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EXPLORING CRITICAL ISSUES IN RELIGIOUS GENOCIDE:
CASE STUDIES OF VIOLENCE IN TIBET, IRAQ AND GUJARAT*

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I. INTRODUCTION

This article was prepared for a symposium organized by the Frederick K. Cox International Law Center at Case Western Reserve University School of Law entitled “To Prevent and Punish: A Conference Commemorating the Sixtieth Anniversary of the Genocide Convention.”1 Consistent with the general theme of the symposium, the subject matter of this article is prosecuting religious genocide. It will explore the contours of genocide through case studies of religious violence in Tibet, Iraq, and Gujarat.

Religious genocide appears to be a small part of existing genocide jurisprudence. Most of the well-known genocide trials have focused on racial, national, or ethnic genocide, even when a claim of religious genocide seemed possible. For example, the International Military Tribunal at Nuremberg treated the persecution of the Jews as racial genocide,2 although it

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* This article does not represent the views or opinions of the Office of the Co-Prosecutors or any other part of the Extraordinary Chambers in the Courts of Cambodia (ECCC). We regret that this article relies so heavily on online sources, but the lack of a good research library in Cambodia forced us to rely upon online sources in situations where hard-copy would have been preferable. The authors would like to thank Jon MacDonald and Zachery Lampell for providing assistance with research and proofreading.

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2 While the Judgment of the International Military Tribunal is sometimes ambiguous about whether the Jews are treated as a race or a religion, in most instances they are referred to as a race. International Military Tribunal, Judgment, in 1 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, at 171, 248, 272, 282, 302 (1971) (1947).
could also have been viewed as religious genocide. In its most famous genocide decision, the International Criminal Tribunal for Yugoslavia (ICTY) found that Bosnian Muslims represented a distinct national group, even as it tacitly acknowledged that the Bosnian Muslims could be a religious group. The International Criminal Tribunal for Rwanda (ICTR) has consistently concluded that the genocide committed in Rwanda was ethnic in nature. In short, criminal cases of religious genocide are quite rare.

In light of this apparent gap in the jurisprudence, we attempt to explore the key elements of genocide through three case studies of potential religious genocides. The case studies we have chosen are: (1) anti-Buddhist violence in Tibet between 1994 and 2002, (2) anti-Christian violence in Iraq between 2003 and the present, and (3) anti-Muslim violence in the Indian state of Gujarat in February 2002. Obviously, the most important criterion in choosing these case studies is that the victims were targeted because of

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3 Technically, the International Military Tribunal (IMT) treated the extermination of the Jews as a crime against humanity, because genocide had not been codified in August 1945, when the IMT Charter was created. The IMT only had jurisdiction over crimes against peace, war crimes, and crimes against humanity. International Military Tribunal, Charter of the International Military Tribunal art. 6, in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 10–11 (1971) (1947). There is little doubt that the acts described in the IMT Judgment would have been construed as genocide if they had been committed at any time after the entry into force of the Genocide Convention. Crimes against humanity, as defined in the IMT, included persecutions based on political, racial, or religious grounds. Id. The IMT could have treated the persecution of the Jews as based on religious grounds.

4 Prosecutor v. Radislav Krstic, Case No. IT-98-33-A, Judgment, para. 6 (Apr. 19, 2004). The Appeals Chamber, following the decision of the Trial Chamber, concluded that the Bosnian Serb forces viewed the Bosnian Muslims as a national group. See Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, Judgment, para. 559 (Aug. 2, 2001). In two subsequent Trial Chamber decisions, the ICTY followed Krstic and concluded that the protected group was "Bosnian Muslims." Nevertheless, neither decision identifies whether this protected group is national, religious, ethnic, racial, or some combination of all of them. See Prosecutor v. Vidoje Blagojevic and Dragan Jokic, Case No. IT-02-60-T, Judgment, para. 667 (Jan. 17, 2005); Prosecutor v. Milomir Stakic, Case No. IT-97-24-T, Judgment, para. 545 (July 31, 2003).

5 Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, Judgment, para. 559 (Aug. 2, 2001) ("Originally viewed as a religious group, the Bosnian Muslims were recognised as a 'nation' by the Yugoslav Constitution of 1963.").

6 Prosecutor v Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, paras. 122–24 n.56, 170–72, 701–02 (Sept. 2, 1998); Prosecutor v. Elizaphan and Gerard Ntakirutimana, Case Nos. ICTR-96-10 & ICTR-96-17-T, Judgment, para. 789 (Feb. 21, 2003); Prosecutor v Clement Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, Judgment, para. 291 (May 21, 1999); Prosecutor v Laurent Semanza, Case No. ICTR-97-20-T, Judgment, para. 422 (May 15, 2003). There is no reason to believe that the genocide in Rwanda could have been framed as a religious genocide.
Another key concern was how recently the violence occurred. The oldest case study, Tibet, covers a time period that begins in 1994 and ends in 2002. Meanwhile, the religious violence in the most recent case study, Iraq, continues. These case studies present interesting questions in religious genocide, including: How does one define the parts of a targeted group? What does it mean to destroy the group? And, how does one prove genocidal intent?

The case studies are arranged from the weakest, Tibet, to the strongest, Gujarat. Each allows the exploration of a particular issue. For example, the anti-Buddhist violence in Tibet appears to have been directed largely at the Buddhist monkhood, not at ordinary Tibetan Buddhists. In this sense, it does not look like a traditional genocide case, where the protected group is usually defined geographically. Instead, it looks like an attack on the leaders of Tibetan Buddhism. This case study presents the question of when attacks on the leadership of a group can qualify as genocide against a part of the group.

The case study of anti-Christian violence in Iraq presents an opportunity to look at what it means to “destroy” a group for purposes of the Genocide Convention. While the Vienna Convention on the Law of Treaties suggests that the term “destroy” should be entitled to its ordinary meaning, a number of courts have embraced a narrow definition of destroy that requires the physical or biological destruction of group members. Recent cases, however, have tended to give destroy a broader meaning. This case study examines the current state of the law on the meaning of “destroy” in the context of anti-Christian violence in Iraq.

Finally, the case study of anti-Muslim violence in Gujarat focuses on how one proves the necessary genocidal intent. In Gujarat there is evidence of intent that arises from a number of factors, including statements made by the perpetrators, the general political context of the anti-Muslim attacks, and the nature, preparation, and repetition of those attacks. This case study describes how circumstantial evidence can be used to prove genocidal intent. Collectively, these three case studies provide opportunities for the exploration of some of the most difficult legal and evidentiary problems associated with the prosecution of religious genocide.

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7 See generally Prosecutor v. Vidoje Blagojevic and Dragan Jokic, Case No. IT-02-60-T, Judgment, para. 669 (Jan. 17, 2005) (“The victims of the crime must be targeted because of their membership in the protected group, although not necessarily solely because of such membership.”); Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, Judgment, para. 561 (Aug. 2, 2001) (“[T]he victims of genocide must be targeted by reason of their membership in a group.”).
II. ATTACKS ON BUDDHIST MONKS IN TIBET, 1994–2002

The occupation of Tibet by the People’s Republic of China (PRC or China) has provoked consistent criticism for more than fifty years. The years immediately following China’s 1950 invasion were the most brutal. In 1959, the International Commission of Jurists investigated atrocities in Tibet and concluded that the government of China was committing genocide against the people of Tibet. More recently, a Spanish court has begun a criminal investigation into whether the Chinese government committed genocide in Tibet beginning in the 1950s. While the violence no longer reaches the level seen in the 1950s, there are periodic crackdowns on various aspects of Tibetan culture. Tibetans have sometimes referred to efforts to suppress opposition to China’s rule as “cultural genocide.” The Chinese government denies these accusations.

One such crackdown appears to have occurred between 1994 and 2002, when the government of the PRC reportedly mistreated, incarcerated, tortured and sometimes killed Buddhist monks and nuns. This section will examine whether China’s mistreatment of Tibetan Buddhist monks between

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8 Press Release, Int’l Comm’n of Jurists, Tibet—Summary of Report on Tibet, Shri Purshottam Trikamdas, Senior Advocate, Sup. Ct. of India, para. 27 (June 5, 1959) [hereinafter Trikamdas], available at http://www.icj.org/news.php3?id_article=3415&lang=en (“There is also a prima facie case that on the part of the Chinese there has been an attempt to destroy the national, ethical, racial and religious group of Tibetans as such by killing members of the group and by causing serious bodily harm and mental harm to members of the group. These acts constitute the crime of Genocide under the Genocide Convention of the United Nations of 1948.”).

9 See Lisa Abend & Goeff Pingree, Spanish Court Looks at Tibetan Genocide Claims, CHRISTIAN SCI. MONITOR, Mar. 2, 2006, at 4. The Spanish court is investigating claims that the Chinese government is responsible for murdering or displacing more than 1 million Tibetans since 1950. Id.; see also Spanish Court to Investigate Tibet Massacre Case, N. ZEALAND HERALD, Jan. 12, 2006. It appears that the Spanish investigation is considerably broader in scope than the mistreatment of Buddhist monks between 1994 and 2002. Id.

10 See Trikamdas, supra note 8, para. 17 (stating that a “reliable estimate[]” of the number of Tibetans killed during the 1950s was 65,000 people).


13 The crackdown began in 1994 and appears to have been triggered by a meeting called the “Third National Forum on Work in Tibet,” which took place in Beijing in July 1994 and was organized by the Central Committee of the Communist Part of China to review China’s policy towards Tibet. See HUMAN RIGHTS WATCH, CHINA: STATE CONTROL OF RELIGION n. 96 (1997) [hereinafter RELIGION]. For more information about the Third Forum on Work in Tibet, see infra notes 28 and 33.
1994 and 2002 would, if substantiated, rise to the level of religious genocide. It will begin with a section on the situation in Tibet, and then discuss the protected status of Buddhist monks under the Genocide Convention. It will conclude with sections on the specific acts that could constitute genocide and the evidence of the intent necessary for a finding of genocide.

A. Background of China’s Rule in Tibet

Tibet is in Central Asia; China lies to its north and east, while India lies to the west and south.\textsuperscript{14} It is integrated into the PRC, but retains a degree of autonomy. China’s authority over Tibet is disputed by the Tibetan government-in-exile, which is based in Dharamsala, India, and is led by Tenzin Gyatso, the fourteenth Dalai Lama.\textsuperscript{15}

Tibet has historically been influenced by China, particularly during the eighteenth century, but it effectively enjoyed self-rule between World War I and World War II, even though the Nationalist government of China claimed Tibet as one of its provinces.\textsuperscript{16} In 1950, China invaded and occupied Tibet.\textsuperscript{17} The Tibetan government delegated full authority to the Dalai Lama, and sent him to India for his protection. From there, he sent a five-member delegation to Beijing representing the Tibetan government.\textsuperscript{18} They eventually signed an agreement known as the “17-point Agreement”\textsuperscript{19} which allowed the Chinese government to take control of Tibet’s foreign affairs and occupy the country.\textsuperscript{20} China claims that the delegation had the authority to sign the agreement and that they did so voluntarily. The Tibetan


\textsuperscript{16} See Trikamdas, supra note 8, at para. 4 (“[F]rom 1912 to 1950 Tibet was virtually an independent country. No Chinese writ ran in Tibet: there was no Chinese law, no Chinese judge, no Chinese policemen on the street corner; there was no Chinese newspaper, no Chinese soldier and even no representative of the Chinese government.”); The Government of Tibet in Exile: Status of Tibet, http://www.tibet.com/WhitePaper/white1.html (last visited Nov. 4, 2007) (discussing the relationship between Tibet and the Chinese government); see also Clark, supra note 15, 294–97 (providing a brief history of Chinese-Tibetan relations from the ninth century A.D. until 1949).

\textsuperscript{17} Trikamdas, supra note 8, para. 5.

\textsuperscript{18} See Invasion, supra note 15.


\textsuperscript{20} Trikamdas, supra note 8, para. 6.
government-in-exile maintains that the delegation, which only had the authority to state the Tibetan position, signed the agreement under duress, including a threat to attack Lhasa, the Tibetan capital.\(^{21}\) China has ruled Tibet since 1950.\(^{22}\) One of the first things the government did was begin persecuting Buddhists, killing monks, and destroying monasteries.\(^{23}\)

### B. China's Hostility Towards Tibetan Buddhism

China's opposition to religion in Tibet seems to have its roots in the Communist Party of China's (CPC) belief that religion and socialism are incompatible,\(^{24}\) and its fear that independent religious groups might serve as a focal point for dissatisfaction with the state.\(^{25}\) The Chinese government tends to view organized religion as a subversive force that is subject to foreign influence and undermines state authority.\(^{26}\) As a result, China is suspicious of, and generally hostile to, Tibetan Buddhism.\(^{27}\) Nevertheless, the Chinese government appears to recognize the importance of Buddhism to

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\(^{21}\) See Clark, supra note 15, at 297–98, 301.

\(^{22}\) Supra text accompanying note 17; Trikamdas, supra note 8, para. 5. The question of whether the invasion and subsequent occupation complied with international law is beyond the scope of this article. The authors take no position on this subject.

\(^{23}\) See Trikamdas, supra note 8, paras. 13–14, 26(d).

\(^{24}\) The 1982 constitution of the PRC enshrined a right to freedom of religion. See XIAN FA art. 36 (1982) (P.R.C.), available at http://english.people.com.cn/constitution/constitution.html. Nevertheless, the CPC theorized that religion would cease to exist once China became a fully developed socialist state. See Cent. Committee of the Chinese Communist Party, The People’s Republic of China: Document 19: The basic viewpoint on the Religious Question during our Country’s Socialist Period, para. XII (1982), available at www.religlaw.org/interdocs/docs/doc19relig1982.htm (“Only after the gradual development of the Socialist, economic, cultural, scientific and technological enterprise and of a Socialist civilization with its own material and spiritual values, will the type of society and level of awareness that gave rise to the existence of religion gradually disappear.”); see also id. art. I (“Religion will eventually disappear from human history. But it will disappear naturally only through the long-term development of Socialism and Communism . . . .”).

\(^{25}\) For example, while article 36 of the 1982 Constitution conferred freedom of religious belief, at the same time it noted that “[n]o one may make use of religion to engage in activities that disrupt public order” and stated that “[r]eligious bodies and religious affairs are not subject to any foreign domination.” XIAN FA art. 36 (1982) (P.R.C.), available at http://english.people.com.cn/constitution/constitution.html. In addition, the government established “Patriotic Religious Organizations” to “organize normal religious activities” for Buddhists, Daoists, Muslims, Catholics, Protestants, and other “Christians.” All of these organizations were to be controlled by the government. Central Committee of the Chinese Communist Party, supra note 24, art. VII (“All patriotic religious organizations should follow the Party’s and government’s leadership.”). These measures suggest that the CPC believed that independent religious organizations were a potential threat to the state.

\(^{26}\) See RELIGION, supra note 13, pt 1.

\(^{27}\) See id. pt. 3.
Tibetan society and has acknowledged that it will not disappear overnight.\(^{28}\) China has therefore focused on the short-term goal of controlling Tibetan Buddhism and ensuring that it does not represent a threat to the state.\(^{29}\)

The CPC appears to have implemented a policy of pressuring Buddhist monks to support the PRC and renounce claims of Tibetan independence. According to reports, this policy has primarily been implemented through the creation of “Patriotic Work Teams.”\(^{30}\) These are teams of laypersons who live in monasteries and provide “patriotic” education to the monks and nuns. The lessons are compulsory, and monks and nuns are tested on material provided by the CPC. It is alleged that Patriotic Work Teams have become permanent features in many monasteries.\(^{31}\) Two core aspects of this patriotic education require monks and nuns to (1) denounce the Dalai Lama, and (2) accept that Tibet is an inseparable part of China.\(^{32}\) It appears that the CPC has conflated supporters of the Dalai Lama with the Tibetan separatist movement, and concluded that both are antigovernment.\(^{33}\)

\(^{28}\) In 1994, the CPC recognized that “Tibetan Buddhism was founded in a certain historical period in Tibet, and it has had a widespread and long-standing effect on the people.” THIRD FORUM ON WORK IN TIBET, A GOLDEN BRIDGE TO STRIDE INTO THE NEW CENTURY 36 (Tibet Information Network trans., 1994) [hereinafter GOLDEN BRIDGE], available at http://www.tibetjustice.org/materials/china/china10.html. The CPC noted seven distinct “problems” associated with Tibetan Buddhism but concluded they could eventually be solved through the “thorough” application of the state’s “religion policy.” Id.; see also INTERNATIONAL CAMPAIGN FOR TIBET, WHEN THE SKY FELL TO EARTH: THE NEW CRACKDOWN ON BUDDHISM IN TIBET 7 (2004), available at http://www.savetibet.org/documents/pdfs/2004ReligionReport.pdf [hereinafter WHEN THE SKY FELL TO EARTH] (“In a return to the policy that existed before the Cultural Revolution, current policy is based on the premise that religion cannot be eliminated by force and will persist for a long time. As a result, ‘religious freedom’ should be permitted and the Party should seek the co-operation of patriotic religious believers . . . .”) This is consistent with CPC theory, which posits that religion will cease to exist, but that the process will take a long time. Cent. Committee of the Chinese Communist Party, supra note 24, at para. I.

\(^{29}\) See Clark, supra note 15, at 320–21 (noting [t]he Chinese authorities believe that Buddhism must be controlled in order to develop a sense of allegiance to the Chinese state.”) (citation omitted).

\(^{30}\) See WHEN THE SKY FELL TO EARTH, supra note 28, at 47.

\(^{31}\) Id. at 51.


\(^{33}\) In 1994, the CPC stated that the “Dalai clique . . . tries] hard to sabotage lots of things in Tibet and in other Tibetan areas. They recognized Lama reincarnations without limit, and by controlling the Lama reincarnations they controlled the monasteries and a part of the masses. They recruit and bribe monks and common people, even including some of our cadres, to be trained in foreign countries, and then send them back with special tasks. They also try in every possible way to get into our contingents, and prepare to overthrow the
A second method of control allegedly utilized by the CPC is the installation of “Democratic Management Committees” which are party-controlled institutions within monasteries that are responsible for religious affairs, study, and finances. The CPC has used the Democratic Management Committees to limit the number of monks allowed in monasteries. There are numerous examples of monks and nuns being forcibly defrocked or forced to leave monasteries.

The PRC has also allegedly tried to control the appointment of senior Buddhist leaders in an attempt to place supporters of the CPC in the Buddhist hierarchy. Tibetan Buddhists believe that their primary religious leaders reincarnate upon death. Traditionally, senior monks undertake the searches for the most important reincarnated religious figures, including the Dalai Lama, the Panchen Lama, and the Reting Rinpoche. Yet, in May 1995 when the Dalai Lama recognized six-year old Gendun Choekyi Nyima as the incarnation of the eleventh Panchen Lama, the PRC took the boy and his parents into custody. Nothing more has been heard about the boy or his family. In his place, the CPC recognized another boy called Gyaltsen Norbu as the eleventh Panchen Lama. Recognizing Gyaltsen Norbu as the eleventh Panchen Lama has become a core part of testing monks and nuns Communists by force. Since Dalai and the Dalai clique have rebelled against us and escaped, they have hung on to the hope of gaining Tibet’s independence, and have become a separatist political clique. They have become a tool of those who are China’s international enemies and have committed a lot of counter-revolutionary activities . . . . “

According to one NGO, an official document states that “[U]nder the leadership of the Peoples’ Government and its expediting offices, voluntarily accepting the oversight and supervision of the local government and agencies in charge of religion, the Democratic Management Committees of monasteries must vigorously support the work of related agencies.”

One official party document states that “At present, the number of monasteries, monks and nuns in our region are sufficient to fulfill the needs of the daily religious practice of the masses. About this matter, we must work patiently but should not leave it unchecked.”

The United States has claimed that “the [Chinese] Government has moved to curb the proliferation of Tibetan Buddhist monasteries . . . . The Government generally imposes strict limits on the number of monks in major monasteries.”

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within the PRC to ensure they are sufficiently patriotic. The Dalai Lama has not recognized the CPC’s choice, and monks have been arrested for protesting the choice.

In some cases, it appears that lesser reincarnations have also been disrupted by the CPC. For example, it is alleged that a reincarnated lama who was identified by senior monks and installed with the permission of the CPC, was stripped of his position when it was discovered that the Dalai Lama had approved the choice. The CPC has also prevented senior religious members who are based abroad from searching for or recognizing reincarnations.

Finally, the Chinese government has arrested and imprisoned key religious leaders who it believes represent a threat to the authority of the state. One significant example is the abbot of Tashi Lhunpo monastery, Chadrel Rinpoche, who led the search for the eleventh Panchen Lama in 1995. Three days after the Dalai Lama announced that Gendun Choekyi Nyima was the reincarnation, the Chinese government arrested Chadrel Rinpoche. He was allegedly held for two years without charge before being convicted of the crime of attempting to split the country; he was sentenced to six years imprisonment. Several other members of the team that assisted Chadrel Rinpoche are reported to have received substantial prison sentences.

C. The Elements of Religious Genocide

For genocide to exist, the elements of the Genocide Convention must be met. Like most crimes, genocide requires two things: (1) the appropriate mental state or intent, and (2) a physical act. These are defined in

42 2000 ANNUAL REPORT, supra note 40.
43 WHEN THE SKY FELL TO EARTH, supra note 28, at 31. “Persons of the religious upper strata from abroad who return to visit our prefecture must not carry out within the prefecture, activities to try to locate, recognize or enthrone [] a reincarnated lama.” WHEN THE SKY FELL TO EARTH, supra note 28, at 31.
44 Id. at 37; HUMAN RIGHTS WATCH, SELECTED PRISONER CASES: CHINA AND TIBET (1999), http://www.hrw.org/campaigns/china-98/prisoner.htm; 1999 ANNUAL REPORT, supra note 35.
the Convention as (1) the intent "to destroy, in whole or in part, a national, ethnical, racial or religious group," and (2) one or more of the prohibited acts enumerated in Article 2 of the Genocide Convention, including killing members of the group, and causing serious bodily or mental harm to members of the group. However, scrutiny of the Genocide Convention by scholars and judges has resulted in the development of additional contextual elements that are implied by the language of Article 2. These additional elements include: (1) that the victims belong to a protected group, and (2) that the purported genocide results in the destruction of a "substantial portion" of the protected group. Each of these elements is addressed below.

1. Buddhists are a protected group

Generally, one of the first steps in evaluating a genocide claim is determining whether the victims are part of a protected group. The language describing intent in Article 2 of the Genocide Convention suggests that the victims of genocide must be members of a national, ethnical, racial or religious group. While there have been suggestions that the four groups listed in Article 2 should be viewed as illustrative of the kinds of "stable" groups that are entitled to protection under the Genocide Convention, the majority of courts addressing this issue have declined to follow this approach. Consequently, for Tibetan Buddhist monks to be the victims of genocide, they must be members of a protected group.

They could probably be classed as an ethnic group (Tibetans). There is also a possibility that they could be treated as a national group (also Tibetans), although this would depend on whether one believes that Tibet is an occupied territory or part of China. Regardless, neither of these is a good choice. The victims of genocide must be targeted because of their membership in a protected group. It appears that Buddhist monks have been targeted because they were Buddhist, not because of their ethnicity or nationality. Consequently, it makes the most sense to treat this as a case of reli-
gious genocide, even though the victims also belong to other groups that are entitled to protection under the Genocide Convention.

A religious group is one whose members share the same religion. It is clear that Buddhism is a religion, and that Buddhists are therefore a protected religious group. Indeed, at the time of this case study, Buddhism was one of the five religions officially recognized by the Chinese government. As such, Buddhists are entitled to protection under the Genocide Convention.

2. Buddhist monks could represent a substantial portion of the Buddhist group because of their leadership role

While Buddhists are a protected group, Buddhist monks—the subject of this case study—are a subset of all Buddhists. If genocide required the elimination of an entire protected group, then simply eliminating all Buddhist monks could not be genocide because the majority of Buddhists (those who are not monks) would escape destruction. Nevertheless, the wording of Article 2 of the Genocide Convention indicates that genocide can be committed against entire groups or against a “part” of a group. This raises the question of what “part” of the group needs to be destroyed.

One possibility is that “part” includes individuals. After all, each member of a group is a part of that group. Therefore, in some sense, the killing of a single member of the group leads to the destruction of a part of

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A religion is “a set of beliefs concerning the cause, nature, and purpose of the universe, esp. when considered as the creation of a superhuman agency or agencies, usually involving devotional and ritual observances, and often containing a moral code governing the conduct of human affairs.” THE RANDOM HOUSE DICTIONARY 1628 (2d ed. 1987). Buddhism is “a religion, originated in India by Buddha (Gautama) and later spreading to China, Burma, Japan, Tibet, and parts of southeast Asia, holding that life is full of suffering caused by desire and that the way to end this suffering is through enlightenment that enables one to halt the endless sequence of births and deaths to which one is otherwise subject.” Id. at 272.

RELIGION, supra note 13, at 2.

Genocide Convention art. 2, supra note 47. Indeed, it would be absurd to require that an entire group be destroyed. As others have noted, not even the genocide of the Jews during World War II extended to every Jew everywhere in the world. Indeed, it is hard to imagine a situation in which any group of actors, even a state, could feasibly intend to destroy every single member of a national, racial, ethnical or religious group. For the concept of genocide to have any applicability it must be possible to commit genocide against a subset of the entire group. See SCHABAS, supra note 50, at 235–36.
Yet this would lead to a result where too many crimes are treated as genocide. Not surprisingly, courts have found a middle ground between requiring the elimination of the whole group and treating individual murders as genocide, holding that where genocide is alleged based on the destruction of a part of a group, a "substantial portion" of the group must be destroyed. This requirement reflects a concern that the "part" of the group being targeted is large enough that its destruction would adversely impact the survival of the group as a whole.

Usually, the "part" of the group is defined as being a geographically limited part of the larger group. Thus, for instance, genocide might be alleged if all the Buddhists in Tibet were destroyed, or if all the Buddhists in a particular town or province within Tibet were destroyed, so long as they constituted a substantial portion of the group. However, the "part" need not be defined geographically. What is important is that the perpetrator views the targeted part as a distinct entity that must be eliminated as such. If the targeted part of the group is emblematic of the group as a whole, or essential

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57 Indeed, during the drafting of the Genocide Convention, some countries suggested that the killing of small groups or even individuals might be genocide, although others disagreed. The Secretariat draft of the Genocide Convention set a relatively low threshold for the "part" and suggested that group massacres or individual executions might be enough. SCHABAS, supra note 50, at 230–231. France proposed that genocide would occur, even if there had been only a single death, so long as the requisite intent existed. Some other countries, including the United States, the United Kingdom, and Egypt, thought that this went too far and that individual killings should not be viewed as genocide even if they were carried out with the intent to destroy a group. SCHABAS, supra note 50, at 233. See also Matthew Lippman, Genocide, in 1 INTERNATIONAL CRIMINAL LAW 589, 597 (M. Cherif Bassiouni ed., 2d ed. 1999).

58 Genocide would lose much of its significance as the "crime of crimes" if individual murders were held to be genocide. Infra notes 308–321 (noting that genocide is viewed by international tribunals as the most serious crime in international law).


to its survival, it could be considered substantial for the purposes of the intent requirement.\footnote{Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment, para. 12 (Apr. 19, 2004) (citing Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgment, para. 83 (Dec. 14, 1999)).}

The leaders who are targeted must be so important that their disappearance would have an impact upon the survival of the group.\footnote{Prosecutor v. Sikirica, Dosen & Kolundzija, Case No. IT-95-8-T, Judgment on Defence Motions to Acquit, paras. 76-77 (Sept. 3, 2001) (quoting Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgment, para. 82 (Dec. 14 1999)).} This approach suggests that there are two factors that interact in determining whether a substantial portion of a group has been destroyed: number and significance. The more significant the targeted group members are to the survival of the group, the fewer of them need to be killed before it impacts the survivability of the group. Thus, fewer leaders need to be killed than ordinary group members because leaders are more important to the group’s overall survival.

In this case study, Buddhist monks are not a geographically limited group. They live throughout Tibet and are interspersed with the rest of the members of the Buddhist group. Regardless, monks appear to be the leaders\footnote{Leaders are people who have the special quality of directing the actions or opinions of the group. They exert a significant influence on the group. Prosecutor v. Sikirica, Dosen & Kolundzija, Case No. IT-95-8-T, Judgment on Defence Motions to Acquit, para. 78 (Sept. 3, 2001).} of the Buddhist group. They are crucial to the survival of Buddhism in Tibet. Tibetan Buddhism places great emphasis on the transmission of Buddhist teachings in an unbroken chain from the Buddha to his disciples, to their students, and so on to the monks of today.\footnote{WHEN THE SKY FELL TO EARTH, supra note 28, at 21.} Elimination of the monkhood would destroy the continuity of teaching that supposedly stretches back to Buddha himself, and eliminate one of the underpinnings of Tibetan Buddhism.

Monks are also very influential, particularly reincarnated lamas. Tibetan Buddhists believe that those who have achieved a high degree of enlightenment can control their reincarnation. Once identified, these reincar-
nated lamas are revered. They are often referred to as “Rinpoche,” meaning “precious one,” as an indicator of the respect in which they are held. The most significant reincarnated lama, the Dalai Lama, is viewed as the spiritual leader of Tibetan Buddhism. Other lamas are also significant, such as the Panchen Lama, who is traditionally viewed as one of the foremost teachers of Buddhism. Elimination of these religious leaders would affect the survival of Tibetan Buddhism.

In addition to their religious influence, Tibetan religious leaders can also wield significant political influence. Indeed, during the 1950 invasion of Tibet by China, the Dalai Lama was appointed the head of the Tibetan government. To this day, the Dalai Lama remains the political and religious leader of the Tibetan government-in-exile. Monks are also crucial to the maintenance of Tibetan language, and historically the monasteries are education centers in Tibet. Elimination of the monks might threaten the survival of the Tibetan language and culture.

There is substantial evidence that Buddhist monks qualify as the leaders of Tibetan Buddhism. They are influential, revered, and crucial to the survival of Tibetan Buddhism. This is confirmed by the Chinese government’s hostility to the monkhood. The authorities are suspicious of the monkhood precisely because of its influence in Tibet. Therefore, it seems that the targeting of Buddhist monks could meet the “substantial portion” test, and that the monks could represent a “part” of the larger group of Buddhists against which genocide could be perpetrated.

Yet the evidence suggests that a relatively small number of monks have been killed. Other forms of harassment, like defrocking or imprisonment, are far more common. Consequently, it is not clear that the monks

68 Id. at 29.
69 Id. at 32 ("[t]he importance of the 14th Dalai Lama, Tenzin Gyatso, to the Tibetan people cannot be over-estimated; as both their spiritual leader and as a powerful symbol of Tibetan national identity.").
70 Id. at 34–44.
71 WHEN THE SKY FELL TO EARTH, supra note 28, at 34. Indeed, the Panchen Lama’s name means “Great Scholar” in Tibetan. Id.
72 See, e.g., WHEN THE SKY FELL TO EARTH, supra note 28, at 35 (quoting tenth Panchen Lama’s 1962 Petition to Mao Zedong, “Those who have religious knowledge will slowly die out, religious affairs are stagnating, knowledge is not being passed on, there is worry about there being no training for new people, and so we see the elimination of Buddhism [in Tibet].”).
73 See Invasion, supra note 15.
75 See WHEN THE SKY FELL TO EARTH, supra note 28, at 25.
76 See supra notes 24–45 and accompanying text (discussing the origins of China’s hostility to Tibetan Buddhism).
77 See infra Section II.C.4.
that have been killed or seriously injured are numerous or important enough to represent a "significant part" of the overall group. Nevertheless, if enough Buddhists monks were targeted, it could be genocide.

3. The Chinese authorities have committed acts which could be considered genocidal if accompanied by the requisite intent

Having established that Buddhist monks could be a protected part of a religious group for the purposes of the Genocide Convention, this section looks at whether they have been the subject of acts prohibited by the Convention. Article 2 contains a list of prohibited acts: (1) killing members of the group, (2) causing serious bodily or mental harm to members of the group, (3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, (4) imposing measures intended to prevent births within the group, and (5) forcibly transferring children of the group to another group. There is no evidence that the government has inflicted conditions of life calculated to destroy Buddhist monks, imposed measures to prevent births amongst Buddhist monks, or forcibly transferred children to other groups. Consequently, this section will focus on the first two categories of physical acts described in Article 2.

a. Unlawful killings and the infliction of serious bodily or mental harm on Buddhist monks

In order to constitute killing, two elements must be present: (1) the victim must be dead, and (2) the death must have resulted from an unlawful act or omission of the accused or a subordinate. There is no minimum number of deaths that must occur in order for the element of "killing" to be satisfied because the quantitative aspect—that genocide involves the destruction of a group "in whole or in part"—belongs to the mental element of the crime. The term "serious bodily or mental harm" has been interpreted to include acts of torture, inhumane or degrading treatment, and persecution. It also includes harm that seriously injures health, causes disfigure-

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78 Genocide Convention, supra note 47, art. 2.
80 See Antonio Cassese, Genocide, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 335, 348 (Antonio Cassese et al. eds., 2002).
81 SCHABAS, supra note 50, at 158.
ment, or causes serious injury to the organs or senses. The harm does not need to be permanent or irremediable.

While the Genocide Convention treats the killing of group members and the infliction of serious harm as two different acts, they are addressed together here because they often arise together. There is evidence that Chinese authorities have made Buddhist monks the target of physical attacks, torture, and unlawful killing. For example, Norbu, a seventeen year old monk, and three fellow monks were detained at their monastery. Norbu was then allegedly taken to a detention center where he was "brutally interrogated." He was denied access to medical treatment and died, apparently of injuries sustained during detention. In another case, a twenty-two year old monk was arrested in 1996 for participating in a pro-Dalai Lama protest. He reportedly died six days after his release from prison as a result of torture suffered there. Similarly, a monk at Thenthok monastery allegedly fell from a third floor window to his death after interrogation by government officials for protesting the removal of the Dalai Lama’s picture from the monastery. Three other monks were also allegedly severely beaten for the same crime.

Another well-documented case concerns the monks Tenzin Delek and Lobsang Dondrup. Lobsang Dondrup was arrested and allegedly tortured into confessing to a bombing. He implicated Tenzin Delek. Although Dondrup repudiated his confession during his sentencing hearing, Delek was arrested with three other monks. They were allegedly beaten while in detention. He and Lobsang were put on trial after eight months in detention and found guilty. Lobsang was immediately executed, and Delek was sentenced to death, but this was later commuted into a life sentence. Similar

84 Id. at para. 108 (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 502 (Sept. 2, 1998)).
85 See U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, Civil and Political Rights Including Questions of Torture and Detention, para. 224, U.N. Doc. E/CN.4/2000/9 (Feb. 2, 2000) (prepared by Nigel Rudley). In another case, two monks were arrested, incarcerated, and severely beaten, for the “crime” of writing to the U.N. High Commissioner for Human Rights. Id. at para. 223. The Special Rapporteur has also noted the Chinese government’s practice of claiming that those who have died while incarcerated have committed suicide: “Four nuns who protested all died on the same day in the same way while held in strict solitary confinement.” Sperling, supra note 32, at Torture and Abuse in Prison.
86 1999 ANNUAL REPORT, supra note 35, ann. at §1.
87 2000 ANNUAL REPORT, supra note 40, ann. at §1.
allegations of beatings, torture, and killings have arisen repeatedly between 1994 and 2002.90

As these examples demonstrate, it seems likely that there have been killings of Buddhist monks and instances where Buddhist monks have been subjected to serious bodily or mental harm, mostly through beatings and torture. These are physical acts that could constitute genocide. Yet, whether or not they actually constitute genocide depends on the intent with which they were carried out, and the existence of the requisite contextual elements. In this sense, the physical acts of genocide are the easiest elements of a genocide claim to prove. These acts must exist for there to be genocide, but not every killing is genocide. Indeed, the vast majority of killings are not genocide. Thus, it is the intent and the other contextual elements that turn unlawful killings and beatings into genocide.

b. Other acts that could be relevant to the existence of genocide

It is also worth noting that the authorities have arbitrarily imprisoned monks, forcibly defrocked monks, manipulated the appointment of reincarnated lamas, and attempted to exert control over Tibetan Buddhism.91 These actions cannot constitute the physical acts of genocide because they do not fall within any of the enumerated acts laid out in Article 2 of the Genocide Convention. Nevertheless, they still could be relevant to a conviction for genocide because they could be inferential evidence of genocidal intent.92


91 Supra Part II.B.

4. The evidence suggests that the Chinese authorities intended to control the monkhood, not destroy it

The most significant limitation on the application of genocide is the specific intent requirement. It requires proof that "the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in 'the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.'"\(^9\) This is a significantly higher evidentiary burden than that generally applicable to other violations of international criminal law, like war crimes or crimes against humanity.\(^9\)

Intent, by its very nature, refers to what is going on in the mind of the accused at the time of the alleged crime. But unless the accused testifies about his intent, there is usually little direct evidence of genocidal intent. Instead, intent is usually inferred from surrounding circumstances.\(^9\) Circumstantial evidence that may be considered includes:\(^9\) the general political doctrine that gave rise to the acts,\(^9\) the context of the preparation and repetition of the acts,\(^9\) and "simultaneous attacks on cultural and religious property and symbols."\(^9\) All of these factors are present to some degree. The Chinese government is generally hostile to Tibetan Buddhism; there appears to have been a repetition of potentially genocidal acts, like the arrest, torture, and killing of monks; and these acts have been accompanied by simultaneous attacks on religious property and symbols. Nevertheless, on balance, the evidence suggesting that the attacks on, and killings of, Tibetan Buddhist monks were carried out with the specific intent of destroying the Buddhist monkhood is relatively weak.


\(^{94}\) See infra Part V and accompanying text.

\(^{95}\) Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 523 (Sept. 2, 1998) (noting that "in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact").

\(^{96}\) Other factors may also be relevant. The section on anti-Muslim violence in Gujarat contains a more complete discussion of the circumstantial evidence that can be used to demonstrate genocidal intent. See infra Part IV.


In contrast, there is relatively strong evidence that the intent of the Chinese authorities was to control the monkhood, not to eradicate it.\textsuperscript{100} While monks have been defrocked, attacked, imprisoned, tortured, and even killed, many monasteries still exist and many monks still reside in them. Rather than eliminating Buddhist monks, the government seems to have focused on controlling the monkhood by installing “Patriotic Work Teams” and “Democratic Management Committees” in monasteries and manipulating the appointment of senior monks. Indeed, the Chinese government seems to have acknowledged that Buddhism is too important to the people of Tibet for it to be eliminated.\textsuperscript{101} Taken together, these facts suggest that the intent of the authorities was to control Tibetan Buddhism, not to destroy it.\textsuperscript{102} Consequently, the evidence suggests that specific intent was lacking and the mistreatment of Buddhist monks in Tibet between 1994 and 2002 probably should not be considered genocide.

III. ANTI-CHRISTIAN VIOLENCE IN IRAQ, 2003–2007

Since the U.S.-led invasion in 2003, there have been high levels of violence in Iraq. Much of this violence appears to be driven by ethnic and religious differences. It is not uncommon for journalists, academics, and politicians to ask whether the violence in Iraq should be called genocide.\textsuperscript{103} Usually, such discussions focus on the ongoing tensions between Shia and Sunni extremist groups, but there have been claims by various Christian groups that attacks against the Christians in Iraq constitute genocide.\textsuperscript{104} This section examines anti-Christian violence in Iraq in more detail and tries to

\textsuperscript{100} See supra Part. II.B.

\textsuperscript{101} See supra note 28 and accompanying text.

\textsuperscript{102} It is theoretically possible that the authorities could simultaneously intend to control Tibetan Buddhism and destroy the monkhood, but the evidence does not suggest that this is the case. The authorities appear to want control over the monasteries in order to identify and remove monks who support the Dalai Lama or Tibetan independence, not as a means to destroy the monkhood itself. When the Sky Fell to Earth, supra note 28, at 47–49.


draw some conclusions about whether genocide is occurring against Iraq’s Christian minority.

A. Background of Violence in Iraq

Iraq is a country of multiple ethnicities and religions. Out of a total population of approximately 27.5 million, Muslims comprise 97% of the population (Shia 60–65%, Sunni 32–37%). The remaining 3% of the population belongs to a range of different religions and denominations. These include various Christian groups, like Chaldeans, Assyrians, Syriacs, Armenians, and Protestants, as well as non-Christian groups such as the Yazidi, Sabean, Baha’i, Kaka’i, and Jews. It appears there are between 600,000 and 800,000 Christians in Iraq. The largest Iraqi Christian groups are Assyrians, Chaldeans, Armenians, and Catholics. The majority of Assyrian Christians can be found in the province of Nineveh. There are also significant Assyrian communities in and around Baghdad. The remaining Christians are mainly from areas around the southern city of Basra.

Iraq has witnessed high levels of sectarian violence since the U.S.-led invasion in March 2003. There are continuing reports of murders, abductions, torture, and destruction of property. According to the United Nations Assistance Mission for Iraq (UNAMI), during 2006, more than 34,000 civilians were killed and more than 36,000 were wounded. Many

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105 CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 272 (2006). The ethnic composition of Iraq is 75–80% Arab and 15–20% Kurdish, with the remaining 5% being made up of Turkomans, Assyrians, and others. Id.


107 Michael Luo, Iraq’s Christians Flee as Extremist Threat Worsens, N.Y. TIMES, Oct. 17, 2006, at A8. According to some Christian sources, the total number of Christians in Iraq is approximately 800,000. Iraqi Christians Seek To Escape Pressure From Islamist Extremists, ASSYRIAN INTELLIGENCE NEWS AGENCY, Sept. 30, 2004, http://www.aina.org/releases/2004093015327.htm; We Are In The Modern Catacombs, Says Young Iraqi Catholic, CHRISTIANS OF IRAQ, Oct. 26, 2004, http://www.christiansofiraq.com/siege.html. Some others have placed the number as low as 600,000. Luo at A8. A number between 600,000 and 800,000 is roughly consistent with Christians comprising a large majority of the 3% of the Iraqi population that is not Muslim. Id. However, the last census was conducted in 1987 and it is difficult to be certain about the size of the current Christian population of Iraq. Id.

108 U.N. High Commission for Refugees [UNHCR], Background Information on the Situation of Non-Muslim Religious Minorities in Iraq, (Oct. 2005) [hereinafter UNHCR Background]. The capital of Nineveh Province is the city of Mosul. Id.

109 Id.


different insurgent groups are thought to be responsible for the attacks, including Sunni Islamist groups, al-Qaeda, Ba’athists and the remnants of Saddam Hussein’s supporters, Shia militias, and a range of criminal gangs. Some groups are linked to members of the Iraqi government or are supported by neighboring countries, including Iran and Syria. “The Iraq Security Force (ISF), the police and the Multinational Force in Iraq have also been responsible for deaths.” Since the 2005 elections, most sectarian violence has been between Shiites and Sunnis, but there have also been significant attacks against Christians.

B. Targeting of the Iraqi Christian Community

According to the United States Commission on International Religious Freedom, while the turbulent situation in Iraq affects all Iraqis, non-Muslim minorities have been particularly affected. Christians are considered to be “non-believers” or infidels by Iraqi extremists, and are vulnerable to attack. Attacks on Christians have become common since the U.S.-led invasion of Iraq in 2003 for a number of reasons, including the perception that Iraqi Christians are aiding the Americans, and a belief among many Muslim Iraqis that the U.S.-led invasion is a crusade against Islam. The Christian community in Iraq has been targeted throughout the country,

of researchers concluded that total excess mortality exceeded 100,000 in Iraq between 2003 and 2004. Burnham et al., infra note 190, at 1. The group further estimates that there had been anywhere from 300,000 to 900,000 excess Iraqi deaths as a consequence of the Iraq war by 2006. Id.

112 Id.

113 Taneja, supra note 109, at 5.


115 The U.S. Commission on International Religious Freedom is a U.S. government body that was created to monitor the status of freedom of religion and provide policy advice to the U.S. government on issues related to freedom of religion. UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, FREQUENTLY ASKED QUESTIONS, http://www.uscirf.gov/about/faqs.html (last visited Jan. 8, 2008).


particularly in Baghdad, Mosul, Basra, and the northern Kurdish regions.\textsuperscript{120} Numerous organizations, including the United Nations and the Iraqi government, as well as Christian religious leaders have noted that Christians are targeted because of their religious beliefs.\textsuperscript{121}

\section*{C. Iraqi Christians are a Protected Group}

The first step in analyzing a genocide claim is identifying the victim group and deciding whether it is entitled to protection under the Genocide Convention.\textsuperscript{122} Many of the victims in Iraq could be viewed as members of either a religious group or an ethnic group. For example, the Chaldeans and Assyrians would probably be entitled to separate protection as an ethnic group.\textsuperscript{123} Nevertheless, the evidence suggests that the victims were chosen because of their religion, rather than their ethnicity.\textsuperscript{124} Accordingly, it makes more sense to focus on their existence as a religious group.\textsuperscript{125} Chris-
tians in Iraq are entitled to protection as a religious group because they share the same religion. Moreover, the individual Christian denominations in Iraq are probably also entitled to protection. Thus, Assyrians or Chaldeans could be the victims of genocide as Christians or as parts of their own denomination, depending on the evidence.

D. There is Evidence of Genocidal Acts

There is no evidence to suggest that the Iraqi Christians have been subjected to any of the acts enumerated in clauses (c) to (e) of Article 2 of the Genocide Convention. Accordingly, this section will focus on the killings of members of the group, and causing them serious bodily or mental harm.

1. Coordinated attacks on churches have resulted in many deaths

Many Iraqi Christians have been killed or grievously injured as a result of attacks on churches. For example, five churches were bombed in what looked like a series of orchestrated attacks in Baghdad and Mosul on August 1, 2004. At least eleven people were reported to have been killed and dozens of others were injured. An Islamic militant group claimed responsibility for the attacks.

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126 See RELIGIOUS FREEDOM REPORT, supra note 123 (noting that while there are differences amongst the different Christian groups in Iraq, for example the Chaldeans recognize the primacy of the Pope but the Assyrians do not, all share the same religion). Id.
127 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 515 (Sept. 2, 1998) ("The religious group is one whose members share the same religion, denomination or mode of worship"); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, para. 98 (May 21, 1999) ("A religious group includes denomination or mode of worship or a group sharing common beliefs.").
128 Geneva Convention, supra note 47, art. 2. To constitute killing, the victim must be dead, and the death must have resulted from an unlawful act of the accused. See supra text accompanying note 79. There is no minimum number of deaths that must occur for the crime of killing to be made out. See supra text accompanying notes 80–81. "Serious bodily or mental harm" encompasses acts of torture, inhumane or degrading treatment, and harm that seriously injures health, causes disfigurement, or causes serious injury to the organs or senses. Supra text accompanying notes 82–83. The harm caused can be temporary and remediable. Supra text accompanying note 84.
130 Bomb Blasts Rock Iraqi Churches, supra note 129.
131 See infra note 144 and accompanying text.
Several other coordinated attacks against Christian churches have taken place. There were a series of attacks on six Christian churches in Baghdad on October 16, 2004, killing at least one person and injuring nine more. On November 8, 2004, “car bombs exploded in front of the St. George and the St. Matthias church in Baghdad,” leaving at least three people dead and several others wounded.\footnote{UNHCR Background, \textit{supra} note 108.} On January 29, 2006, car bombs targeted the Catholic Church of the Virgin Mary, the Orthodox Church in Kirkuk, Saint Joseph’s Catholic Church, and an Anglican Church in Baghdad killing at least three people and wounding nine.\footnote{U.N. Assistance Mission for Iraq [UNAMI], \textit{Human Rights Report: 1 January--28 February} 2006, para. 19 (2006).} Attacks of this nature have led to cancellation of services by many churches and attendance at the remaining churches has dwindled.\footnote{Luo, \textit{supra} note 107.}

2. Numerous Christian religious leaders have been killed

In addition, prominent Christian religious leaders have been targeted. For example, the leader of Iraq’s Christian Syrian Community was killed in an attack on Qaraqosh, northeast of Mosul.\footnote{\textit{Human Rights Report: 1 November--31 December} 2006, \textit{supra} note 111, at para. 56.} On October 9, 2006, “Paulos Eskander, a priest from the Syriac Orthodox Church, was kidnapped” and executed.\footnote{\textit{Id.}} Two Chaldean Catholic nuns were stabbed to death in Kirkuk in March 2007.\footnote{Associated Press, \textit{Two Chaldean Catholic Nuns Stabbed to Death in North Iraq}, Mar. 28, 2007, \textit{available at} http://www.aina.org/news/2007032791913.htm.} Moreover, there have been reports of several other attacks on priests.\footnote{See Barbara B. Baker, \textit{Iraqi Captors Release Chaldean Priest}, \textit{AGENCE-FRANCE PRESSE}, Sept. 13, 2006, \textit{http://www.hrwf.net/religiousfreedom/news/freedom.html}.} In Mosul, a high-ranking priest “claimed that priests in Iraq can no longer wear their clerical robes in public for fear of being attacked by Islamists.”\footnote{U.N. Assistance Mission for Iraq [UNAMI], \textit{Human Rights Report: 1 September--31 October} 2006, para. 55 (2006).}

3. Many other Christians have been attacked and killed

Other prominent Christians have also been attacked, such as surgeon Ra’aad Augustine Qoryaqos, who was shot dead by three terrorists while making his hospital rounds.\footnote{Nina Shea & James Y. Rajis, \textit{Christian Crisis}, \textit{NAT’L REV. ONLINE}, Jan. 6, 2005, \textit{http://www.nationalreview.com/comment/shearayis200501060730.asp}.} On March 18, 2005, “\textit{Ansar Al-Sunna,} which mainly operates in Northern Iraq, announced the killing of a Christian gen-
eral of the Iraqi Army on its [] website." In 2005, two Christian businessmen were abducted in Baghdad and murdered. "In February 2005, a Christian nurse was beheaded by her kidnappers." According to the main Assyrian Christian news agency, thousands of Christians have been kidnapped and held for ransom. Some have been killed if the ransom was not paid. Unfortunately, given the chaos in Iraq, it is difficult to draw any firm conclusions about how many Christians have been killed because of their religion, although the number is almost certainly higher than indicated by the examples that are described above.

E. There is Evidence of a Specific Intent to Destroy the Iraqi Christian Community

The following factors may be relevant in assessing the existence of the requisite genocidal intent against the Christian community in Iraq:

1. Statements accompanying attacks on churches are important evidence of genocidal intent

While direct evidence of genocidal intent is rare, except where the accused confesses, statements made by the perpetrators can serve as important evidence of the requisite genocidal intent. The statements that have been made in conjunction with attacks on Christian churches and leaders are the most important evidence of the attackers' intent. For example, in the aftermath of the August 2004 church bombings, threats were issued by the militant group responsible for the attacks: "To the people of the crosses: Return to your senses and be aware that God's soldiers are ready for you. You wanted a crusade and these are its results."

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141 UNHCR Background, supra note 108.
142 Shea, supra 140.
143 UNHCR Background, supra note 108.
145 See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 728 (Sept. 2, 1998); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, para. 538 (May 21, 1999); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment, para. 933 (Jan. 27, 2000); compare Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgment, paras. 986–87 (Sept. 1, 2004) (noting that the "utterances of the accused are one way to prove genocidal intent, but that they do not lead to the conclusion that the "Accused harbored the intent to destroy the Bosnian Muslims and the Bosnian Croats of the ARK.").
There appears to have been a surge in anti-Christian violence following Pope Benedict XVI’s controversial public remarks on Islam. In September 2006, the Pope gave a speech at which he appeared to suggest that Islam was “evil and inhuman.” Extremist groups issued threats to kill all Christians unless the Pope apologized and warned of “reprisals against ‘worshippers of the cross.’” According to the Catholic Asia News agency, Islamist militants distributed flyers across Mosul threatening that unless the local Catholic clergy condemned the Pope’s remarks about Islam “Christians will be killed and churches burned down.” In October, unidentified men who attacked the Chaldean Church of the Holy Spirit in Mosul, wrote a message on the church doors: “If the Pope does not apologize, we will bomb all churches, kill more Christians and steal their property and money.” In addition, anti-Christian graffiti has been scrawled on church walls and inflammatory CDs sold in the markets. These statements are powerful evidence of genocidal intent, particularly the statements that suggest that all churches will be destroyed or that all Christians will be killed. Where available, such contemporaneous 

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147 See, e.g., note 150 and accompanying text.
148 The Pope quoted Manuel II Palaeologus, a fourteenth century Byzantine Emperor, during a speech delivered on September 12, 2006, at the University of Regensburg in Bavaria, Germany, saying: “Show me just what Muhammad brought that was new, and there you will find things only evil and inhuman, such as his command to spread by the sword the faith he preached.” Pope Benedict XVI, Faith Reason and the University: Memories and Reflections, Sept. 12, 2006, available at http://www.vatican.va/holyfather/benedict-xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html. This remark provoked criticism and anger from Muslim groups, especially in Iraq. Luo, supra note 107, at Al.
149 Luo, supra note 107, at Al.
150 Jenny Booth, Al-Qaeda Threatens Jihad over Pope’s Remarks, THE TIMES ONLINE, Sept. 18, 2006, http://www.timesonline.co.uk/tol/news/world/middle_east/article642645.ece. Abu Jaffar, an Islamic extremist from Muhammad’s Army, a Sunni insurgent group stated: “Their leader [the Pope] has verbally abused and offended our religion and the Prophet. Unfortunately, he did not analyze the consequences of his speech. Our country is an Islamic land and they [Christians] will have to rely on the Pope’s charity from now on.” Christians Live in Fear of Death Squads, supra note 121.
153 Fairweather, supra note 104.
154 Id.
155 One significant downside to this evidence of genocidal intent is the apparent diversity of perpetrators. See Human Rights Report: 1 November–31 December 2006, supra note 111, at paras. 30–32. It is often not clear which groups are committing which violent acts, nor is it clear what relationships the various groups have to one another. Consequently, while collectively the evidence of genocidal intent is quite compelling, it might be difficult to attribute
statements by perpetrators are usually better evidence of intent than inferences derived from other factors like the context or repetition of attacks because there is a more direct connection between the statement and the perpetrator’s intent. In this case study, they are accompanied by other factors that can be used to establish genocidal intent.

2. Simultaneous attacks on churches and other religious buildings

Simultaneous attacks on cultural and religious property and symbols may also be evidence of genocidal intent. Since the U.S.-led invasion of Iraq in 2003, more than twenty-five churches in Iraq are reported to have been bombed. Some of the bombings of churches have already been referred to previously. Other religious buildings, including Christian schools, convents, and the residences of Christian religious leaders, have also been attacked. The attacks appear to have been coordinated, and come in waves, with multiple churches or religious buildings attacked in each wave. The attacks began in late 2003, with waves of attacks occurring in late 2004, early 2006, and late 2006.

These statements to individual groups, even though the different groups appear to share similar aims.

156 Supra note 99 and accompanying text.
157 Supra notes 129–34.
158 In 2003, there was a rocket attack on a convent in Mosul, explosions in two Christian schools in Baghdad and Mosul, and an explosion in a church in Baghdad on Christmas Eve. A bomb was found and defused in a monastery in Mosul. TANEJA, supra note 110, at 9.
3. Other acts that are relevant to establishing special intent

Genocidal intent can also be inferred from the context in which the anti-Christian violence is occurring and evidence of other violent or coercive acts targeting Iraqi Christians. There have been reports of Iraqi Christians being forcibly converted to Islam, mass displacement of the Iraqi Christians within and across national borders, and forced compliance with Islamic religious prescriptions. Acts such as mass exodus and displacement can be used as inferential evidence of the special intent to commit genocide. These will be discussed in greater depth in the section dealing with destruction of the Iraqi Christians as a group.

F. Destruction of the Group

The jurisprudence of international tribunals and learned commentaries are far from unanimous in understanding what is meant by “destroy” in the chapeau of Article 2 of the Genocide Convention. As a starting point, customary international law indicates that Articles 31 and 32 of the Vienna Convention on the Law of Treaties should be used as a guide to interpreting the term. These articles suggest that “destroy” should be given its ordinary meaning in its context and in light of its object and purpose. Only in the event that the ordinary meaning leads to an ambiguous or manifestly absurd result should supplementary means such as the negotiating history be used to interpret the text of the Genocide Convention.

If “destroy” is given its ordinary meaning, it should encompass several meanings, such as (1) to ruin completely, (2) to tear down or break up, (3) to do away with (4) to kill, (5) to subdue or defeat completely, and (6) to subdue.

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162 See supra notes 129–34.
163 See infra notes 192–98 and accompanying text.
164 See infra Part III.F.3.
165 See infra notes 210–16 and accompanying text.
render useless or ineffective.\textsuperscript{170} While one of the meanings of destroy is "to kill," it is not the only one, and several meanings—like to subdue, defeat, or render useless—do not require the deaths of the things being destroyed. Thus, one would not expect "destroy" to require the deaths of the members of the group. This interpretation is supported by the fifth enumerated genocidal act, the forcible transference of children from one group to another, which does not require the killing of the children, yet clearly constitutes genocide.\textsuperscript{171}

Yet, the dominant interpretation of "destroy" in the early jurisprudence of the ICTY and the ICTR ignored this approach and confined destruction to only physical or biological acts. In \textit{Krstic}, the ICTY Trial Chamber categorically held that "customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group."\textsuperscript{172} Later decisions from the ICTY and the ICTR followed this holding.\textsuperscript{173} This interpretation of "destruction" was adopted in an attempt to distinguish physical and biological acts of destruction from situations of "cultural" genocide, which the \textit{Krstic} court found were excluded from the definition of genocide.\textsuperscript{174}

At first glance, the drafting history of the Convention appears to support a limited interpretation of destruction,\textsuperscript{175} a position that has been endorsed by the International Law Commission.\textsuperscript{176} Nevertheless, there seems to be no legal reason why non-physical and biological acts (with the exception of cultural genocide) cannot be considered forms of "destruc-
Indeed, some recent judicial decisions indicate a trend towards expanding destruction to cover conduct that goes beyond physical and biological destruction.

For instance, in Krajisnik an ICTY Trial Chamber held that "destruction," as a component of the specific intent of genocide, could not be limited to physical or biological destruction of the group’s members, since the group could be destroyed in other ways, such as by transferring children out of the group. Judge Shahabuddeen’s partially dissenting opinion in Krstic stressed that while the enumerated acts described in clauses (a) to (e) of Article 2 must take a physical or biological form, the accompanying intent to destroy the group need not always lead to physical destruction. He went on to argue that:

[M]ere displacement does not amount to genocide. But, in this case, there was more than mere displacement. The killings, together with a determined effort to capture others for killing, the forced transportation or exile of the remaining population, and the destruction of homes and places of worship, constituted a single operation which was executed with intent to destroy a group in whole or in part. . . .

In one of the most important recent genocide cases, the Blagojevic Trial Chamber extensively analyzed past jurisprudence on the meaning of “destroy” and noted that recent developments indicated that the concept of destruction was expanding beyond physical and biological destruction. It referred to the Trial Chamber’s decision in Akayesu, which held that sexual violence against Tutsi women was integral to the process of destruction of

177 SCHABAS, supra note 50, at 229 (noting that the words of the Genocide Convention can “certainly bear” a broader interpretation of destroy). It is also interesting that Raphael Lemkin, who coined the term genocide, had a broad understanding of destruction, which encompassed destruction of political institutions, economic life, language and culture with physical destruction as only the ultimate stage in genocide. Raphael Lemkin, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 79, 87–89 (1944); see also Lippman, supra note 57, at 590 (noting that in Lemkin’s view, genocide did not necessarily involve immediate extermination). Lippman notes that some early prosecutions for genocide adopted Lemkin’s broad approach. Id. at 593 (describing three early cases brought before the Supreme National Tribunal of Poland in 1946 and 1947).


180 Id. at para. 57.

the Tutsis as a group, and could therefore constitute genocide.\footnote{182} It also noted that the Trial Chamber's decision in \textit{Kayishema and Ruzindana}, which held that acts falling short of death could fall within the concept of destruction of a group.\footnote{183} Judge Shahabuddeen also found support in the separate opinion of Judge Lauterpacht in the \textit{Application of the Convention for the Prevention and Punishment of the Crime of Genocide}, where he argued that

\textit{[T]he forced migration of civilians, more commonly known as "ethnic cleansing," is, in truth, part of a deliberate campaign by the Serbs to eliminate Muslim control of, and presence in, substantial parts of Bosnia-Herzegovina. Such being the case, it is difficult to regard the Serbian acts as other than acts of genocide in that . . . they are intended to destroy that group, if not in whole certainly in part, to the extent necessary to ensure that that group no longer occupies the parts of Bosnia-Herzegovina coveted by the Serbs.}\footnote{184}

As additional support, the Chamber referred to General Assembly Resolutions that had equated "ethnic cleansing" with genocide,\footnote{185} and quoted from the jurisprudence of the German Federal Constitutional Court.\footnote{186}

The \textit{Blagojevic} court concluded that physical or biological destruction of a group could be accomplished through means other than simply direct acts of killing. Such destruction is the "likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself—particularly when it involves the separation of its members."\footnote{187} Forcible transfer could thus lead to the material destruction of the group, at least in its former state.\footnote{188} The following

\begin{footnotes}
\item[182] \textit{Id.} at para. 662 (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, paras. 731–32 (Sept. 2, 1998)).
\item[183] \textit{Id.} (citing Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, para. 95 (May 21, 1999)).
\item[184] \textit{Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. and Mont.)), 1993 I.C.J. 325, 431–32 (separate opinion of Judge Lauterpacht).}
\item[186] \textit{Id.} at para. 664 (citing Bundesverfassungsgericht, [BverfG] [Federal Constitutional Court] Dec. 12, 2000, 2 Entscheidungen des Bundesverfassungsgericht [BverfGE] [F.R.G.]). The Federal Constitutional Court held that the limits of the extension of "destroy" to encompass non-physical and non-biological destruction are only exceeded when the intention to destroy relates solely to the cultural identity of a group. The term "destroy" may thus include other means of destruction pertaining to the destruction of a group as a social unit in its specificity, uniqueness and feeling of belonging. \textit{Id.}
\item[188] \textit{Id.}
\end{footnotes}
sections will examine the evidence that the Iraqi Christian group has been targeted for destruction in light of this legal discussion.

1. The physical or biological destruction of Iraqi Christians

As the facts above demonstrate, there have been numerous killings of Iraqi Christians. It is virtually impossible to determine how many Iraqi Christians have been killed as a result of religiously motivated violence, but it is certainly much higher than the number of dead recorded in the examples described above. The chaotic nature of the violence undoubtedly means that many more Christians have died than have been reported in the English language press. In fact, the number of deaths could possibly be in the tens of thousands. There is no question that these deaths constitute evidence of destruction for purposes of the Genocide Convention, but recent jurisprudence suggests that other forms of destruction should also be considered.

2. Forced conversions

The United Nations Assistance Mission in Iraq Human Rights Report of December 2006 noted that Assyrians and other minority communities in the Nineveh plains region have been pressured to convert to Islam. In early 2007, insurgents in parts of Baghdad “demanded that Christians living there pay jizya, a head tax on non-Muslims living under Muslim rule,” convert to Islam, or leave. In early 2007, a militant Islamic group

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189 The authors have searched for but have been unable to locate any figures they consider reliable.

190 See Gilbert Burnham et al., Mortality After the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey, 368 LANCET 1421, 1426–28 (2006) (noting that “passive surveillance measures” rarely accurately report the number of excess deaths and citing as an example that newspaper accounts of deaths in Guatemala between 1960 and 1990 under-reported excess deaths during years of high violence by a factor of twenty).

191 At least one excess mortality survey has concluded that as many as 650,000 people have died as a result of violence in Iraq, with almost 600,000 of them dying from violent causes. See Burnham et al., supra note 190, at 6. Christians make up about 3% of the population of Iraq. See supra note 200. If Christians were being killed at the same rate as other groups, this would suggest a death toll of approximately 18,000 people. But the evidence suggests that Christians (and other minorities) have been disproportionately targeted in Iraq. Supra Part III.B. For example, Iraqi Christians seem to have been displaced at a rate nearly ten times higher than their overall representation in the population. See infra Part III.F.3. This may indicate that the Christian death toll is higher than 18,000.


issued a *fatwa* to the Assyrian Christian residents of Dora, a suburb in Baghdad ordering them to convert to Islam within twenty-four hours, or face death. The Muslim residents were also exhorted over the loudspeakers of local mosques, to confiscate property of Christians and enforce the *fatwa*. This led to mass exodus of the Assyrian community from Dora.

Some aspects of forced conversions are analogous to the crime of forcible transfer of children described in Article 2 of the Genocide Convention, and therefore should qualify as a form of destruction. Forcible transfer of children and forced conversions both ultimately lead to the same result: the children of the protected group are prevented from becoming members of the group, which eventually destroys the group. This suggests that forced conversions should be treated as a form of destruction.

3. Mass exodus and displacement resulting in the destruction of the protected group

One result of the high level of violence in Iraq is the movements of large numbers of people both across borders and internally within Iraq. According to the United Nations High Commissioner for Refugees (UNHCR), at least 1.6 million people remain internally displaced in Iraq and a further 1.6 to 1.8 million have fled to neighboring states. While minorities make up only about three percent of the Iraqi population, they form 30% of Iraqis who have fled since 2003 and are now seeking refugee status; the number of minority community refugees thus seems to be ten times their proportion of the Iraqi population. Mowfaq Abdul al Raoof, spokesman

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195 Issac, supra note 146.
196 Id.
198 Cf. Lippman, supra note 57, at 589, 598 (noting that the "relocation of adolescents into environments where they will be instilled with new customs, languages, religions and values was considered tantamount to the eradication of the next generation" by the drafters of the Genocide Convention).
199 TANEJA, supra note 110, at 7.
200 "An official from the UN refugee agency (UNHCR), speaking on condition of anonymity, told UN News Agency IRIN that minorities in Iraq make up about 30 percent of Iraqi refugees, whose total number is thought to be 1.8 million... Iraq's religious minorities include Chaldean Catholics, Eastern Rite Catholics, Orthodox, Assyrian, Syriac, Sabaeo-Mandeans, Kaka'I [sometimes known as Ahl-e-Haqq], Armenians, Yazidis, Bahais, and Hebrews." IRAQ: Minorities Living Tormented Days Under Sectarian Violence, Integrated Regional Information Networks, Jan. 4, 2007, http://www.irinnews.org/Report.aspx?ReportId=62981.
for the Ministry of Migration and Displacement in Iraq, stated that “[a]ccording to our estimates, nearly half of the minority communities have already fled to other countries.”

A very large number of these refugees are Christian. The Catholic bishop of Baghdad, Andreos Abouna, was quoted recently as saying that half of all Iraqi Christians had fled the country since the 2003 U.S.-led invasion. Emmanuel Khosaba, the Syrian head of the Assyrian and Democratic Movement reported that more than 35,000 Iraqi Christians had fled to Syria by October 2006 because of individual threats from Muslim extremists and the general deterioration of security in Iraq.

There is also significant internal displacement of Christians within Iraq. In 2007, “groups affiliated with Al-Qaeda issued a threat of ‘convert or be killed’” prompting an exodus of Christians in the district of Dora. Iraqi Christians are also leaving the city of Mosul for other parts of Nineveh Province because of anti-Christian violence. When combined with evidence of the deliberate killings of large numbers of Iraqi Christians, this forced displacement of the Iraqi Christian population should be considered a form of destruction.

202 Id.
204 TANEJA, supra note 110, at 7 (citation omitted).
206 Some Christians are moving from Mosul, Baghdad, and Basra, towards the Kurdish regions in the north of the country. Human Rights Report: 1 September–31 October 2006, supra note 139, at para. 57. Others are simply leaving Iraq’s cities for safer areas. It is reported that one in four Christian families living in the major Iraqi cities has already left. Out of 20,000 Christian families in the Dora neighborhood of Baghdad before the U.S.-led invasion of 2003, only 3,000 are left. Keith Roderick, Iraq’s Christian Exodus, NAT’L REVIEW ONLINE, Jul. 30, 2007 http://article.nationalreview.com/?q=NjFIZTIyYjZjYjklNmZhZTc2MmUxNzJjZmJ4ZTI0MW1=.
207 Damien McElroy, Christians Flee Iraq after Death Threats, DAILY TELEGRAPH, May 10, 2007, http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/05/08/wiraq08.xml. The religious leaders of churches in Dora claim that their people are being killed just for their faith, and that this is being done with the complicity of the government of Iraq. Id.
209 See Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment, para. 57 (Apr. 19, 2004) (Shahabuddeen, J., dissenting in part) (noting that forcible displacement should have been considered in light of the killings by the Bosnian Serb forces).
4. Enforcement of Islamic religious proscriptions

Christians have been targeted by Islamic extremists for activities that supposedly fail to comply with Islamic beliefs. For example, selling alcohol, a traditional Christian occupation in Iraq, is now effectively prohibited in many places. According to the Christian and Other Religions Endowment Bureau in Iraq, 210 "approximately 95 percent of alcohol shops have closed following threats by Islamic extremists." 211 Liquor stores that have stayed open have sometimes been destroyed and the people running them have been killed. 212

Women have also been subjected to abuse and humiliation for not wearing a veil. 213 In Mosul, female students received leaflets warning them to wear proper "Muslim attire" at local universities. 214 In the Sadr city suburb of Baghdad, Shiite religious leader Mohammed al-Fartussi "threatened 'sinful women,' alcohol sellers and cinemas of grave consequences if they did not stop their practices within a week." 215

Under a narrow definition of destruction, these acts might be viewed as simply the elimination of the religious identity of the protected group. Thus they might be dismissed as "cultural genocide" and not evidence of true genocide. Nevertheless, under a slightly broader interpretation of destruction, these acts could be considered, along with evidence of widespread killings, forced displacement, attacks on churches, and other support-

211 TANEJA, supra note 110, at 8.
213 Zoepf, supra note 118.
ing evidence, as part of a larger policy of destroying Christian communities in Iraq.\textsuperscript{216}

\textbf{G. \textit{Substantial Portion}}

Genocide must involve the intent to destroy a substantial portion of the group,\textsuperscript{217} which could be a reasonably significant number, relative to the total of a group as a whole, or a "significant section of the group such as its leadership."\textsuperscript{218} There is no minimum number of deaths that is required, so long as it represents a "substantial part" of the group.\textsuperscript{219} For instance, in the case of the massacre of Bosnian Muslims at Srebenica, the ICTY found that the deaths of approximately 7,000 people constituted a substantial portion of the relevant protected group.\textsuperscript{220} Unfortunately, there is very little evidence on the exact number of killings of Iraqi Christians.

While the number of people killed in the examples described above is quite high, the casualties from these attacks alone would probably not constitute a significant part of the 600,000 to 800,000 Christians in Iraq.\textsuperscript{221} Nevertheless, there are likely to be many more killings that were religiously motivated, but that were not reported. In the absence of better data about the overall number of Christians killed in religiously-motivated violence in Iraq, it is impossible to make any firm conclusions about whether a substantial portion of the group has been killed.\textsuperscript{222}

A substantial portion of the group could also be destroyed if its leadership was killed and the loss of that leadership would affect the survival of the group.\textsuperscript{223} Christian religious leaders have been targeted and killed, especially in the context of attacks against churches and other religious


\textsuperscript{217} See supra notes 47–48 and accompanying text.

\textsuperscript{218} Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, supra note 64, at para. 29.

\textsuperscript{219} Prosecutor v. Bagilishema, Case No. ICTR 95-1A-T, Judgment, para.64 (June 7, 2001); Prosecutor v. Kristic, Case No. IT-98-33-A, Judgment, para. 13 (Apr. 19, 2004).

\textsuperscript{220} Prosecutor v. Kristic, Case No. IT-98-33-T, Judgment, paras. 592–99 (Aug. 2, 2001); Prosecutor v. Kristic, Case No. IT-98-33-A, Judgment, paras. 35, 37–38 (Apr. 19, 2004). The size of the protected group (i.e., Bosnian Muslims in and around Srebenica) was found to be about 40,000. Consequently, the Kristic court found that slightly less than 18% of a group was a substantial portion. There is no reason to believe that the figure 18% is particularly significant or that it represents some sort of minimum value below which genocide cannot occur.

\textsuperscript{221} Supra note 107.

\textsuperscript{222} Supra note 189–91 (discussing the difficulty of estimating the number of Christians killed in Iraq).

\textsuperscript{223} See supra notes 64–65.
buildings in Iraq.\textsuperscript{224} The dwindling number of people attending church,\textsuperscript{225} and fear of priests to wear clerical robes in public\textsuperscript{226} suggest that these attacks have had a significant impact on the Iraqi Christian leadership, and by extension, Iraqi Christians as a group. But in the absence of more detailed evidence on the scale and nature of this impact, it is difficult to say that a significant part of the leadership has been destroyed.

\textbf{H. Conclusion}

Assessing whether violence against the Christians in Iraq can be classified as religious genocide presents interesting challenges. The context of the violence against the Iraqi Christians, along with the targeting of religious leaders and buildings accompanied by statements advocating the destruction of Iraqi Christians supports an inference of the requisite genocidal intent. Nevertheless, while there is evidence to suggest that many Iraqi Christians have been subjected to acts of violence on account of their membership in a religious group, the lack of evidence about the number of deaths makes it difficult to know whether a substantial portion of the group has been destroyed. If the traditional interpretation of destruction is expanded to include other acts such as mass displacement, forced conversions, and enforcement of Islamic proscriptions, seen in the context of kidnappings, assaults, and attacks on religious property, it is more likely that a court would find that a substantial portion of the group has been destroyed. Unfortunately, the lack of evidence about the scope of the attacks on Iraqi Christians means it is difficult to draw any firm conclusions.

\textbf{IV. VIOLENCE AGAINST MUSLIMS IN GUJARAT IN FEBRUARY 2002}

On February 27, 2002, two train carriages carrying Hindu activists were allegedly set on fire by a Muslim mob in the town of Godhra, in the Indian state of Gujarat,\textsuperscript{227} resulting in fifty-eight deaths, including women and children.\textsuperscript{228} The Hindu activists were returning from Ayodhya, in the state of Uttar Pradesh, where they had participated in a campaign led by the

\textsuperscript{224} \textit{Supra} notes Part III.D.1–2.
\textsuperscript{225} \textit{Supra} notes 134 and accompanying text.
\textsuperscript{226} \textit{Supra} notes 139 and accompanying text.
\textsuperscript{228} \textit{Human Rights Watch, We Have No Orders to Save You: State Participation and Complicity and Communal Violence in Gujarat 4} (2002) [hereinafter \textit{We Have No Orders to Save You}].
Vishwa Hindu Parishad (VHP or World Hindu Council)\textsuperscript{229} to construct a temple to Ram, a Hindu deity, on the site of a sixteenth century mosque that had been destroyed by VHP supporters in December 1992.\textsuperscript{230} In response, from February 28 to March 3, 2002 there were widespread attacks throughout Gujarat by Hindus against Muslims, involving killings, sexual violence, torture, destruction of property—and the internal displacement of people.\textsuperscript{231} The violence continued for several months afterwards, despite the deployment of the Indian army in Gujarat.\textsuperscript{232}

The Gujarat violence has been labeled “genocide” by various commentators and reports,\textsuperscript{233} although the government has downplayed the severity of the violence.\textsuperscript{234} Some of those responsible for crimes linked to the Gujarat violence have been convicted of murder, but it does not appear that Indian courts have addressed the question of whether the violence in Gujarat constituted genocide.\textsuperscript{235} This section assesses whether the reported violence meets the elements necessary to constitute genocide against a religious group.\textsuperscript{236}


\textsuperscript{231} \textit{WE HAVE NO ORDERS TO SAVE YOU}, supra note 228, at 4.

\textsuperscript{232} Id.


\textsuperscript{234} \textit{WE HAVE NO ORDERS TO SAVE YOU}, supra note 228; Press Trust of India, \textit{BJP Cites Government Statistics to Defend Modi}, INDIA EXPRESS, May 12, 2005.


\textsuperscript{236} The elements of genocide are discussed above. See \textit{supra} notes 47–48 and accompanying text.
A. Muslims are a Protected Religious Group

For the crime of genocide to be committed, the victims must be members of a racial, ethnical, national or religious group. A religious group is one whose members share the same religion.\(^\text{237}\) Islam is a recognized religion in India, where Muslims make up more than 13% of the population.\(^\text{238}\) Consequently, Muslims are a protected religious group. But the subject of this case study is not all Muslims, but a specific subset of the Muslim community—Muslims living in Gujarat. For genocide to be committed against them, they must constitute "part" of a group as defined in Article 2 of the Genocide Convention. This will be analyzed in the section dealing with the requirement of destruction of the group "in part."

B. There is Evidence of Genocidal Acts

There is no evidence to suggest that any of the acts enumerated in clauses (c) to (e) of Article 2 of the Genocide Convention were carried out against the Muslim community in Gujarat in February 2002. This section will focus on killings of members of the group and causing them serious bodily or mental harm.

1. Killings

According to official government estimates, around 850 people were killed\(^\text{239}\) (later revised to 790 Muslims and 254 Hindus),\(^\text{240}\) but most observers have concluded that approximately 2000 people died, most of

\(^{237}\) Supra note 53.

\(^{238}\) CENSUS OF INDIA 2001, DATA ON RELIGION, available at http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/religion.aspx. India is a multi-religious state dominated by two religions, Hinduism and Islam, which together account for nearly 95% of the population. According to the 2001 Indian census, India’s overall population is 80.5% Hindu and 13.4% Muslim. The remaining 6.1% of the population is split between Christians, Sikhs, Buddhists, Jains, and “Other Religions and Persuasions.” Id. Like India as a whole, Gujarat is also dominated by Hindus and Muslims—89.1% of the population is Hindu. Muslims make up 9.1% of the population, see Census Reference Table, C-Series Population by Religious Communities (2001), http://www.censusindia.gov.in/Census_Data_2001/Census_data_finder/C_Series/Population_by_religious_communities.htm.

\(^{239}\) We Have No Orders to Save You, supra note 228, at 4. The crime of killing requires that the victim must be dead; and the death must be attributable to an unlawful act of the accused. There is no quantitative requirement that must be satisfied in order to constitute killing. See supra notes 80–82 and accompanying text.

them Muslims, during the communal violence in Gujarat. As the descriptions throughout this case study demonstrate, a large number of those deaths would probably be considered unlawful, particularly those that were the result of anti-Muslim mob violence. Accordingly, it appears that this physical element of genocide does exist.

2. Causing serious bodily or mental harm

"Serious bodily or mental harm" encompasses rape and acts of sexual violence. Several reports have concluded that violence against women and girls was a key feature of the attacks against the Muslim population. The exhortations to commit rape and other acts of sexual violence against Muslim women were allegedly contained in pamphlets distributed by the VHP and RSS in Ahmedabad months before the massacre. According to reports, during the Gujarat violence, several hundred Muslim women and girls were sexually humiliated, mutilated, raped, or gang raped. According to local investigators, there were around 250 to 300 female victims among the dead, most of whom had either been raped or gang raped and in several cases, burnt alive.

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242 For example, an Indian court has found that at least one instance of mob violence during the Gujarat riots constituted murder. See Hindus Jailed over Gujarat Riots, BBC NEWS, Oct. 30 2007, http://news.bbc.co.uk/2/hi/southasia/7069809.stm.

243 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 731 (Sept. 2, 1998) ("Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict [sic] harm on the victim as he or she suffers both bodily and mental harm.").


246 Justice, the Victim—Gujarat State Fails to Protect Women from Violence, supra note 241, at 17. In one incident, a woman was gang raped, her womb cut open, the fetus ripped apart, hacked to pieces and thrown into the fire. Id. at 20.
C. Genocidal Intent

In the case of the violence against the Muslims in Gujarat, several circumstantial factors are relevant to an establishment of genocidal intent:

1. General political doctrine giving rise to the acts

The general political doctrine that gave rise to the acts of violence against the targeted group can be used as inferential evidence of genocidal intent. The incidents leading up to the Godhra train incident and its aftermath must be seen against the backdrop of the political situation in Gujarat and the buildup to the violence. The groups allegedly responsible for violence against Muslims in Gujarat include the VHP, the Bajrang Dal, and the Bharatiya Janata Party (BJP). All three of these groups belong to an umbrella organization called Rashtriya Swayamsevak Sangh (National Volunteer Corps or RSS). These organizations "collectively form the sangh parivar (or "family" of Hindu nationalist groups).

The Vishwa Hindu Parishad (VHP) was formed in 1964 to cover the social aspects of RSS activities. The VHP propagates RSS ideology to Hindus living abroad and holds conferences for Hindu religious leaders across India. It is involved in Sanskrit education, the organization of Hindu rites and rituals, and converting people from other religions to Hinduism.

The Bajrang Dal is the militant youth wing of the VHP. It was formed in 1984, during the Babri Masjid conflict, in order to mobilize youth for the Ram temple campaign. The BJP is the political wing of the sangh parivar.

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247 Supra notes 97 and accompanying text.
248 The BJP was the political party in charge of both the Indian central government and the state government of Gujarat at the time of the violence. supra note 228, at 41–46.
249 Id. at 39. “The RSS was founded in 1925 in Nagpur by Keshav Baliram Hedgewar with the mission of creating a Hindu state. Since its founding, it has propagated a militant form of Hindu nationalism which it promotes as the sole basis for national identity in India.” Id. Western thought and civilization are labeled as enemies of Hindu culture and Islam and Christianity are depicted as alien religions of foreign invaders—the Mughals and the British. Id. (citation omitted).
250 WE HAVE NO ORDERS TO SAVE YOU, supra note 228, at 4.
253 See supra note 230 and accompanying text (describing the Babri Masjid conflict).
254 N.K. Singh & Uday Mahurkar, Bajrang Dal: Loonies at Large, INDIA TODAY, Feb. 2, 1999, at 26. The Bajrang Dal has a fairly loose organizational structure and initially operated under different names in different states. Id.
The BJP came to power in Gujarat in 1995, and since 1998 has been associated with an increasing “Hinduisation” of the state.256 Parallel to the rise of the BJP in Gujarat, Hindu nationalist groups in the state have become more prominent and violent. Gujarat has witnessed successive episodes of Hindu-Muslim violence in 1969, 1985, 1989 and 1992.257 Fliers proclaiming India as a Hindu country and containing hate speech directed against Muslims and Christians were allegedly circulating in Gujarat since at least 1998.258

2. Systematic targeting of Muslims as a group and attacks on religious symbols

Genocidal intent may also be established by evidence that victims were systematically targeted because of their membership in a particular group and by evidence of simultaneous attacks on cultural and religious property and symbols.259 Muslims, as a distinct group, were the target of violence in the aftermath of the train attack at Godhra. For example, Muslim houses were deliberately targeted.260 According to reports, a few days before the attack at Godhra, Hindu houses in Muslim dominated areas had been marked out with easily identifiable Hindu symbols such as saffron flags and pictures of Hindu deities and were spared from attacks.261 Islamic
religious symbols were also targeted. Mosques, *dargahs* (shrines or tombs of Muslim saints), and other places of Muslim religious significance were damaged.\(^{262}\) Copies of the Qur'an were damaged or destroyed in towns and villages all over Gujarat.\(^{263}\) In addition, Muslim men, women, and children were allegedly burned alive as a deliberate method of terrorizing the Muslim population, because Muslims bury their dead, while Hindus cremate them.\(^{264}\)

3. Utterances of the perpetrators and attacks on pregnant women

Muslim women were particularly targeted by Hindu attackers as symbols of the community that they sought to humiliate and destroy—not only as bearers of children, but also as a target of revenge for the supposed historical defilement of Hindu women by Muslim men during repeated “Muslim” invasions of the “motherland.”\(^{265}\) Some survivors reported rapists shouting that they intended to impregnate them with “little Hindus,” and pregnant women were allegedly attacked so as to destroy the fetus.\(^{266}\)

The use of the words “little Hindus” by the perpetrators during rapes is strongly suggestive of a genocidal intent.\(^{267}\) These words imply that the goal of the crime was not just rape of Muslim woman, but the destruction of the Muslim group. The perpetrators appeared to believe that by raping Muslim women, they could ensure that the children born of the rapes would not be Muslim. This implies that their intent was the destruction of


\(^{263}\) 1 CONCERNED CITIZENS TRIBUNAL, supra note 261, at 43.


\(^{265}\) A FEMINIST ANALYSIS OF THE GENOCIDE IN GUJARAT, supra note 233, at 69; According to Amnesty International “Women were raped while the rapists chanted Hindu slogans; the weapons with which women’s wombs were cut open were *trishul* and swords; the bodies of the victims were not left where they fell but burned in the way Hindus cremate their dead. Witnesses reported that in some cases, the syllable ‘Om’ which has religious significance in Hinduism was cut into the bodies and skulls of victims.” AMNESTY INT’L, INDIA: JUSTICE, THE VICTIM—GUJARAT STATE FAILS TO PROTECT WOMEN FROM VIOLENCE 17 (Jan. 27, 2005), http://www.amnesty.org/en/library/info/ASA20/001/2005.

\(^{266}\) INDIA: JUSTICE, THE VICTIM—GUJARAT STATE FAILS TO PROTECT WOMEN FROM VIOLENCE, supra note 265, at 20.

\(^{267}\) Id. Genocidal intent may be inferred from the utterances of the accused at the time of commission of the crimes. See Prosecutor v. Radoslav Brdanin, Case No. IT-99-36-T, Judgment, paras. 986–87 (Sept. 1, 2004).
4. Statements by leaders advocating violence and other forms of hate speech

Statements made by the leaders at the time of the violence may be used to infer the special intent to commit genocide. Several pamphlets and newspaper articles advocating violence against Muslims, economic boycott of Muslim commercial establishments, and sexual violence against Muslim women were in circulation before, during, and after the Gujarat violence. Pamphlets advocating an economic boycott of the Muslim community resurfaced in 2002, in the months preceding the Godhra train attack.

In the aftermath of the Godhra train burning, Pravin Togadia, international general secretary of the VHP, allegedly stated that “[t]his has never happened in the history of independent India. Hindu society will avenge the Godhra killings. Muslim[s] should accept the fact that Hindus are not wearing bangles. We will respond vigorously to all such incidents.” Jaideep Patel, the Joint Secretary of the VHP in Gujarat declared on February 27, 2002, “[w]hoever stays with us will benefit. You can see the results in UP [Uttar Pradesh]. In this country whoever stays with the Hindu community and Hindutva, will benefit, or they will suffer.” Local newspapers such as Sandesh reportedly contributed to inciting communal violence with headlines such as “Avenge Blood with Blood,” running unverified reports of

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268 See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, paras. 507–08 (Sept. 2, 1998) (noting that raping a woman with the intent that the offspring of the rape will not belong to the mother’s group is a form of genocide).

269 In the context of rape and sexual violence against women, statements by the accused advocating the killing of pregnant women so as to prevent the perpetuation of the target group have been held to demonstrate the existence of genocidal intent. See id. at para. 21.

270 Supra note 145.


274 Id.
sexual assaults on Hindu women, and publishing graphic photographs of charred bodies of the Godhra victims.\(^{275}\)

In the aftermath of the violence, Ashok Singhal, the working president of the VHP allegedly described Gujarat as a “successful experiment” in raising Hindu consciousness, which would be repeated all over the country.\(^{276}\) At the height of the killings, on March 1, 2002, Narendra Modi, the Chief Minister of Gujarat described the riots as “resulting from the natural and justified anger of the people.”\(^{277}\) Praveen Togadia, the international general secretary of the VHP stated that the “time was ripe for forming a separate army of Hindu youths who would protect the religion from attacks by jehadis.”\(^{278}\) In December 2002, after the BJP party’s decisive win in the state assembly elections in Gujarat, Togadia reportedly asserted that the experiment of the “Hindutva lab” would be repeated in other parts of the country and that “[a] Hindu Rashtra [state] can be expected in the next two years... We will change India’s history and Pakistan’s geography by then.”\(^{279}\)

5. Evidence of advanced preparation for the attacks

The nature of the violence indicates that the attacks were premeditated.\(^{280}\) Allegedly, meetings of Sangh Parivar members were held in advance, where strategies for attacking the Muslims were formulated and plans for providing legal assistance to Hindus who may face legal action for their part in the riots were discussed.\(^{281}\) The attacks were carried out by mobs, sometimes running into thousands of people, led by organizers allegedly carrying lists of the names and addresses of Muslims.\(^{282}\) Mobs were

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\(^{277}\) Gujarat Used as Hindutva Laboratory, Asian Age, Mar. 25, 2002, reprinted in We Have No Orders to Save You, supra note 228, at 34. He also went on record to say that “Relief camps are actually child making factories. Those who keep on multiplying the population [Muslims] should be taught a lesson.” Hindu (Chennai), Sep. 10, 2002, reprinted in 1 Concerned Citizens Tribunal, supra note 261, at 259.


\(^{280}\) The context of the perpetration of the acts and the existence of a genocidal plan are relevant to an establishment of the requisite special intent. See supra notes 93–99.


\(^{282}\) We Have No Orders to Save You, supra note 228, at 5. Professor Keshavram Kashi-ram Shastri, the chairman of the Gujarat unit of the VHP publicly stated that the list of shops
equipped in advance with weapons such as swords, *trishuls*, and guns. Some of the trucks and other vehicles that carried people chanting anti-Muslim slogans like “Hindus are children of Lord Rama, Muslims are bastards” and “Jai Shri Ram” were brought into Gujarat from other Indian states.

6. Participation in the anti-Muslim violence by the police

There is evidence that some members of the police participated in the violence in Gujarat. For example, the police were accused of favoring the Hindu mobs. There were numerous allegations of police officers not responding to calls for help from Muslims under attack. Most prominently, former MP Ehsan Jafri made repeated calls for police assistance when his house was surrounded by a mob that eventually killed him and everyone who had taken shelter with him. Police officers who tried to control the violence or act against the leaders of the mobs were allegedly transferred to other locations or job postings, or were reprimanded by their superiors.

The police were also accused of frustrating attempts to initiate legal proceedings against those responsible for the violence. Some policemen allegedly filed incorrect First Information Reports (FIRs), or refused to write

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284 1 CONCERNED CITIZENS TRIBUNAL, supra note 261, at 99.


286 The attitude of the police was best summarized in a news telecast of the remarks of Ahmedabad’s police commissioner, PC Pandey: “These people [the police] also, they somehow get carried away by the overall general sentiment.” 2 CONCERNED CITIZENS TRIBUNAL, supra note 261, at 84.


289 Id. (A First Information Report is a written report prepared by the police in India when they receive information about the commission of a certain class of crimes known as “cognizable offences.” It is usually filed by the victim of a crime but can be filed by anyone who
down the names of assailants identified by the victims while registering FIRs. Finally, some police officers were accused of committing crimes against the Muslim population, including sexual misconduct.

D. Destruction of a Substantial Portion of the Group

The violence against Muslims was widespread and took place throughout Gujarat. A report by the National Commission on Human Rights found that: (1) the mobs involved in the major incidents contained between five and fifteen thousand people; (2) there were mob attacks on minority communities in more than 1,200 villages leading to a large scale exodus of members of those minority groups; and (3) more than one hundred mosques and dargahs were desecrated and damaged in Ahmedabad, the capital of Gujarat, and about 500 in other parts of Gujarat state. In an order relating to the holding of general elections in Gujarat, the Election Commission of India noted that twenty out of the twenty-five districts in Gujarat had been affected by the communal violence and riots. It is esti-
imated that around 2000 people were killed, most of them Muslim, and several thousand people were injured, subjected to violence or displaced.

Despite the widespread nature of the violence, the actual number of deaths caused by the violence was small when compared to the overall Muslim population of Gujarat. While some areas witnessed large numbers of killings, such as the localities of Naroda Gaon and Naroda Patiya in Ahmedabad (allegedly, 200 people were killed, though the official estimates are 105), the rioting and killings were spread over a large number of districts. With a few exceptions such as MP Ehsan Jafri, the killings did not seem to target prominent persons within the community or religious leaders.

The dominant interpretation of “destroy” would require that the acts in Gujarat result in the physical or biological destruction of a substantial portion of the protected group before they could be considered genocide. There is no minimum number of people that must be killed, but the number of deaths must be significant enough to impact the survival of the group. In this case, the relatively low number of deaths (relative to the overall population of the state) does not seem to be large enough to adversely impact the survival of Muslims in all of Gujarat.

If a more expansive definition of destroy was used, this conclusion might change. There is evidence that several hundred Muslim women in Gujarat were victims of religiously-motivated sexual violence. Moreover, several thousand people were injured or displaced by the violence. There were also several hundred attacks on Muslim religious buildings. These additional factors strengthen the argument that a substantial portion of the Muslim population of Gujarat was targeted. Nevertheless, it is not clear whether the addition of these factors would be enough to satisfy a court.

It may be possible to overcome these difficulties by adjusting the geographic limits of the claimed genocide. There is no legal requirement that the geographic limits of the genocide must cover the whole state of

296 Supra note 241 and accompanying text.
297 Ram, supra note 296.
298 Gujarat had a Muslim population of approximately 4.5 million at the time. CENSUS OF INDIA 2001, supra note 238.
300 Supra note 287 and accompanying text.
301 See supra notes 46–48.
302 See supra notes 59–60.
303 This supposition, of course, could be rebutted by evidence that the deaths did impact the survival of the group. The authors have found no such evidence.
304 Supra note 231 and accompanying text.
305 See supra note 260 and accompanying text.
Gujarat. The geographic scope could be more limited so long as the perpetrators viewed the targeted part as a distinct entity within the larger group. 306 Focusing on locations that suffered disproportionately at the hands of the mob, like individual districts or the city of Ahmedabad, might allow for the framing of a geographic area within which a substantial portion of the Muslim population was affected. 307

E. Conclusion

At first glance, several factors strongly support the characterization of the violence against the Muslim community in Gujarat in February 2002 as religious genocide. Muslims in Gujarat were apparently targeted on account of their religious affiliation, killed, tortured, raped, and sexually abused; their property was looted, and their religious symbols and buildings were desecrated. The attacks were systematic and organized, carried out in the context of a history of religious conflict in Gujarat, and accompanied by statements inciting violence against Muslims.

If a more liberal interpretation of destruction was adopted, the widespread nature of the violence, the scale of atrocities committed, and the concerted attacks on religious symbols, along with the incitement to violence, might be sufficient to establish that a substantial portion of the Muslim community was targeted. However, under an interpretation of destruction that requires physical or biological destruction of the group, the number of killings probably does not constitute the destruction of a substantial portion of the Muslims in Gujarat. The problems associated with the “substantial portion” requirement might be overcome by limiting the geographic scope of the claimed genocide to only the worst affected areas of Gujarat state.

V. GENOCIDE AS THE “CRIME OF CRIMES”

There are three crimes—war crimes, crimes against humanity, and genocide—that are most often prosecuted under international law. All three of these international crimes have contextual elements that set them apart from crimes that punish similar physical acts under domestic law (e.g., murder). For war crimes, the required contextual elements are the existence of an armed conflict 308 and a nexus between the alleged crimes and the

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306 See supra notes 61–62.
For crimes against humanity, the contextual elements are the existence of a widespread or systematic attack against a civilian population and that the alleged crimes must be part of the attack. Genocide, too, has its contextual elements; the genocidal acts must be carried out against members of a protected group, and the acts must result in the destruction of a substantial portion of the protected group.

What distinguishes genocide from war crimes and crimes against humanity is the additional requirement of specific intent. All three crimes require proof that the physical acts were committed intentionally. For example, the war crime of willful killing requires that the accused intended to kill the victim or that he or she intended to seriously harm the victim while knowing that such injury was likely to cause death. The intent requirement for killing as a crime against humanity is essentially identical. Proof
of killing for genocide also requires evidence that the killing was intentional. However, a prosecutor seeking a genocide conviction must also show that the accused acted with the intent of destroying the protected group to which the victim belongs.

As these case studies show, the additional requirement of proof of specific intent makes it harder to prove a case for genocide than it is for war crimes or crimes against humanity. For example, the situations in Iraq and Gujarat could both qualify as crimes against humanity. The events described in Iraq might also qualify as war crimes. Yet, there would be problems with any attempt to treat the case studies as genocide. Those problems might be overcome, but it is generally harder to secure a conviction for genocide than for war crimes or crimes against humanity.

This added evidentiary burden may be one of the reasons genocide is sometimes referred to as the "crime of crimes." It is not only viewed as the most serious crime in international law, it is also the most difficult to prove. As a result, prosecutions are quite rare. There are simply fewer cases of genocide than war crimes or crimes against humanity. The overall scarcity of genocide convictions may help explain why there have been so few successful prosecutions for religious genocide.

While it is important that the gravity of the crime of genocide is not diluted, recent genocide jurisprudence demonstrates a slow but steady development of the elements of genocide. There appears to be a trend towards broadening the interpretations of "destroy," what can be considered destruction "in part" of a group, and the kinds of circumstantial evidence that may be used to infer the existence of genocidal intent. International and internationalized criminal tribunals must walk a fine line between upholding the

315 Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, para. 319 (May 15, 2003); Prosecutor v. Stakic, Case No. IT-97-24-T, Judgment, para. 515 (July 31, 2003) ("As regards the underlying acts, the word 'killing' is understood to refer to intentional but not necessarily premeditated acts.").


317 While there is no space to address this point in detail, the evidence described above in Parts III & IV suggests that the violence in Iraq and the violence in Gujarat were both carried out as part of a widespread or systematic attack against a civilian population.

318 This would depend on whether or not there is an armed conflict in Iraq. This question is beyond the scope of this article.

319 See supra Sections II–IV.

320 Prosecutor v. Kambanda, Case No. 97-23-S, Judgment and Sentence, para. 16 (Sept. 4, 1998) (noting that genocide, because of its special intent requirement, is the most serious crime in international law—the "crime of crimes"); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, paras. 979–81 (Jan. 27, 2000); Prosecutor v. Stakic, Case No. IT-97-24-T, Judgment, para. 502 (July 31, 2003) (adopting the ICTR's description of genocide as the "crime of crimes").

321 Cf. supra notes 2–6.
status of genocide as the most serious of international crimes and progressively developing the elements of the crime of genocide to ensure that, in legitimate cases, prosecutions for genocide are possible.