule as well as Cambodia under the Khmer Rouge, which are mostly described as crimes against humanity because the legal definition of genocide excludes political and social groups.⁹⁶ May, on the other hand, also claims that genocide is not morally unique or worse than crimes against humanity. According to him, the unique moral gravity of genocide is seemingly the destruction of a human group, yet according to him groups have no distinct value. Moreover, he argues in elsewhere that “one can destroy a group by disconnecting members of the group from the group; for instance, by forbidding them to speak their native language or by dispersing them to destroy any group coherence.”⁹⁷ In this regard, only additional harm of genocide compared to crimes against humanity is the loss of status, rights and identity of victims and this does not make genocide morally unique.

Therefore, in the contemporary legal understanding, unlike the social perception, crimes against humanity and genocide are accepted as equally heinous crimes. In terms of their legal consequences, however, Akhavan’s work revealed some interesting findings. While there is no real differences between two crimes in terms of issues like restitution or payment of compensation, Akhavan shows that international courts and tribunals punished individual perpetrators more severely in the cases of

93 Ibid. p.132

94 Prosecutor v. Stakic, Case No.: IT-97-24-A, Judgement, (Mar. 22, 2006), para.375.

95 Payam Akhavan, *Reducing Genocide to Law*, (Cambridge: Cambridge University Press, 2012); Larry May, *Genocide: A Normative Account*, (Cambridge: Cambridge University Press, 2010).

96 Payam Akhavan, Ibid. p.86

97 Larry May, ‘How is Humanity Harmed by Genocide’, *International Legal Theory* 10 (2004), p.3

genocide compared to crimes against humanity.⁹⁸ This might be interpreted as the impact of social perception of the crimes over courts and tribunals. Moreover, it is widely accepted that the existence of genocide in a situation entails the invocation of responsibility to protect doctrine, while it is hard to find same general acceptance (at least in the same readiness) in terms of crimes against humanity.

If we return to the case of the Crimean Tatars, the differences in the social, political and legal perceptions of the two crimes seems as the only reasonable cause of why Crimean Tatars prefer to pursue a case for genocide rather than crimes against humanity. The reason of this conclusion is that there would be no difference in terms of *legal consequences* of different characterizations. It is true that the perpetrators are usually convicted more severe sentences in genocide cases, yet the most, maybe all, of the perpetrators lost their lives in the past 65 years. Therefore, whether atrocities of the Soviet Union are recognized as crimes against humanity or genocide will practically produce similar legal consequences.

V. CONCLUSION

This paper concludes that from the standpoint of international criminal law the *Sürgün* should be characterized as a crime against humanity, rather than genocide. Crimean Tatars might feel that their suffering is undermined by the possible characterization of these offenses as crimes against humanity, but not genocide. This is unfortunately one of our modern epidemics in international law because the term ‘genocide’ has an almost magical effect both socially and politically. When it is used in relation to a situation, it draws a great deal of attention and conception of gravity in terms of the atrocities certain communities have faced. This is partially because the Holocaust, which is seen as the archetype of genocide, is considered as the biggest crime in the history of modern times. Therefore, communities who faced massive atrocities, repression, mistreatments, persecution and so on, wants the same level of social recognition for their suffering. Yet, this undermines the specific stigma attached to genocide and ignores the legal speciality of the crime. It also dilutes and distorts the legal concept. That is, social perception and political use of genocide severely contradicts with the legal definition of the crime. From a legal point of view, the crime of genocide has a

98 Payam Akhavan, *Reducing Genocide to Law*, pp.56-88 (*supra* note 96)

significantly different meaning. Moreover, as it is explained in the final part of this study, there is no legal hierarchy between crimes against humanity and genocide. Thus, the term ‘genocide’ refers to a very specific crime, which is defined by Article II of the Genocide Convention.

Without any doubt the *Sürgün* was an unjust and criminal act. It should be also noted that many aspects of the *Sürgün* fits in the legal definition of genocide. Indeed, the Crimean Tatars were targeted as an ethnic group as such (one of the protected groups in genocide law) and acts of the Soviet government fell into the scope of *actus reus* of the crime. However, the *mens rea* of the crime is a contentious point. The broader interpretations as to the term “intent to destroy” in the legal definition accepts that the intended dissolution of a protected group satisfies the specific intent element. Following this approach would lead to the acceptance of the *Sürgün* as genocide. Yet this view overwhelmingly stays in the minority position in the decisions of courts and tribunals. International adjudicative bodies almost exclusively followed the conventional approach, which interprets the term ‘intent to destroy’ as intended physical and biological destruction of a protected group. This entails the rejection of genocide claims on the *Sürgün*. In addition, the problem of non-retroactive application of law is an obstacle for the application of the Genocide Convention to this situation.

Therefore, it should be concluded that the crime of genocide was not committed against Crimean Tatars during the *Sürgün*. The strongest case for the Crimean Tatars is demanding the recognition of the *Sürgün* as a crime against humanity as well as restitution and compensation. It is not only because the characterization of the *Sürgün* as crimes against humanity is technically more plausible, but also because it will not lead to the retroactive application of law since the criminal acts in the *Sürgün* were committed in connection with the war and aggression, and they were widespread and systematic. Within this context, *Kolk and Kislyiy v. Estonia* Case⁹⁹ sets an important precedent for the Crimean Tatars to follow.

99 *Kolk and Kislyiy v. Estonia*, ECtHR (supra note 78)

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