The Role of German Industry: From Individual Criminal Responsibility of Some to a Broadly Shared Responsibility for Compensatory Payments

Hitler's wars would not have been possible without a cooperating industry and the massive abuse of forced labourers.\(^1\) Several million people were coerced to work under the cruelest conditions — according to estimates by Marc Spoerer ten million people (not counting prisoners of war) were forced to work on the territory of the German Reich alone during World War II.\(^2\) The exploitation of forced labour was among the deeds for which the major war criminals were sentenced by the Nuremberg International Military Tribunal. Moreover, some industry leaders were put on trial later on in the so-called “subsequent Nuremberg trials” before the US Military Court in Nuremberg and were held criminally responsible for what they had done to millions of forced labourers during World War II.

The Flick Trial was the first of three trials of leading industrialists of Nazi Germany for their conduct during the Nazi regime. The defendants in this case were Friedrich Flick and five other high-ranking directors of the Flick concern. The charges centred on slave labour and plundering, but Flick and the most senior director were also charged for their membership in the “Circle of Friends of Himmler”, the purpose of which was the financial support of the Nazis. Its members “donated” annually about one million Reichsmark on a “Special Account S” in favour of Himmler.

The Flick Trial was followed by the IG Farben Trial. The defendants in this case were all directors of IG Farben, a large German conglomerate of chemical firms. In World War II, IG Farben developed chemical processes for synthesizing gasoline and rubber from coal, and contributed significantly to Germany’s effort to wage a war despite the absence of large natural oil reserves. Charges were put forward namely for waging a war of aggression, slave labour and pillaging.

In the Krupp Trial, twelve former directors of the Krupp Group were accused of having enabled the armament of the German military forces and thus having actively participated in the Nazis’ preparations for an aggressive war, and for having used slave labourers in their companies. According to conservative estimates, the Krupp enterprises used nearly 100,000 persons in the forced labour programme among them about 23,000 prisoners of war.

As a result of these trials, a number of high ranking industrialists were found guilty and sentenced to an imprisonment ranging between 2½ to 12 years.

This is the criminal aspect as to the responsibility borne by representatives of the German State and industry. However, vis-à-vis the victims, responsibility does not end with bringing to trial some of those individuals who are the most responsible for what had been done. The other aspect of responsibility is to provide some form of reparation to those who have suffered such cruel abuse. I have been invited by the organisers of the Conference to focus my presentation on this side of the coin. Germany’s industry serves as a good example for the joint responsibility between state and private enterprises in abusing millions of people through forced labour. The joint responsibility is particularly illustrated by the fact that, finally in the year 2000, the German government and companies together funded a Foundation with the task, among others, to make financial restitution to surviving victims of forced labour.

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\(^1\) Most recently, the German historian Götz Aly claimed that the exploitation of forced labour was also central for maintaining support among the German population for Hitler’s politics by providing a number of material privileges to the overall German population, see Götz Aly, Hitler’s Volkstaat, 181 et subs. (2005).

\(^2\) See Mark Spoerer, Zwangsarbeit im Dritten Reich und Entschädigung: ein Überblick, in: Zwangsarbeit in der Kirche (K. Barwig/D.R. Bauer/K. J. Hummel, eds., 2001); quoted from the internet www.adademie-rs/publikationen/hp56_spoerer.htm (visited 30 June 2005). According to Spoerer, this estimate includes 1,000,000 people, who came voluntarily to Germany to work; taking heed to the pressure exerted by Germany as the occupying power on the local population the term “voluntariness” frequently does not stand closer analysis.
What did Germany and German Companies Do to Live Up to Their Responsibility to Provide for Compensation?

Germany has a long history of financial efforts to provide some form of compensation. In 1951, Adenauer said in his landmark speech on German responsibility to the Bundestag: "The Federal Government, and with it the vast majority of the German people are conscious of the immeasurable suffering that was brought to bear upon the Jews in Germany and in the occupied territories during the period of National Socialism (...). But unspeakable crimes were perpetrated in the name of the German people which impose upon them the obligation to make moral and material amends, both as regards the individual damage which Jews have suffered and as regards Jewish property for which there are no longer individual claimants."

This promise was fulfilled when in 1952 the Federal Republic of Germany, the State of Israel and the Conference on Jewish Material Claims against Germany signed the Luxembourg Agreements. These Agreements formed the basis for the German Federal compensation and restitution programmes for Holocaust survivors. Germany acknowledged in these Agreements its debts to both individuals and to the Jewish world by agreeing to pay three billion Deutsch Marks in annual instalments to Israel in the form of goods and services. Moreover, Germany committed to enact legislation requiring compensation to be directly paid to individual claimants for damages including the loss of life, liberty, health, property, or professional opportunity. Finally, Germany agreed to pay 450 million Deutsch Marks to the Jewish Claims Conference for the relief, rehabilitation and resettlement of Jewish victims.

Partly in implementation of these agreements, the Federal Law on Compensation was adopted in 1953 and later on reformed in 1956. This law established a detailed legal framework for compensating victims of Nazi persecution. Not only the conditions for a claim were set out in detail but also - and even more complicatedly - details on the amount to be awarded. The damage suffered as a result of persecution was evaluated in each and every individual case - ranging from generalised sums per day in a concentration camp over the definition of health damage by certain percentages of full capacity to a calculation of financial implications of lost professional opportunities.

At the same time, Germany was largely protected under international law from reparations claims by virtue of the 1953 London Debt Agreement which postponed remaining reparations claims to be settled by a final peace treaty. According to the German government's understanding, such a final peace treaty is to be seen in the 2+4 Treaty. This treaty does not address any reparation claims and consequently the reparation question is perceived as settled by the German government.

A number of so-called "Globalabkommen" - treaties concluded with some of the victims' States - provided for a global sum to be paid to the respective government of the formerly occupied State. This sum was then to be paid out to the individual victims by the respective government. A first round of treaties was prompted by the exclusion of forced labourers from Western States from compensation under the Federal Law on Compensation: since these persons were not persecuted for political or racial reasons according to the understanding in post-war Western Germany, they were not eligible under this compensation scheme. In a last round of such global payments after the conclusion of the 2+4 Treaty, 1.5 billion German Marks (3/4 billion Euro) were transferred to the governments of Poland, Ukraine, Russia and Belarus with a view to providing for some relief to victims of Nazi terror.

Some German companies established their own compensation schemes over the years providing for payments to "their" forced labourers during the war. In the years 1950 and 1960, IG Farben, Krupp,

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1 This English translation is provided in The Conference on Jewish Material Claims against Germany, 1951-2001 – 50 Years of Service to Holocaust Survivors, 2001, p. 6.
2 The question of statute of limitations applying to eventual claims under German law cannot be discussed here in detail. There is, however, a strong argument that legal claims under German law - if existing at all - expired only a certain time after the 2+4 Treaty, i.e. that statute of limitations only started running with the entry into force of the 2+4 Treaty or their expiry was suspended during the time between the entering into force of the London Debt Agreement and the 2+4 Treaty.
AEG and Telefunken, Siemens and Rheinmetall started payment programmes with sums of up to 30 Million DM. Only the IG Farben programme also addressed non-Jewish concentration camp inmates. More companies joined in during the 1980ies and particularly the 1990ies and some increased the funding of their payment schemes. However, others never established any compensation scheme. The overall sum paid by German companies – as far as payments have been made public – amounts to 280 million DM calculated on the basis of prices in the year 2000.6

Finally, – and more than 55 years after the end of World War II – Germany established a foundation with the name “Remembrance, Responsibility and Future” with a view to making payments for a number of National Socialist injustices, in particular, forced labour. The Foundation was jointly funded by German companies and the German State providing for an overall sum of 10 billion DM.7

Why was the Foundation Established and Why so Late?

Among a greater scope of relevant factors, the new readiness for further efforts to grant some compensation to former victims of Nazi-injustice, in particular, forced labourers, has been encouraged decisively by four aspects: Firstly, the gap in compensation efforts regarding forced labour; secondly, the fall of the iron curtain in 1989; thirdly, a wave of class-action law suits against German companies in the late 1990ies; and finally, the political will of the new German government which came into power in autumn 1998.

The compensation gap: Amazingly, the historical situation of forced labour had never been a criterion for compensatory payments before the establishment of the Foundation. In particular, compensation under the Federal Law on Compensation was restricted to cases of persecution because of political, racial, religious or conscience related reasons.8 In particular, this did not include forced labourers from Slavic countries since they were not persecuted for racial reasons but for reasons of their nationality according to the Western German understanding.9 As a consequence, a great number of former forced labourers had received no or only little compensatory payments from the German State(s).

Moreover, neither the laws providing victims with legal claims nor any of the hardship payments had foreseen any compensation specifically addressing forced labour. And, whereas certain companies have paid out some compensation to “their” former forced labourers, individual amounts varied considerably and sometimes payments were initiated only quite recently. The situation of forced labourers therefore had constituted a gap in Germany’s record of compensatory efforts for atrocities committed during the period of the Nazi regime.

The fall of the iron curtain: Throughout the Cold War, the Federal Republic of Germany had excluded States of the Communist block and victims living in those states from compensatory payments. Only after the political turnover in Central and Eastern Europe in 1989 and the ensuing disruption of the Soviet Union, the motivation to withhold payments to victims living in the communist world in order not to subsidise the political “enemy” had ceased to exist. To put it in a simplified way, until then, compensation had been channelled predominantly to those victims residing in the Federal Republic of Germany or somewhere abroad in the Western world including Israel.10 The application deadline under the Federal Law on Compensation had expired already at the end of 1969. In addition,

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6 Ibid.
7 The statute of the Foundation together with other basic texts and documents can be found in both German and English at www.stiftung-evz.de.
8 Section 1 of the Bundesentschädigungsgesetz (Federal Law on Compensation) as of 29 June 1956, BGBl: (Federal Law Gazette) I 562 (1956).
9 These victims could obtain some compensation under narrow preconditions, if they had suffered a lasting bodily injury. Art. VI No.1 para. 1 Final Law on the Federal Law on Compensation of September 14, 1965, BGBl. I 1315 (1965).
10 See in particular the territoriality principle in Section 4 para. 1 and the diplomatic clause in Section 238a of the Federal Law on Compensation, (Bundesentschädigungsgesetz) as amended by the Final Law on the Federal Law on Compensation (BEG-Schlussgesetz) as of 14 September 1965, BGBl. I 1315 (1965).
due to the political situation before 1989 there had been no agreements with Eastern European States providing for lump sum payments in order to address the historical responsibilities.

After the end of the East-West confrontation, political bodies in Germany were no longer principally opposed to providing some late justice to those victims who were living in Central and Eastern Europe. Already in connection with the 1990 Treaty on Unification of Germany an additional agreement had provided for hardship payments to Jewish Nazi-victims in the East who so far had obtained no or only little compensation (so called Article-2-Fund). As a consequence of the political changes, Germany also provided lump sum payments to Poland, Russia, Ukraine and Belarus already in the years 1990 as it had done before to Western European countries. However, the overall volume of 1.5 billion German Marks did not allow individual amounts paid out to victims to reach a substantial level – broken down to individual payments that meant that in Ukraine, for instance, a victim of a concentration camp received some 900 Deutsch Marks (450 Euro). And, the definition of victims eligible for receiving the monies was largely left to the discretion of the receiving country; in practice, the former forced labourers in those countries were usually the beneficiaries of most of the monies distributed under these programmes even though an explicit reference to forced labour was avoided. Finally, the idea to leave the responsibility for the just and prompt distribution of the monies to the Central and Eastern European States and their reconciliation foundations was cast into doubt when some parts of the monies disappeared due to improper financial practices or bankruptcies of national banks. Consequently, a significant discontent with the measures adopted remained and the compensation gap with a view to forced labour was not really closed.

This may have been one of the factors which inspired the wave of class actions in US courts against German companies which started in 1998. What is relevant here is that the increasing use of class action litigation against companies and the relaxed requirements for establishing a forum of territorial jurisdiction in the US have made this kind of court procedures a political factor of potentially high relevance for the economic performance of a company in the US. Irrespective of their prospect for success, pending class action cases have made it attractive for German companies to look for solutions which may save them from a court’s judgment with unpredictable results after years of extremely costly proceedings and negative publicity. This explains the increased readiness of companies to contribute to a foundation solution but also prompts the justified interest on the part of those companies to get a certain protection against future proceedings in return for their financial engagement.

It is difficult to judge how far judicial proceedings in Germany brought forth by former forced labourers both against the authorities and German companies have contributed to the foundation solution. No final judgment is known in which a company has been obliged to pay compensation to a former forced labourer. However, it cannot be disputed that the legal situation was far less than clear both with regard to eventual claims against German companies and against the authorities. What became evident during the years 1990 was that protracted legal proceedings with unpredictable results could not suffice to meet the moral and political responsibilities having in mind the advanced age of the victims which turned any effort to provide some satisfaction into a race against time.

It was a combination of these moral, legal and economical factors that forms the background to the creation of the Foundation Initiative of German Companies (“Stiftungsinitiative der deutschen Wirtschaft”), a loose association of those leading German companies which had been involved in

15 The legal nature of the Foundation Initiative still remains somewhat obscure (association under German civil law, so called “BGB-Gesellschaft”, or a corporation sui generis).
forced labour. Regardless of the motives, it is evident that the principal interest of German companies was to avert legal proceedings by creating a foundation which would make payments to victims. The momentum of events matched well with the idea of a foundation that had been already promulgated by the German Green Party several years beforehand, which became an instrumental part of the German political party system after the 1998 elections at which time the new Social Democrat/Green government made it a mutual project of their coalition agreement.\footnote{"Aufbruch und Erneuerung – Deutschlands Weg ins 21. Jahrhundert, Koalitionsvereinbarung zwischen der Sozialdemokratischen Partei Deutschlands und BÜNDNIS 90/DIE GRÜNEN", Bonn, 20. Oktober 1998, IX. 3.} Subsequently, the German Chancellor appointed a special envoy with the task to negotiate with the US and all other relevant governments as well as victims’ lawyers and victims’ organisations an overall solution. In several rounds of negotiations the overall amount of money to be inserted into a foundation and the basic features of a law creating the respective foundation as well as a plan of allocation were agreed on. The most important parts of the basic features are comprised in an annex to the government agreement between the US government and the German government of 17 July 2000\footnote{Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America on the Foundation “Remembrance, Responsibility and the Future”, Annex A, BGBl. II 1373 et seq. (2000).} and confirmed by other governments of victim states, an organisation representing the worldwide Jewish community, the victims’ lawyers and the Foundation Initiative of German Companies in the Joint Statement on the occasion of the final plenary meeting concluding international talks on the preparation of the Foundation “Remembrance, Responsibility and the Future” of 17 July 2000.\footnote{BGBl. II 1383 et seq. (2000).}

**Main Elements of the Foundation Solution**

The solution to the pending problems by establishing a Foundation is characterised by three elements: It is based on a mass claims approach which favours expediency over a detailed individual justice. It is intended as a gesture of reconciliation towards those victims who were still alive when the Foundation idea was agreed on. And, as a second aim, it seeks to provide legal closure for the German State and German companies in order to protect them against further lawsuits.

Mass claims approach: The Foundation Law provides for only three main categories involving forced labour. One category includes detention in a concentration camp, a ghetto or a similar institution; the second category addresses former forced labourers who were deported from their home country, kept in detention, detention-like or comparable harsh living conditions and forced to work except in agriculture; and a third category provides for payments for “other National Socialist injustice” which may include forced labour in agriculture or without detention or deportation.\footnote{Section 11 para. 1 sentence 1 No. 1, 2 and sentence 2 Law on the Establishment of a Foundation “Remembrance, Responsibility and Future”, subsequently: German Foundation Law. of 2 August 2000, BGBl. I 1263 (2000).} The law defines certain sums as maximum amounts for each of these categories; despite the possibility to do so to a certain extent, in practice hardly any differentiation was made regarding groups of individual fates within the categories. Consequently, the individual fate is only analysed with a view to falling under one of the categories which then prompts a payment of a specific sum irrespective of the exact circumstances of the individual suffering. Relaxed standards of proof are applied: a claim can be made credible by any means including credible individual anecdotal statements if no documentation can be found. Review of decisions is limited to recourse to an independent appeals body. Consequently, the concept is putting more emphasis on expedient payments to eligible applicants than on examining the particularities of each application in detail. This approach was justified for two reasons: firstly, to process and decide on more than two million applications would have taken a very long time had the cases been evaluated in a detailed manner. In situations of mass claims, a generalising approach may therefore be preferable anyway. And secondly, in this specific situation, the entire programme was a race against time since victims were very old already and the purpose of the programme was to make a gesture towards them rather than to their heirs.
Payment as a “gesture”: The Foundation Law openly recognises that it is impossible to make good by way of financial compensation for any of the harm caused.\(^{20}\) This is first of all due, of course, to the immensity of the suffering involved in the cruel treatment at the hands of Germans and its allies during the Nazi era. Deportation to a foreign country, long periods of forced labour under constantly degrading and life-threatening conditions or let alone exploitation by labour while awaiting extinction in a programme of racial persecution may never be fully compensated. But it is also due to the fact that any attempt to compensate for the suffering comes too late for those who were killed already during the war or who have died in the meantime before the Foundation was established. On the other hand, the founders wished to acknowledge the injustice and the suffering caused by the German State and by German companies and to accept their responsibility by granting a modest sum to those victims still alive. Therefore, the concept is aimed at making a gesture in the spirit of reconciliation.

At the same time, the concept of legal closure is pursued with the establishment of the Foundation. It is clear that this was part of the motivation underpinning the idea of a Foundation. A number of measures have been adopted in this respect. The US government has taken on an obligation to intervene in eventual future legal action in US courts against Germany, Austria or the respective companies. To this end the US government is obliged to issue a so called “Statement of Interest” making the point that it is in the foreign policy interest of the United States that cases concerning Nazi injustice are dismissed by US courts in favour of the solutions agreed on in the Austrian and German Foundation solutions.\(^{21}\) Additionally, the beginning of payments was made dependant on the dismissal of claims pending in US courts.\(^{22}\) Moreover, the requirement to sign a waiver has been made a condition for payments in the German and all Austrian programmes.\(^{23}\) Finally, the current programmes have partly been designated as the sole and exclusive forum for any claims relating to that period apart from already existing provisions.\(^{24}\)

What are the Effects of the Work of the Foundation?

Of course, the primary effect of the work of the Foundation so far is that some 1.6 million victims of Nazi injustice have received at least a first instalment of the payment foreseen. Most of the recipients have also received the second instalment of their payment. Beyond this immediate effect of the payment programme, both the work of the Foundation as well as the discussions around its establishment also has a number of additional positive effects.

First and foremost, the gesture of reconciliation seems to have been accepted in many cases. Although there is no empirical evaluation of the reaction to the reception of payments, at least in contacts with victims’ organisations the German efforts were appreciated on their part. Of course, reactions to the programme were rather negative where applicants felt excluded for unjustified reasons. In particular, this remark pertains to former prisoners of war who were excluded from the programme as a result of the international negotiations in the Foundation Act.

Additionally, the payment programme has given back their personal history to victims of forced labour in the former states of the Soviet Union. Upon return, many of the forced labourers from the Soviet Union upon return were screened for the GULAG for “having collaborated with the enemy” according to Stalin’s ideology. Also after Stalin’s death, their double suffering was suppressed for decades. It seems that it was very important especially for these victims that the injustice committed

\(^{20}\) German Foundation Law, Preamble.
\(^{22}\) Joint Statement on Occasion of the Final Plenary Meeting Concluding International Talks on the Preparation of the Foundation “Remembrance, Responsibility and Future”, Section 4 d.
\(^{24}\) Joint Statement on Occasion of the Final Plenary Meeting Concluding International Talks on the Preparation of the Foundation “Remembrance, Responsibility and Future”; Preamble; Section 16 (1) Foundation Law.
against them was recognised as such by the successors of the former perpetrators and that their personal story was finally listened to.

The discussion around its establishment as well as the work of the Foundation also gave a boost to consciousness in German society of the historical situation of forced labour. This was of particular importance since consciousness of the treatment accorded to forced labourers from Central and Eastern Europe had been much less developed than that of the Holocaust. Throughout the last five or six years, the media have frequently reported on this aspect of German history. In addition to the Federal payment programme carried out by the Foundation a number of German cities established own payment programmes. Moreover, a lot of communities invited former forced labourers to visit their home towns in order to tell the young generation about their suffering.

As outlined above, one of the aims of establishing a Foundation was to bring legal closure for those violations covered by the Foundation solution. The forum at which this attempt to bring closure was aimed at was that of US courts. Even though in the beginning there had been serious problems with achieving closure it seems to have worked in the longer run.

The attempt to bring closure had led to a delay in the beginning of payments in early 2001. A nexus had been established between the dismissal of certain legal actions pending before US courts and the beginning of payments to former victims. The dismissal did not go as smoothly as expected. This was partly due to the fact that German industry did not collect the monies quickly enough and partly due to the refusal of a US judge to dismiss the claims pending before the court of the Southern District of New York. The latter situation also proved that it was possibly the failure to establish a binding legal obligation to dismiss the cases concerned was not the best solution. However, over the years, it seems that US courts have accepted the Foundation solution, and subsequent legal actions in this field were usually dismissed. In the German forum, legal closure has worked comprehensively. Any subsequent legal actions were dismissed on the basis of the explicit provision in the Foundation Law.

**Concluding Remarks**

I have said at the outset of my presentation that there is a joint responsibility of the German State and German companies. Did they live up to their responsibilities? Focussing on the Foundation, I see it as a positive signal that not only governments have accepted the Foundation solution and the way it was put into practice but also numerous victims’ organisations which have also been involved in the process of implementing the programme. On the other hand – despite the fact that Germany has undertaken great efforts in field of individual compensation since the 1950ies – it cannot be overlooked that the compensation gap concerning forced labour remained at least partly open until more than 55 years after the atrocities were committed. Consequently, the German legislator openly admits in the Preamble of the Foundation Law that the Foundation comes too late for all those having deceased in the meantime. Moreover, the far reaching exclusion of former prisoners of war from any direct compensation irrespective of whether they were treated in accordance with international humanitarian law led to major disappointment in particular among those former prisoners who were denied even most existential conditions, i.e. prisoners from the Soviet Red Army and from Italy after Italy had quit the Axis with the German Reich and concluded a separate cease-fire with the Allied Forces before subsequently joining them in their fight against the Reich.

Talking about closure, it is important to emphasise that this means legal closure, not moral closure. To the contrary, the Foundation also constitutes an attempt to avoid moral closure. This is not only due to the effects of the awareness for the situations addressed under the Foundation’s payment scheme. It is also reflected in the second pillar of the Foundation which is the so called Fund “Remembrance and Future”. This permanent Fund has the task to support projects fostering, in particular, the understanding

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25 There was one important exception to the rule excluding prisoners of war from the compensation scheme: those prisoners of war who were transferred to concentration camps – usually run by the SS – received an award for their suffering in a concentration camp irrespective of their legal status as prisoners of war. The reason for this exception was that these persons were completely stripped of their status and merged into the persecution system.
of peoples as well as the remembrance of the threats which emanated from totalitarian systems. Among other things the Fund has been supporting projects for maintaining the historical consciousness for the atrocities committed during the era of the Third Reich among young people. An attempt to bring moral closure would also run contrary to the broad concept of reparation which should include measures of moral recognition of the injustice committed. In this sense, moral reparation could not work if financial compensation were combined with the expectation never to hear anything again about the guilt incurred by the nation bearing responsibility for atrocities. It is important to state that the idea of moral closure would run contrary to the aim and purpose of the Foundation.

Let me close with a remark on the relationship between what I see as constituents of international justice: criminal prosecution of those responsible for atrocities and compensation for the victims. It is important to hold perpetrators criminally responsible. The Nuremberg Tribunal constituted a major step towards a system of international justice which was later followed by other steps to the same end. The question of reparation has added the perspective of the victims to the concept of international justice. The example of the German history of individual compensatory payments for atrocities committed under the Nazi regime is an example for the growing respect for the perspective of the victims. Other examples are the United Nations Compensation Commission, established with a view to compensatory payments to victims of Iraq’s illegal invasion of Kuwait, or the Eritrea-Ethiopia Claims Commission, established with the purpose to provide for reparation for damages incurred in the war between the two states. The increasing perception that international justice does not only encompass the prosecution of the guilty with the means of international criminal law but also reparation to victims now is corroborated by the provisions of the ICC Statute on victims’ participation and compensation. It remains to be hoped that the tendency to strengthen the victims’ role in the process of international justice will continue.
Die Rolle der deutschen Industrie: Von individueller strafrechtlicher Verantwortung zur gemeinsamen Verantwortung für Entschädigungszahlung