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Letter from the Editor

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LETTER FROM THE EDITOR-IN-CHIEF

Dear Readers,

In this second issue of Volume 13 of the *Notre Dame Journal of International & Comparative Law*, the staff endeavors to publish noble scholarship on nuanced international law. The topics being published in this issue are novel and intricate.

Issue 2 of Volume 13 opens with an article from practitioner Mark Labaton. The article lives the "never forget, never again" mentality with regard to the Holocaust. Mr. Labaton calls for returning Nazi-looted art to its rightful owners, to advance the notion of transitional justice. The second article in the spring issue was written by Sarah Johns. She brings to light the displacement of the Êzidi people in the Middle East. Her article helps hold the international community accountable for failings related to asylum and intervention.

The Spring Issue closes with two Notes written by Notre Dame Law School students and members of the *Journal*. Their notes both discuss more procedural matters of law in European nations. Mike Kowalski discusses the differences between the U.S. and U.K. high courts, and the celebrity status afford, or not afforded to the members of both courts. Kirk Earl writes about the Swiss summary penalty order, a measure which allows prosecutors to sentence defendants with a fine, or imprisonment for six months or a monetary penalty in the equivalent. The measure is comparable to how American prosecutors use the plea-bargaining system.

As the volume comes to a close, I renew my gratitude, on behalf of the *Journal*, for all of the contributors to our publication. The Executive Board and Editorial Staff were indispensable to the publication process. Professors Roger Alford and Diane Desierto have continued to be reliable, kind, and helpful. I present to you Issue 2 of Volume 13, with great hope that the scholarship will be a force for good in the world.

In Notre Dame,

Michael Klein
Editor-in-Chief, Volume 13

MORE THAN A "DROP OF JUSTICE:" HOW NAZI-LOOTED ART CASES PROMOTE "TRANSITIONAL JUSTICE" AND WHY THESE CASES STILL MATTER

MARK I. LABATON*

INTRODUCTION

When it comes to Nazi looting, the past is not dead.[1] Nor should it be. Even now more than three-quarters of a century after the Holocaust, Nazi-looted art cases still provide direct justice to victimized families while also advancing broader historical redress known as "transitional justice," which since World War II has become a means to address mass atrocities through criminal trials, civil litigation, truth reconciliation commissions, memorials, and reparations.[2]

Before annihilating six million European Jews – two-thirds of the European Jewish population – the Nazis smeared Jews before dispossessing them of their civil liberties, citizenship rights, and property. This course of events makes Nazi-looted art cases central to Holocaust history. As memories of the Holocaust fade, the cases valuably memorialize important parts of this history.

Reichsfuhrer Heinrich Himmler implored that the Nazis "must kill *all* the Jews," because, he added, "if we don't kill them, their grandchildren will ask for their property back."[3] Nazi-looted art cases are still possible because the Nazis failed to kill *all* Jews; they also remain uniquely viable in only one nation, the United States. There are several reasons for this. They include:

- Congressional legislation particularly the Holocaust Expropriated Art Recovery Act (the "HEAR Act"), which preempts restrictive state statutes of limitation ("SOLs") and makes it possible to start cases decades after the Holocaust.
- The American civil justice system. That system historically has promoted groundbreaking cases of political and social import and enables claimants to bring lawsuits against well-heeled art collectors on a contingent basis, without having to post bonds, and does not require losing parties to pay the prevailing parties' legal fees. American law also allows claimants wide-ranging document and testimonial discovery rights

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[1] William Faulkner said "the past was never dead. It's not even past." WILLIAM FAULKNER, REQUIEM FOR A NUN, 73 (1951).

[2] *See generally*, Eric Posner & Adrian Vermuele, *Transitional Justice as Ordinary Justice* 117 HARV. L. REV. 762 (2003); David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice* 87 WASH. UNIV. L. REV. 1043 (2010); Therese O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of The Medusa?* 22 EUR. J. OF INT'L L. 49 (2011).

[3] MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 295 (2005).

and litigation opportunities that claimants elsewhere lack. Such discovery is needed to build and develop complex cases as looting disputes often invariably are.

- American substantive law, which is far more favorable to claimants than foreign laws. For example, in most American jurisdictions, one who purchases stolen from a thief – even innocently as well as subsequent purchasers – does not acquire good title to such property; whereas in most European countries an "innocent" purchaser is the presumed owner of such property.[4]
- State and federal courts have been receptive to such lawsuits and have upheld jurisdiction even when the artwork at issue is in a foreign nation.

Only in America can such cases be fully and fairly litigated. This imposes a particular obligation to ensure cases brought are justly adjudicated here. These cases offer an avenue for justice for the heirs of Holocaust victims, many of whom are direct relatives of the victims of heinous Nazi atrocities. For them, lawsuits might provide what Senator Charles Schumer (D-NY), a co-sponsor,[5] described as "a drop of justice in an ocean of injustice."[6]

Still, those drops are important. Besides offering the possibility of familial redress, these cases further broader benefits of understanding and of transitional justice. In this way, they continue a noble tradition that began with 13 post-World War II Nuremberg War Crimes Trials later followed by the trial in Jerusalem of Adolph Eichmann, a key strategist of the Final Solution, the planned genocide of European Jews. Civil litigation of looted-art cases continues this tradition. Concerning the Nuremberg War Crimes Trial, chief allied trial counsel and Supreme Court Justice Robert H. Jackson, said:

> That four great nations, flushed with victory and stung with injury stayed the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason.[7]

It was. Between 1945 and 1949, the Allies tried Nazi leaders for waging a war of aggression, upholding eugenic laws, and genocide.[8] But these trials did not address the earlier dispossession of Jews. Nazi-looted art cases do.

This article explores how and why more recent Nazi-looted art cases remain important and timely. It begins by describing the vast scope of Nazi

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[4] *See, e.g.*, *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S. Ct. 1502 (2022). *See also, e.g.,* Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 633–34 (2000).

[5] Senators Ted Cruz (R-Texas), John Cornyn (R-Texas), and Richard Blumenthal (D-Conn) were the other co-sponsors.

[6] Schumer Announces Legislation to Help Recover Nazi-Confiscated Art Passes Judiciary Committee; Bill Now Heads to Senate Floor, Sen. Charles E. Schumer Press Release, Sept. 15, 2016.

[7] Justice Robert H. Jackson, Opening Address for the United States, (Nov. 21, 1945) in 1 NAZI CONSPIRACY & AGGRESSION 114 (1946).

[8] *Nuremberg Trials*, History.com, (Oct. 13, 2021) https://www.history.com/topics/world-war-ii/nuremberg-trials.