Comment on the Recommendation by the Advisory Commission in the case of "Behrens v. Düsseldorf"*

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In its recommendation of February 3, 2015[2] the Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property (*Beratende Kommission für die Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter* or Limbach Commission for short) has advised against the restitution of a painting. The work concerned is "Pariser Wochentag" by Adolph von Menzel. The claimant was the community of heirs to the estate of George Eduard Behrens. The respondent, the City of Düsseldorf, opposed the claim arguing that the sale of the painting from the Behrens collection to the municipal art collections (Städtische Kunstsammlungen Düsseldorf) had not been a loss of property as a consequence of Nazi persecution.

I. Factual background

The factual background to the recommendation was essentially as follows:

"Pariser Wochentag" was painted by Adolph von Menzel in 1869 and acquired by Eduard Ludwig Behrens, the owner of L. Behrens & Söhne, a private bank in Hamburg, for his art collection in or before 1886. The painting remained in the family's ownership until 1935. In March of that year George E. Behrens informed the Hamburger Kunsthalle about the proposed sale of 33 paintings from the Behrens collection which were on loan to the Kunsthalle. That same year, Hans-Wilhelm Hupp[3], the director of Düsselsdorf's municipal art collections since 1933, was attempting to acquire a "major work by Menzel". In July 1935 Menzel's painting "Pariser Wochentag" came into the possession of the Galerie Paffrath, the same gallery which earlier that year Hupp had commissioned to look for a work by Menzel. Städtische Kunstsammlungen Düsseldorf eventually acquired the painting later that year for a price of 33,000 Reichsmark.

The art collection had been in the hands of Eduard Ludwig Behrens' grandson, George E. Behrens (February 21, 1881 – June 5, 1956) since the death of his father in 1925. He was the fifth generation of the family to manage L. Behrens & Söhne as senior partner. Although George E. Behrens and his sister Elisabeth Emma were both Protestants, under the "Nuremberg Laws" they were both classed as Jewish. Between 1933 and 1935 George Behrens lost his positions on several supervisory boards and sold the family property at Harvestehuderweg 34 in July 1934.

George E. Behrens was arrested in the wake of the November pogrom in 1938 and detained in Sachsenhausen concentration camp until March 1939. L. Behrens & Söhne had already been forced to cease operating on May 31, 1938 and to go into liquidation on December 31, 1938. George E.

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Behrens emigrated to Cuba via Belgium and France in April 1939, after paying the Jewish Property Levy (*Judenvermögensabgabe*) and the Tax on Flight from the Reich (*Reichsfluchtsteuer*). He eventually returned to Hamburg for good in 1950. In 1952 he received compensation for the loss of the family land after ending "reparation"-proceedings by agreeing to a compromise.

The contentious points are:

1. There is disagreement between the parties as regards the precise date of the purchase agreement – i.e. whether it was before or after the "Nuremberg Laws" were issued on September 15, 1935 .

2. Another point in dispute in this context is whether George Behrens sold the painting to Galerie Paffrath or to Städtische Kunstsammlungen Düsseldorf.

3. The parties disagree on whether the purchase price was fair.

4. Finally, the parties disagree about the question of whether George Behrens was ever in a position to dispose of the purchase price as he pleased.

II. The Advisory Commission's recommendation

The Advisory Commission is advising against restitution of the painting, on the grounds that the sale of "Pariser Wochentag" was not a loss of property caused by Nazi persecution.

They argue that at the time when "Pariser Wochentag" was sold in 1935, George Behrens did not yet find himself in a situation of no longer being able to freely dispose of the picture and that he was not forced to act as he did because of the political circumstances of the time. The Commission takes the view that his actions would have been similar even under different circumstances and that the reasons for the loss of the supervisory board posts and the property at Harvestehuderweg are more likely to have been economic in nature than anti-Semitic.

The Commission considers that the heirs cannot benefit from the presumption pursuant to Art. 3 of the Berlin Restitution Ordinance (*Berliner Rückerstattungsanordnung*[4] (REAO)) as the painting was sold in July 1935 and thus before September 15, 1935. This is said to be shown by the business records of Galerie Paffrath submitted in the proceedings. Furthermore, the Commission takes the view that, even if the rules on presumption did apply, the presumption would be refuted.

III. Comment

The decision made by the Commission gives reason for concern. It departs from the standards practiced by most public authorities in charge of museums over the past 15 years, and it does so to the detriment of those persecuted by the Nazis. It has also been based on incorrect assumptions as to the facts.

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The standards referred to are made clear in the 2001 Guidelines for implementing the Joint Declaration of 1999 (of 2001 as revised in November 2007) [5]. The Joint Declaration[6] and the Guidelines are declarations of political will made by the representatives of the Federal Government, the *Länder* (Federal States), the national associations of local authorities, and in the case of the Guidelines also by the bodies in charge of major cultural institutions, concerning the transposition of the Washington Conference Principles of 1998[7] to match the situation in Germany. In No. 8 the Washington Principles provide that for moral and political reasons, public sector owners of works of art should take steps to achieve a "just and fair" solution if the work concerned was lost because of Nazi persecution, i.e. if the work concerned was so-called "looted art" ("*Raubkunst*"). According to No.1 para. 2 of the Joint Declaration, works of art that were lost because of Nazi persecution ought to be returned as a matter of principle. Thus, according to the Joint Declaration the "just and fair solution" to situations where there are issues to do with Nazi-confiscation will as a rule be to return a work of art if it is regarded as looted art. Please note: "lost art" in the context of this article is only art whose loss was caused by the Nazi persecution of its owners. In other contexts, e.g. in connection with the Gurlitt art trove, the term is also used for losses by owners who were not persecuted.

According to No. 4 of the Washington Principles, when answering the question of whether a work of art was looted, consideration should be made for today's unavoidable gaps in knowledge. It is for this reason that the Guidelines state that the institutions concerned should be "encouraged" when making decisions on how to deal with art that changed possession or ownership during the Nazi era, "to abide by the guiding principles of post-war restitution policy" when examining restitution claims[8]. The Guidelines include detailed explanatory comments, in particular as regards the criteria for applying the presumption pursuant to Art. 3 REAO[9].

No. 11 of the Washington Principles calls upon nations to develop processes to implement the principles, and in particular to establish alternative dispute resolution mechanisms.

The standards set forth in the Guidelines and the Declaration they implement are not legally binding. They do, however, mean that all parts of the German public sector have a political and moral duty to act in accordance with the principles they contain[10].

1. Deviation from the Guidelines: Period of collective persecution

Art. 1 and Art. 3 REAO and the similar legislative provisions enacted in the British and American Zones were of key importance for the way restitution law was put into practice during the post-war period. Under § 1 para. 6 of the 1990 Act on the Settlement of Unresolved Property Claims (*Gesetz zur Regelung offener Vermögensfragen von 1990* ("VermG")) Art. 3 REAO remains in effect to this day.

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Like the Joint Declaration, Art. 1 para. 1 REAO provided that property that was lost because of Nazi persecution should be returned. Art. 3 REAO provided that where a transfer or relinquishment of property by a person exposed to measures of collective persecution occurred during the time between January 30, 1933 and May 8, 1945 the transferor (or his heirs) should benefit from a relaxation in the burden of proof, namely a presumption in their favor that Nazi persecution was causative for the loss of property.

The Commission does not apply the presumption in its recommendation. It is of the opinion that George Behrens was not exposed to collective persecution in July 1935. According to the Commission, although they have not failed to note that

"*George E. Behrens did belong to the category of persons collectively persecuted on racist grounds after promulgation of the 'Reich Citizenship Law'* [Reichsbürgergesetz] *of September 15, 1935"*[11],

it is

"*undisputed by historical scholars that during the first years of the 'Third Reich' Jewish private banks were not directly affected"*

by anti-Semitic agitation, anti-Jewish excesses and changes in the law. The Commission goes on to state:

"*Until the end of the ‚Schacht era' the Reich's Ministry of Economics remained interested in ensuring that banks, including the Jewish private banks, operated as smoothly as possible and for several years it successfully averted anti-Semitic attacks in this area.*"

According to Art. 1 para. 1 REAO, however, collective persecution of people regarded as Jewish began when Adolf Hitler was appointed Chancellor on January 30, 1933, and not just two and half years later[12]. This means that when it comes to finding a solution to the case in accordance with the standards set out in the Guidelines the question of whether the museum acquired the picture in July 1935 or later is of no significance. The wording of the provision is unambiguous as regards the relevant period. It leaves no room for supposing that a person who was subject to collective persecution should be deemed to have been persecuted only from a later date, such as September 15, 1935. The reason for the presumption in favor of the victims of Nazi persecution is that victims and their heirs ought not to be expected decades later to detail the precise circumstances proving persecution in their own individual case.

When considering this point in 2006 in connection with the VermG, the Federal Administrative Court commented:

"*There can be no question that citizens of Jewish descent did belong to the category of persons collectively persecuted since January 30, 1933, as there was an intention from the very outset to exclude all Jews from economic and cultural life in Germany. In the case of citizens of Jewish descent it is impossible to draw distinctions according to professional categories which legislative measures excluded from professional life at a different point in time. Thus, civil servants of Jewish descent had for the main part already been removed from the civil service in April 1933 as a consequence of the*

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Law for the Restoration of the Professional Civil Service [Gesetz zur Wiederherstellung des Berufsbeamtentums] *of April 7, 1933. This does not, however, allow one to infer that Jewish people in general did not face collective persecution before September 15, 1935, based on the argument that it was only then that the Reich Citizenship Law defined who should be regarded as a Jew*.[13]"

2. Deviation from the Guidelines: Disproving the presumption of persecution

According to Art. 3 REAO, where a deprivation of property occurred during the period of National Socialist rule, even if the loss took place before September 15, 1935, a claimant who was persecuted by the Nazis does not have to prove that his persecution was causative for the relevant loss of property. The normal distribution of the burden of proof is thus reversed. Where Art. 3 REAO applies, the onus is on the respondent to prove that the deprivation was caused by other circumstances. Indeed, it goes so far as to make it more difficult for the person in current possession of property that was lost during the Nazi period to rebut the statutory presumption. According to Art. 3 para. 2 REAO, the presumption that Nazi persecution was causative can be refuted only

a) by showing that a fair purchase price was paid, **and**

b) by showing that the persecuted person had a free right of disposal over that purchase price[14].

In other words, then as now under the VermG, the statutory presumption was that the purchase price was not fair and that money was not placed at the persecuted person's free disposal.

According to the opinion expressed by the Commission, the presumption is supposed to apply only as regards the period after September 15, 1935. Although that date does certainly mark a cut-off, this affects only the rebuttal of the statutory presumption, and not the presumption itself. Where a transfer took place after that the current holder of the property has to prove in addition that the transaction would have taken place even in the absence of the National Socialist regime, or that the transferee protected the proprietary interests of the persecuted person in an exceptional manner.

According to the opinion expressed by the Commission, even if the presumption were applicable it would nevertheless be refuted.

a) Fairness of the purchase price

The Commission considers that the purchase price has been shown to have been fair, because "the sale took place quickly" (i.e. just a few months after the term of the loan contract ended). However, this can also been seen as indicating exactly the opposite. Above all the Guidelines state that the deciding factor cannot be the speed of the sale or any indications other than those which are definitive according to Art. 3 para. 2 REAO. This means that it should have been up to the City of Düsseldorf to prove that the purchase price was fair, for example by means of an expert opinion. The Commission takes the view that the circumstantial evidence presented by the Behrens heirs

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(presumably as a secondary alternative) in order to show that the purchase price was unfair is unconvincing. Yet according to the Guidelines, that is precisely not the point. After all, it is not the Behrens heirs who have to prove that they were paid too little, but rather the City of Düsseldorf that has to prove that it paid enough. Thus, according to the Guidelines, even if it is likely that a fair purchase price was agreed, that will not be enough to disprove the presumption that the loss was caused by Nazi persecution.

b) Free right of disposal

The City of Düsseldorf has also been unable to present the second type of evidence needed to refute the presumption pursuant to Art. 3 para. 2 REAO. Although the Commission considers it implausible that Galerie Paffrath did not pay, even if only because George Behrens would have been able to sue for the purchase price, that is not enough to refute the presumption. To do that Düsseldorf would have to prove rather than make a plausible case that Galerie Paffrath did pay and that George Behrens was able to dispose freely over the money, for example by presenting evidence for payment.

3. Incorrect assertions of fact to the disadvantage of the Behrens heirs

In addition to these legal mistakes the Commission has countered the claim by the Behrens heirs by making various assertions as to the historical facts, which are incorrect, in order to show that the Nazi persecution was not causative for the loss of property.

a) "Not directly affected" by persecution

In particular, the Commission denies that George Behrens and the bank were persecuted during the period between January 30, 1933 and the "end of the 'Schacht era'". That is wrong. Moreover, the question is not that of the persecution of the bank which George Behrens held an interest. The relevant factor for assessing what was the cause for the loss of a work of art which was his private property is the persecution to which he was exposed as an individual, about which virtually nothing is known. However, because of the presumption pursuant to Art. 3 REAO such specific knowledge is not required. In this respect a selection of arguments displaying the incorrectness of certain factual assertions will suffice.

aa) Collective persecution of Jews after January 30, 1933

Persecution of Jews by the state and above all persecution by the SA and the other bands of ruffians elevated to the status of auxiliary police began at once[15], and in some cases even before the so-called "*Machtergreifung*"[16]. Much research has been conducted showing that the boycott of Jewish

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shops and businesses in April 1933 served the purpose of channeling and directing the earlier wildcat violence against Jews[17]. Already during the weeks running up to the start of the boycott on April 1, 1933 Jews were being abused and beaten up openly on the streets, in some cases killed, and Jewish lawyers and judges suffered violence and abuse in court[18]. This is precisely why the REAO and the Guidelines are justified in their presumption of collective persecution: if a few dozen people seen as politically and "racially" undesirable are beaten up or incarcerated by the state and the party, or suffer an even worse fate, then everyone else meeting the criteria by which persecutors choose their victims is exposed to persecution as well. Bankers regarded as Jewish met the criteria, indeed Jewish bankers were the very prototype of the Nazi party's concept of the enemy, see Point 11 of the NSDAP's party program, "Breaking the bondage of interest" ["*Brechung der Zinsknechtschaft*"][18a]. This remains true regardless of whether the individual concerned was spared from experiencing violence to his person.

bb) Individual persecution of Jewish bankers starting in spring 1933

Contrary to the opinion expressed by the Commission, the hostile stereotype referred to above was by no means without consequences for those affected, even before September 15, 1935. There are numerous cases illustrating this.

(1) Nazi measures against banks starting 1933

As early as 1933, there were cases of Jewish bankers suffering ill-treatment, kidnapping and extortion by members of the SS, of arbitrary searches of business or private premises, as well of arrests[19], such as that of Hannoverian banker Albert Scheiberg, who committed suicide shortly afterwards[20]. Even in 1933, newspapers refused to publish announcements by Jewish banks[21]. That same year many local authorities terminated their ongoing business relationships with Jewish private banks and refused to allow Jewish businesses to participate in tendering procedures[22]. In some cases even non-Jewish businesses were ignored when public contracts were awarded, simply because the account they had described was held at a "Jewish" bank[23]. An initiative launched by Julius Streicher led to non-Jewish customers at the Kohn bank in Nuremberg being included in lists with opprobrious comments after March 1934[24], an action which resulted in many non-Jewish customers closing their accounts at Jewish banks[25]. In March 1933, party officials started targeting bank operations directly, for example by hampering or completely forbidding transactions involving Jewish accounts[26]. One of the branches of the Reichsbank was required by the local *Gauleiter* to

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block Jewish accounts and to inform him about the respective balances[27]. The measures the Reichsbank's board of directors took to counter such attacks have been described as completely ineffective[28]. On March 8, 1933 members of the SA entered the building of the Berlin Stock Exchange in Burgstraße and demanded the resignation of the board, denounced by the Nazis as being Jewish[29]. The President of the Berlin Stock Exchange, Eduard Mosler, thereupon suggested to the Economics Minster that the board should be reduced in size. Although partly elected by the members of the exchange, the board also had to be confirmed in office by the chambers of industry and commerce, which by that time had already been brought under full Nazi control[30]. Out of the 14 previous members who were presumably Jewish, only two bankers regarded as being Jewish remained on the board, Sigmund Wassermann and Paul von Mendelssohn-Bartholdy[31]. Thus, the Jewish voice in this very important body was rigorously curtailed as well. Beyond that, a great number of Jewish bankers were deprived of their positions on supervisory boards between 1933 and 1935. Fritz Warburg, for example, lost three during this period, Carl Melchior – also from the M. M. Warburg & Co. bank – lost nine, and Georg Hirschland and Kurt Arnhold five such positions each[32]. Apart from this, by September 1935 the Gestapo had long been engaged in extensive police investigations, surveillance of mail and telephone calls and active coercion aimed at forcing businessmen and companies out of business. These affected Jewish bankers as well[33]. It is well-documented that Jewish banks were forced to defend themselves against denunciations concerning alleged irregularities – often made by employees – and faced harassment in the form of spurious external audits, frequently relating to foreign exchange[34].

For example, in April 1934 investigations were launched against the Berlin banker Jacques Krako from Falkenburger bank, who was alleged to have been an accessory to credit fraud. Krako was remanded into pre-trial custody without being granted a hearing. While he was in prison, the Berlin registrar of companies officially deleted the bank from the register. In March 1935, Krako was acquitted and declared "completely innocent"[35].

As early as spring 1933, the Jewish owners of Dresden's largest private bank, Gebrüder Arnhold, learned that Martin Mutschmann, the *Gauleiter* of Saxony, wanted to force the Arnhold family to leave the country[36]. With this in mind, Mutschmann accused the bank of having falsified its balance sheet, whereupon the Dresden public prosecutor's office began investigations into suspected fraud in January 1934 [37]. During the investigative proceedings counsel for the bankers was refused access to the files[38]. The public prosecutor's office rejected exonerating evidence on the grounds that records which had presumably been falsified by a fraudulent company could not be admitted in the proceedings. Saxony's Minister of Economics Georg Lenk said in May 1934 that, "he had been advised to leave the charges hanging like a sword of Damocles over the gentlemen, to make them

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more amenable to the Dresden sale"[39]. There are no known indications that Schacht ever intervened with Mutschmann or Hitler to assist the bank[40].

(2) Nazi measures against major banks

The influence commanded by Deutsche Bank went much further than that of Bankhaus L. Behrens & Söhne, yet in spring 1933 they discharged Oscar Wassermann and Georg Solmssen, both of whom were Jewish members of the management board. Shortly before that happened Schacht had let the management board know that he reserved the right to take "all measures" in matters of the bank's personnel[41]. Although Deutsche Bank was not within the formal scope of the Law for the Restoration of the Professional Civil Service [*Gesetz zur Wiederherstellung des Berufsbeamtentums*][42] , the non-Jewish Franz Urbig, Chairman of Deutsche Bank's supervisory board, and the Jewish Georg Solmssen, Chairman of its board of management, had been advised by Schacht on April 6, 1933, just one day before the law was introduced, that they ought to adopt an accommodating approach towards the government's anti-Semitic measures[43]. In this case, therefore, Schacht intervened not in favor of Jews, but against them instead.

At Schacht's insistence, Solmssen also had to resign as chairman of the Central Association of German Banks and Bankers [*Centralverband des Deutschen Bank- und Bankiergewerbes*] on April 7, 1933, as did the Association's general secretary Otto Bernstein[44]. This naturally resulted in a worsening of the situation of the Jews in the German banking sector.

Dresdner Bank dismissed several hundred, mainly Jewish employees between April and June 1933. Wilhelm Kleemann was forced to leave Dresdner Bank's board of management on April 1, 1933, Siegmund Bodenheimer on October 1[45]. The last remaining Jewish member of the management board of a major bank was ousted in 1936[46].

cc) Protection by Hjalmar Schacht?

Hjalmar Schacht, Minister of Economics from July 30, 1934 until November 27, 1937[47] and President of the Reichsbank from March 17, 1933 until January 20, 1939[48], cannot be said to have prevented the persecution of Jewish bankers and their institutions in any kind of comprehensive fashion. This is evident even from the examples referred to above. Even those studies whose judgement of Schacht is comparatively favorable come to the conclusion that it is "difficult to assess the extent to which

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Schacht sought to protect the Jewish private banks or the degree of personal support and commitment he showed[49]".

Although Schacht is said to have attempted to use the idea of limited rights of citizenship for German Jews as a means to "finally bring the violent, radically anti-Semitic impetus of the NSDAP, rekindled since the spring of 1935, and the debate concerning statutory discrimination to a halt and to secure the economic livelihoods of German Jews [...][50]", this only shows that, ultimately, even the most influential politician willing to do something to protect Jews supported the idea that the law should discriminate against them. The very fact that, like his predecessor Kurt Schmitt, Hjalmar Schacht responded to the numerous cries for help from Jewish businessmen by intervening again and again with authorities other than the Reich Ministry of Economics to challenge "wild attacks"[51] in itself shows that even during this period banks were being persecuted by other governmental agencies and the party, regardless of the legal situation. During the "Schacht era", anyone who met Max Warburg ran the risk of being photographed by the Hamburg Gestapo and subsequently vilified in party newspapers as a "friend of Jews"[52]. Schacht himself admitted to Max Warburg in 1934 how unsuccessful his efforts had been. Schacht said there was very little he could do for those persecuted by the Nazis, and he had "got his fingers burned to often already"[53]. If even Schacht admitted that he could not do much then it becomes impossible to say that it is "undisputed" that he successfully protected the Jewish banks for years. The claim that Schacht successfully averted anti-Semitic attacks against private banks is thus at best true only of individual cases.

Furthermore, banks like L. Behrens & Söhne were far from being as important for the general economy as Warburg, Mendelssohn or Hirschland. The Nazi government, to which Schacht did after all belong, had even less reason to respect the interests of such institutions than those of large banking houses.

There are no indications suggesting that Schacht ever helped George Behrens or his family, nor that Schacht assisted the bank. The house of L. Behrens & Söhne was not of international significance and was wound up in 1938, at a time when, because of their importance, Warburg and Hirschland were being "Aryanized" and Mendelssohn was being taken over.

b) Access to justice available to Jews?

The recommendation also expresses the opinion that, in 1935, access to the German justice system free from discrimination was still available to George Behrens. The Commission says that "the option of taking legal action to pursue a defaulter was readily available to him", and that this suggests he did receive the purchase price and could dispose over it freely.

Even if it were to be true that discriminatory rulings were not the norm in the civil courts – which the Commission evidently assumes – the Commission's objection fails to take into account that there was at least a very great risk of discrimination in court. The discriminatory rulings that were made at

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least on occasion, the changes in the membership of the judiciary, the obstacles making it more difficult for Jewish citizens to hire a lawyer, the devastation of the offices of Jewish lawyers, including those which occurred in connection with the anti-Jewish boycott on April 1, 1933, as well as the anti-Semitic agitation by the state throughout the period since January 1933 had all made it significantly more difficult for Jewish citizens to obtain access to justice. The developments which led to the discrimination against Jewish citizens in Düsseldorf are especially well documented. In all events they present a good outline of the circumstances prevailing at the time, which argues against the view adopted by the Commission.

aa) Changes in the judiciary

The Nazi's takeover of power was swiftly followed by changes in the staffing of the judicial system. Even before the boycott on April 1, 1933, Jewish judges and public prosecutors had "been asked to take leave at short notice"[54]. The Law for the Restoration of the Professional Civil Service ["*Gesetz zur Wiederherstellung des Berufsbeamtentums*] of April 7, 1933[55] ordered the dismissal of Jewish civil servants – and of judges, trainee lawyers and notaries[56] – as well as of all those "of whom it is not certain that they will always act wholeheartedly for the National Socialist state". Since April 14, 1933 Jewish judges were rejected because of an apprehension of bias[57]. Judges and lawyers who decided to appear in court despite this often fell victim to attacks by the SA whose abuse and violence obstructed them from practicing their profession[58].

When new judges were appointed one of the most important criteria was holding National Socialist convictions, promotion depended not only on professional performance but also on ancestry and political convictions[59]. The candidates' political reliability was checked and "political certificates of good character" were issued[60].

In the context of the Law for the Restoration of the Professional Civil Service of April 7, 1933, Art. 3 No. 2 of the Law to amend certain provisions of the Lawyers Act, the Code of Civil Procedure and the Labor Courts Act [*Gesetz zur Änderung einiger Vorschriften der Rechtsanwaltsordnung, der Zivilprozessordnung and des Arbeitsgerichtsgesetzes*] of July 20, 1933[61] introduced a provision allowing "non-Aryans" as defined by the Law for the Restoration of the Professional Civil Service to be rejected as arbitrators in courts of arbitration, including the arbitral tribunals established pursuant to the Labor Courts Act [*Arbeitsgerichtsgesetz*][62].

In 1933, 39 of the 80 judges at Düsseldorf Higher Regional Court [*Oberlandesgericht Düsseldorf*] whose cases can be assessed from the surviving records had joined the NSDAP; in 1945 55 judges were party members. Out of the 49 judges of the Higher Regional Court in the years 1933-1945, 35

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were members of the party[63]. Not only that, many lawyers and lawyers' associations announced as early as April 1933 that they were committed to fostering a new legal order[64]. After May 1, 1935 Jews were no longer allowed to be sworn in as court appointed experts[65].

bb) Changes in the legal profession

Another exacerbating factor is that, even in the first years of the Nazi regime, it was no longer easy for Jews to find a lawyer to represent them[66]. At a conference on March 14, 1933 the Association of National Socialist German Legal Professionals [*Bund Nationalsozialistischer Deutscher Juristen; "BNSDJ"*] demanded the "cleansing" of all courts as well as fresh bar council elections in order to make them "free from Jews and Marxists" [67]. The Düsseldorf Bar Council [*Rechtsanwaltskammer*] was brought into line with the new political situation as early as April 22, 1933. After the new elections the executive committee was composed of 14 National Socialists and other lawyers described as close to the Nazis[68]. On May 15, 1933 the newly elected executive committee decided that allowing former, "non-Aryan" lawyers to work in law firms even as office managers was contrary to the rules of the profession[69]. In 1934, Rudolf Hess, the so-called Deputy of the Führer, issued a decree forbidding party members from representing Jews any cases adverse to a party member[70]. This prohibition was lifted the following year and replaced by a complete ban, forbidding party members from representing Jews in court on pain of exclusion from the party[71].

The number of Jewish legal practitioners fell steadily as a result of the Law on Admission to the Legal Profession [*Gesetz über die Zulassung zur Rechtsanwaltschaft*"] of April 7, 1933[72]. Not only was the admission of new lawyers of Jewish descent forbidden, the Law also made it possible to revoke the license of any "non-Aryan" lawyers admitted by September 30, 1933[73]. As a consequence, within the space of just a month, 66 of the 141 Jewish lawyers admitted to the bar in the district of Düsseldorf Higher Regional Court on April 7, 1933 lost their license[74]. On August 28, 1933 the "*Hessische Volkswacht*" newspaper published a list of litigants "who were not ashamed to use Jewish lawyers" together with case numbers and the names of the respective lawyers[75].

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cc) „Triumphant advance of racial jurisprudence“

The changes introduced to the judicial system from 1933 onwards that disadvantaged Jews were not limited to changes in personnel. The law itself shifted, even in the absence of legislative changes[76]. The catalog of the Federal Justice Ministry's exhibition, "Justiz und Nationalsozialismus", includes a chapter headed "*Der bürgerliche Tod*" (civil death):

„In the field of private law – i.e. tenancy, sales and employment law – the 'triumphant advance of racial jurisprudence' [Siegeszug rasserechtlichen Denkens] *began as early as 1933, without having to amend a single law[77]" This development was effected through the general clauses in legislation such as that on good faith* [Treu und Glauben] *and other undefined legal concepts[78]*.

Even adherence to the law in a legally correct fashion was seen as a mistake when applied specifically to Jews, and lambasted in the Nazi press[79]. From the earliest years of the „Third Reich“ both Hitler and Göring[80] as well as leading legal experts[81] declared that the exclusive purpose of the law ought to be to implement the National Socialist *Weltanschauung*. It is also known that party officials attempted to influence the courts, as may be seen from the example of a case before Breisach Local Court *[Amtsgericht Breisach]*. Although legally correct, the court's 1935 decision to rule in favor of a Jewish landlord seeking an eviction order evoked a response from the local NSDAP-*Kreisleiter* who threatened in March 1936 that he would launch a "public discussion of the case in the National Socialist Press" if the court failed to reverse its decision[82]. Unlawful discrimination against Jews evidently occurred so frequently that even the then Secretary of State at the Reich Ministry of Justice, Roland Freisler, felt the need to publish a (half-hearted) call to abide by the law. On November 23, 1933 he wrote that judges ought to keep to the law even if the laws concerned could not be reconciled with National Socialism[83]. It is thus clear that by this time the independence of the judiciary was by no means still secured[84]. If George Behrens had pursued the conceivable course of attempting to claim the purchase price in court, there is every possibility that he would have fallen victim to the "triumphant advance of racial law".

IV. Conclusions

The recommendation gives cause for concern in that it uses incorrect information to produce a conclusion to the detriment of the heirs of victims of Nazis persecution. Contrary to the views expressed by the Commission, George Behrens was exposed to persecution in July 1935 and had no access to the justice system free from discrimination.

However, it is the fact that the recommendation departs from the Washington Principles in the form they have been given under the Joint Declaration of 1999 and the Guidelines of 2001/2007 which is

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of significance beyond this one case. In particular, the recommendation fails to apply the statutory presumption pursuant to Art. 3 REAO in favor of a victim of persecution.

By doing this the Commission is making the criteria according to which a restitution claim is assessed much tougher than those required by the political will of the Federal government, the Federal States, etc. It falls short of the guiding principles of post-war restitution policy even though the Guidelines suggest that abiding by these principles should be encouraged and in particular also recommend applying the rules on the statutory presumption. The Commission has chosen to do this despite the fact that it itself is a product of the Washington Principles, more specifically the call to establish alternative dispute resolution mechanisms set out in No.11.

Although the Commission has departed from post-war restitution principles on earlier occasions, whenever it did so in the past it was always in favor of the Nazi persecutees. The decisions against agencies of the German state and in favor of the successors of those oppressed by the Nazis occurred in specific, individual cases where there were uncertainties as to the actual course of events. This can be seen to be in conformity with No. 4 of the Washington Principles, which states that account should be taken of the fact that gaps in knowledge are unavoidable. One may wish to criticize the standards and criteria set out in the Guidelines. After all, taken together the criteria and standards set out in the Guidelines (and a series of decisions by the Commission) mean that a museum authority can lose a picture even where it has by no means been proven that the work was lost because of Nazi persecution. This does constitute preferential treatment of the heirs as opposed to the museum authorities and there are indeed those who regard this approach as not “just and fair”. Yet the standards set out in the Guidelines are right. The only parties they disadvantage are divisions of the perpetrator state, in this case the City of Düsseldorf. The parties afforded an advantage are the heirs to the victims of that state. Whatever one’s feelings about the standards and criteria set out in the Guidelines might be: the Federal Government, the Federal States, local authorities, etc. have declared their political commitment to comply with them. The Federal Council (*Bundesrat*) reiterated support for the Joint Declaration in March 2014[85]. That is something political representatives are allowed to do. The Limbach Commission, however, does not have a mandate to tighten up the criteria.

Whereas the City of Düsseldorf is not bound by the Limbach Commission’s recommendation, the standards in the Guidelines do place it under a political duty. For this reason, the political obligation remains unaltered, requiring the City of Düsseldorf to return the work or pay a fair amount in settlement. What it ought to do is seek an amicable solution with the heirs.

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*) February 3, 2015

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2) *Empfehlung der Beratenden Kommission in der Sache "Behrens ./. Düsseldorf"* [Recommendation of the Advisory Commission in the case of "Behrens ./. Düsseldorf"], www.lostart.de, last accessed May 18, 2015.

3) For more on Hupp see *Museum Kunstpalast. Eine Düsseldorfer Museumsgeschichte*, Düsseldorf 2013, p. 71 et seqq.

4) Anordnung BK/O (49) 180 der Alliierten Kommandantur Berlin vom 26. Juli 1949, „Rückerstattung feststellbarer Vermögensgegenstände an Opfer der nationalsozialistischen Unterdrückungsmaßnahmen" [Ordinance BK/O (49) 180 of the Allied Kommandatura in Berlin of July 26, 1949, "Restitution of identifiable property to victims of Nazi oppression"], VOBl. für (West-) Berlin 1949, p. 221.

5) Handreichung zur Umsetzung der „Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz" von Dezember 1999 aus dem Jahre 2001 in der Fassung von November 2007 [Guidelines for implementing the Joint Declaration by the Federal Government, the Länder and the national associations of local authorities on the tracing and return of Nazi-confiscated cultural property, especially Jewish property, of December 1999 (of 2001 as revised in November 2007)], www.lostart.de, last accessed May 20, 2015.

6) Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes insbesondere aus jüdischem Besitz vom 9. Dezember 1999 [Joint Declaration by the Federal Government, the Länder and the national associations of local authorities on the tracing and return of Nazi-confiscated cultural property, especially Jewish property, of December 9, 1999] , www.lostart.de, last accessed May 20, 2015.

7) Grundsätze der Washingtoner Konferenz in Bezug auf Kunstwerke, die von den Nationalsozialisten beschlagnahmt wurden (Washington Principles) von Dezember 1998, www.lostart.de, last accessed May 20, 2015.

8) Section V A, p. 27 of the Guidelines.

9) Section V B, p. 29 of the Guidelines.

10) See: Winfried Bausback, Bavarian Minister of Justice, at the meeting of the Committee on Constitution, Legal and Parliamentary Affairs on November 28, 2013, Protokoll der 3. Sitzung des Bayerischen Landtags [records of the 3rd session of the Bavarian Parliament], p. 6, according to whom Germany considers the Washington Conference Principles "a moral as well as a legal obligation". Similarly, Ministerialdirektorin a. D. Ingeborg Berggreen-Merkel, op cit., p. 20, who describes the Washington Principles as being "of key relevance and binding through the executive".

11) Page 6 of the recommendation.

12) Federal Administrative Court [*Bundesverwaltungsgericht*; "BVerwG"], Judgment of June 18, 1998, 8 B 56/98, Rn. 5 (juris), ZOV 1998, 380-381; Leipzig Administrative Court, Judgment of February 1, 1996, 3 K 379/95, Rn. 27 (juris), ZOV 1996, 459-460; Potsdam Administrative Court, Judgment of December 12, 1996, 1 K4253/95 (headnote, juris), ZOV 1997, 288-292.

13) BVerwG, Judgment of February 23, 2006, 7 C 4/05, Rn. 23 (juris), ZOV 2006, 144-146.

14) BVerwG, Judgment of December 16, 1998, Rn. 33 (juris), ZOV 1999, 164-168; Dietsche in: Kimme (Ed.), *Offene Vermögensfragen*, Köln, § 1 para. 6 VermG, Rn. 6.56, 28. Lfg. 11/07; Wasmuth in: Clemm et. al. (Ed.), *Rechtshandbuch Vermögen und Investitionen in der ehemaligen DDR*, München, § 1 VermG, Lfg. 12, Rn. 192; Neuhaus in: Fieberg/ Reichenbach (Ed.), München, § 1 VermG, Rn. 147, Lfg. 20.

15) Helmut Genschel, *Die Verdrängung der Juden aus der Wirtschaft im Dritten Reich*, Göttingen 1966, p. 44; Albert Fischer, *Hjalmar Schacht und Deutschlands „Judenfrage"*, Köln 1995, p. 128; Horst Göppinger, *Juristen jüdischer Abstammung im „Dritten Reich". Entrechtung und Verfolgung*, München 1990, p. 27 et seq.; Christoph Kreutzmüller, *Ausverkauf. Die Vernichtung der jüdischen Gewerbetätigkeit in Berlin 1930-1945*, Berlin 2013, p. 125 et seq. with further references; Wolf Gruner, *Judenverfolgung in Berlin 1933-1945. Eine Chronologie der Behördenmaßnahmen in der Reichshauptstadt*, Berlin 2009, p. 14; Ingo Köhler, *Die „Arisierung" der Privatbanken im Dritten Reich.Verdrängung, Ausschaltung und die Frage der Wiedergutmachung*, München 2005, p. 103 with further references

16) Avraham Barkai, *Vom Boykott zur „Entjudung". Der wirtschaftliche Existenzkampf der Juden im Dritten Reich 1933-1945*, Frankfurt am Main 1988, p. 23.

17) Barkai, *Boykott*, p. 25; Genschel, *Verdrängung*, p. 45; Kreutzmüller, *Ausverkauf*, p. 131; Gruner, *Judenverfolgung*, p. 16.

18) Fischer, *Hjalmar Schacht*, p. 128; Kreutzmüller, *Ausverkauf*, p. 128 et seq.; Uwe Dietrich Adam, *Judenpolitik im Dritten Reich*, Düsseldorf 1972, p. 47; Lothar Gruchmann, *Justiz im Dritten Reich 1933-1940. Anpassung und Unterwerfung in der Ära Gürtner*, München 2001, p. 124.

18a) www.documentarchiv.de/wr/1920/nsdap-programm. html, last accessed June 22, 2015.

19) Köhler, *„Arisierung"*, p. 117 et seq.; Maximilian Elsner von der Malsburg, *„Arisierung" von Privatbanken am Beispiel des Bankhauses E. J. Meyer in Berlin*, Diss., Frankfurt am Main 2015, p. 167.

20) Köhler, *„Arisierung"*, p. 117; Elsner, E. J. Meyer, p. 167.

21) Elsner, *E. J. Meyer*, p. 167 et seq. with further references; for similar cases of obstruction see: Genschel, *Verdrängung*, p. 68 et seq. with further references

22) Christopher Kopper, *Hjalmar Schacht. Aufstieg und Fall von Hitlers mächtigstem Bankier*, München 2006, p. 275; Frank Bajohr, *„Arisierung" in Hamburg. Die Verdrängung der jüdischen Unternehmer 1933-1945*, Hamburg 1997, p. 97-100.

23) Köhler, *„Arisierung"*, p. 120; Elsner, *E. J. Meyer*, p. 168 et seq.

24) Maren Janetzko, *Haben Sie nicht das Bankhaus Kohn gesehen? Ein jüdisches Familienschicksal in Nürnberg 1850-1950*, Nürnberg 1998, p. 62, quoted from: Köhler, *„Arisierung“*, p. 116.

25) Köhler, *„Arisierung“*, p. 117; Simone Lässig, *Nationalsozialistische„Judenpolitik“ und jüdische Selbstbehauptung vor dem Novemberpogrom. Das Beispiel der Dresdner Bankiersfamilie Arnhold*, in: Reiner Pommerin (Ed.), *Dresden unterm Hakenkreuz*, Köln 1998, p. 158.

26) Fischer, *Hjalmar Schacht*, p. 130; Elsner, *E. J. Meyer*, p. 169 et seq.

27) Fischer, *Hjalmar Schacht*, p. 131.

28) Fischer, *Hjalmar Schacht*, p. 130 et seq.

29) Kreutzmüller, *Ausverkauf*, p. 128 et seq.

30) Elsner, *E. J. Meyer*, p. 230; Henning Medert, *Die Verdrängung der Juden von der Berliner Börse. Kleine und mittlere Unternehmen an de rWertpapier-, Produkten- und Metallbörse (1928-1938)*, Berlin 2012, p. 201 et seq.; Ferdinand von Weyhe, *A. E. Wassermann. Eine rechtshistorische Fallstudie zur „Arisierung“ zweier Bankhäuser,* Frankfurt am Main 2007, p. 80 et seq.

31) Henning Kahmann, *Die Bankiers von Jacquier & Securius 1933-1945: Eine rechtshistorische Fallstudie zur „Arisierung“ eines Berliner Bankhauses*, Diss., Frankfurt am Main 2002, p. 102.

32) Köhler, *„Arisierung“*, p. 141.

33) Yvonne Rieker/Michael Zimmermann, in: Michael Zimmermann (Ed.), *Die Geschichte der Juden im Rheinland und in Westfalen*, Köln 1998, p. 234 et seq.

34) Köhler, *„Arisierung“*, p. 152.

35) Elsner, *E. J. Meyer*, p. 213 et seq.

36) Kopper, *Hjalmar Schacht*, p. 275; Köhler, *„Arisierung“*, p. 209 with further references

37) Kopper, *Hjalmar Schacht*, p. 275; Köhler, *„Arisierung"*, p. 155; Lässig, *Nationalsozialistische„Judenpolitik"*, p. 156.

38) Lässig, *Nationalsozialistische „Judenpolitik”*, p. 158.

39) Lisa Arnhold, diary entry for May 25, 1934, quoted from: Lässig, *Nationalsozialistische „Judenpolitik"*, p. 159.

40) Kopper, *Hjalmar Schacht*, p. 275; Lässig, *Nationalsozialistische „Judenpolitik"*, p. 159.

41) Martin Münzel, *Die jüdischen Mitglieder der deutschen Wirtschaftselite 1927 - 1955. Verdrängung - Emigration - Rückkehr*, Paderborn 2006, p. 194 et seq.

42) RGBl. I, p. 175-177.

43) Christopher Kopper, *Bankiers unterm Hakenkreuz*, München 2005, p. 54; Münzel, *Wirtschaftselite*, p. 194 et seq.

44) Christopher Kopper, *Privates Bankwesen im Nationalsozialismus: Das Hamburger Bankhaus M. M. Warburg & Co.*, p. 64, in: Werner Plumpe/Christian Kleinschmidt (Ed.), *Unternehmen zwischen Markt und Macht. Aspekte deutscher Unternehmens- und Industriegeschichte im 20. Jahrhundert*, Essen 1992; Harold James, *Verbandspolitik im Nationalsozialismus*, München 2001, p. 47.

45) Christopher Kopper, *Zwischen Marktwirtschaft und Dirigismus. Bankenpolitik im „Dritten Reich" 1933-1939*, Bonn 1995, p. 221.

46) Elsner, *E. J. Meyer*, p. 219; Kopper, *Bankiers*, p. 4.

47) Fischer, *Hjalmar Schacht*, p. 148, 206.

48) *Ibid.*, p. 78, 221.

49) Kopper, *Marktwirtschaft*, p. 226.

50) *Ibid.*, p. 224 et seq.; Kopper, *Privates Bankwesen*, p. 66 with further references

51) Keith Ulrich, *Aufstieg und Fall der Privatbankiers. Die wirtschaftliche Bedeutung von 1918 bis 1938*, Diss., Frankfurt am Main 1998, p. 313.

52) *Ibid.*; Köhler, *„Arisierung"*, p. 104 et seq.; Max M. Warburg, *Aus meinen Aufzeichnungen*, New York 1952, p. 148.

53) Fischer, *Hjalmar Schacht*, p. 147; Max M. Warburg, *Aufzeichnungen*, p. 154; Lutz Graf Schwerin von Krosigk, *Staatsbankrott. Die Geschichte der Finanzpolitik des Deutschen Reiches von 1920 bis 1945. Geschrieben vom letzten Finanzminister*, Göttingen 1974, p. 221.

54) Barkai, *Boykott*, p. 25; Adam, *Judenpolitik*, p. 47.

55) RGBl. I, p. 175-177.

56) 3. Durchführungsverordnung [Third implementing Ordinance] of May 6, 1933, RGBl. I, p. 245.

57) Herbert Schmidt, *Der Elendsweg der Düsseldorfer Juden. Chronologie des Schreckens 1933-1945*, Düsseldorf 2005, p. 27.

58) Martin Dreyer, *Die zivilgerichtliche Rechtsprechung des Oberlandesgerichts Düsseldorf in der nationalsozialistischen Zeit*, Diss., Göttingen 2004, p. 33; Göppinger, *Juristen*, p. 49 et seq.

59) Federal Ministry of Justice, exhibition catalog *"Justiz und Nationalsozialismus"*, [no place of publication] 1998, p. 274; Dreyer, *OLG Düsseldorf*, p. 66; Rainer Schröder*„„... aber im Zivilrecht sind die Richter standhaft geblieben!" Die Urteile des OLG Celle aus dem Dritten Reich*, Baden-Baden 1988, p. 249 et seq.

60) Federal Ministry of Justice, exhibition catalog, p. 274.

61) RGBl. I, p. 522.

62) Göppinger, *Juristen*, p. 90.

63) Dreyer, *OLG Düsseldorf*, p. 38.

64) DJZ 1933, 453 et seqq., DJZ 1933, 761, 762.

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67) Barkai, *Boykott*, p. 25; Fischer, *Hjalmar Schacht*, p. 128; Adam, *Judenpolitik*, p. 47 et seq.; Göppinger, *Juristen*, p. 42; Gruchmann, *Justiz*, p. 125.

68) Dreyer, *OLG Düsseldorf*, p. 43.

69) Müller, *Furchtbare Juristen*, p. 69; *Die Lage der Juden in Deutschland 1933. Das Schwarzbuch - Tatsachen und Dokumente*, publishecd by the Comité des Délégations Juives, Paris 1934 (reprint: Frankfurt am Main 1983), p. 174.

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71) Dreyer, *OLG Düsseldorf*, p. 50; Tillmann Krach, *Jüdische Rechtsanwälte in Preußen*, München 1991, p. 335; Circular letter from Hess dated August 7, 1935, JW 1935, 2544; Schröder, *Zivilrecht*, p. 145.

72) RGBl. I p. 188.

73) Ernst Noam/Wolf-Arno Kropat, *Juden vor Gericht 1933-1945. Dokumente aus hessischen Justizakten mit einem Vorwort von Johannes Strelitz*, Wiesbaden 1975, p. 16; Göppinger, *Juristen*, p. 89.

74) DJ 1939, 966, quoted from: Schmidt, *Düsseldorfer Juden*, p. 27.

75) Müller, *Furchtbare Juristen*, p. 69.

76) Bernd Rüthers, *Entartetes Recht. Rechtslehren und Kronjuristen im Dritten Reich,* München 1993, p. 31, 52 et seq.

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Court, Judgment of November 5, 1934, JW 1935, 1445; Wetzlar Local Court, Judgment of June 17, 1935, quoted from: Noam/Kropat, *Juden vor Gericht*, p. 58; see also Hans Wrobel, *Die Anfechtung der Rassenmischehe. Diskriminierung und Entrechtung der Juden in den Jahren 1933 bis 1935*, KJ 1983, 349-374 citing further discriminatory judgments made in 1933 in the fields of commercial law, family law, procedural law and labor law (FN 34); see also Christof Schiller, *Das Oberlandesgericht Karlsruhe im Dritten Reich*, Diss., Berlin 1997, p. 145 et seq. and Hackländer, *Im Namen des Deutschen Volkes*, p. 107.

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81) JW 1934, 1895; DJZ 1933, 1229, 1231, DJZ 1933, 453.

82) Christof Schiller, *Das Oberlandesgericht Karlsruhe im Dritten Reich*, Diss., Berlin 1997, p. 145 et seq.; Hackländer, *Im Namen des Deutschen Volkes*, p. 107.

83) Roland Freisler, *Recht, Richter und Gesetz*, DJ 1933, 694, 695.

84) Müller, *Furchtbare Juristen*, p. 45.

85) Entschließung des Bundesrates zum Verlust von Kulturgut in der NS-Zeit [Federal Council resolution on the loss of cultural property during the Nazi period] of March 14, 2014, Drs. 94/14.