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THE LIMITS OF LEGAL ARCHITECTURE: HOW TEXTUAL DEFICIENCIES AND POLITICAL CONSTRAINTS INTERACT TO DEFEAT CULTURAL HERITAGE PROTECTION IN ARMED CONFLICT

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Abstract

Cultural heritage destruction in armed conflict is not incidental to war it is frequently a deliberate strategy of identity erasure and ideological domination. Despite a substantial body of international law comprising the 1954 Hague Convention and its Protocols, the Rome Statute of the International Criminal Court, and dedicated United Nations Security Council resolutions, systematic destruction continues across Syria, Ukraine, Mali, and Iraq with near-zero criminal accountability. This article argues that these failures arise not from political will deficits alo.ne, nor from legal inadequacy in isolation, but from the interaction between specific textual deficiencies that create exploitation surfaces and the political actors who predictably use them. Three compounding deficits a consent-based jurisdictional architecture that excludes the majority of modern perpetrators by design, the absence of legally binding proactive mechanisms leaving protection entirely reactive, and a prosecutorial framework that structurally subordinates cultural crimes to geopolitical calculation interact and mutually reinforce one another in ways that make accountability for cultural destruction exceptional rather than routine. Through doctrinal analysis of primary instruments and critical examination of four case studies, including the landmark ICC conviction in *Prosecutor v Al Mahdi*, this article demonstrates that incremental reform cannot resolve these deficits at the pace demanded by modern asymmetric conflict, and proposes three structural interventions targeting the interaction between textual gaps and political exploitation.

Keywords – Cultural Heritage; Armed Conflict; International Humanitarian Law; ICC; Hague Convention; War Crimes; Jus Cogens; Accountability; Structural deficiency.

I. INTRODUCTION: THE PARADOX OF LAW WITHOUT CONSEQUENCE

The Animating Paradox

The first ICC prosecution to focus solely on the destruction of cultural assets was Ahmad Al Faqi Al Mahdi's conviction in September 2016 for the war crime of deliberately directing attacks against

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religious and historical artifacts in Timbuktu, Mali.[1] As a turning point, the conviction proved that international criminal law could safeguard communities' cultural essence beyond only physical harm. That watershed still hasn't generated a cascade, even after nine years. There is no longer any evidence of Palmyra's Temple of Bel. Since its inception in February 2022, UNESCO has assessed more than 300 Ukrainian cultural monuments for damage or destruction.[2] The destruction of Palmyra remains unpunished. The International Criminal Court's investigation into Ukraine has not focused primarily on cultural crimes. There is a law, yet there are no penalties.

Any credible investigation into this conundrum must take into account the alternative explanation. According to the incrementalist interpretation, the process that began with the 1954 Hague Convention and continued with the 1999 Second Protocol, Al Mahdi, and finally the first resolution solely addressing cultural heritage, Security Council Resolution 2347 of 2017, shows that the system is functioning, albeit slowly, and that the best course of action is to be patient instead of to completely overhaul the architecture.[3] This paper disagrees with that interpretation for one reason: in the context of contemporary asymmetric warfare characterized by non-state actors, ideological extremism, and great-power veto politics, the rate of incremental development is fundamentally unable to compete with the speed and kind of devastation. Political will is not the subject of this assertion. Given the current state of affairs, it is an assertion regarding the sufficiency of architecture.

The Argument: Structural Deficiency as Textual Exploitation Surface

The main point of the piece is well-stated. The international legal system is flawed due to a self-reinforcing cycle of three deficiencies, one of which is the specific textual shortcomings that allow political actors to exploit vulnerabilities in a predictable and systematic manner.

The first deficit jurisdictional exclusion has both a textual and a political dimension. The Rome Statute's consent-based jurisdictional architecture was a deliberate drafting choice in 1998; non-party states are excluded by the treaty's own terms. The UN Security Council referral mechanism under Article 13(b) was designed as a corrective but is structurally vulnerable to veto, which political actors predictably deploy. The textual choice creates the surface; political exploitation closes the gap.

The second deficit absent proactive mechanisms is primarily textual and institutional. The Second Protocol's Article 5 peacetime preparedness obligations exist in treaty text but are monitored by no body with investigation powers, creating obligations that states predictably fail to implement without external pressure.

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[1] Prosecutor v Ahmad Al Faqi Al Mahdi (Judgment and Sentence) ICC-01/12-01/15-171 (ICC Trial Chamber VIII, 27 September 2016).

[2] UNESCO, 'Damaged Cultural Sites in Ukraine Verified by UNESCO' (UNESCO 2024) https://www.unesco.org/en/articles/damaged-cultural-sites-ukraine-verified-unesco accessed 11 June 2026.

[3] UN Security Council Res 2347 (24 March 2017) UN Doc S/RES/2347; Roger O'Keefe, The Protection of Cultural Property in Armed Conflict (Cambridge University Press 2006) 1–14; Marina Lostal, International Cultural Heritage Law in Armed Conflict: Case Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan (Cambridge University Press 2017) 1–12.

The third deficit prosecutorial subordination is primarily institutional and political. No textual provision prevents the ICC from prioritising cultural crimes. The subordination reflects prosecutorial resource decisions shaped by geopolitical environments, operating in a textual vacuum that enables rather than constrains them.

These three shortcomings do not merely exist in tandem. They combine. Collecting evidence is hindered by the lack of jurisdiction. Prosecution becomes politically unappealing when necessary evidence is not present. The deterrent effect is diminished and the institutional incentive for non-party nations to join the framework is diminished when the prosecution is subordinated. This loop reinforces itself. This mechanism is shown empirically in Section IV.

Scope, Method, and Contribution

This article primarily focuses on tangible heritage and uses the doctrinal method to analyze treaty texts, court decisions, and academic interpretation to analyze international and non-international armed conflicts involving state and non-state perpetrators. This article does not cover the following topics: the 1970 UNESCO Convention on the illicit trade of cultural property, the law of conservation during times of peace, and the law of reconstruction following conflicts.[4]

The results of criminal prosecutions are used to measure effectiveness. Cultural heritage protection also happens through diplomatic pressure, civil society documentation, and UNESCO emergency response, therefore this decision demands defense. The results are handled by these systems. The sole way to make people pay for their actions and prevent more damage is through criminal prosecution. Prosecutorial metrics are best suited for structural legal analyses.

The existing literature documents enforcement failures O'Keefe analyses the Hague Convention's structural limits; Lostal documents treaty non-compliance across conflict zones; Gerstenblith analyses the Al Mahdi ceiling.[5] None synthesises these failures as a compounding interactive system in which textual gaps create exploitation surfaces. This synthesis, and the three structural interventions derived from it, constitute the article's original contribution.

The Operative Legal Baseline

Article 1 of the 1954 Hague Convention defines cultural property as 'movable or immovable property of great importance to the cultural heritage of every people. Such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest.[6] The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003 expands the category to oral traditions, performing arts, and traditional knowledge systems. This article uses 'cultural heritage' to encompass both categories while

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[4] Lyndel V Prott and Patrick J O'Keefe, Law and the Cultural Heritage, Volume 3: Movement (Butterworths 1989); Patrick J O'Keefe, Commentary on the 1970 UNESCO Convention (2nd edn, Institute of Art and Law 2007).

[5] O'Keefe (n 3); Lostal (n 3); Patty Gerstenblith, 'The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?' (2016) 15 John Marshall Review of Intellectual Property Law 336, 358–72.

[6] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 215, art 1.

acknowledging that the IHL enforcement architecture was built around the narrower tangible conception a definitional gap that itself creates interpretive conservatism in enforcement contexts.[7]

II. THE LEGAL FRAMEWORK: TEXTUAL DEFICIENCIES AND THEIR POLITICAL EXPLOITATION

The 1954 Hague Convention: Consent Architecture and the Military Necessity Exploitation Surface

With the introduction of the Blue Shield emblem and the establishment of reciprocal duties between state parties to preserve and honor cultural property, the 1954 Hague Convention laid the groundwork for the first thorough treaty framework for the protection of cultural property during armed conflict.[8] You can trust these accomplishments. The fundamental architectural constraint of the Convention is also legitimate: as a consent-based instrument, it can only bind state parties and depends solely on states to carry out and enforce its duties using their own military forces.

This restriction is further tightened by the military necessity exception in Article 4. When a state party can be "militarily imperatively required to waive its protection obligations," it can depart from its protection obligations. There is no objective criterion set, and the word "imperatively" is vague. Any defendant in future cases can predictably invoke this language, which was a purposeful compromise during drafting in order to win ratification of a political choice inscribed in the treaty text.[9] Article 6 of the Second Protocol did away with the surface-level text but did limit the exception by mandating that the decision be made by an officer at a certain level and documented. Containment through litigation is an afterthought, as structural drafting ought to have avoided the textual difficulty that has plagued judicial construction's narrowing of military necessity defenses in international criminal prosecutions.[10]

There is no force behind the Blue Shield marking scheme; it only designates protected areas. An unresolved structural weakness of the Convention is identification without enforcement, an institutional shortcoming that its designers recognized as a pragmatic compromise.

The Second Protocol: Advancement and Its Unmonitored Obligations

The Hague framework saw its most substantial evolution with the 1999 Second Protocol. By outlining particular egregious infractions, mandating that states parties establish jurisdiction, passing domestic criminal laws, and extraditing or prosecuting perpetrators, Article 15 establishes a true

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[7] UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3; Francesco Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction' (2011) 22(1) European Journal of International Law 9, 9–16.

[8] Hague Convention (n 6) arts 4, 6, 16 and 17; O'Keefe (n 3) 91–155.

[9] Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172, art 6; O'Keefe (n 3) 115–32.

[10] Prosecutor v Strugar (Judgment) IT-01-42-T (ICTY Trial Chamber II, 31 January 2005) paras 229–32; Prosecutor v Ahmad Al Faqi Al Mahdi (n 1) paras 38–42; Kononov v Latvia App No 36376/04 (ECtHR Grand Chamber, 17 May 2010) para 187.

individual criminal liability regime. The cultural heritage framework shifted from an aspirational to a criminal accountability framework in the treaty text due to Article 15.

Article 15's shortcomings, not its contents, are the focus of the article's argument. The Committee for the Protection of Cultural Property in the Event of Armed Conflict, which was established under Article 24, lacks the authority to investigate, handle individual complaints, visit countries, or determine if the domestic criminal legislation required by Article 15 has been enacted by the states parties.[11] The obligation exists in text; compliance monitoring does not exist in institutional design. A significant number of states parties to the Second Protocol have not enacted implementing legislation; no mechanism exists to identify or respond to this non-compliance.[12] Article 15's obligations are real but unmonitored, and therefore routinely unimplemented. This textual-institutional gap obligations without monitoring architecture is precisely what Section V's reform proposals address.

The Rome Statute: Jurisdictional Ceiling and the Veto Surface

Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute criminalise intentional attacks against cultural property in international and non-international armed conflict respectively. The jurisdictional architecture, however, confines prosecution to states parties, nationals of states parties, or situations referred by the Security Council under Article 13(b).[13] The primary theatres of documented post-2001 cultural destruction are concentrated among states that are not Rome Statute parties.[14] The referral mechanism designed to correct this limitation is structurally vulnerable to the veto: when a permanent Security Council member has strategic interests in the perpetrating state, referral fails regardless of evidentiary strength or normative consensus.

This is the most basic form of textual exploitation. A geopolitical player can utilize the veto, which is built into the treaty's jurisdictional extension mechanism, to stop it from working. Political exploitation blocks the road to accountability, while the text builds the surface. The two do not interact in a coincidental way; rather, it is predictable and has been seen to function precisely as the structural argument explains in the context of Syria.

Security Council Resolutions 2199 and 2347: Normative Progress Without Enforcement

Resolution 2347 (2017) stands as the first Security Council resolution dedicated solely to cultural heritage protection, calling upon states to take preventive measures, prosecute perpetrators, and

[11] Second Protocol (n 9) art 24; Patrick J Boylan, Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954) (UNESCO 1993) CLT-93/WS/12, 96–112.

[12] Nout van Woudenberg and Liesbeth Lijnzaad (eds), Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (Martinus Nijhoff 2010) 197–215; UNESCO, 'States Parties to the 1999 Second Protocol to the Hague Convention of 1954' (UNESCO) https://www.unesco.org/en/articles/states-parties-1999-second-protocol-hague-convention-1954 accessed 11 June 2026.

[13] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, arts 8(2)(b)(ix), 8(2)(e)(iv), 12 and 13(b).

[14] Rome Statute (n 13); ICC Assembly of States Parties, 'The States Parties to the Rome Statute' (ICC) https://asp.icc-cpi.int/states-parties accessed 11 June 2026.

enhance cooperation. Resolution 2199 (2015) condemned ISIL and Al-Nusrah Front destruction in Syria and Iraq and banned illicit cultural property trade.[15]

These two things stand for real progress in terms of norms. Neither of these options establishes norms for personal responsibility. Although member states are obligated to enforce Chapter VII resolutions, these resolutions do not have the authority to prosecute persons or demand the surrender of suspects. It is possible to effectively nullify even implementation commitments in cases when the state or its patron retains veto power. There has been no criminal prosecution as a result of Resolution 2347.

Customary International Law and the Case for Jus Cogens Elevation: A De Lege Ferenda Argument

The ICRC Customary IHL Study identifies Rules 38 and 40 as customary rules applicable in both international and non-international armed conflicts, binding even non-party states through consistent state practice and *opinio juris.*[16] This finding partially narrows the Rome Statute's jurisdictional gap a non-party state that deliberately destroys cultural heritage may violate customary international law regardless of treaty membership. However, customary law enforcement depends on state willingness to exercise universal jurisdiction or enact domestic implementing legislation, neither of which is widespread.

This article advances, explicitly as a *de lege ferenda* argument about what international law should recognise rather than what it currently does, the following normative claim: deliberate cultural destruction targeting a community's identity, where connected to ethnic cleansing, genocide, or crimes against humanity, satisfies the gravity and universality criteria the ILC articulates in its 2022 Draft Conclusions on Peremptory Norms for elevation to *jus cogens* status.[17] Support for this claim is found in Al Mahdi's explicit judicial recognition that cultural destruction harms the entire international community, in Resolution 2347's characterisation of cultural heritage as a matter of international peace and security, and in the growing cross-regional state practice condemning such destruction. The practical consequence of jus cogens elevation obligations erga omnes enabling any state to bring a claim, and the removal of treaty-based derogation would structurally narrow the jurisdictional deficit in its most significant dimension. The article recommends that states pursue this elevation through deliberate state practice, UNGA declaration, and engagement with the ILC process.[18]

[15] UN Security Council Res 2199 (12 February 2015) UN Doc S/RES/2199; UN Security Council Res 2347 (n 3).
[16] Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules (ICRC and Cambridge University Press 2005) Rules 38–40, 127–36.
[17] International Law Commission, 'Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens)' in Report of the International Law Commission: Seventy-Third Session (2022) UN Doc A/77/10, Conclusion 2.
[18] International Law Commission, 'Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens)' in Report of the International Law Commission: Seventy-Third Session (2022) UN Doc A/77/10, Conclusions 7, 17–19; ibid, commentary to Conclusion 23.

III. THE HUMAN RIGHTS DIMENSION: PARALLEL OBLIGATIONS AND THE INSTITUTIONAL SILOING PROBLEM

Concurrent Application, Cultural Rights, and the Siloing Problem

The relationship between international humanitarian law and international human rights law during armed conflict is established in ICJ jurisprudence. The *Nuclear Weapons* advisory opinion and the Wall advisory opinion both confirm that IHRL continues to apply during armed conflict, with IHL operating as *lex specialis* where normative conflict between the two bodies arises.[19] This article does not contest that framework. Its argument is institutional rather than normative: cultural destruction in armed conflict simultaneously violates IHL and IHRL, yet these violations are addressed through entirely separate institutional machinery the ICC, Hague regime, and Security Council on the IHL side; treaty body reporting cycles, Special Rapporteur mechanisms, and regional courts on the IHRL side with no coordination mechanism between them. This institutional siloing is a structural deficiency that persists regardless of the normative relationship between the two bodies of law and regardless of whether political will improves.

ICESCR Article 15(1)(a) guarantees the right to take part in cultural life. The Committee on Economic, Social and Cultural Rights' General Comment No 21 imposes positive obligations on states to safeguard cultural heritage and ensure non-discriminatory cultural access obligations that survive armed conflict.[20] ICCPR Article 27 protects minority cultural rights; Human Rights Committee General Comment No 23 establishes positive state duties to protect minority cultures during emergencies.[21] These responsibilities extend normative reach to states that are not parties to the Rome Statute, filling a gap in the IHL framework's jurisdictional architecture. There is a clear imbalance: IHRL has a broader normative reach but weaker enforcement. Individual communications procedures are sluggish and have limited remedial power; reporting cycles of treaty bodies run on multi-year schedules. Thus, IHRL partially closes the normative gap but does not close the accountability gap between the two frameworks.

UNDRIP and Collective Rights: Supplementing the Hague Occupying Power Framework

UNDRIP Articles 11, 12, and 13 recognise collective rights rights attaching to the group rather than merely to individual members to maintain, protect, and develop cultural heritage including archaeological sites, ceremonies, and languages.[22] These provisions are the most directly applicable human rights framework for systematic cultural erasure targeting a defined community. Read

[19] Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, para 25; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, paras 105–06.
[20] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 15(1)(a); Committee on Economic, Social and Cultural Rights, 'General Comment No 21: Right of Everyone to Take Part in Cultural Life (Art 15, para 1(a) of the Covenant)' (21 December 2009) UN Doc E/C.12/GC/21, paras 50–55.
[21] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 27; Human Rights Committee, 'General Comment No 23: The Rights of Minorities (Art 27)' (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5, para 6.2.
[22] United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) UN Doc A/RES/61/295, arts 11–13.

alongside General Comment No 23's positive duty framework, UNDRIP creates obligations applicable to occupying powers that supplement the Hague Convention's Article 5 obligations where those provisions are textually silent or ambiguous. This constructive concurrent application IHL and IHRL reinforcing one another in areas of normative overlap is the productive dimension of the *lex specialis* framework that the institutional siloing problem prevents from being realised in practice.[23]

Cultural Genocide: The Enforcement Gap

The eradication of cultural institutions, languages, and history was an integral part of Raphael Lemkin's initial definition of genocide. Cultural genocide was not included in the final text of the 1948 Genocide Convention due to a legal decision that cultural destruction is not grave enough, but rather to political considerations.[24] This creates a conceptual void: cultural genocide according to Lemkin may not be physically destroyed enough to be prosecuted as a war crime by the International Criminal Court (ICC), may be covered by international human rights mechanisms that do not account for the time urgency of actual conflicts, and may not be sufficiently documented to meet the 1948 Convention's physical destruction threshold. As discussed in Section IV, the ICTY made a doctrinal contribution that helped to overcome this gap by viewing systematic cultural devastation as evidence of genocidal and persecutive intent. The most catastrophic kind of structural shortcoming is shown by the fact that the gap is still there and cannot be simultaneously addressed by the two legal frameworks due to the institutional siloing problem.

IV. ACCOUNTABILITY IN PRACTICE: THE COMPOUNDING MECHANISM DEMONSTRATED

Timbuktu (Mali): The Al Mahdi Conviction as Proof of Concept and Conditions of Possibility

In 2012, Ahmad Al Faqi Al Mahdi directed the systematic destruction of fourteen religious and historical monuments in Timbuktu shrines, mausoleums, and a mosque that had stood for centuries as markers of Malian Islamic cultural identity and African scholarly heritage. In 2016, the ICC convicted him under Article 8(2)(e)(iv) and sentenced him to nine years' imprisonment. The Reparations Order of 2017 recognised that cultural destruction causes harm both to individual community members and to the community as a whole, awarding individual compensation, collective rehabilitation measures, and a guarantee of non-repetition.[25]

The conviction's historic significance is not in dispute.

[23] Federico Lenzerini, 'Cultural Rights as Human Rights' in Francesco Francioni and Ana Filipa Vrdoljak (eds), The Oxford Handbook of International Cultural Heritage Law (Oxford University Press 2016) 45, 45–72; Pueblo Indígena Kichwa de Sarayaku v Ecuador (Merits and Reparations) IACtHR Series C No 245 (27 June 2012) paras 155–67.

[24] Raphael Lemkin, Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress (Carnegie Endowment for International Peace 1944) 79–95; William A Schabas, Genocide in International Law: The Crime of Crimes (2nd edn, Cambridge University Press 2009) 185–98.

[25] Prosecutor v Ahmad Al Faqi Al Mahdi (n 1); Prosecutor v Ahmad Al Faqi Al Mahdi (Reparations Order) ICC-01/12-01/15-236 (ICC Trial Chamber VIII, 17 August 2017).

The incrementalist reading holds that Al Mahdi demonstrates institutional learning and adaptation: the ICC identified a prosecutorial gap, developed the legal theory, obtained state cooperation, and successfully prosecuted. This reading is partially correct, and the article concedes it. *Al Mahdi* is a proof of concept in the precise sense that it establishes ICC prosecution for cultural crimes as legally and institutionally possible.

The article's response is empirical. A proof of concept establishes possibility; it does not establish routine capacity. The conditions enabling *Al Mahdi* Mali's Rome Statute membership, Al Mahdi's voluntary surrender, his guilty plea represent a conjunction of exceptional circumstances. No commander-level prosecution followed. No comparable prosecution has occurred in nine subsequent years of documented destruction across Syria, Iraq, and Ukraine. If *Al Mahdi* were proof of concept for routine prosecution, subsequent prosecutions should have followed as the concept was applied. The nine-year silence is itself the most powerful evidence that the case revealed the ceiling of the existing architecture under optimal conditions, not the floor of a developing prosecutorial capacity.

Palmyra (Syria): Jurisdictional Exclusion, Veto Politics, and the Non-State Actor Dimension

ISIL seized Palmyra in May 2015. The destruction of the Temple of Bel, the Temple of Baalshamin, and the Arch of Triumph was filmed and broadcast by the perpetrators evidence of deliberate targeting requires no inference. Syria is not a Rome Statute party. Two draft Security Council resolutions that would have referred the Syria situation to the ICC under Article 13(b) were vetoed.[26] Resolution 2199 condemned the destruction and banned illicit cultural property trade. No individual has faced criminal accountability for Palmyra's destruction.

An alternative reading of this failure emphasises the non-state actor dimension: ISIL was not a state, its members were dispersed across multiple jurisdictions, and prosecution would have required multi-state cooperation regardless of Syria's treaty status. This reading is correct as far as it goes the non-state actor complexity is a compounding jurisdictional factor, not a separate problem. Even if Syria were a Rome Statute party, ISIL prosecution would require additional state cooperation that may not be forthcoming. This acknowledgement strengthens rather than undermines the structural argument: the jurisdictional deficit operates across both the state-party architecture and the non-state actor gap simultaneously. Both dimensions must be addressed.

The proactive mechanisms deficit is also fully visible in Palmyra. UNESCO listed the site as endangered but had no legal authority to mandate protective measures within Syrian territory.[27] No binding obligation required pre-conflict documentation, artifact relocation, or site preparation. The absence of proactive architecture meant that when ISIL seized the site, there was no legal basis for intervention, no pre-existing evidence base, and no institutional capacity deployed in advance.

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[26] UN Security Council, Draft Resolution S/2014/348 (22 May 2014); UN Press Release, 'Security Council Fails to Adopt Draft Resolution Referring Situation in Syria to International Criminal Court' (22 May 2014) UN Doc SC/11407.

[27] UNESCO World Heritage Committee, Decision 39 COM 7A.27, State of Conservation of the Ancient City of Palmyra (Syrian Arab Republic) (2015) https://whc.unesco.org/en/decisions/6293 accessed 11 June 2026.

Palmyra thus demonstrates all three deficits operating in combination, which is why sub-section 4.5 returns to it as the vehicle for the compounding mechanism demonstration.

Ukraine (2022–Present): Jurisdiction Present, Accountability Deferred

Ukraine accepted ICC jurisdiction under Article 12(3) in 2015 and is a Rome Statute party. Jurisdiction in the Ukraine investigation obtained immediately upon the Russian invasion of February 2022. The Office of the Prosecutor has issued arrest warrants for specific Russian officials in relation to the conflict.[28] UNESCO's verified figure of over 300 damaged or destroyed cultural heritage sites is derived from satellite imagery analysis cross-referenced with ground reports from partner organisations and Ukrainian authorities, supplemented by field missions where security permits a methodologically grounded estimate, not an uncritical aggregate.[29] The conservative subset of verified deliberate attacks on non-military cultural sites is numerically significant for the article's argument even if the full figure includes proximity damage.

As of this writing, the ICC's investigation into Ukraine has not levied any charges related to cultural heritage. The essay presents a detailed framing of the ongoing inquiry, which includes the following points: the existence of jurisdiction, the documented amount of devastation, and the lack of cultural accusations as primary counts, all of which are consistent with the structural subordination thesis provided in this article. As the investigation progresses, we will learn whether this is proven subordination or prosecutorial sequencing. The difference is less important than the observation it supports structurally: offenders committing cultural crimes confront a lower accountability risk than those committing other types of violations, for whatever institutional reason, because cultural destruction is seen more as supporting evidence for other charges than as a separate violation requiring prosecution.

As an example of proactive protection, Ukraine sheds light on the voluntary/obliging divide. It is technically possible to implement proactive protection measures, as shown by the country's satellite monitoring and 3D digitization programs.[30] Their implementation, however, is driven by Ukrainian governmental initiative and NGO support, not by any binding legal obligation. The Second Protocol's Article 5 peacetime preparedness requirements existed before the invasion; no specific mandatory action was legally compelled. Technical feasibility without legal obligation is the Article 5 monitoring gap in its most visible form.

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[28] ICC Office of the Prosecutor, 'Statement of ICC Prosecutor, Karim AA Khan KC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation' (2 March 2022) https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-khan-situation-ukraine accessed 11 June 2026; ICC, 'Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova' (Press Release ICC-CPI-20230317-PR1, 17 March 2023) https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and accessed 11 June 2026.

[29] UNESCO, 'Damaged Cultural Sites in Ukraine Verified by UNESCO' (n 2); UNESCO, 'Ukraine Emergency: UNESCO's Response' (UNESCO 2023) https://www.unesco.org/en/emergencies/ukraine accessed 11 June 2026.

[30] ALIPH (International Alliance for the Protection of Heritage in Conflict Areas), 'Ukraine Emergency Response' (ALIPH, 2022–24) https://www.aliph-foundation.org/en/cases/ukraine accessed 11 June 2026; UNESCO and Google Arts & Culture, 'Safeguarding Ukrainian Cultural Heritage Online' (2022) https://artsandculture.google.com/project/ukraine accessed 11 June 2026.

Bosnia and the ICTY: A Doctrinal Contribution and Its Limits

The Stari Most the sixteenth-century Ottoman bridge in Mostar was destroyed by Croatian Defence Council forces in 1993. The ICTY addressed this and other instances of cultural destruction in *Prosecutor v Prlić et al* and *Prosecutor v Kordić and Čerkez* not as independent crimes but as evidence of persecutory campaigns of ethnic cleansing.[31] The Tribunal's treatment of cultural destruction across its cases was inconsistent, and it never established a clean, self-standing doctrine of cultural heritage prosecution. These concessions must be made explicitly.

The article's recovery of a narrower doctrinal point from this mixed legacy is equally explicit: the ICTY established that systematic cultural destruction targeting a community's identity markers is probative of the *mens rea* elements of the most serious international crimes persecutory intent and genocidal intent. This narrow contribution is usable by ICC prosecutors regardless of the ICTY's broader inconsistencies. The recommendation this article advances is precise: ICC prosecutors in cases where systematic cultural destruction accompanies campaigns of ethnic violence should charge cultural destruction both as a standalone war crime under Article 8 and as evidence of the intent elements required for crimes against humanity under Article 7. The Ukraine investigation may present the first opportunity to test this combined charging strategy in the ICC context.

The Compounding Mechanism: Why Accountability Is Structurally Exceptional

The four cases together reveal a structural pattern that is the article's central empirical contribution. Accountability for cultural destruction is possible only when a conjunction of exceptional conditions simultaneously obtains: the perpetrator or perpetrating state falls within ICC jurisdiction; the perpetrator surrenders or is captured; a pre-existing evidence base exists; and cultural crimes are treated as primary prosecutorial charges rather than supporting evidence. *Al Mahdi* satisfies all four conditions. Palmyra satisfies none. Ukraine satisfies the first condition partially; the remaining three remain unresolved.

The compounding mechanism is traced most clearly through Palmyra. Syria's non-party status a textual jurisdictional deficit means no binding proactive protection obligations apply to non-party states under the Second Protocol's enhanced protection regime. Without pre-conflict documentation and site preparation, the evidentiary record for prosecution is thin. Thin evidence makes prosecution institutionally and politically unattractive for a resource-constrained court operating in a geopolitically contested environment. The absence of prosecution removes deterrent effect. The absence of deterrence removes any institutional incentive for non-party states to join the Rome Statute framework. The cycle returns to the original jurisdictional deficit, now reinforced.

Here we see the compounding mechanism at work, when the three deficiencies feed sequentially on one another rather than coexisting. The elimination of a single shortfall breaks the cycle in half, but it does not eliminate it entirely. Without proactive tools, even if Syria became a party to the Rome

[31] Prosecutor v Prlić and Others (Judgment) IT-04-74-T (ICTY Trial Chamber III, 29 May 2013) vol 3, paras 1584–1600; Prosecutor v Kordić and Čerkez (Judgment) IT-95-14/2-T (ICTY Trial Chamber, 26 February 2001) paras 200–15.

Statute, the evidence would be weak, and prosecutorial subordination would be probable. To structurally interrupt the accountability loop, all three deficiencies must be addressed simultaneously. This isn't just random chance. As one would expect from a system of laws whose wording leaves room for political actors to exploit loopholes, this is the inevitable result.

V. REFORMING THE ARCHITECTURE: THREE STRUCTURAL INTERVENTIONS

Universal Domestic Jurisdiction: Distributing Accountability Across the Selectivity Problem

The most achievable near-term reform does not require Rome Statute amendment or new treaty negotiation. Universal jurisdiction for crimes of gravity equivalent to systematic cultural destruction where connected to ethnic cleansing, genocide, or crimes against humanity is consistent with established customary international law. The ICRC's Rules 38 and 40, combined with the *de lege ferenda* customary argument advanced in Section II, provide the legal foundation for asserting that states may exercise universal jurisdiction over deliberate cultural destruction meeting a gravity threshold. Germany and the Netherlands have already prosecuted IS members for offences including cultural heritage crimes under domestic terrorism and universal jurisdiction frameworks demonstrating that this proposal is not theoretical.[32]

We need to tackle the selectivity problem head-on, which has always limited universal jurisdiction. There has been political pressure on states with expansive universal jurisdiction statutes to drop prosecutions of citizens of strong allied nations. This is an actual restriction. Since the prosecution burden is shared across numerous national jurisdictions under universal jurisdiction, it becomes much more difficult for anyone geopolitical actor to completely obstruct accountability. This is the structural response. A veto from the Security Council can only prevent prosecutions in one country at a time; it cannot halt proceedings in all four of these countries at once. In order to increase the structural possibility that prosecution occurs in at least one jurisdiction, the idea multiplies the potential accountability vectors, but it does not reduce political pressure.

The sovereignty question is addressed head-on: states, not non-state entities, exercise universal domestic authority. Although it does not bind states that do not consent, it does allow states that do consent to prosecute crimes against universal values regardless of territorial proximity. Compared to the current ICC framework, which governments have previously accepted, this one is less intrusive on sovereignty.

A Standalone Binding Treaty: The OPCAT Model Applied

The standalone treaty proposal is the long-term structural solution to be pursued in parallel with the near-term measures in sub-sections 5.1 and 5.3. The OPCAT timeline from initial proposal in 1980 to adoption in 2002 to entry into force in 2006 reflects a realistic horizon of fifteen to twenty-five

[32] Robert Heinsch and Koustubh Sanjanwala, 'Improving Compliance with International Humanitarian Law through Domestic Implementation' in Heike Krieger (ed), The Diversity of International Law (Brill Nijhoff 2019); Lostal (n 3) 245–62; Prosecutor v Anwar Raslan (Judgment) Oberlandesgericht Koblenz, 3 StE 4/21-4 (13 January 2022).

years for comparable negotiation and implementation.[33] This acknowledged timeline reinforces rather than undermines the case for immediate pursuit: the longer negotiation begins, the longer the architectural gap persists.

The proposal must specify precisely what a standalone treaty adds that the Second Protocol does not provide. Three elements are identified:

First, mandatory domestic criminalisation with verification. Article 15 of the Second Protocol requires states parties to establish domestic criminal jurisdiction but creates no monitoring mechanism to verify compliance. The proposed treaty would require submission of implementing legislation to a treaty body within a specified period of ratification, with the body empowered to assess adequacy and issue compliance findings. This converts Article 15's unmonitored obligation into an accountable one.

Second, a monitoring body modelled on the OPCAT Subcommittee on Prevention, able to conduct periodic country visits to assess peacetime preparedness under Article 5 obligations, receive individual and state communications, and issue public compliance reports. Investigation powers independent of state invitation the ability to visit without requiring consent in each instance are the critical addition that converts Article 24's existing Committee from a consultative body into an accountability mechanism.

Third, an automatic referral pathway to the ICC for systematic or large-scale cultural destruction meeting a gravity threshold, routed through the treaty body rather than through the Security Council. This removes the veto as a blocking mechanism in the most serious cases. The treaty body a technical expert body operating on legal criteria rather than political calculation would determine whether the gravity threshold is met and refer accordingly. This element requires either Rome Statute amendment or a separate agreement between the treaty body and the Court; the negotiating complexity is acknowledged, and the structural change it would deliver justifies the investment.

Proactive Protection as Legal Obligation: Operationalising Article 5 Through Mandatory Monitoring

The near-term operational reform connects directly to sub-section 5.2's monitoring body, which serves as its enforcement mechanism. The Second Protocol's Article 5 already requires peacetime preparedness inventories, emergency plans, and preparation for the removal of movable cultural property. The problem is that these obligations are unmonitored and therefore routinely unimplemented. Ukraine's voluntary digitisation programme demonstrates technical feasibility; the reform proposal makes comparable programmes legally mandatory.

Two components operationalise this obligation. First, mandatory periodic reporting to the monitoring body proposed in sub-section 5.2, on national cultural heritage protection plans, with UNESCO

[33] Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237; Malcolm D Evans, 'The Optional Protocol: More than a Panacea?' in Rachel Murray (ed), The Optional Protocol to the UN Convention against Torture (Oxford University Press 2011) 19–38.

technical assistance available for states lacking capacity. This converts Article 5 from a dormant obligation to an active compliance regime. Second, standardised cultural protection components in UN peacekeeping mandates as a default operational element, rather than an optional addition dependent on individual mandate negotiation. The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law establishes IHL obligations for peacekeeping forces; cultural protection should be explicitly enumerated.[34] MINUSMA in Mali and UNMIK in Kosovo have included cultural protection elements; the reform makes this universal through a standing Security Council resolution or amendment to standard peacekeeping mandate templates.

States are not likely to comply with peacetime readiness responsibilities if they are prepared to destroy cultural heritage during conflict, which is an objection to compliance that applies to all treaty duties and is not conclusive. States that care about their international position are more likely to comply with the monitoring body's demands because of the reputational and diplomatic pressure mechanism. The two suggestions made in subsections 5.2 and 5.3 are interdependent; one cannot have its complete structural impact without the other, and they are both required parts of an overhauled structure that combines to fix all three of the highlighted deficiencies.

VI. CONCLUSION: STRUCTURAL ACCOUNTABILITY AS THE NECESSARY RESPONSE

This article has proven that the failures of cultural heritage protection during armed conflict are not just due to a lack of political will or inadequate legal protections; rather, they result from the interplay between particular textual shortcomings and the political actors who will inevitably take advantage of them. Textual exploitation surfaces are created under the 1954 Hague Convention's permission architecture and the military necessity exception. Article 15 of the Second Protocol, which is not overseen, exposes institutions to exploitation. The most consequential surface is created by the combination of the Security Council veto and the Rome Statute's consent-based jurisdiction. There is a vicious cycle here where these shortcomings reinforce each other: jurisdictional exclusion stops evidence from being collected, prosecution becomes politically unattractive due to a lack of evidence, and the deterrent effect that could encourage participation in the framework is removed by prosecutorial subordination.

When interpreted correctly, the *Al Mahdi* conviction lends credence to this assessment rather than casting doubt on it. It shows what the building can do when all the extraordinary requirements are met at once, which hasn't happened in nine years. One of the most well-documented and purposefully carried out acts of cultural destruction in the post-WWII era occurred in Palmyra, when all three deficiencies worked in tandem, leading to complete accountability failure. Ukraine poses the most important contemporary test for architecture in terms of jurisdiction. The question now is whether

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[34] Secretary-General's Bulletin, 'Observance by United Nations Forces of International Humanitarian Law' (6 August 1999) UN Doc ST/SGB/1999/13, s 6.

cultural crimes will be prosecuted as primary charges or if they will be considered secondary. The answer to this question will either confirm or disrupt the structural pattern described in this article.

All three of the proposed interventions—universal domestic jurisdiction, an independent binding treaty modeled after OPCAT, and the use of mandated monitoring to put Article 5 responsibilities into action—would aim to address different aspects of the compounding cycle. Beyond the one referral route to the UN Security Council, which is susceptible to a single veto, universal domestic jurisdiction increases accountability channels. The veto is removed from the most critical referral decisions and unmonitored responsibilities are transformed into accountable ones through a stand-alone treaty with monitoring authorities. Without the evidentiary infrastructure created by mandatory proactive protection, prosecution becomes structurally impractical regardless of the availability of jurisdiction. Instead of focusing on deficiencies separately, they aim to address the interplay between textual gaps and political exploitation.

The article makes a unique contribution by arguing that the law is ineffective through a specific structural mechanism, and that this mechanism has a diagnosis and a prescription that have not been synthesised in the current reform literature. No similar prosecution has been brought forward in the nine years since Al Mahdi and this article. Unless the architecture is changed, the predictable outcome of the architecture described in this paper will be that gap.