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

Robert Petit,[†] Stuart Ford[‡] & Neha Jain[§]

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

* 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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¹ The symposium took place on September 28, 2007. For more information about the symposium, the agenda and background material are available at <http://law.case.edu/lectures/index.asp?dt=20070928>. Streaming video of the symposium itself is available at <http://law.case.edu/centers/cox/webcast.asp?dt=20070928>.

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.³ In its most famous genocide decision, the International Criminal Tribunal for Yugoslavia (ICTY) found that Bosnian Muslims represented a distinct national group,⁴ even as it tacitly acknowledged that the Bosnian Muslims could be a religious group.⁵ The International Criminal Tribunal for Rwanda (ICTR) has consistently concluded that the genocide committed in Rwanda was ethnic in nature.⁶ 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

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.

their religion.⁷ 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.

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.⁸ More recently, a Spanish court has begun a criminal investigation into whether the Chinese government committed genocide in Tibet beginning in the 1950s.⁹ While the violence no longer reaches the level seen in the 1950s,¹⁰ 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."¹¹ The Chinese government denies these accusations.¹²

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.¹³ This section will examine whether China's mistreatment of Tibetan Buddhist monks between

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).

¹¹ Jonathan Watts, *Tibetans Fear 'Cultural Genocide' Will Follow Chinese Railway*, GUARDIAN, July 1, 2006; *Exiled Tibetan Official Slams 'Cultural Genocide'*, GLOBE & MAIL, July 8, 2002, <http://www.tibet.com/NewsRoom/samdhong1.htm>.

¹² See *Charge of Chinese Government 'Practicing Cultural Genocide Against Tibetan[s]'* False, PEOPLE'S DAILY ONLINE, Oct. 11, 2006, http://english.peopledaily.com.cn/200610/11/eng20061011_310656.html.

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.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.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.¹⁶ In 1950, China invaded and occupied Tibet.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.¹⁸ They eventually signed an agreement known as the "17-point Agreement"¹⁹ which allowed the Chinese government to take control of Tibet's foreign affairs and occupy the country.²⁰ China claims that the delegation had the authority to sign the agreement and that they did so voluntarily. The Tibetan

¹⁴ See *Basic Data on Tibet*, <http://www.unescap.org/esid/psis/population/database/chinadata/tibet.htm> (last visited Nov. 4, 2007).

¹⁵ *Invasion and illegal annexation of Tibet: 1949–1951*, <http://www.tibet.com/WhitePaper/white2.html> (last visited Nov. 4, 2007) [hereinafter *Invasion*]; Regina M. Clark, Note, *China's Unlawful Control Over Tibet: The Tibetan People's Entitlement To Self-Determination*, 12 *IND. INT'L & COMP. L. REV.* 293, 299 (2002).

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).

¹⁷ Trikamdas, *supra* note 8, para. 5.

¹⁸ See *Invasion*, *supra* note 15.

¹⁹ Trikamdas, *supra* note 8, para. 6; Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet, P.R.C.-Tibet, May 23, 1951, reprinted in MICHAEL C. VAN PRAAG, *THE STATUS OF TIBET: HISTORY, RIGHTS, AND PROSPECTS IN INTERNATIONAL LAW* 190 (1987).

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

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 anti-government.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.

³² Elliot Sperling, Assoc. Professor of Tibetan Studies, Indiana Univ., Human Rights Violations in Tibet, Statement to U.S. Senate Committee on Foreign Relations Subcommittee on East Asian and Pacific Affairs (June 13, 2000), available at www.hrw.org/campaigns/china-99/tibet-test0613.htm.

³³ In 1994, the CPC stated that the “Dalai clique . . . tr[ies] 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.³⁴ The CPC has used the Democratic Management Committees to limit the number of monks allowed in monasteries.³⁵ There are numerous examples of monks and nuns being forcibly defrocked or forced to leave monasteries.³⁶

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.³⁷ 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.³⁸ Nothing more has been heard about the boy or his family.³⁹ In his place, the CPC recognized another boy called Gyaltzen Norbu as the eleventh Panchen Lama. Recognizing Gyaltzen 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" Tibet Justice Center, *supra* note 28, at para. 11; *see also* RELIGION, *supra* note 13, at n.20.

³⁴ 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." WHEN THE SKY FELL TO EARTH, *supra* note 28, at 28.

³⁵ 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." Golden Bridge, *supra* note 28, at para. 12. 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." U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM FOR 1999: CHINA [hereinafter 1999 ANNUAL REPORT], available at http://www.state.gov/www/global/human_rights/irf/irf_rpt/1999/irf_china99.html.

³⁶ WHEN THE SKY FELL TO EARTH, *supra* note 28, at 22, 26.

³⁷ *See id.* at 36-37; *see also* Dalai Lama, *His Holiness the Dalai Lama recognizes the Panchen Lama*, (May 14, 1995), available at <http://www.tibet.com/PL/may14a.html>.

³⁸ *Id.*

³⁹ 1999 ANNUAL REPORT, *supra* note 35; *see also* Elliot Sperling, *supra* note 32; *see generally* ISABEL HILTON, *THE SEARCH FOR THE PANCHEN LAMA* (2001).

within the PRC to ensure they are sufficiently patriotic.⁴⁰ Further, in 1999 the sixth Reting Rinpoche was chosen by the CPC. The Dalai Lama has not recognized the CPC's choice,⁴¹ and monks have been arrested for protesting the choice.⁴²

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.⁴³ The CPC has also prevented senior religious members who are based abroad from searching for or recognizing reincarnations.⁴⁴

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.⁴⁵

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.⁴⁶ These are defined in

⁴⁰ See Sperling, *supra* note 32; U.S. DEP'T OF STATE, 2000 ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: CHINA, available at http://www.state.gov/www/global/human_rights/irf/irf_rpt/irf_china.html [hereinafter 2000 ANNUAL REPORT].

⁴¹ Letter from Tempa Tsering, Secretary, Dep't of Info. & Int'l Relations, Dharamsala Condemns Pretender Panchen Lama's Enthronement Today: Expresses Concern Over the Safety of Tibetans' Real Panchen Lama (Dec. 8, 1995), <http://www.tibet.com/PL/dec8.html>.

⁴² 2000 ANNUAL REPORT, *supra* note 40.

⁴³ WHEN THE SKY FELL TO EARTH, *supra* note 28, at 31.

⁴⁴ "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.

⁴⁵ *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.

⁴⁶ International Law Commission, *Report of the International Law Commission on the Work on its Forty-Eighth Session*, Article 17, commentary para. 4, U.N. GAOR, 51st Sess., Supp. No. 10, at 44, art. 17 U.N. Doc. A/51/10 (1996) (hereafter ILC Report).

the Convention as (1) the intent “to destroy, in whole or in part, a national, ethnical, racial or religious group”;⁴⁷ 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.⁴⁸ 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,⁴⁹ the majority of courts addressing this issue have declined to follow this approach.⁵⁰ 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.⁵¹ It appears that Buddhist monks have been targeted because they were Buddhist, not because of their ethnicity or nationality.⁵² Consequently, it makes the most sense to treat this as a case of reli-

⁴⁷ Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1949, 102 Stat. 3046, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

⁴⁸ *Id.*

⁴⁹ Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, paras. 511, 516 (Sept. 2, 1998).

⁵⁰ See WILLIAM A SCHABAS, GENOCIDE IN INTERNATIONAL LAW 130–133 (2000); see also ANTONIO CASSESE, GENOCIDE IN INTERNATIONAL LAW 101 (2003).

⁵¹ See Genocide Convention, *supra* note 47, at art. 2.

⁵² The fact that Tibetan Buddhists as a group may be associated with a political agenda does not undermine the fact that they have been targeted on account of their religion. On the contrary, the fact that they are associated with political opposition to the Chinese government because of their religious affiliation goes to show that they are being targeted for their membership in a religious group. Similar reasoning was used by the ICTR in the context of the

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.⁵³ It is clear that Buddhism is a religion,⁵⁴ 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.⁵⁵ 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.⁵⁶ 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

Tutsis being targeted on account of their ethnicity. *Prosecutor v Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T, Judgment, Dec. 3, 2003, para. 969 (Dec. 3, 2003).

⁵³ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, para. 515 (Sept. 2, 1998); *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, para. 98 (May 21, 1999).

⁵⁴ 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.

⁵⁵ RELIGION, *supra* note 13, at 2.

⁵⁶ 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.

the group.⁵⁷ Yet this would lead to a result where too many crimes are treated as genocide.⁵⁸ 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.⁵⁹ 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.⁶⁰

Usually, the “part” of the group is defined as being a geographically limited part of the larger group.⁶¹ 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.⁶² If the targeted part of the group is emblematic of the group as a whole, or essential

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).

⁵⁹ *See* Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment, paras. 8–11 (Apr. 19, 2004); Prosecutor v. Blagojevic & Jokic, Case No. IT-02-60-T, Judgment, para. 668 (Jan. 17, 2005); Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgment, para. 701 (Sept. 1, 2004); *See* Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, Judgment, para. 634 (Aug. 2, 2001); Prosecutor v. Goran Jelusic, Case No. IT-95-10-T, Judgment, para. 82 (Dec. 14, 1999). *See also* MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES 421–22 (2002); WILLIAM A. SCHABAS, *Genocide*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 107, 109–10 (Otto Triffterer ed., 1999).

⁶⁰ Prosecutor v. Radoslav Brdanin, Case No. IT-99-36-T, Judgment, para. 701 (Sept. 1, 2004) (citing Prosecutor v. Radislav Krstic, Case No. IT-98-33-A, Judgment, para. 8 (Apr. 19, 2004)).

⁶¹ Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, para. 590 (Aug. 2, 2001); Prosecutor v. Sikirica, Case No. IT-95-8-T, Judgment on Defence Motions to Acquit, para. 63–75 (Sept. 3, 2001); Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgment, para. 703 (Sept. 1, 2004); Prosecutor v. Stakic, Case No. IT-97-24-T, Judgment, para. 523 (July 31, 2003); Prosecutor v. Jelusic, Case No. IT-95-10-T, Judgment, para. 83 (Dec. 14, 1999).

⁶² Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, para. 590 (Aug. 2, 2001); Prosecutor v. Stakic, Case No. IT-97-24-T, Judgment, para. 524 (July 31, 2003).

to its survival, it could be considered substantial for the purposes of the intent requirement.⁶³

The leadership of a group is a “part” of the group, and courts have suggested that the destruction of a group’s leaders could meet the “substantial portion” test if the leadership was a “significant part” of the group.⁶⁴ The leaders who are targeted must be so important that their disappearance would have an impact upon the survival of the group.⁶⁵ 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 leaders⁶⁶ 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.⁶⁷ 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-

⁶³ Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment, para. 12 (Apr. 19, 2004) (citing Prosecutor v. Jelusic, Case No. IT-95-10-T, Judgment, para. 83 (Dec. 14, 1999)).

⁶⁴ Prosecutor v. Jelusic, Case No. IT-95-10-T, Judgment, para. 82 (Dec. 14 1999); Prosecutor v. Sikirica, Case No. IT-95-8-T, Judgment on Defence Motions to Acquit, paras. 65, 67–85 (Sept. 3, 2001); Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, para. 587 (Aug. 2, 2001); Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgment, paras. 702–03 (Sept. 1 2004); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, para. 96 (May 21, 1999). See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. Of Minorities, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, para. 29, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985) (prepared by Benjamin Whitaker).

⁶⁵ 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. Jelusic, Case No. IT-95-10-T, Judgment, para. 82 (Dec. 14 1999)).

⁶⁶ 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).

⁶⁷ WHEN THE SKY FELL TO EARTH, *supra* note 28, at 21.

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.⁶⁸ The most significant reincarnated lama, the Dalai Lama, is viewed as the spiritual leader of Tibetan Buddhism.⁶⁹ Other lamas are also significant,⁷⁰ such as the Panchen Lama, who is traditionally viewed as one of the foremost teachers of Buddhism.⁷¹ Elimination of these religious leaders would affect the survival of Tibetan Buddhism.⁷²

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.⁷³ To this day, the Dalai Lama remains the political and religious leader of the Tibetan government-in-exile.⁷⁴ 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.⁷⁵

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.⁷⁶ 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.⁷⁷ 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.

⁷⁴ *Tibet at a Glance*, <http://www.tibet.com/glance.html> (last visited Nov. 13, 2007).

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 Buddhist 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.⁷⁸ 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.⁷⁹ There is no minimum number of deaths that must occur in order for the element of “killing” to be satisfied⁸⁰ 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.⁸¹ The term “serious bodily or mental harm” has been interpreted to include acts of torture, inhumane or degrading treatment, and persecution.⁸² It also includes harm that seriously injures health, causes disfigure-

⁷⁸ Genocide Convention, *supra* note 47, art. 2.

⁷⁹ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 588–89 (Sept. 2, 1998).

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.

⁸² Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 504 (Sept. 2, 1998); Prosecutor v. Karadzic & Mladic, Case Nos. IT-95-5-R61, IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, para. 93 (July 11, 1996).

ment, or causes serious injury to the organs or senses.⁸³ The harm does not need to be permanent or irremediable.⁸⁴

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.⁸⁵ 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.⁸⁶ 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.⁸⁷

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,⁸⁸ but this was later commuted into a life sentence.⁸⁹ Similar

⁸³ Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, para. 109 (May 21, 1999).

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 §I.

⁸⁷ 2000 ANNUAL REPORT, *supra* note 40, ann. at §I.

⁸⁸ HUMAN RIGHTS WATCH, TRIAL OF A TIBETAN MONK: THE CASE OF TENZIN DELEK (2004).

⁸⁹ *International Campaign for Tibet: Campaigns: Tenzin Delek Rinpoche*, <http://www.savetibet.org/campaigns/tdr/index.php> (last visited Mar. 21, 2008).

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

⁹⁰ See *International Campaign for Tibet: Tibetan Prisoners of Conscience*, <http://www.savetibet.org/news/positionpapers/prisonersofconscience.php> (last visited Mar. 21, 2008); Ronald Schwartz, *Religious Persecution in Tibet* (on file with the Canada Tibetan Community); U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm on Prevention of Discrimination and Protection of Minorities, *The Right of Peoples to Self-Determination and Its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation*, paras. 5–7, U.N. Doc. E/CN.4/2000/NGO/51 (Feb. 3, 2000); U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm on Prevention of Discrimination and Protection of Minorities, *Question of the Violation of Human Rights and Fundamental Freedoms*, U.N. Doc. E/CN/Sub.2/1999/NGO/9 (June 24, 1999).

⁹¹ *Supra* Part II.B.

⁹² Genocidal intent can be inferred from circumstantial evidence. Prosecutor v. Sikirica, Dosen & Kolundzija, Case No. IT-95-8-T, Judgment on Defence Motions to Acquit, para. 61 (Sept. 3, 2001); Prosecutor v. Jeliscic, Case No. IT-95-10-A, Judgment, para. 47 (July 5, 2001). For example, the general political doctrine that gave rise to the genocidal acts can be considered. Prosecutor v. Karadzic & Mladic, Case Nos. IT-95-5-R61, IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, para. 94 (July 11, 1996). The existence of attacks on cultural and religious property and symbols may also be relevant. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, para. 580 (Aug. 2, 2001).

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.’”⁹³ 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.⁹⁴

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.⁹⁵ Circumstantial evidence that may be considered includes:⁹⁶ the general political doctrine that gave rise to the acts,⁹⁷ the context of the preparation and repetition of the acts,⁹⁸ and “simultaneous attacks on cultural and religious property and symbols.”⁹⁹ 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.

⁹³ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 498 (Sept. 2, 1998).

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.

⁹⁷ Prosecutor v. Karadzic & Mladic, Case Nos. IT-95-5-R61, IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, para. 94 (July 11, 1996).

⁹⁸ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, paras. 523–524 (Sept. 2, 1998) (citing Prosecutor v. Karadzic & Mladic, Case Nos. IT-95-5-R61, IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, para. 94 (July 11, 1996)); Prosecutor v. Jelusic, Case No. IT-95-10-A, Judgment, para. 47 (July, 5 2001); see also Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgment, paras. 980–84 (Sept. 1, 2004) (discussing the nature of the Bosnian Serb leadership’s plan and the perpetration committed as part of that plan).

⁹⁹ Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, para. 580 (Aug. 2, 2001).

In contrast, there is relatively strong evidence that the intent of the Chinese authorities was to control the monkhood, not eradicate it.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.¹⁰¹ Taken together, these facts suggest that the intent of the authorities was to control Tibetan Buddhism, not to destroy it.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.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.¹⁰⁴ This section examines anti-Christian violence in Iraq in more detail and tries to

¹⁰⁰ See *supra* Part. II.B.

¹⁰¹ See *supra* note 28 and accompanying text.

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.

¹⁰³ See Samantha Power, *How to stop genocide in Iraq*, L.A. TIMES, Mar. 5, 2007, at A15, <http://www.latimes.com/news/opinion/la-oe-power5mar05,0,3348120.story?coll=la-opinion-center> (last visited Apr. 7, 2008); Massimo Calabresi, *Is Iraq Headed for Genocide?*, TIME 29, Nov. 29, 2006, <http://www.time.com/time/world/article/0,8599,1564270,00.html> (last visited Apr. 7, 2008); Associated Press, *Obama: Don't stay in Iraq over genocide*, July 20, 2007, available at <http://www.msnbc.msn.com/id/19862711/> (last visited Apr. 7, 2008).

¹⁰⁴ Jack Fairweather, *Christians Flee Genocide as Fear Sweeps Iraq*, CHRISTIANS OF IRAQ, Jan. 8 2005, <http://www.christiansofiraq.com/fear2.html>; *Mounting Fears of Assyrian Genocide in Iraq*, ASSYRIAN INT'L NEW AGENCY, May 31, 2007, <http://www.aina.org/releases/2007053195824.htm>; Interview with Rosie Malek-Yonan, Author of *THE CRIMSON FIELD*, on the Religion Report (May 30, 2007), <http://www.abc.net.au/m/religionreport/stories/2007/1937124.htm> (last visited Oct. 28, 2007).

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.¹⁰⁵ 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.¹⁰⁶ It appears there are between 600,000 and 800,000 Christians in Iraq.¹⁰⁷ The largest Iraqi Christian groups are Assyrians, Chaldeans, Armenians, and Catholics. The majority of Assyrian Christians can be found in the province of Nineveh.¹⁰⁸ There are also significant Assyrian communities in and around Baghdad. The remaining Christians are mainly from areas around the southern city of Basra.¹⁰⁹

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.¹¹⁰ 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.¹¹¹ Many

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.*

¹⁰⁶ UNITED STATES DEPARTMENT OF STATE, *INTERNATIONAL RELIGIOUS FREEDOM REPORT 2005: IRAQ* (NOV. 8, 2005), <http://www.state.gov/g/drl/rls/irf/2005/51600.htm>.

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 INT'L NEWS AGENCY, Sept. 30, 2004, <http://www.aina.org/releases/20040930115327.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.*

¹¹⁰ PRETI TANEJA, *MINORITY RIGHTS GROUP INT'L, ASSIMILATION, EXODUS, ERADICATION: IRAQ'S MINORITY COMMUNITIES SINCE 2003 5* (2007), available at <http://www.minorityrights.org/?lid=2805>.

¹¹¹ United Nations Assistance Mission for Iraq [UNAMI], *Human Rights Report: 1 November–31 December 2006* (2007). The estimates of some experts are much higher. One group

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.¹¹² 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."¹¹³ Since the 2005 elections, most sectarian violence has been between Shiites and Sunnis,¹¹⁴ 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,¹¹⁵ while the turbulent situation in Iraq affects all Iraqis, non-Muslim minorities have been particularly affected.¹¹⁶ Christians are considered to be "non-believers" or infidels by Iraqi extremists, and are vulnerable to attack.¹¹⁷ 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,¹¹⁸ and a belief among many Muslim Iraqis that the U.S.-led invasion is a crusade against Islam.¹¹⁹ 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.

¹¹⁴ INTERNATIONAL CRISIS GROUP, THE NEXT IRAQI WAR: SECTARIANISM AND CIVIL CONFLICT I (2006).

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).

¹¹⁶ Letter from Michael Cromartie, Chairman, U.S. Comm'n on Int'l Religions Freedom, to Condoleezza Rice, U.S. Secretary of State (Sept. 5, 2007) [hereinafter USCIRF], <http://www.uscirf.gov/mediaroom/press/2007/september/20070906RiceLetterIraq.html>.

¹¹⁷ *Iraq: Baghdad Christians Flee Forced Conversion*, COMPASS DIRECT NEWS, Apr. 18, 2007, <http://www.compassdirect.org/en/display.php?page=news&length=long&lang=en&idelement=4834>.

¹¹⁸ Christopher Allbritton, *Iraq's Persecuted Christians*, TIME, Sept. 20 2004, at 43; Katherine Zoepf, *The Reach of War: Exodus; Many Christians Flee Iraq, with Syria the Haven of Choice*, N.Y. TIMES, Aug. 5 2004, at A11.

¹¹⁹ Luo, *supra* note 107, at A1; *Christians Fleeing Violence in Iraq*, FOX NEWS, May 7 2007, <http://www.foxnews.com/story/0,2933,270377,00.html>.

particularly in Baghdad, Mosul, Basra, and the northern Kurdish regions.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.¹²¹

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.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.¹²³ Nevertheless, the evidence suggests that the victims were chosen because of their religion, rather than their ethnicity.¹²⁴ Accordingly, it makes more sense to focus on their existence as a religious group.¹²⁵ Chris-

¹²⁰ USCIRF, *supra* note 116. Baghdad alone accounts for slightly more than half of all civilian and police war related killings in Iraq. *Violence Appears to be Shifting from Baghdad*, MSNBC, Aug. 25, 2007, <http://www.msnbc.msn.com/id/20440397/>. Christians live in disproportionately greater numbers in Baghdad, and have thus been more severely affected by the violence in Iraq. Eden Naby, Letter to the Editor, Reply by Peter W Galbraith, *The Plight of Christians in Iraq*, N. Y. REV. OF BOOKS 69, Nov. 30, 2006, available at <http://www.nybooks.com/articles/19677> [hereinafter Naby & Galbraith].

¹²¹ Juan Méndez, the U.N. Secretary-General's special advisor on the prevention of genocide, has stated that minorities in Iraq are being targeted solely on account of religion. Calabresi, *supra* note 104, at 29. Representatives of UNHCR have also expressed concern that the Iraqi Christian community is being persecuted. *Iraqi Christians Debate Self-Autonomy to Halt Exodus*, ASSYRIAN INT'L NEWS AGENCY, Dec. 22 2006, <http://www.aina.org/news/20061223033558.htm>. Hummam Dairi, from the Iraqi Ministry of Human Rights acknowledged that the Iraqi Christians are being targeted because of their religious affiliation. Integrated Regional Information Networks, *Christians Live in Fear of Death Squads*, Oct. 19, 2006, <http://www.irinnews.org/report.aspx?reportid=61897>. Christian religious leaders are also increasingly worried by what they perceive as the systematic targeting of Christian Assyrians in Iraq. Human Rights Without Frontiers, *Former Anglican Head Warns of Abuses against Assyrians in Iraq*, Jan. 24 2005, http://www.hrwf.net/religiousfreedom/news/2005PDF/Iraq_2005.pdf.

¹²² *Supra* note 47 and accompanying text.

¹²³ U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT: IRAQ (2006) [hereinafter RELIGIOUS FREEDOM REPORT], available at <http://www.state.gov/g/drl/rls/irf/2006/71422.htm>. ("The Chaldean and Assyrian Christians are descendants of the earliest Christian communities, and they share a similar cultural and linguistic background. Both communities speak the same ancient language (Syriac); however, they are considered by many to be distinct ethnic groups. . . . While some Chaldeans and Assyrians consider themselves Arab, the majority, as well as the Government, considered both groups as ethnically distinct from Arabs and Kurds."). *Id.*

¹²⁴ See *supra* note 120 and accompanying text.

¹²⁵ A religious group is one whose members share the same religion. See *supra* note 53 and accompanying text.

tians in Iraq are entitled to protection as a religious group because they share the same religion.¹²⁶ Moreover, the individual Christian denominations in Iraq are probably also entitled to protection.¹²⁷ 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.¹²⁸

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, 2004.¹²⁹ At least eleven people were reported to have been killed and dozens of others were injured.¹³⁰ An Islamic militant group claimed responsibility for the attacks.¹³¹

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.

¹²⁹ The first blast occurred as a car bomb detonated outside an Armenian church in Baghdad, and three other churches were hit soon after. A blast was reported around the same time in Mosul. *Bomb Blasts Rock Iraqi Churches*, BBC NEWS, Aug. 1, 2004, http://news.bbc.co.uk/2/hi/middle_east/3526084.stm; *Car Bombs Target Christian Churches in Iraq*, VOICE OF AMERICA, Aug. 1, 2004, <http://www.voanews.com/burmese/archive/2004-08/a-2004-08-01-3-1.cfm>.

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.¹³² 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.¹³³ Attacks of this nature have led to cancellation of services by many churches and attendance at the remaining churches has dwindled.¹³⁴

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.¹³⁵ On October 9, 2006, "Paulos Eskander, a priest from the Syriac Orthodox Church, was kidnapped" and executed.¹³⁶ Two Chaldean Catholic nuns were stabbed to death in Kirkuk in March 2007.¹³⁷ Moreover, there have been reports of several other attacks on priests.¹³⁸ 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."¹³⁹

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.¹⁴⁰ On March 18, 2005, "*Ansar Al-Sunna*, which mainly operates in Northern Iraq, announced the killing of a Christian gen-

¹³² UNHCR Background, *supra* note 108.

¹³³ U.N. Assistance Mission for Iraq [UNAMI], *Human Rights Report: 1 January–28 February 2006*, para. 19 (2006).

¹³⁴ Luo, *supra* note 107.

¹³⁵ *Human Rights Report: 1 November–31 December 2006*, *supra* note 111, at para. 56.

¹³⁶ *Id.*

¹³⁷ Associated Press, *Two Chaldean Catholic Nuns Stabbed to Death in North Iraq*, Mar. 28, 2007, available at <http://www.aina.org/news/2007032791913.htm>.

¹³⁸ See Barbara B. Baker, *Iraqi Captors Release Chaldean Priest*, AGENCE-FRANCE PRESSE, Sept. 13, 2006, <http://www.hrwf.net/religiousfreedom/news/freedom.html>.

¹³⁹ U.N. Assistance Mission for Iraq [UNAMI], *Human Rights Report: 1 September–31 October 2006*, para. 55 (2006).

¹⁴⁰ Nina Shea & James Y. Rajis, *Christian Crisis*, NAT'L REV. ONLINE, Jan. 6, 2005, http://www.nationalreview.com/comment/shear_rayis200501060730.asp.

eral of the Iraqi Army on its [] website.”¹⁴¹ In 2005, two Christian businessmen were abducted in Baghdad and murdered.¹⁴² “In February 2005, a Christian nurse was beheaded by her kidnappers.”¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ 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.”¹⁴⁶

¹⁴¹ UNHCR Background, *supra* note 108.

¹⁴² Shea, *supra* 140.

¹⁴³ UNHCR Background, *supra* note 108.

¹⁴⁴ Shea, *supra* note 140. Thousands more have received death threats and been warned that they should leave Iraq. *Christians Live in Fear of Death Squads*, *supra* note 121; Integrated Regional Information Networks, *Threats Force Iraqi Christians to Flee to Syria*, Oct. 15, 2006, <http://www.irinnews.org/Report.aspx?ReportId=61885>.

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.”).

¹⁴⁶ Paul Isaac, *The Assault on Assyrian Christians*, INT’L HERALD TRIB., May 8, 2007, <http://www.ihf.com/articles/2007/05/08/opinion/edisaac.php>.

There appears to have been a surge in anti-Christian violence following Pope Benedict XVI's controversial public remarks on Islam.¹⁴⁷ In September 2006, the Pope gave a speech at which he appeared to suggest that Islam was "evil and inhuman."¹⁴⁸ Extremist groups issued threats to kill all Christians unless the Pope apologized¹⁴⁹ and warned of "reprisals against 'worshippers of the cross.'"¹⁵⁰ 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."¹⁵¹ 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."¹⁵² In addition, anti-Christian graffiti has been scrawled on church walls¹⁵³ and inflammatory CDs sold in the markets.¹⁵⁴

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.¹⁵⁵ Where available, such contemporaneous

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/holy_father/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 A1.

¹⁴⁹ Luo, *supra* note 107, at A1.

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.

¹⁵¹ Barbara G. Baker, *Iraqi Kidnappers Behead Priest in Mosul*, COMPASS, Oct. 12, 2006, http://www.hrwf.net/religiousfreedom/news/2006PDF/Iraq%202006.doc#_Toc156125637.

¹⁵² *Human Rights Report: 1 September–31 October 2006*, *supra* note 139, at para. 54.

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.¹⁵⁶ 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.¹⁵⁷ 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 2003,¹⁵⁸ with waves of attacks occurring in late 2004,¹⁵⁹ early 2006,¹⁶⁰ and late 2006.¹⁶¹

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.

¹⁵⁹ See *Bomb Blasts Rocks Iraqi Churches*, *supra* note 129; *Car Bombs Target Christian Churches in Iraq*, *supra* note 129. In addition, on December 7, 2004, a series of attacks on Armenian and Chaldean churches in Mosul caused substantial damage to property. See UNHCR Background, *supra* note 108. These attacks created fear amongst the Christian community in Iraq and caused some to consider leaving the country. See *Christians Talk of Leaving Iraq after Church Bombs*, REUTERS, Oct. 17, 2004, available at www.hrwf.net/religiousfreedom/news/2004PDF/Iraq_2004.pdf. A car bomb also exploded outside the residence of the Apostolic Nuncio. *Human Rights Report: 1 January–28 February 2006*, *supra* note 135, at para. 19. An “Apostolic Nuncio” is the Pope’s representative in another country, roughly the equivalent of an ambassador for the Holy See. J.P. Kirsch, Nuncio, CATHOLIC ENCYCLOPEDIA (2007), <http://www.newadvent.org/catchen/11160a.htm>.

¹⁶⁰ *Human Rights Report: 1 January–28 February 2006*, *supra* note 135, at para. 19 (2006). In addition, in February 2006, militants shot at a church near Al Sadr City, wounding a priest. *Id.*

¹⁶¹ On October 2, 2006, “in Mosul, a convent of Iraqi Dominican Sisters was fired upon.” *Human Rights Report: 1 September–31 October 2006*, *supra* note 139, at para. 55. On October 16, 2006, “in Mosul, unknown gunmen fired at AlSafena Church causing damage to the church.” *Id.* para. 56.

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.¹⁶² There have been reports of Iraqi Christians being forcibly converted to Islam,¹⁶³ mass displacement of the Iraqi Christians within and across national borders,¹⁶⁴ and forced compliance with Islamic religious prescriptions.¹⁶⁵ Acts such as mass exodus and displacement can be used as inferential evidence of the special intent to commit genocide.¹⁶⁶ 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.¹⁶⁷ These articles suggest that “destroy” should be given its ordinary meaning in its context and in light of its object and purpose.¹⁶⁸ Only in the event that the ordinary meaning leads to an ambiguous or manifestly absurd result should supplementary means such as thenegotiating history be used to interpret the text of the Genocide Convention.¹⁶⁹

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

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.

¹⁶⁶ Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment, para. 33 (Apr. 19, 2004); see also ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 99–100 (2003).

¹⁶⁷ It is generally accepted that these articles embody the current state of customary international law regarding the interpretation of treaties. Stuart Ford, *Legal Processes of Change: Article 2(4) and the Vienna Convention on the Law of Treaties*, 4 J. ARMED CONFLICT L. 75, 96 (1999). The Vienna Convention does not directly apply to the Genocide Convention because the Genocide Convention entered into force before the Vienna Convention. Vienna Convention on the Law of Treaties art 31(1), May 23, 1969, U.N.Doc. A/Conf.39/27; 1155 U.N.T.S. 331. Nevertheless, the customary rules embodied in Articles 31 and 32 should still guide the interpretation of the Genocide Convention.

¹⁶⁸ Vienna Convention on the Law of Treaties, *supra* note 167, at art 31(1).

¹⁶⁹ *Id.* art. 32; see also Jan Klabbbers, *International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation*, L. NETH. INT'L L. REV. 267, 280–81 (2003).

render useless or ineffective.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.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 *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.”¹⁷² Later decisions from the ICTY and the ICTR followed this holding.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 *Krstic* court found were excluded from the definition of genocide.¹⁷⁴

At first glance, the drafting history of the Convention appears to support a limited interpretation of destruction,¹⁷⁵ a position that has been endorsed by the International Law Commission.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-

¹⁷⁰ OXFORD ENGLISH DICTIONARY 538 (2d ed. 1989).

¹⁷¹ The enumerated acts listed in Article 2 are part of the “context” of the treaty and are, therefore, an appropriate means of discovering the ordinary meaning of “destroy.” Vienna Convention on the Law of Treaties, *supra* note 167, art. 31(2) (noting that the context of a treaty includes the text of the treaty).

¹⁷² Prosecutor v. *Krstic*, Case No. IT-98-33-T, Judgment, para. 580 (Aug. 2, 2001), *aff’d*, Case No. IT-98-33-A, Judgment, para. 25 (Apr. 19, 2004).

¹⁷³ Prosecutor v. *Brdanin*, Case No. IT-99-36-T, Judgment, (Sept. 1, 2004) para. 694 (citing Prosecutor v. *Krstic*, Case No. IT-98-33-A, Judgment, para. 25 (Apr. 19, 2004)) (the judgment of the Appeals Chamber on Apr. 3, 2007, does not comment on this aspect of the Trial Chamber’s decision); Prosecutor v. *Semanza*, Case No. ICTR-97-20-T, Judgment, para. 315 (May 15, 2003); Prosecutor v. *Kajelijeli*, Case No. ICTR-98-44A-T, Judgment, para. 808 (Dec. 1, 2003).

¹⁷⁴ Prosecutor v. *Krstic*, Case No. IT-98-33-T, Judgment, paras. 576–80 (Aug. 2, 2001).

¹⁷⁵ SCHABAS, *supra* note 50, at 229. Nevertheless, as Schabas notes, the negotiating history should not be used to alter the ordinary meaning of the terms unless the meaning is ambiguous or absurd. *Id.* at 229–30. Matthew Lippman has noted that the decision by the drafters of the Genocide Convention to remove provisions on cultural genocide was taken only after “persistent and prolonged debate” between delegates from different countries. Lippman, *supra* note 57, at 599.

¹⁷⁶ ILC Report, *supra* note 46, art. 17, para. 12.

tion.”¹⁷⁷ 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.¹⁷⁸ 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.¹⁷⁹ 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. . . .¹⁸⁰

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.¹⁸¹ 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).

¹⁷⁸ Prosecutor v. *Krajisnik*, Case No. IT-00-39-T, Judgment, para. 854, n.1701 (Sept. 27, 2006).

¹⁷⁹ Prosecutor v. *Krstic*, Case No. IT-98-33-A, Judgment, para. 48 (Apr. 19, 2004) (Shahabuddeen, J., dissenting in part) (citation omitted).

¹⁸⁰ *Id.* at para. 57.

¹⁸¹ Prosecutor v. *Blagojevic & Jokic*, Case No. IT-02-60-T, Judgment, para. 658 (Jan. 17, 2005) (citing Prosecutor v. *Krstic*, Case No. IT-98-33-T, Judgment, paras. 576–79 (Aug. 2, 2001)).

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

[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.¹⁸⁴

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

The *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.”¹⁸⁷ Forcible transfer could thus lead to the material destruction of the group, at least in its former state.¹⁸⁸ The following

¹⁸² *Id.* at para. 662 (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, paras. 731–32 (Sept. 2, 1998)).

¹⁸³ *Id.* (citing Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, para. 95 (May 21, 1999)).

¹⁸⁴ 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).

¹⁸⁵ Prosecutor v. Blagojevic & Jokic, Case No. IT-02-60-T, Judgment, para. 664 (Jan. 17, 2005) (citing G.A. Res.47/121, U.N. Doc. AG/Res/47/121 (Dec. 18, 1992)).

¹⁸⁶ *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. *Id.*

¹⁸⁷ Prosecutor v. Blagojevic & Jokic, Case No. IT-02-60-T, Judgment, para. 666 (Jan. 17, 2005).

¹⁸⁸ *Id.*

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,¹⁸⁹ 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.¹⁹⁰ In fact, the number of deaths could possibly be in the tens of thousands.¹⁹¹ 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.¹⁹² 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,¹⁹³ or leave.¹⁹⁴ In early 2007, a militant Islamic group

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.

¹⁹² *Human Rights Report: 1 January–28 February 2006*, *supra* note 135, at para. 54.

¹⁹³ Kathleen Ridolfo, *Iraq: Christian Population Dwindling Due to Threats, Attacks*, RADIO FREE EUROPE, May 31, 2007, <http://www.rferl.org/featuresarticle/2007/05/a453003e-dec4-491a-9069-81255c27a7fa.html>.

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.¹⁹⁵ 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.¹⁹⁶

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.¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹ While minorities make up only about three percent of the Iraqi population,²⁰⁰ 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.²⁰¹ Mowfaq Abdul al Raof, spokesman

¹⁹⁴ See *Christians Fleeing Violence in Iraq*, ASSOCIATED PRESS, May 7, 2007, <http://www.foxnews.com/story/0,2933,270377,00.html>.

¹⁹⁵ Issac, *supra* note 146.

¹⁹⁶ *Id.*

¹⁹⁷ *Prosecutor v. Krajisnik*, Case No. IT-00-39-T, Judgment, n.1701 (Sept. 27, 2006).

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 Minorities make up only three percent of the Iraqi population. *Supra* notes 105–09 and accompanying text.

²⁰¹ “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, Sabaeans-Mandaeans, 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.”²⁰²

A very large number of these refugees are Christian.²⁰³ “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.”²⁰⁴ 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.²⁰⁵

There is also significant internal displacement of Christians within Iraq.²⁰⁶ 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.²⁰⁷ Iraqi Christians are also leaving the city of Mosul for other parts of Nineveh Province because of anti-Christian violence.²⁰⁸ 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.²⁰⁹

²⁰² *Id.*

²⁰³ Chaldo-Assyrian Christians are the largest religious minority group in Iraq. Ellen Massey, *Iraq: Religious Minorities Hit from All Sides*, Inter Press Service News Agency, July 31, 2007, <http://ipsnews.net/news.asp?idnews=38742>. Christians formed the largest portion of new refugees arriving in Jordan’s capital Amman in the first quarter of 2006. “In Syria . . . 44% of Iraqi asylum-seekers were recorded as Christian.” Mark Lattimer, ‘*In 20 Years, There Will be No More Christians in Iraq*,’ *GUARDIAN UNLIMITED*, Oct. 26, 2006, <http://www.guardian.co.uk/Iraq/Story/0,,1888848,00.html>.

²⁰⁴ TANEJA, *supra* note 110, at 7 (citation omitted).

²⁰⁵ See *Over 35,000 Christians have Fled Iraq*, *JERUSALEM POST*, Oct. 12, 2006, <http://www.jpost.com/servlet/Satellite?cid=1159193427145&pagename=JPost%2FJPArticle%2FShowFull>.

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=NjFIZTIyYjZjYjk1NmZhZTc2MmUxNzJmI4ZTI0MWI=>.

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.*

²⁰⁸ *Human Rights Report: 1 January–28 February 2006*, *supra* note 135, at para. 19.

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-

²¹⁰ This is an Iraqi government ministry entrusted with supervision of religious estates. U.S. DEP’T OF STATE, ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM FOR 2005: IRAQ (2005), available at <http://www.state.gov/g/drl/rls/irf/2005/51600.htm>.

²¹¹ TANEJA, *supra* note 110, at 8.

²¹² Naby & Galbraith, *supra* note 120, at 69; Salim Abraham, *Iraqi Christians Flee to Syria*, HUMAN RIGHTS WITHOUT FRONTIERS, Aug. 3, 2004, www.hrwf.net/religiousfreedom/news/2004PDF/Iraq_2004.pdf; Christopher Allbritton, *Iraq’s Persecuted Christians*, TIME, Sept. 20, 2004, <http://www.time.com/time/magazine/article/0,9171,699409,00.html>; Annia Ciezadlo, *Iraq’s Christians Consider Fleeing as Attacks on them Rise*, CHRISTIAN SCI. MONITOR, July 14, 2004; Kate Connolly, *Christians Murdered for Selling Alcohol*, DAILY TELEGRAPH, May 9, 2003, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2003/05/09/wirq409.xml>; Rory McCarthy, *‘Iron Hand’ Cleric Issues Fatwa Amid Baghdad Chaos*, GUARDIAN UNLIMITED, May 21, 2003, <http://www.guardian.co.uk/Iraq/Story/0,2763,960363,00.html>.

²¹³ Zoepf, *supra* note 118.

²¹⁴ *Human Rights Report: 1 September–31 October 2006*, *supra* note 139, at para. 50.

²¹⁵ Associated Press, *Shiite Leader in Baghdad Warns Women, Alcohol Sellers, Cinemas*, May 16, 2003, available at http://www.hrwf.net/religiousfreedom/news/iraq_2003.html#Shiiteleader.

ing evidence, as part of a larger policy of destroying Christian communities in Iraq.²¹⁶

G. Substantial Portion

Genocide must involve the intent to destroy a substantial portion of the group,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.”²¹⁸ There is no minimum number of deaths that is required, so long as it represents a “substantial part” of the group.²¹⁹ For instance, in the case of the massacre of Bosnian Muslims at Srebrenica, the ICTY found that the deaths of approximately 7,000 people constituted a substantial portion of the relevant protected group.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.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.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.²²³ Christian religious leaders have been targeted and killed, especially in the context of attacks against churches and other religious

²¹⁶ Cf. Application of the Convention of the Prevention and Punishment of the Crime of Genocide, (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 407, 431 (Apr. 8) (separate opinion of Judge Lauterpacht).

²¹⁷ See *supra* notes 47–48 and accompanying text.

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

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

²²⁰ Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, paras. 592–99 (Aug. 2, 2001); Prosecutor v. Krstic, 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 Srebrenica) was found to be about 40,000. Consequently, the *Krstic* 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.

²²¹ *Supra* note 107.

²²² *Supra* note 189–91 (discussing the difficulty of estimating the number of Christians killed in Iraq).

²²³ See *supra* notes 64–65.

buildings in Iraq.²²⁴ The dwindling number of people attending church,²²⁵ and fear of priests to wear clerical robes in public²²⁶ 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.

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.

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,²²⁷ resulting in fifty-eight deaths, including women and children.²²⁸ The Hindu activists were returning from Ayodhya, in the state of Uttar Pradesh, where they had participated in a campaign led by the

²²⁴ *Supra* notes Part III.D.1–2.

²²⁵ *Supra* notes 134 and accompanying text.

²²⁶ *Supra* notes 139 and accompanying text.

²²⁷ Gujarat is one of twenty-eight states in the Indian federal structure and is located in the northwest of the country on the border with Pakistan. *See States and Union Territories*, 2005, http://india.gov.in/knowindia/state_uts.php (last visited Jan. 27, 2008); *State Profile*, 2007, <http://gujaratindia.com/stateprofile/profile1.htm> (last visited Jan. 27, 2008).

²²⁸ HUMAN RIGHTS WATCH, WE HAVE NO ORDERS TO SAVE YOU: STATE PARTICIPATION AND COMPLICITY AND COMMUNAL VIOLENCE IN GUJARAT 4 (2002) [hereinafter WE HAVE NO ORDERS TO SAVE YOU].

Vishwa Hindu Parishad (VHP or World Hindu Council)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 1992.²³⁰ 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—including the destruction of places of worship—and the internal displacement of people.²³¹ The violence continued for several months afterwards, despite the deployment of the Indian army in Gujarat.²³²

The Gujarat violence has been labeled “genocide” by various commentators and reports,²³³ although the government has downplayed the severity of the violence.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.²³⁵ This section assesses whether the reported violence meets the elements necessary to constitute genocide against a religious group.²³⁶

²²⁹ The VHP is a militant Hindu organization backed by the Bharatiya Janata Party (BJP). The BJP was the ruling party in Gujarat and the central government of India at the time. *See Ruling Party Wins Gujarat Poll*, CNN.COM, Dec. 16, 2002, <http://edition.cnn.com/2002/WORLD/asiapcf/south/12/15/india.gujarat/index.html>.

²³⁰ Vijay Joshi, *Government Seizes Land Around Disputed Shrine in Ayodha*, ASSOCIATED PRESS, Jan. 7, 1993; Tom Masland, *Holy War in India*, NEWSWEEK, Dec. 12, 1992, at 46; *Testing India's Structure*, ECONOMIST, Dec. 12, 1992, at 41.

²³¹ WE HAVE NO ORDERS TO SAVE YOU, *supra* note 228, at 4.

²³² *Id.*

²³³ *See* OXFAM INDIA AND THE BANGALORE INITIATIVE FOR PEACE AND RELIEF, GUJARAT GENOCIDE—2002: A HUMANITARIAN CRISIS (2002), <http://www.onlinevolunteers.org/gujarat/reports/humanitarian-crisis.pdf> [hereinafter OXFAM INDIA AND THE BANGALORE INITIATIVE FOR PEACE AND RELIEF]; INTERNATIONAL INITIATIVE FOR JUSTICE IN GUJARAT, A FEMINIST ANALYSIS OF THE GENOCIDE IN GUJARAT (2003), <http://www.onlinevolunteers.org/gujarat/reports/iihg/2003> [hereinafter A FEMINIST ANALYSIS OF THE GENOCIDE IN GUJARAT]; *Gujarat 2002—The Truth*, TEHELKA, Nov. 3, 2007, http://www.tehelka.com/story_main35.asp?filename=Ne031107gujarat_sec.asp.

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

²³⁵ *See* *Hindus Jailed Over Gujarat Riots*, BBC NEWS, Oct. 30 2007, http://news.bbc.co.uk/2/hi/south_asia/7069809.stm; Rathin Das, *11 Convicted in Gujarat Riots Case, 8 Sentenced to Life*, HINDUSTAN TIMES, Oct. 31 2007, <http://www.hindustantimes.com/StoryPage/StoryPage.aspx?id=b5c308f2-5afb-471e-aae29fd7a7fb3997&&Headline=11+convicted+in+Gujarat+riots+case>.

²³⁶ The elements of genocide are discussed above. *See 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.²³⁷ Islam is a recognized religion in India, where Muslims make up more than 13% of the population.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 killed²³⁹ (later revised to 790 Muslims and 254 Hindus),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, Sikh, 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.

²⁴⁰ WE HAVE NO ORDERS TO SAVE YOU, *supra* note 228, at 4; BBC NEWS, *Gujarat Riot Death Toll Revealed*, May 11, 2005, http://news.bbc.co.uk/2/hi/south_asia/4536199.stm; Press Trust of India, *BJP Cites Government Statistics to Defend Modi*, INDIA EXPRESS, May 12, 2005.

them Muslims, during the communal violence in Gujarat.²⁴¹ 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.²⁴² 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.²⁴³ 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.²⁴⁴ According to reports, during the Gujarat violence, several hundred Muslim women and girls were sexually humiliated, mutilated, raped, or gang raped.²⁴⁵ 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.²⁴⁶

²⁴¹ See WE HAVE NO ORDERS TO SAVE YOU, *supra* note 228, at 4; OXFAM INDIA AND THE BANGALORE INITIATIVE FOR PEACE AND RELIEF, *supra* note 233; AMNESTY INTERNATIONAL, *Justice, the Victim—Gujarat State Fails to Protect Women from Violence*, at 3, available at <http://coalitionagainstgenocide.org/reports/2005/ai.27jan2005.gujarat.pdf>; Mark Oliver & Luke Harding, *He is Blamed for the Death of 2000 Muslims in India. So Why is Narendra Modi in Wembley?*, GUARDIAN, Aug. 18, 2003; Sunanda K. Datta-Ray, *India in Crisis: Coming Apart at the Seams*, INT'L HERALD TRIB., Mar. 4 2002.

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/south_asia/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.”).

²⁴⁴ *Genocide Gujarat*, COMMUNALISM COMBAT 8, 77–78 (2002); Tanika Sarkar, *Semiotics of Terror*, ECON. AND POL. WKLY, July 13, 2002, at 2872.

²⁴⁵ A FEMINIST ANALYSIS OF THE GENOCIDE IN GUJARAT, *supra* note 233, at 25–34; PEOPLE'S UNION FOR CIVIL LIBERTIES, VADODARA & VADODARA SHANTI ABHIYAN, AT THE RECEIVING END: WOMEN'S EXPERIENCES OF VIOLENCE IN VADODARA, 9–13 (2002), <http://www.onlinevolunteers.org/gujarat/reports/pucl/receivingend.pdf>.

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.²⁴⁷ 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).²⁴⁸ All three of these groups belong to an umbrella organization called Rashtriya Swayamsevak Sangh (National Volunteer Corps or RSS).²⁴⁹ These organizations “collectively form the *sangh parivar* (or “family” of Hindu nationalist groups).”²⁵⁰

The Vishva Hindu Parishad (VHP) was formed in 1964 to cover the social aspects of RSS activities.²⁵¹ 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.²⁵² The Bajrang Dal is the militant youth wing of the VHP. It was formed in 1984, during the Babri Masjid conflict,²⁵³ in order to mobilize youth for the Ram temple campaign.²⁵⁴ The BJP is the political wing of the *sangh pari-*

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. WE HAVE NO ORDERS TO SAVE YOU, *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.

²⁵¹ See S.S. Apte, *Why Vishva Hindu Parishad*, VHP, http://www.vhp.org/englishsite/origin_growth/whyvhp.htm (last visited Feb. 19, 2008).

²⁵² See Aims Vishua Hindu Parishad, *In Service of Poor*, http://www.vhp.org/englishsite/b-objectives/aim_object.htm (last visited Feb. 25, 2008).

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.*

*var.*²⁵⁵ 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

²⁵⁵ The Jana Sangh Party was formed in 1951 as the political wing of the RSS, it was replaced by the Bharatiya Janata Party in 1980. See Shri K. R. Malkani, *BJP History: It's Birth and Early Growth*, BJP, <http://www.bjp.org/history/history.html>.

²⁵⁶ See generally *WE HAVE NO ORDERS TO SAVE YOU*, *supra* note 228, at 41–46 (2002). Narendra Modi's appointment as chief minister of Gujarat in 2001 was considered a significant victory for the RSS, as Mr. Modi is a RSS *pracharak* (a volunteer who propagates RSS philosophy). *New Chief Minister for Gujarat*, BBC NEWS, Oct. 4, 2001, http://news.bbc.co.uk/1/hi/world/south_asia/1579033.stm; V. Venkatesan, *A Pracharak as Chief Minister*, FRONTLINE, Oct. 13, 2001, <http://www.hinduonnet.com/fline/fl1821/18210310.htm>.

²⁵⁷ *WE HAVE NO ORDERS TO SAVE YOU*, *supra* note 228, at 45.

²⁵⁸ *Id.* at 43–44.

²⁵⁹ *Supra* note 99.

²⁶⁰ In Sabarkantha district for instance, around 1,500 Muslim houses and 1,200 Muslim businesses were reportedly burned. Ashish Khetan, *Sabarkantha: Nowhere to Run*, TEHELKA, Nov. 3, 2007, http://www.tehelka.com/story_main35.asp?filename=Ne031107Sabarkantha.asp.

²⁶¹ 2 CONCERNED CITIZENS TRIBUNAL, CITIZENS FOR JUSTICE AND PEACE 24 (2002), available at <http://www.sabrang.com/tribunal/index.html> [hereinafter 2 CONCERNED CITIZENS TRIBUNAL]. Muslim houses in certain localities were completely destroyed whereas Hindu houses in the same area stood unscathed. *WE HAVE NO ORDERS TO SAVE YOU*, *supra* note 228, at 15. Also, Hindus and even some Muslims deliberately put prominent Hindu religious symbols outside their houses, both during and after the massacre in the hope that this would protect them from attack. *Id.* at 36; Amit Mukherjee, *Shops in Gujarat Wear Religion on Their Sleeves*, TIMES OF INDIA, Mar. 17, 2002, <http://timesofindia.indiatimes.com/>

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

articleshow/4095645.cms.

²⁶² 1 CONCERNED CITIZENS TRIBUNAL, CITIZENS FOR JUSTICE AND PEACE 48 (2002) [hereinafter 1 CONCERNED CITIZENS TRIBUNAL]; Ashish Khetan, *Conspirators & Rioters: A Cold Eclipse*, TEHELKA, Nov. 3, 2007, available at http://www.tehelka.com/story_main35.asp?filename=Ne031107A_Cold.asp.

²⁶³ 1 CONCERNED CITIZENS TRIBUNAL, *supra* note 261, at 43.

²⁶⁴ Ashish Khetan, *Conspirators & Rioters: A Cold Eclipse*, TEHELKA, Nov. 3, 2007, available at http://www.tehelka.com/story_main35.asp?filename=Ne031107A_Cold.asp.

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 *trishuls* 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).

the group.²⁶⁸ The deliberate rape of women so as to destroy unborn children of the target group may also be an indication of genocidal intent by the perpetrators.²⁶⁹

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.²⁷⁰ 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.²⁷¹ Pamphlets advocating an economic boycott of the Muslim community resurfaced in 2002, in the months preceding the Godhra train attack.²⁷²

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.”²⁷³ 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.”²⁷⁴ Local newspapers such as *Sandesh* reportedly contributed to inciting communal violence with headlines such as “Avenge Blood with Blood,” running unverified reports of

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.

²⁷¹ 1 CONCERNED CITIZENS TRIBUNAL, *Gujarat Annexure*, *supra* note 261, at 11 (2002), <http://www.sabrang.com/tribunal/voll/annex/annex11.html>. Fliers circulated in August 1998 proclaimed: “India is a country of Hindus . . . Our religion of Rama and Krishna is pious. To convert [or] leave it is a sin.” Another flier by the VHP in Bardoli, Gujarat, warned, “Caution Hindus! Beware of inhuman deeds of Muslims . . . Muslims are destroying Hindu Community by slaughter houses, slaughtering cows and making Hindu girls elope. Crime, drugs, terrorism are Muslim’s empire.” HUMAN RIGHTS WATCH, POLITICS BY OTHER MEANS: ATTACKS AGAINST CHRISTIANS IN INDIA 18 (1999).

²⁷² Anosh Malekar, *Silence of the Lambs*, THE WEEK, Apr. 7, 2002.

²⁷³ *Call to Arms*, COMMUNIALISM COMBAT, Mar.–Apr. 2002, <http://www.sabrang.com/cc/archive/2002/marapril/arms.htm>.

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 jihadis.”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

²⁷⁵ PEOPLE’S UNION FOR CIVIL LIBERTIES, VIOLENCE IN VADODARA: A REPORT 140–62, June 26, 2002, http://www.onlinevolunteers.org/gujarat/reports/pucl/vv_chapter7.pdf.

²⁷⁶ *We’ll Repeat Our Gujarat Experiment*, INDIAN EXPRESS, Sep. 4, 2002, available at http://www.indianexpress.com/res/web/pIe/archive_full_story.php?content_id=8831.

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.

²⁷⁸ *Seers’ Meet Calls For Protection of Temples*, TIMES OF INDIA, Oct. 18, 2002, available at <http://timesofindia.indiatimes.com/articleshow/25511906.cms>.

²⁷⁹ *‘Hindu Rashtra’ in Two Years: Togadia*, REDIFF, Dec. 15, 2002, <http://www.rediff.com/election/2002/dec/15guj13.htm>.

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.

²⁸¹ Ashish Khetan, *Legal Subversion: Justice. Blind to the Victim*, TEHELKA, Nov. 3, 2007, available at http://www.tehelka.com/story_main35.asp?filename=Ne031107Justice.asp.

²⁸² WE HAVE NO ORDERS TO SAVE YOU, *supra* note 228, at 5. Professor Keshavram Kashiram 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*,²⁸³ and guns.²⁸⁴ 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”²⁸⁵ 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.²⁸⁶ 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.²⁸⁷ 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.²⁸⁸ 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 Reports²⁸⁹ (FIRs), or refused to write

owned by Muslims in Ahmedabad was prepared on the morning of February 28. Sheela Bhatt, *It Had to be Done, VHP Leader Says of Riots*, REDIFF.COM, Mar. 12, 2002, <http://www.rediff.com/news/2002/mar/12train.htm>.

²⁸³ A traditional trident used by Hindus both as a religious symbol and a weapon. See Kavita Srivastava, *Communalising Rajasthan*, PEOPLE'S UNION FOR CIVIL LIBERTIES, April 2003, <http://www.pucl.org/Topics/Religion-communalism/2003/communal-rajasthan.htm>.

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

²⁸⁵ Literally: “Hail Lord Rama” (a Hindu deity). *Dushehra: The Victory of Good over Evil*, http://www.gurjari.net/ico/Festival/main.asp?item=H_002.

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.

²⁸⁷ 2 CONCERNED CITIZENS TRIBUNAL, *supra* note 261, at 85; see also *Police Chief Vanishes as Rajkot Burns*, TIMES OF INDIA, Mar. 1, 2002, available at <http://timesofindia.indiatimes.com/articleshow/2461130.cms>; *The Police Watched as We Were Attacked*, TIMES OF INDIA, Mar. 2, 2002, reprinted in 1 CONCERNED CITIZENS TRIBUNAL, CITIZENS FOR JUSTICE AND PEACE 256 (2002), available at <http://www.sabrang.com/tribunal/tribunal1.pdf>; *Police Fails to Provide Security to Activist*, ASIAN AGE, Mar. 6, 2002, reprinted in 1 CONCERNED CITIZENS TRIBUNAL, *supra* note 261, at 256.

²⁸⁸ Basant Rawat, *Minority Hole in Gujarat Police Force*, TELEGRAPH, Mar. 26, 2002, reprinted in WE HAVE NO ORDERS TO SAVE YOU, *supra* note 228, at 23.

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.²⁹⁰ Finally, some police officers were accused of committing crimes against the Muslim population, including sexual misconduct.²⁹¹

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 Rights²⁹² 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.²⁹³ In an order relating to the holding of general elections in Gujarat, the Election Commission of India²⁹⁴ noted that twenty out of the twenty-five districts in Gujarat had been affected by the communal violence and riots.²⁹⁵ It is esti-

has knowledge that a crime has been committed. A police investigation can begin only after an FIR has been received). COMMONWEALTH HUMAN RIGHTS INITIATIVE, FIRST INFORMATION REPORT & YOU, <http://www.humanrightsinitiative.org/publications/police/fir.pdf>.

²⁹⁰ *Failing the People*, INDIAN EXPRESS, Mar. 13, 2002, reprinted in 1 CONCERNED CITIZENS TRIBUNAL, *supra* note 261, at 256; *FIR Says Muslim MLA Led Riot Mob*, ASIAN AGE, Mar. 23, 2002, reprinted in 1 CONCERNED CITIZENS TRIBUNAL, *supra* note 261, at 257. Even when FIRs are reported, the police fail to enforce the law.

²⁹¹ *Minors Shot by Police*, TIMES OF INDIA, Mar. 1, 2002, reprinted in 1 CONCERNED CITIZENS TRIBUNAL, *supra* note 261, at 255; *6 Deaths After Mob Attack, Police Call It 'Asphyxiation'*, INDIAN EXPRESS, Mar. 5, 2002, reprinted in 1 CONCERNED CITIZENS TRIBUNAL, *supra* note 261, at 256; *We Were Just Watching, Why Did They Fire At Us?*, INDIAN EXPRESS, Mar. 22, 2002, reprinted in 1 CONCERNED CITIZENS TRIBUNAL, *supra* note 261, at 256–57.

²⁹² The National Human Rights Commission is an autonomous statutory body set up under the Protection of Human Rights 1993 to enquire into allegations of violations of human rights as well as promote research into and implementation of human rights standards. National Human Rights Commission, *FAQ's About NHRC*, <http://nhrc.nic.in/FAQ.htm>.

²⁹³ Y.S.R. MURTHY, NAT'L HUMAN RTS. COMM'N, REPORT ON THE VISIT OF NHRC TEAM HEADED BY CHAIRPERSON, NHRC TO AHMEDABAD, VADODRA AND GODHRA FROM 19–22 MARCH 2002 (Mar. 31, 2002), http://nhrc.nic.in/guj_annex_1.htm.

²⁹⁴ The Election Commission is a permanent autonomous constitutional authority entrusted with the task of conducting elections to the Parliament and State legislatures, and to the offices of the President and the Vice-President of India. Election Commission India, *About ECI*, http://www.eci.gov.in/about-eci/the_setup.asp.

²⁹⁵ Press Release, Shangara Ram, Election Comm'n of India, Press Note: General Elections to the Gujarat Legislative Assembly paras. 18–19, (Aug. 16, 2002), http://www.eci.gov.in/Press/current/PN_16082002.pdf.

The Election Commission specifically rejected the Gujarat state government's report on law and order, which concluded that the riots were confined to a few pockets in twelve districts of the state. *Id.*

mated that around 2000 people were killed, most of them Muslim,²⁹⁶ and several thousand people were injured, subjected to violence or displaced.²⁹⁷

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.²⁹⁸ 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.²⁹⁹ With a few exceptions such as MP Ehsan Jafri,³⁰⁰ 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.³⁰¹ 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.³⁰² 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.³⁰³

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.³⁰⁴ There were also several hundred attacks on Muslim religious buildings.³⁰⁵ 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.

²⁹⁹ Ashish Khetan, *Conspirators & Rioters: Ahmedabad: Carnage Capital*, TEHELKA, Nov. 3, 2007, available at http://www.tehelka.com/story_main35.asp?filename=Ne031107Ahmedabad.asp.

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 conflict³⁰⁸ and a nexus between the alleged crimes and the

³⁰⁶ See *supra* notes 61–62.

³⁰⁷ See, e.g., Ashish Khetan, *Conspirators & Rioters: Ahmedabad: Carnage Capital*, TEHELKA, Nov. 3, 2007, available at http://www.tehelka.com/story_main35.asp?filename=Ne031107Ahmedabad.asp (noting particular locations that bore the brunt of the anti-Muslim violence).

³⁰⁸ *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, para. 83 (Nov. 30, 2005) (citing *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, para. 562 (May 7, 1997)) (“In order for

armed conflict.³⁰⁹ 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.³¹⁰ Genocide, too, has its contextual elements; the genocidal acts must be carried out against members of a protected group,³¹¹ and the acts must result in the destruction of a substantial portion of the protected group.³¹²

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.³¹³ The intent requirement for killing as a crime against humanity is essentially identical.³¹⁴ Proof

the Tribunal to have jurisdiction over crimes punishable under Article 3 of the Statute . . . [t]here must be an armed conflict, whether international or internal . . ."); *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment, para. 215 (Jan. 31, 2005); *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgment, para. 91 (Dec. 6, 1999).

³⁰⁹ *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, para. 91 (Nov. 30, 2005) (citing *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, paras. 572–73 (May 7, 1997)) (“[T]o meet the jurisdictional preconditions of Article 3 of the Statute, the Prosecution must establish not only the existence of an armed conflict but also a sufficient link between the alleged acts of the accused and the armed conflict. . . .”); *Prosecutor v. Halilovic*, Case No. IT-01-48-T, Judgment, para. 28 (Nov. 16, 2005); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, para. 438 n.807 (June 1, 2001); *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, para. 169 (May 21, 1999) (“[T]here must be a nexus between the crime and the armed conflict.”).

³¹⁰ See Rome Statute of the International Criminal Court art. 7(1), July 17, 1998, 37 I.L.M. 999 [hereinafter ICC Statute], available at http://www.icc-cpi.int/library/about/official_journal/Rome_Statute_120704-EN.pdf. (“For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population”); *Prosecutor v. Deronjic*, Case No. IT-02-61-A, Judgment on Sentencing Appeal, para. 109 (July 20, 2005) (“The acts of the accused need only be a part of the attack”); *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, para. 99 (June 12, 2002) (“The acts of the accused must constitute part of the attack.”); *Prosecutor v. Semanza*, Case No. ICTR 97-20-T, Judgment, para. 326 (May 15, 2003) (“A crime against humanity must have been committed as part of a widespread or systematic attack against any civilian population on discriminatory grounds. Although the act need not be committed at the same time and place as the attack or share all of the features of the attack, it must, by its characteristics, aims, nature, or consequence objectively form part of the discriminatory attack.”).

³¹¹ See *supra* note 51 and accompanying text.

³¹² See *supra* notes 59–60.

³¹³ *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-A, Judgment, para. 36 (Dec. 17, 2004); *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Judgment, para. 381 (Sept. 1, 2004).

³¹⁴ *Prosecutor v. Blagojevic & Jokic*, Case No. IT-02-60-T, Judgment, para. 556 (Jan. 17, 2005) (“The elements of the offence of murder as a crime against humanity and as a violation of the laws or customs of war are the same.”).

of killing for genocide also requires evidence that the killing was intentional.³¹⁵ 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.³¹⁶

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.³¹⁷ The events described in Iraq might also qualify as war crimes.³¹⁸ Yet, there would be problems with any attempt to treat the case studies as genocide.³¹⁹ 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.”³²⁰ 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.³²¹

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.”).

³¹⁶ See *supra* note 47–48.

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.