The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. Government, the U.S. Department of the Navy or the Naval War College.
V. ENFORCEMENT OF THE LAW OF NAVAL WARFARE

There are a number of means available to belligerents for inducing compliance with the rules governing war's conduct.\(^1\) In the event of unlawful behavior on the part of an enemy remedial action may take the form of direct protest and demand for compensation as well as for the punishment of individual offenders. Assuming, however, that the unlawful behavior in question has either been directly instigated by order of the enemy government, or at least performed with its sufferance, other measures will generally prove necessary.\(^2\) The injured belligerent may direct an appeal to neutral states, requesting the latter to intervene for the purpose of bringing pressure to bear upon the delinquent party.\(^3\) And although neutral states have no duty to protest against the commission of illegitimate acts of warfare it has been frequently asserted that they have a right to do so.\(^4\) Finally, the injured belligerent may resort to repressive measures—sanctions—in reaction to unlawful behavior on the part of an enemy, measures which take the form of reprisals or of punishing captured offenders as war criminals. It is to these two latter categories of measures that attention will be directed in the following pages.

\(^1\) See Law of Naval Warfare, Section 300, for an enumeration of the types of remedial action an injured belligerent may resort to in the event of unlawful behavior on the part of an enemy.

\(^2\) It may be, of course, that the primary purpose of protesting the unlawful behavior is to influence world opinion against the offending belligerent. Protests may be communicated direct to the enemy state, through a protecting power, a humanitarian organization acting in the capacity of a protecting power, or any state not participating in the conflict.

\(^3\) Neutral states may provide their good offices to the belligerents with a view to settling the controversy.

\(^4\) "There can be no doubt that neutral States . . . may, either singly, or jointly and collectively, exercise intervention whenever illegitimate acts or omissions of warfare are committed (1) by belligerent Governments, or (2) by members of belligerent forces, if the Governments concerned do not punish the offenders and compensate the sufferers. . . . But although neutral States have without doubt a right to intervene, they have no duty to do so." Oppenheim-Lauterpacht, op. cit., pp. 559-60.—Experience has shown that it is particularly in warfare at sea that neutral states have been vigilant to protest against unlawful belligerent behavior, even though such behavior may only directly concern for the moment the other belligerent. The reason for this is the intimate relationship between observance of belligerent rights and observance of neutral rights, violations of the former being either concomitant with or leading to violations of the latter. Needless to say, the effect of such neutral intervention will be directly proportional to the strength of the neutral states and the vigor with which protests are pressed.
A. REPRISALS

As between belligerents reprisals are acts, otherwise unlawful, which are exceptionally permitted to one belligerent as a reaction against illegal acts of warfare committed by an enemy. It is generally acknowledged that

\[\text{See Law of Naval Warfare, Section 310a. In a recent survey of the problem of war reprisals the latter are defined as "otherwise illegitimate acts of warfare which under certain conditions may legally be used by a belligerent against the enemy in order to deter the enemy from a repetition of his prior illegal acts and thus to enforce compliance with the generally recognized rules of war." A. R. Albrecht, "War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949," A. J. I. L., 49 (1953), p. 590. -- It is preferable that a distinction be drawn between 'reprisals', in the strict sense of the term, and other 'collective measures' a belligerent may take, particularly against the population of an occupied territory. Whereas both types of measures involve the principle of collective responsibility, the basis for and consequences of these two types of measures differ. The legal basis for a reprisal—in the strict sense—must be an unlawful act ordered or authorized by the enemy government, or at least an unlawful act performed by the armed forces of an enemy which—though performed without higher authorization—is not met with measures of repression and (possibly) of compensation. Illegitimate acts of warfare may be performed by individuals—particularly by the enemy population in occupied territory—which cannot be attributed either directly or indirectly to the enemy state. As against these latter acts a belligerent appears to be permitted by customary law to take collective measures of repression, so-called "collective sanctions." In the war crimes trials held after World War II there does not appear to have been a case involving reprisals in the strict sense. Instead, the trials involving so-called "reprisals" dealt in reality with the measures of repression taken by Germany against civilian populations in occupied territories for allegedly illegitimate acts of warfare performed by individual members of the population. In two trials a distinction was drawn between reprisals—in the strict sense—and other collective measures of repression. In the Trial of Hans Rauter the Netherlands Special Court of Cassation declared that: "In the proper sense one can speak of reprisals only when a State resorts, by means of its organs, to measures at variance with International Law, on account of the fact that its opponent—in this case the State with which it is at war—had begun...to commit acts contrary to International Law..." Law Reports... 14 (1949), p. 132. In the second trial an Italian Military Tribunal at Rome stated that "the right to take reprisals arises only in consequence of an illegal act which can be attributed, directly or indirectly, to a State. On the other hand, if civilian citizens of the occupied State commit criminal acts within the occupied territory which harm the occupying state, and if the search for the culprits proves to be a matter of considerable difficulty, partly owing to the solidarity of the population, it is permissible to impose collective sanctions." In re Kappler, [1948], Annual Digest and Reports of Public International Law Cases, (1948), Case No. 153, p. 472. At the same time, most tribunals—particularly the American and British—insisted upon referring to the collective measures taken against civilian populations in occupied territories as "reprisals," thereby obscuring the fact that there are important differences between these measures and the measures belligerents may take against illegitimate acts of warfare performed by the armed forces of a state under the command or authorization of the government. There is no intention here of undertaking an analysis of these trials. It is sufficient only to state that despite a lack of uniformity in certain respects over the restrictions imposed upon a belligerent occupant in taking hostages and so-called "reprisal prisoners" (and even of executing them in the event of absolute necessity), there was a general consensus that such collective measures were—in principle—permitted, but that Article 50 of the 1907 Hague Regulations (IV) demanded, at the very least, that a clear connection be established between the victims of collective measures and the illegal actions which gave rise to these measures. See, for example, the Hostages Trial (Trial of Wilhelm List and Others) Trials of War Criminals, 11 (1950), pp. 1249-53 and the Einsatzgruppen}
since the purpose of reprisals is to induce compliance with the laws of war
reprisals should not be resorted to merely for revenge but only as a last
resort in order to compel an enemy to desist from unlawful behavior. For
this reason the injured belligerent should attempt, whenever possible, to
obtain cessation of the illegal acts (and appropriate redress) through means
other than reprisals. It is always preferable that if measures of reprisal
are finally resorted to the order to employ them should emanate from the
highest authority. However, in circumstances of urgent necessity it is
conceded that subordinate military commanders may, on their own initia-
tive, order appropriate reprisals. In all cases, reprisals must be terminated
once they have achieved their objective, which is to induce a belligerent
to desist from unlawful conduct and to comply with the rules regulating
the conduct of war.  

According to customary law measures of reprisal may be directed gener-
ally against the persons and property of an enemy. There need be no con-
nection between the individuals performing the unlawful acts which give
rise to the right of reprisal and the individuals made the objects of retaliat-
tory measures. In a word, the essential principle characterizing measures
of reprisal is that of collective responsibility. However, as between the
parties to the 1949 Geneva Conventions, the individuals (and their property)
who may be made the objects of reprisals have been substantially restricted.
For these Conventions prohibit the taking of reprisals against any of the
several categories of individuals afforded the protection of the Conventions.
But apart from the prohibitions contained in the 1949 Geneva Conventions

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6 See Law of Naval Warfare, Section 310b. It must be noted that a large measure of uncertainty
characterizes many of the customary rules, summarized above, allegedly regulating the resort
to reprisals. Thus it is by no means clear—at least not from belligerent practice—that reprisals
may be resorted to only when other means prove to be of no avail. In recent maritime warfare
belligerents have but rarely sought to take other remedial measures against allegedly unlawful
behavior before resorting to reprisals. In many instances reprisals have been taken at the first
possible opportunity, the belligerents seemingly welcoming the opportunity presented by an
enemy’s actions to escape from rules found to be unduly restrictive (see pp. 30-1, 188-90).

7 See Law of Naval Warfare, Section 310e and notes thereto.
the only remaining restriction laid upon belligerents is that forbidding retaliatory measures which are out of all proportion to the unlawful behavior forming the basis of the reprisals.

B. PUNISHMENT OF WAR CRIMINALS

War crimes may be defined as acts which violate the rules regulating the conduct of war and which result in the liability to punishment of the perpetrators. According to customary international law belligerents have

8 At least this is the only remaining restriction laid upon belligerents in resorting to reprisal action directed exclusively against enemy persons and property. Quite different considerations arise in the case of inter-belligerent reprisals which affect neutral rights (see pp. 188-90, 254-8). The restrictions placed upon inter-belligerent reprisals adversely affecting neutral interests—assuming the legitimacy, in principle, of such measures—ought not to be confused with the restrictions operative solely as between belligerents.

9 See Law of Naval Warfare, Section 310c—This latter restriction has never been easy to apply, if only for the reason that measures of reprisal need not consist of the same measures as the original illegality. Nor has it ever been entirely clear whether the "proportionality" required of reprisals must be judged by the character of the enemy's unlawful behavior or by the measures necessary to compel the enemy to desist from such behavior. In the main, the weight of authority has tended to emphasize the former as providing the proper criterion for judging the "proportionality of reprisals." Yet there is a good deal to be said for the latter criterion, since the real purpose of reprisals is to compel an enemy to desist from unlawful behavior. For a review of the principle of reprisal measures taken by the naval belligerents in the two World Wars, see pp. 296-315.

Prior to 1914, there had been no significant attempt to resort to retaliatory measures in maritime warfare for over a century, and it is not surprising to find reprisals being dismissed in the years preceding World War I as "an almost wholly obsolete form of action." U. S. Naval War College, International Law Discussions, 1903, p. 43. It need hardly be pointed out that this opinion reflected the extremely favorable conditions attending the conduct of naval hostilities during the nineteenth century. These conditions did not obtain during the two World Wars, and as a consequence the belligerent resort to reprisals formed one of the regular features of naval hostilities. Elsewhere (see pp. 30-2) the question has been raised as to what extent the reprisal structure erected by the belligerents may be considered as having served a "legislative" function, i. e. of subverting the traditional law, rather than an enforcement function. Certainly this question admits of no easy and sweeping answer, and although it is quite clear that in numerous instances belligerent reprisals have succeeded in replacing traditional rules, in other instances the effect of reprisals upon the traditional law is still far from apparent. Even greater caution must be exercised in evaluating the effects of reprisal measures bearing adversely upon neutral rights (see pp. 193-5, 315-7).

10 See Law of Naval Warfare, Section 320 for a definition and an enumeration of representative war crimes. Although, in the main, war crimes have reference to illegal acts of warfare committed by members of the armed forces of belligerents, it should be noted that war crimes may be committed by civilians as well. Generally speaking, the classification of an act as a war crime has been held to follow from the fact that the act performed has a direct relation to the conduct of war and, at the same time, is prohibited by the law of war. War crimes in the narrow and traditional sense, as defined above, are to be clearly distinguished from so called 'crimes against peace,' i. e., acts which consist in the planning, preparation, initiation or waging of an unlawful war. The distinction between 'crimes against peace' and war crimes in the narrow sense (as well as the distinction between 'crimes against humanity,' and war crimes) was initially set forth in Article 6 of the Charter of the International Military Tribunal at
the obligation to punish their own nationals found violating the law of war and the right—in principle—to punish captured enemy individuals who have committed similar acts. Prior to World War II, however,

Nuremberg, and followed by the American military tribunals in the 'subsequent Nuremberg proceedings' as well as by the International Military Tribunal for the Far East (Tokyo Tribunal). In recent years the term war crimes has been used not infrequently to refer to 'crimes against peace' (and 'crimes against humanity') in addition to violations of the rules governing war's conduct. Unfortunately, one result of this usage has been to obscure the fact that there is no novelty attached either to the concept of war crimes—in the narrow sense—or to the punishment of individuals who violate the rules regulating the conduct of war. So far as war crimes in the traditional sense are concerned, the novelty of the post World War II period must rather be found in the number of enemy individuals charged with war crimes, in the vigor with which they were tried and punished, in the development of the rules governing the procedure of war crimes tribunals, and—very important—in the marked extension of the limits of individual responsibility for violations of the laws of war. A lucid review of state practice prior to World War II with respect to war crimes is given by Lord Wright, History of The United Nations War Crimes Commission and the Development of the Law of War (1948), pp. 40-86. The literature to which World War II developments have given rise is vast and—as might be expected—frequently controversial in character. Perhaps the most useful source for the decisions of war crimes tribunals in this later period is the Law Reports of Trials of War Criminals, consisting of 15 volumes, and selected and prepared by the United Nations War Crimes Commission over the years 1946-49. Volume 15 contains a systematic analysis and summary of the 89 representative decisions (which do not include, however, the trials of the major war criminals before the Nuremberg and Tokyo International Military Tribunals) reported in the first 14 volumes. In the period following the termination of hostilities in 1945 the United States alone conducted 956 war crimes trials involving over 3,000 defendants.

Provided the most rudimentary requirements were fulfilled, the customary law traditionally permitted each belligerent to establish its own system of tribunals, to create its own procedure to govern the trial of war criminals, and to impose whatever penalties it deemed just upon individuals found to have committed war crimes. This was, at least, the situation that prevailed prior to World War II, belligerents having only the obligation—under international law—to refrain from imposing punishment upon captured members of an enemy's armed forces accused of war crimes without first granting the accused the benefit of a "trial." However, as a result of state practice during and following the second World War, and in consequence of obligations undertaken in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, the situation formerly prevailing with respect to the trial of captured enemy personnel accused of war crimes has been substantially altered. The cumulative effect of these recent developments has been to impose upon belligerents the obligation to accord the accused certain minimum requirements of a "fair trial." These procedural requirements of a fair trial were originally set forth in section IV of the Charter of the International Military Tribunal at Nuremberg and subsequently endorsed by other war crimes tribunals—national and international. They provide that the accused be informed of the charges made against him in a language he understands, that he have adequate time to prepare his defense, that he have aid of counsel, that he be permitted to attend trial and to give evidence, and that he have an interpreter if needed.—The 1949 Geneva Convention on prisoners of war provides—Article 102—that a prisoner of war "can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed." The effect of this provision is to guarantee enemy prisoners on trial for war crimes the minimum requirements of a fair trial, summarized above. However, if a state goes beyond these minimum requirements for members of its own armed forces, then it must grant the same procedure to prisoners of war on trial for war crimes.—Finally, it may be noted that in reviewing

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some doubt had existed as to whether or not a belligerent was entitled to exercise jurisdiction over individuals accused of war crimes when the acts in question were not performed either on the territory of the belligerent or against its nationals. But in the light of recent practice it now appears clear that the right of a belligerent to exercise such jurisdiction is limited neither to offenses having a particular geographical location nor to offenses committed against the nationals of the belligerent claiming jurisdiction. In addition, there is no rule of customary law preventing a belligerent from trying and punishing war criminals during the period following the termination of active hostilities but prior to the conclusion of a peace treaty, though the past practice of states has not been to continue proceedings against individuals accused of war crimes once peace has been re-established.

the nature of the penalties imposed upon war criminals by Allied courts and tribunals after World War II, one authoritative source has concluded that “despite the fact that international law has previously permitted the death sentence to be passed for any war crime, some kind of international practice is growing according to which Allied Courts, apart from avoiding inhumane punishment, have themselves attempted to make the punishment fit the crime; any habitual practice of this kind would tend in time to modify the general rule that any war crime is punishable by death.” Law Reports . . . 15 (1949), p. 201.

It is generally agreed that post World War II practice has firmly established the so-called principle of “universality of jurisdiction over war crimes,” thereby permitting belligerents to exercise jurisdiction over individuals accused of war crimes without regard to the place where an offense was committed or to the nationality of the victims. In its most general form this principle might well be interpreted to permit neutral states to try and punish war criminals who fall under their control. But there is no record of neutral states making such an attempt, and the right of neutrals to do so remains doubtful.

"We cannot say that there is no authority to convene a (military) commission after hostilities have ended to try violations of the Law of War committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government. In fact, in most instances the practical administration of the system of military justice under the Law of War would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial.” In re Yamashita, 327 U. S. 1 (1946). Of course, an armistice agreement terminating hostilities may itself make provision for the trial of war criminals. But if it does not belligerents may nevertheless prosecute those enemy individuals accused of war crimes who fall under their control. Following World War II the trial of German nationals accused of war crimes before Allied courts and tribunals was based not only upon the customary right of belligerents to try and punish violators in their tribunals but also upon the unconditional surrender of Germany and the assumption of supreme authority over Germany by the four occupant Powers (the United States, Great Britain, France and the Soviet Union). The legal basis for the trial of Japanese war criminals was expressly provided for in the armistice terms by which Japan unconditionally surrendered to the victorious United Nations. On the other hand, the effect of a peace treaty is to bring to a close the right to prosecute war criminals, unless the treaty of peace itself makes express provision to the contrary. Such provision was made after World War I in Articles 227 and 228 of the Treaty of Versailles. And in the 1947 peace treaties concluded between the Allied and Associated Powers and Bulgaria, Finland, Rumania, and Italy, provision was also made for the trial of persons accused of committing war crimes (as well as crimes against peace and crimes against humanity).
It is an interesting fact that among the war crimes trials held during and since the second World War only a relatively small number concerned violations of rules regulating the actual conduct of hostilities. In part, this may be explained by a reluctance to try members of the armed forces of the defeated states for the violation of rules whose status is no longer a matter of certainty. In part, the dearth of trials concerned with infractions of the rules regulating the actual conduct of hostilities may be attributed to the conviction that where both sides in a conflict openly departed from the established law, the requirements of justice forbade the prosecution of only those who happened to be on the defeated side.

There is little question, however, but that the commission of certain acts during the course of hostilities at sea must continue to be regarded as resulting—in the absence of special reasons to the contrary—in the individual (criminal) responsibility of the perpetrators. The unnecessary use of force particularly as against the merchant vessels of an enemy, the denial of quarter at sea, the firing upon survivors of sunken ships, the failure to search out and make provision for the survivors of sunken vessels when military interests so permit, the deliberate attack upon hospital vessels or other vessels granted special immunity, and the misuse of the Red Cross emblem constitute a summary of only the more important acts the com-

14 So far as naval hostilities are concerned, these reported trials have all been cited in a previous section dealing with the attack upon and destruction of enemy vessels (see pp. 70-3). There are no records at all of trials relating to illegitimate conduct in aerial warfare. Law Reports... 15 (1949), pp. 109-12. The great bulk of the war crimes trials dealt instead with offenses committed against prisoners of war and the civilian inhabitants of occupied territory.

15 The American military tribunal in the I. G. Farben Trial took note of this point by stating that: "It must be admitted that there exist many areas of grave uncertainty concerning the laws and customs of war... Technical advancement in the weapons and tactics used in the actual waging of war may have been made obsolete, in some respects, or may have rendered inapplicable, some of the Hague Regulations having to do with the actual conduct of hostilities and what is considered legitimate warfare. But these uncertainties relate principally to military and naval operations proper and the manner in which they shall be conducted." (Trial of Carl Krauch and Twenty Two Others), Law Reports... 10 (1949), pp. 48-9.

16 It was this consideration, among others, that the International Military Tribunal gave expression to in refusing to assess the sentence of Admiral Doenitz "on the ground of his breaches of the international law of submarine warfare." Elsewhere (see p. 302(n)) it is submitted that in so far as the "facts" upon which the Tribunal allegedly based this aspect of the judgment were held to justify refusal of sentence for the sinking without warning of neutral merchant vessels—serious objections must be raised. With respect to the facts held to justify refusal of sentence for the sinking without warning of enemy merchant vessels the matter is admittedly quite different (see pp. 67-9). There are no reported trials of naval personnel for the act of having attacked enemy merchant vessels without first attempting to seize such vessels and put passengers and crew in a place of safety before resorting to destruction. The argument that this failure to try individuals for the attack without warning of enemy merchant vessels points to the desuetude of the traditional rules—at least as these rules apply to submarine and aircraft—is difficult to accept, however.
mission of which may result in a liability to punishment upon capture by an enemy. 17

Where individuals have been charged with the commission of war crimes the principal difficulty has been that of determining what recognition ought to be given the defense plea that the acts in question were performed either by order of the belligerent government or on the command of a superior. 18

Prior to World War II the attitude of states—and the opinions of writers on the law of war—had varied with respect to the treatment to be accorded the plea of superior orders, though a relatively strong case may be made on behalf of the assertion that illegitimate acts of warfare performed by direct order of the state were not considered to result in the individual responsibility of those performing such acts. 19

A decided change from earlier opinion and practice occurred both during and after the 1939 war. While that conflict was still in progress several of the belligerents amended their military manuals to provide that a violation of the law of war is not deprived of its character of a war crime, and does not confer upon the actor immunity from punishment, simply for the reason that it was performed in response to the order of a belligerent government.

17 And quite apart from the liability incurred as a result of misconduct during the course of naval hostilities there is—of course—a further liability for those acts involving the maltreatment of the sick, wounded and shipwrecked members of an enemy's armed forces carried on board belligerent warships (see pp. 135-7, for a discussion of liability resulting from “grave breaches” of the 1949 Geneva Convention on the treatment of the wounded, sick and shipwrecked).

18 The plea that illegitimate acts of war were performed for reasons of military (or “operational”) necessity has already been considered in another connection (see pp. 36-7).

19 The issues raised by the above statement are rather complicated, and their relevance to this study is distinctly limited—particularly in view of World War II practice. Nevertheless, some comment—however brief—is required. It will be noted, to begin with, that a distinction is drawn between illegitimate acts of warfare performed by order of the state and similar acts performed by command of a superior. It is very doubtful whether the plea of superior orders (i.e., whether or not the plea of superior orders should be accepted as a defense) has ever been directly or indirectly regulated by international law. Instead, the acceptance or rejection of this plea has been a matter left by international law to the discretion of the individual states. On the other hand, the fact that an illegitimate act of warfare was performed by order of the state (i.e., was an “act of state”) was generally regarded as sufficient to divest the act of its character as a war crime (acts of espionage and war treason formed clear exceptions to the rule) according to international law. Against those acts which had the character of acts of state the injured state could take collective sanctions—i.e., reprisals—but international law was generally considered as excluding the individual (criminal) liability of the perpetrators. This followed from the rule of general international law which normally forbade one state from exercising jurisdiction in its courts over the acts of another state, i.e., from exercising jurisdiction over individuals performing acts possessing the character of acts of state. As will presently be noted, however, recent practice appears to have firmly established that the act of state doctrine is no longer applicable to acts having the character of violations of the law of war; the fact that an individual has performed an illegitimate act of warfare by order of the state does not deprive the act of its character as a war crime—though, of course, this circumstance may serve to mitigate punishment.
or a superior. In the period following the termination of hostilities Allied courts and tribunals charged with the task of trying individuals accused of war crimes have uniformly endorsed this principle.

At the same time, it has been the consensus of judicial opinion that in order to establish responsibility the person must know, or have reason to know, that the act he is ordered to perform is unlawful under international law. Thus if the rule that allegedly has been violated is itself controversial or if—though of unquestioned validity—the rule has been departed from under the conviction that such departure forms a legitimate measure

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of reprisal, either circumstance may prove sufficient to relieve the actor of responsibility. Furthermore, it would appear that if an individual though knowing that the act he has been ordered to perform is unlawful nevertheless has acted under duress this circumstance may be taken into consideration either by way of defense or in mitigation of punishment.

What has been termed the "inverse case" of superior orders concerns the scope of the responsibility commanding officers must bear for illegiti-

Every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the order received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the Armed Forces are bound to obey only lawful orders.

Apart from the more obvious objections that have been urged against the practice of holding individuals responsible for unlawful acts carried out in pursuance of an order by a superior authority, the two circumstances cited above have been singled out for special attention by critics. Yet a survey of the war crimes trials held after World War II indicates that the uncertainty of the law was seldom involved, the one major exception being the cases involving 'collective measures' taken against occupied populations. It may also be observed that in the few trials concerning violations of the rules regulating hostilities at sea there are no instances in which individuals were punished for the violation of controversial rules or for the violation of rules committed in the belief that such violations constituted instead legitimate measures of reprisal. Thus there was never any pretense to the effect that the so-called "Laconia Order" (see pp. 72-3) represented a legitimate reprisal measure.

See Law of Naval Warfare, Section 330b (1), the last sentence of which corresponds to the statement made in the text above—and notes thereto.—One may be said to act under duress if the act is performed under an immediate threat—particularly a threat of physical coercion—in the event of noncompliance with the order. But the threat must be, in the words of one tribunal, "imminent, real and inevitable," it must pose a danger "both serious and irreparable." The Einsatzgruppen Case (U. S. v. Otto Ohlendorf, et al.) Trial of War Criminals, 4 (1950), p. 480. A review of the trials in which the plea of duress was considered does not reveal, however, any marked uniformity in the treatment of the plea. Courts differed over those precise circumstances that could be held to justify the plea of duress; and they also differed over whether duress, even when admitted in principle, could serve only in mitigation of punishment or as a complete defense against the charge of having committed a war crime. The decisions bearing upon the plea of duress have been summarized in the following manner:

"The general view seems . . . to be that duress may prove a defense if (a) the act charged was done to avoid an immediate danger both serious and irreparable; (b) there was no other adequate means of escape; (c) the remedy was disproportionate to the evil. According to the decision in the Krupp Trial, these tests are to be applied according to the facts as they were honestly believed to exist by the accused. Finally, if the facts do not warrant the successful pleading of duress as a defense, they may constitute an argument in mitigation of punishment."


See Oppenheim-Lauterpacht (op. cit., p. 572) where responsibility of the nature discussed above is said to arise "directly and undeniably, when the acts in question [i. e., unlawful acts of subordinates] have been committed in pursuance of an order of the commander concerned, or if he has culpably failed to take the necessary measures to prevent or suppress them. The failure to do so raises the presumption—which for the sake of the effectiveness of the law cannot be regarded as easily rebuttable—of authorization, encouragement, connivance, acquiescence, or subsequent ratification of the criminal acts."
mate acts of warfare performed by subordinates. There is no question but that military commanders are liable for the unlawful acts they have ordered or authorized subordinates to perform. Equally well established is the responsibility of military commanders for the illegal acts of subordinates which the former had knowledge of but failed to take adequate measures to control. By the failure to suppress unlawful acts of subordinates as are known to military commanders, the presumption of acquiescence in these acts must arise. It is clear, therefore, that the responsibility of commanders can result solely from inaction, though here it is inaction based upon a knowledge that unlawful acts of subordinates have been committed. Finally, it would appear that the responsibility military commanders must bear for the acts of subordinates implies a further duty to take reasonable measures to insure that the latter will refrain from unlawful behavior, and, should unlawful behavior nevertheless occur, to discover and control the misconduct of subordinates. Where the failure to take precautionary or preventive measures is palpable and gross military commanders have been held liable for the unlawful behavior of subordinates even though without actual knowledge of such behavior.

26 The numerous cases that have come before war crimes tribunals involving the responsibility of military commanders for acts of subordinates are reviewed in Law Reports . . . 15 (1949), pp. 65–78. See also Law of Naval Warfare, Section 330b (2.) and notes thereto. Paragraph 501 of the U. S. Army Rules of Land Warfare reads:

In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to ensure compliance with the law of war or to punish violators thereof.

27 The statements made in the text above are believed to represent a reasonably accurate summary of the numerous—and occasionally conflicting—decisions relating to the scope of a commanding officer's responsibility for acts of subordinates. A review of these decisions indicates that perhaps the central issue giving rise to uncertainty—and controversy—has been the liability incurred by military commanders who are unaware of the offenses committed by subordinates but who have failed to take reasonable measures to prevent such offenses and—once committed—have made little effort to discover and control them. In this connection the Trial of General Yamashita (Law Reports . . . 4 (1948), pp. 1-95) is instructive. Tried before an American Military Commission, General Yamashita was charged and convicted of failing "to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines . . ." (3-4). Although the prosecution asserted that Yamashita must have known of, and permitted, the offenses committed by his troops, it was further insisted that he had—in any event—the duty to "discover and control" these offenses once they were committed, and failed to do so. A similar view was taken by the Commission in its findings. In its review of the case the Supreme
Court emphasized that a commanding officer, particularly in occupied territory, is responsible for the behavior of his troops. *In re Yamashita*, 326 U. S. 1 (1946). But the Court neither expressly accepted nor rejected the findings of the Military Commission that Yamashita, even in the absence of knowledge, had the duty to "discover and control" illegal acts of subordinates, and could be held liable for the failure to carry out this duty. Instead, the Court considered itself as bound by the finding of the Commission on the question of fact, namely, that Yamashita had known of the offenses being committed by his troops. In view of the state of disorganization and breakdown of communications in the Philippines at the time, this was a hotly disputed question—and one of the principal targets of critics of the trial. A further criticism was that even if Yamashita had known of the atrocities being committed by his troops he could not have brought a stop to this behavior since American military operations prevented him from exercising effective control over the members of his command.

In the German High Command Trial (*Trial of Wilhelm Von Leeb and Thirteen Others, Law Reports* ... 12 (1949), pp. 71, 74–9, 103-12) the tribunal assumed, with respect to some of the accused, that actual knowledge was essential to establish responsibility for acts of subordinates. For other defendants, however, it was maintained that the accused "should have had knowledge" of the offenses, that they had a duty to find out that offenses were being committed and to stop them.—And in the Hostages Trial (*Trial of Wilhelm List and Others, Law Reports* ... 8 (1949), p. 71) the tribunal declared that a Commanding General "... is charged with notice of occurrences taking place within that territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense."