

March 3 1987

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I N D E X

Of

EXHIBITS

<u>Doc. No.</u>	<u>Def. No.</u>	<u>Pros. No.</u>	<u>Description</u>	<u>For Ident.</u>	<u>In Evidence</u>
475	2323		Journal of the League of Nations	17637	
478	2324		"Speeches by British Leaders" published by the Foreign Ministry of Japan	17638	
559	2325		Book "Events Leading up to World War II" published by the U. S. Government Printing Office	17639	
563	2326		Treaty of Non-Aggression Between the USSR and Estonia, published by the Foreign Ministry of Japan	17640	
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516	2330		Volume of the New York Times dated 19 December 1941	17647	
516A	2330-A		Excerpt therefrom "Portugal Bids the Allies Quit Timor; They Say "No" as Axis Warns Lisbon		17647

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<u>Doc. No.</u>	<u>Def. No.</u>	<u>Pros. No.</u>	<u>Description</u>	<u>For Ident.</u>	<u>In Evidence</u>
517	2331		Volume of the New York Times dated 11 April 1941	17653	
517A	2331-A		Excerpt therefrom "Agreement Whereby U. S. Becomes Protector of Greenland"	17653	
562	2332		Further excerpt from the Book entitled "Events Leading up to the World War II" re Greenland	17654	
518	2333		Volume of the New York Times dated 8 July 1941	17654	
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353	2335		Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War on the Enforcement of Penalties" dated 29 March 1919	17665	
548	2336		Charter of the United Nations, Articles 39, 41 and 42	17671	

1 Monday, 3 March 1947

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3
4 INTERNATIONAL MILITARY TRIBUNAL
5 FOR THE FAR EAST
6 Court House of the Tribunal
7 War Ministry Building
8 Tokyo, Japan

9 The Tribunal met, pursuant to adjournment,
10 at 0930.

11 Appearances:

12 For the Tribunal, same as before.

13 For the Prosecution Section, same as before.

14 For the Defense Section, same as before.

15 - - -
16 The Accused:

17 All present except OKAWA, Shumei, who is
18 represented by his counsel.

19 - - -
20 (English to Japanese and Japanese
21 to English interpretation was made by the
22 Language Section, IMTFE.)
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MARSHAL OF THE COURT: The International Military Tribunal for the Far East is now in session.

THE PRESIDENT: Major Blakeney.

MR. BLAKENEY: May it please the Tribunal, when the Court rose on Friday last we were about to argue the question of the admissibility of evidence relating to certain acts of various nations which the defense wishes to offer as proof of the present state of the international law relevant to this case. In view of the vital importance of this question to the defense generally, I trust that the Tribunal will indulge me in hearing our views on it rather fully.

It is submitted that the evidence under discussion is admissible on four grounds, which I shall discuss seriatim.

Of these grounds my first -- by far the most important and, in our view, determinative -- is that this evidence is necessary to the Tribunal to enable it to ascertain the law applicable to the case.

THE PRESIDENT: The common law, of course, is not to be ascertained by way of evidence, not by this Tribunal which administers international law relating to war. You might as well contend that

1 the common law of England has to be ascertained by
2 evidence. I don't think we will be disposed to
3 hear you at great length on that point, Major
4 Blakeney.

5 MR. BLAKENEY: I had already mentioned
6 to the Tribunal that we did not know whether its
7 view would be that evidence should be introduced
8 of the customary law of nations or whether judicial
9 notice would be taken of the actions which go to
10 make up customary law.

11 THE PRESIDENT: I venture to say that the
12 common law would be ascertained by this Tribunal
13 as the common law would be ascertained by English
14 and American courts; and the treaties would be
15 proved in the usual way subject to our power to
16 judicially notice them under the Charter.

17 MR. BLAKENEY: The point which I was trying
18 to make, your Honor, is not only the treaties make
19 law on the international plane but, as is universally
20 recognized by the text-writers and the courts, the
21 acts of nations make law on the international plane.
22 And it was those acts which we did not know, and
23 therefore offered to prove, whether the Tribunal
24 would take judicial notice of. We, of course, are
25 equally content either way if the Tribunal notices

the law or hears proof of the law.

1 Passing to the next ground upon which the
2 admissibility of this evidence is urged, we come
3 to the question of the interpretation of treaties
4 by the contracting parties.
5

6 For the information of the Language Section
7 I am at the bottom of page 2 of the argument.

8 If the Pact of Paris, for example, has
9 made the waging of war an international crime and
10 one for the commission of which individuals must
11 suffer punishment, it is by reason not of its
12 language, which patently has no such effect, but
13 of its interpretation by the nations. We look,
14 therefore, to the acts of the nations signatory to
15 the document to find whether instances of aggression
16 have occurred subsequently to the adoption of the
17 Pact, whether the Pact has been invoked in such
18 case to punish nations or individuals, --

19 THE MONITOR: Mr. Blakeney, we do not have
20 the English version of it.

21 MR. BLAKENEY: You have had it since Friday
22 afternoon.

23 THE MONITOR: We don't have it here.

24 MR. BLAKENEY (Continuing): whether by
25 their conduct the nations now contending for that

1 interpretation of the Pact have erected a state
2 of international society of which it can be said
3 that such a contention has ripened into a rule of
4 customary law. Unless we find such a condition
5 to exist, it is idle to contend that nations have
6 agreed on that principle of international law; if
7 they have not treated their words as creating law
8 binding on themselves, have not been content by their
9 deeds to submit to the precepts which they avow,
10 there is no such law.

11 The proof which I propose to submit on
12 this point will be such as to show that acts of
13 aggression have been committed, since the birth
14 of the Pact of Paris and within the period of time
15 included in the Indictment herein, by signatories
16 of that Pact who are nations prosecutor here.
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1 THE PRESIDENT: Before you get to the
2 proof let us decide whether we accept the principle.
3 The Pact of Paris was adhered to by over sixty
4 nations. At most only one or two have broken it.
5 Even that is not sufficient to warrant the repeal
6 of the statute, which would be the only way of
7 dealing with it in the circumstances.

8 I think Oppenheim deals with this. He
9 says, or Lauterpacht, who wrote the last edition, says --
10 and I don't know that it is questioned by any serious
11 authority -- that these breaches do not destroy the
12 law. It would be amazing if they did. Before you
13 enter upon this proof I think the Tribunal would
14 want to be satisfied that the principle you assert
15 does exist; so direct your argument, Major Blakeney,
16 to show that there is a principle that if enough
17 nations break a treaty the treaty ceases to have any
18 force.

19 MR. BLAKENEY: That wasn't quite the prin-
20 ciple I was discussing, if it please the Tribunal,
21 the question of the pact falling into desuetude as
22 a result of violation.

23 THE PRESIDENT: Well, the Pact of Paris is
24 there and is to be interpreted according to the words
25 it uses. It is for you to show that it no longer

1 exists or, in the alternative, that its interpreta-
2 tion is affected by the number of breaches that have
3 taken place since it was enacted. But that falls
4 short of giving proof of the breaches. We don't
5 want to hear those unless it is necessary.

6 MR. BLAKENEY: I certainly shouldn't offer
7 such proof unless I thought it necessary to show
8 the interpretation of the pact by the signatories.
9 To put in one sentence the principle which I am con-
10 tending for now, it is this: that if I can show the
11 Tribunal that five of the great powerful victor
12 nations of the world among the prosecutor nations
13 here have acted in what seems to be contravention
14 of the Pact of Paris, then the Pact of Paris is to
15 be interpreted as those nations have interpreted it.

16 The President used the figure of speech
17 asking whether we propose to defend against the
18 charge of burglary by showing that others committed
19 burglary.

20 THE PRESIDENT: That is not a figure of
21 speech.

22 MR. BLAKENEY: I didn't know we were liter-
23 ally charged with burglary. In any event, our inten-
24 tion is the exact opposite to that. Our intention
25 is to urge the law that international law is molded

1 ultimately by the great dominant nations and that
2 if they did these things they can't be burglars.
3 The conduct of nations at large, and of the great
4 nations in particular, is the criterion of inter-
5 national law, of international morality.

6 THE PRESIDENT: I think I can safely say
7 that if there have been any breaches of the Pact
8 of Paris we will judicially notice them. There will
9 be no need to prove them.

10 MR. BLAKENEY: If the Tribunal will judic-
11 ially notice the breaches, not only of the Pact of
12 Paris, which I used as an illustration, but of the
13 various treaties, conventions, and agreements of
14 which these defendants are charged with breaches,
15 we are content to have such judicial notice taken.
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1 THE PRESIDENT: You could say briefly, and
2 we can ascertain whether it would be the fact with-
3 out any further assistance from you, that you contend
4 that in a certain year there was a breach of the
5 pact by a certain nation in respect of another certain
6 nation. You need not go into any details. You can
7 submit that that destroys the pact or affects its
8 interpretation in the way you suggested. That would
9 be sufficient.

10 We do not want to place any limitation on
11 argument. We do want to limit the evidence to what
12 it is necessary to hear.

13 MR. BLAKENEY: There is one further consider-
14 ation which I wish to avert to briefly in connection
15 with evidence of this type. Our Charter specifically
16 provides by its Article VI that the fact that an
17 accused acted pursuant to the orders of his superiors
18 or of his government may be considered in mitigation
19 of punishment.

20 THE PRESIDENT: When I say that we will take
21 judicial notice I mean judicial notice of any fact
22 found by the League of Nations. There must be a fact-
23 finding body of that quality before we can act.

24 MR. BLAKENEY: I might say in that connec-
25 tion that only one of our proffered bits of evidence

1 has to do with a finding of the League of Nations.

2 THE PRESIDENT: If we go beyond that we
3 undertake to find what aggressive wars are com-
4 mitted in the world, which would be beyond our
5 province. We have only one to determine under the
6 Charter.

7 MR. BLAKENEY: Inasmuch as the evidence
8 which we have proposed to submit is in many instances
9 exactly analagous -- is in many instances proof of a
10 state of facts exactly analagous to those charged
11 here, we feel it is going to look perilously like
12 a double standard if the Tribunal finds these
13 defendants guilty and finds other great nations to
14 have been innocent in doing the same acts.

15 THE PRESIDENT: Well, the League of Nations
16 made a finding about Finland. We have that evidence
17 before us. We do not need any more. We are not
18 going to inquire into the rights and wrongs of every
19 war or attempted war since the Pact of Paris, apart
20 from wars coming directly under our jurisdiction
21 here.

22 MR. BLAKENEY: But I must confess that we
23 don't know how the Tribunal is to determine the inter-
24 national law which we are charged by the Indictment
25 with violating.

1 THE PRESIDENT: Well, I have made it clear
2 how you ascertain common law of war. There is no
3 question about the treaties. There is a question,
4 according to you, as to whether the Pact of Paris is
5 still a treaty, and I have stated it is open to you to
6 contend that there is no longer a treaty or that its
7 interpretation is affected and for that purpose to make
8 assumptions, but we will not allow you to prove the
9 matters assumed because that would involve us in
10 ascertaining the rights and wrongs of other wars.

11 MR. BLAKENEY: I don't understand what your
12 Honor means by assumptions. We were offering to
13 present facts, nor assumptions.

14 THE PRESIDENT: You are anxious to prove facts
15 in this way, by proving a number of other wars and
16 proving no aggressive wars. You started off with
17 Finland, but you are not prepared to limit yourself
18 to findings of the League of Nations. You want to go
19 further. You want us to investigate other wars. But
20 we say to you, assume these other wars took place,
21 then what effect have they on the Pact of Paris? Do
22 they go to its existence or do they go to its inter-
23 pretation? That is all you need do.

24 MR. BLAKENEY: Yes, that is what I was trying
25 to argue, that they go to the interpretation. Assuming

1 such events to have occurred, assuming that the great
 2 dominant nations among the signatories of the Pact
 3 of Paris, among others, to have committed acts which
 4 appear on their face to be in contravention of the
 5 pact. then we can't say that the pact has a legal as
 6 distinguished from a national or a political force,
 7 a legal force carrying with it punishments as for
 8 criminal acts.

9 I haven't the faintest interest as a defense
 10 counsel as to whether the USSR has committed aggres-
 11 sion.

12 THE PRESIDENT: Nor have we as a Tribunal. 17,615

13 MR. BLAKENEY: But I am interested in show-
 14 ing to the Tribunal that if the USSR, the United
 15 States, Great Britain and other nations have done
 16 these things they can not be acts of criminal aggres-
 17 sion.

18 THE PRESIDENT: No court and no writer of
 19 any authority has ever made such a submission as far
 20 as I recall. Before you invite us to hear this proof
 21 I think you should satisfy us that some authority,
 22 some real authority, has made the proposition you
 23 are putting.

24 MR. BLAKENEY: Yes, I will be glad to read
 25 to the Tribunal short excerpts from two of the leading

THE PRESIDENT: Nor have we as a Tribunal. 17,615

MR. BLAKENEY: But I am interested in show-

1 authorities on international law. The first is
2 William Edward Hall, "Treatise on International Law,"
3 1924, 6th edition, page 5.

4 THE PRESIDENT: Before the Pact of Paris?
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1 MR. BLAKENEY: Defense counsel unfortunately
2 have not access to all the books we might desire, but
3 I think I might assure the Tribunal that the same
4 passage occurs in later editions, after the Pact of
5 Paris. In any event, I am not discussing the Pact of
6 Paris as such. I am discussing the principle of
7 international law of general application. The Pact
8 of Paris is only one of very many treaties, conventions
9 and other consensual acts of which these defendants
10 are charged with breaches by the Indictment, and, I
11 might add, that all of the evidence which we propose
12 submission of **occurred** after the entering into of the
13 Pact of Paris and after the period with which this
14 Indictment commences.

15 Hall then states the principle in this way:

16 "If international law consists simply in
17 those principles and definitive rules which states
18 agree to regard as obligatory -- "

19 I will commence again, if I may. I don't
20 want to be interrupted in this discussion of the law.

21 "If international law consists simply in those
22 principles and definitive rules which states agree to
23 regard as obligatory, the question at once arises
24 how such principles and rules as may purport to constitute
25 international law can be shown to be sanctioned by the

1 needful international agreement. No formal code has
2 been adopted by the body of civilized states, and
3 scarcely any principles have even separately been laid
4 down by common consent."

5 Some of course have, including the Pact
6 of Paris.

7 "The rules by which nations are governed are
8 unexpressed. The evidence of their existence and of
9 their contents must therefore be sought in national
10 acts--in other words, in such international usage as
11 can be looked upon as authoritative."

12 That is the end of the quotation from Hall.

13 Now, if we turn to Oppenheim's international
14 law, we find this point considerably amplified. This
15 is the 4th edition, of 1928, page 24.

16 THE PRESIDENT: Does that mention the Pact
17 of Paris?

18 MR. BLAKENEY: I can't say offhand, but the
19 book is deposited with the clerk and I will look it up,
20 if your Honor desires.

21 Yes, it does. He says this:

22 "As the basis of the Law of Nations is the
23 common consent of the member-States of the Family of
24 Nations, it is evident that there must exist, and can
25 only exist, as many sources of International Law as

1 there are facts through which such common consent can
2 possibly come into existence. Of such facts there are
3 only two. A State, just as an individual, may give
4 its consent either directly by an express declaration,
5 or tacitly by conduct which it would not follow in case
6 it did not consent. The sources of International Law
7 are therefore two-fold -- namely: (1) express consent,
8 which is given when States conclude a treaty stipulating
9 certain rules for the future international conduct of
10 the parties; (2) tacit consent, that is, implied consent
11 or consent by conduct, which is given through States
12 having adopted the custom of submitting to certain rules
13 of international conduct. Treaties and custom are,
14 therefore, exclusively the sources of the Law of Nations."

15 That is the conclusion of the quotation from
16 Oppenheim.

17 THE PRESIDENT: The latest edition is always
18 the best, Major Blakeney. This is the 6th edition,
19 Volume II, edited by Lauterpacht, at page 161: (Reading)

20 "The fact that within a short period after
21 the conclusion of the Pact its provisions were repeat-
22 edly violated can not properly be regarded as detracting
23 from its legal significance."

24 That disposes of Oppenheim. Is there any
25 other authority?

1 MR. BLAKENEY: I should quite agree that that
2 disposed of Oppenheim if the Pact of Paris said the
3 waging of aggressive war is a crime it shall be
4 punished by International Tribunals and individuals
5 shall be punished therefore. But, what I --

6 THE PRESIDENT: Individual responsibility
7 is wholly unrelated to the principle of desuetude or
8 of violation. It is a different question entirely.

9 MR. BLAKENEY: I have repeatedly said that
10 I am not discussing desuetude, your Honor. I am
11 discussing the question of interpretation of the Pact.
12 The Pact of Paris says that the signatories agree upon
13 the renunciation of war as an instrument of national
14 policy. We are concerned to know what that means. We
15 fully agree that the Pact is still in force and effect
16 regardless of what nations may have done.

17 THE PRESIDENT: But Oppenheim says that the
18 repeated violations do not detract from its legal
19 significance, that is, do not affect its interpretation.

20 MR. BLAKENEY: I should have thought that in
21 the ordinary use of language those words of Oppenheim
22 would have meant that repeated violations did not
23 detract from the Pact's having whatever legal affect
24 it has.

25 THE PRESIDENT: Well, there have been many

1 editions of recognized books on international law
2 since the Pact of Paris. In any of them can you find
3 anything to support what you are claiming, Major
4 Blakeney?

5 MR. BLAKENEY: Oh, I think that can be done.
6 I took it to be a principle so universally recognized
7 by the textwriters that I haven't done more than to
8 go to the two chief authorities, as I considered them.
9 In any event, I can't find them at this moment so I
10 will proceed with the last remark that I wished to make.

11 THE PRESIDENT: Well, I can assure you we have
12 sought for them and we haven't been able to find
13 authorities to support your proposition.
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1 MR. BLAKENEY: Possibly we disagree about
2 what supports my position. Lastly, at all events,
3 I wish to return for a moment to the question of
4 reception of evidence of this type in mitigation of
5 any punishment which might be imposed. I had al-
6 ready referred to Article 6 of the Charter which
7 provides that the fact that an accused acted pursuant
8 to orders of his superiors or his government might
9 be considered in mitigation of punishment; and I
10 submit that from this point of view alone, if from
11 no other, evidence of the state of international law
12 at the time of the commission of the acts now charged
13 as crimes is clearly relevant. It is relevant if it
14 tends to show that the acts of the defendants and
15 their superiors and government were not in violation
16 of but were in conformity to prevailing standards,
17 and it is submitted that evidence of this nature will
18 be helpful to the Tribunal in ascertaining what those
19 standards were at the time of the commission of these
20 acts.

21 THE PRESIDENT: Mr. Comyns Carr.

22 MR. COMYNS CARR: May it please the Tri-
23 bunal, I had prepared some remarks in answer to what
24 I imagined to be the grounds about to be put forward.
25 I now find they do not fully cover them. But, with

1 the Tribunal's permission, I will read what I had
2 prepared, which is more convenient. Then I will add
3 some further observations.

4 Mr. President and Members of the Tribunal,
5 this is the first of a considerable group of docu-
6 ments served upon us which all seem to be open to
7 the same objection and to be supportable, if at all,
8 only by the same type of argument. If they are ad-
9 mitted it will involve a series of inquiries into
10 the relations of the U.S.S.R. with Finland, Estonia,
11 Latvia, Lithuania, Poland, Rumania and Iran; of Great
12 Britain with Iran; of Great Britain and the United
13 States of America with Denmark in respect of Iceland
14 and Greenland; and into the conduct of the United
15 States of America in making use of the atomic bomb.

16 In each case it would be necessary to make
17 an exhaustive investigation of the facts, to consider
18 what treaties, if any, are alleged to have been broken
19 and whether they were broken, and to investigate the
20 attitude adopted by other powers or the League of
21 Nations in connection with the dispute.

22 It must be remembered that in this Indict-
23 ment there is no Count in which a war by Japan is
24 alleged to be aggressive in which it is not also
25 alleged to be a breach of treaty.

1 We submit, one, that this Tribunal has no
2 jurisdiction to embark upon any such inquiries, and,
3 two, that even if, after long and patient investiga-
4 tion, it found any of the insinuations, which are
5 nowhere clearly expressed as charges, proved against
6 one or more of the prosecuting nations, it could have
7 no bearing upon the only issue which you have juris-
8 diction to try, namely, whether these Japanese leaders
9 are guilty of the offenses with which they are charged.

10 Originally, the admissibility of these
11 documents was supported on the ground of some kind of
12 estoppel. We say there is no such thing in criminal
13 law. It is no defense for the man accused of a crime
14 to show that the prosecutor has himself committed
15 one, even on the same occasion, still less on some
16 other occasion, whether before or after the offense
17 charged against him.

18 Now it is apparently suggested that these
19 documents are relevant because they show that the
20 treaties had fallen into disuse. Such a state of
21 affairs could only arise if they had been disregarded
22 over a long period, and if all parties, including
23 those alleged to have violated them, had repudiated
24 them or at least had ceased to rely upon them. These
25 documents, however, would show, one, that all the

1 events alleged to be violations occurred after the
2 outbreak in Europe of World War II; two, that the
3 alleged violators themselves recognized the treaties
4 by claiming, rightly or wrongly, that they were
5 acting in accordance with them; and, three, in the
6 case of Finland, that the League of Nations con-
7 demned the action complained of, again rightly or
8 wrongly, on the ground that it was a violation of
9 the Covenant. So far from showing that the treaties
10 or any of them had fallen into disuse, they show
11 that they remained the basis of all discussions on
12 the rights and wrongs of the actions taken.

13 We are left, therefore, in the position
14 that these documents serve no purpose except that
15 of irrelevant counter-charges against prosecuting
16 nations.

17 The Charter, in our submission, leaves no
18 room for any such allegations, and we ask that the
19 documents be rejected.

20 Mr. President, in the argument this morning
21 the proposition of the defense has been based mainly
22 upon a third ground, a principle which may be shortly
23 described as interpretation by breach. We all know
24 that some crimes are frequently committed. We also
25 know that in certain countries, for political or

1 other reasons, juries have frequently refused to
2 convict. I have never heard it suggested that either
3 of those was a reason for saying that the law no
4 longer existed or should be interpreted differently
5 from the **natural** meaning of the words used.

6 There is a complete confusion in the use
7 which my friend sought to make of the quotation from
8 Hall and Oppenheim. It is quite true that, in order
9 to establish a proposition in international common
10 law as in national common law, you must proceed by
11 practice and custom of the parties concerned. But,
12 even in that case, when the proposition is once es-
13 tablished, the fact that some nation subsequently
14 chooses to break the rule does not affect the valid-
15 ity or interpretation of the rule.

16 When the rule is established by treaty,
17 which corresponds in the international sphere approx-
18 imately to legislation in the national sphere, then,
19 in my submission, subsequent breaches, even by one
20 of the parties to the treaty, can have no possible
21 bearing on its true meaning or construction.

22 We would also like to make our position
23 clear with regard to the question of the Tribunal
24 taking judicial notice of such matters. It is ob-
25 vious that most, if not all, of the incidents referred

1 to in the documents to which we are objecting would
2 be, if the matter were investigated, subject to keen
3 dispute both on the facts and the international law
4 applicable to those facts. We wish to guard against
5 the remark of the President with regard to the taking
6 of judicial notice being interpreted at a later stage
7 by the defense so as to enable them to make, by way
8 or assertion in closing speeches, the very allega-
9 tions which, if the Tribunal excludes this evidence,
10 will not have been investigated.

11 Finally, on the question of mitigation, I
12 could not follow what was supposed to be the bearing
13 of this type of evidence on Article 6 of the Charter
14 which was quoted and which deals with possible miti-
15 gation in respect of the command of a superior offi-
16 cer. In any event, it is a novelty to suggest that
17 the fact that a crime is frequently committed, if it
18 be the fact, is a matter to be taken as mitigation
19 for the punishment of those who are actually brought
20 to trial for it. I have frequently heard it used for
21 the opposite purpose in considering the matter of
22 sentence.

23 We ask that the whole of these documents be
24 excluded squarely on the ground that they are irrele-
25 vant to any issue to be tried within the jurisdiction

1 of this Tribunal.

2 THE PRESIDENT: There are two points that
3 I desire to refer to in Mr. Carr's reply. This
4 Court has never admitted a document on the ground
5 that estoppel applies in criminal cases, nor on any
6 ground bearing the faintest resemblance to estoppel.
7 Further, I think it is bold to suggest to us that we
8 would not take judicial notice of the fact that a
9 fact was found by the League of Nations bearing on
10 the point of aggressive wars between Russia and Fin-
11 land.

12 We will recess for fifteen minutes.

13 (Whereupon, at 1050, a recess was
14 taken until 1110, after which the proceed-
15 ings were resumed as follows:)
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1 MARSHAL OF THE COURT: The International
2 Military Tribunal for the Far East is now resumed.

3 THE PRESIDENT: Mr. Comyns Carr.

4 MR. COMYNS CARR: Your Honor, I am afraid I
5 may have failed to make myself clear on the two points
6 to which you referred before the adjournment.

7 With regard to estoppel, I was not suggesting
8 that this Tribunal had ever admitted a document on the
9 ground of estoppel. I was dealing with the original
10 argument of the defense in their opening in support of
11 the admission of these documents in which it was based
12 on estoppel.

13 With regard to judicial notice, if it is
14 confined, as your Honor says, to an actual finding
15 of the League of Nations, we should have no objection.
16 But that would only touch one part of one of the many
17 subjects dealt with in the documents now under con-
18 sideration; and I was seeking to guard against
19 assertions being made at a later stage about matters
20 of fact which are in dispute, or would be in dispute
21 if they were relevant, and the Tribunal being asked
22 to take judicial notice of assertions of that kind.

23 THE PRESIDENT: Major Blakeney.

24 MR. BLAKENEY: If permitted, I should like to
25 answer Mr. Comyns Carr very briefly.

1 THE PRESIDENT: Did you finish what you were
2 going to say, Major Blakeney?

3 MR. BLAKENEY: Yes, sir, I finished my
4 argument.

5 THE PRESIDENT: That is, allowing for an
6 interruption by Mr. Comyns Carr. Actually, I thought
7 that was the position. Mr. Carr came to the lectern.
8 You hadn't finished, and you allowed him to speak.
9 If so, there is no question as to your right to
10 continue. There may be a question as to your right to
11 reply.

12 MR. BLAKENEY: No, sir, I am afraid that is
13 not quite the position. I had finished my submission
14 and yielded to Mr. Carr to reply. But since he has
15 made one or two--

16 THE PRESIDENT: Thus far we haven't been
17 hearing replies in these matter, but we are allowing
18 this. The majority of the Court think it ought to be
19 allowed.

20 MR. BLAKENEY: At the moment there is, of
21 course, one document before the Tribunal for decision
22 upon. Mr. Comyns Carr has referred, in his answer,
23 to other defense documents which will be subsequently
24 tendered, and refers to them as containing insinuations
25 of some nature against other nations. In order that

1 the Tribunal shall not have to hear the same argument
2 on further documents, I should merely like to state
3 correctly the nature of these further documents.

4 I think the Tribunal will readily apprehend
5 that it will not be necessary to make exhaustive
6 investigations of these other incidents when it is
7 considered that, for example, the next document on my
8 list is a statement of Winston Churchill as to what
9 he did and why he did it in Iran. It will certainly
10 not be necessary, as Mr. Comyns Carr suggests, for
11 the Tribunal to search for treaties applicable to
12 these other instances for those treaties are pleaded
13 in the Indictment and are either in evidence or will be
14 tendered in evidence by the defense. If there is any
15 genuine apprehension that the defense intends to try
16 to prove voluminous facts and details about these
17 incidents, I might say that the presentation of my
18 entire list of documents will take less than half a
19 day.

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1 THE PRESIDENT: Personally I think you should
2 be made to show from the law itself that the documents
3 are admissible before you specify what they are. It
4 is sufficient for you to assume for the time being
5 that the conduct of other nations and of statesmen
6 of other nations are relevant considerations in dealing
7 with this pact, and then if we agree with you, to
8 give the evidence. But I am not sure that my colleagues
9 all agree with me, so I will take their opinion.

10 MR. BLAKENEY: Meanwhile I will pass on to my
11 last point, the questions raised by the President.

12 I should like to point out that the defense
13 has never used the term estoppel, and that when Mr.
14 Comyns Carr refers to it as having been in our argu-
15 ment, which was not an argument but an opening state-
16 ment, he refers to something that was not read and is
17 not before the Tribunal.

18 THE PRESIDENT: I believe one defense counsel
19 in a motion going to jurisdiction did rely on estoppel.
20 However, you do not rely on it, Major?

21 MR. BLAKENEY: No, sir. As to the other point
22 of judicial notice of actions of the League, I might
23 merely suggest that the fact of the League's having
24 acted, of course, does not render the state of the
25 facts any more relevant to this case than they would

1 be otherwise. The taking of judicial notice is in
2 a sense one way of receiving evidence, and--

3 THE PRESIDENT: And one way of dispensing
4 with it.

5 MR. BLAKENEY: Or of the dispensing with the
6 taking of evidence. It is one way of the Tribunal
7 knowing the facts or coming to know them.

8 THE PRESIDENT: Of course, we always expect
9 to be invited to take judicial notice, and to have
10 the relevant facts placed before us. That is the
11 usual thing. But we could act independently; particu-
12 larly, notice of proclamations without the production
13 of it.

14 MR. BLAKENEY: Yes. My point was that since
15 the Tribunal has indicated -- since the President has
16 indicated that perhaps the Tribunal will take judicial
17 notice of the action of the League in one of these
18 instances--

19 THE PRESIDENT: And if we did judicially notice
20 that finding of fact it is hardly likely we would
21 reject it, investigate the matter, and substitute our
22 own. We are always obliged to act according to common
23 sense.

24 MR. BLAKENEY: And if in other similar
25 instances which are not susceptible of being taken

1 judicial notice of the Tribunal finds the same rele-
2 vancy, then, of course, we should have to offer proof
3 of them in the ordinary way. Therefore, I was trying
4 to suggest that the question of relevancy, of course,
5 would be the test, not the question of convenience of
6 making proof or the convenience of finding of facts.

7 THE PRESIDENT: We cannot shut out a single
8 relevant and material fact, no matter how disagreeable,
9 unless it is cumulative or petty.

10 MR. BLAKENEY: That is all that I have to say
11 on the tender now before the Tribunal.

12 THE PRESIDENT: We will reserve our decision
13 on the question whether you are to be permitted to
14 read these documents and give this evidence.

15 We will adjourn for a few minutes.

16 (Whereupon, at 1130, an adjournment
17 was taken to 1145, after which the proceed-
18 ings were resumed as follows:)
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1 MARSHAL OF THE COURT: The International
2 Military Tribunal for the Far East is now resumed.

3 THE PRESIDENT: The Tribunal has decided not
4 to receive evidence as to the relations between the
5 USSR and Finland, Latvia, Esthonia, Poland and
6 Roumania; nor as to the relations between Russia and
7 Great Britain and Iran; nor as to the relations be-
8 tween the United States of America and Denmark,
9 vis-a-vis Greenland and Iceland. These are collateral
10 and irrelevant issues. The decision is a decision of
11 the majority.

12 Mr. Smith.

13 MR. SMITH: If your Honor please, on behalf
14 of Mr. HIROTA, I would like to have an exception to
15 the ruling of the Court.

16 THE PRESIDENT: You have the exception,
17 Mr. Smith.

18 Major Blakeney.

19 MR. BLAKENEY: I presume that as has been
20 done in similar instances in the past I should make
21 my tender of these documents and let the Tribunal's
22 ruling apply to each of them separately.

23 THE PRESIDENT: In a national court that would
24 be necessary to ground future rights, Mr. Blakeney. I
25 think that statement I read out covered the lot,

1 didn't it?

2 MR. BLAKENEY: It covered a large number
3 of my documents, possibly all of them on this exact
4 point.

5 THE PRESIDENT: Tender them and we will
6 reject them.

7 MR. BLAKENEY: The Journal of the League
8 of Nations has already been tendered for identifica-
9 tion together with the excerpt constituting defense
10 document No. 475-B.

11 THE PRESIDENT: I understand one of my
12 colleagues desires to see these documents so you had
13 better list them all and give copies to the Judges
14 who desire them.

15 We will adjourn now to enable you to make a
16 list.

17 The Court will recess until half-past one.

18 (Whereupon, at 1150 a recess was
19 taken.)
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AFTERNOON SESSION

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The Tribunal met, pursuant to recess, at 1330.

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MARSHAL OF THE COURT: The International
Military Tribunal for the Far East is now resumed.

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THE PRESIDENT: Major Blakeney.

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MR. BLAKENEY: I had tendered and requested
that it be marked for identification, the Journal
of the League of Nations.

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CLERK OF THE COURT: The Journal of the
League of Nations, to wit, defense document No. 475,
will be given exhibit No. 2323 for identification
only.

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(Whereupon, the document above re-
ferred to was marked defense exhibit No. 2323
for identification only.)

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MR. BLAKENEY: I now offer in evidence the
excerpt comprising defense document 475-B which
has already been rejected, of course. Following
that I should like to offer the excerpt described
as defense document No. 475-A, being the action
of the Council of the League in the same matter; and
I assume that the same ruling follows.

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(Whereupon, the President nodded.)

MR. BLAKENEY: I now tender for identification

1 defense document No. 478, being the volume "Speeches
2 by British Leaders" published by the Foreign
3 Ministry of Japan.

4 CLERK OF THE COURT: Defense document
5 No. 478 will receive exhibit No. 2324 for identifi-
6 cation only.

7 (Whereupon, the document above re-
8 ferred to was marked defense exhibit No. 2324
9 for identification only.)

10 MR. BLAKENEY: And I now offer in evidence
11 excerpts therefrom consisting of parts of the speech
12 of Winston Churchill in the House of Commons on
13 the 9th of September, 1941, dealing with the subject
14 of the occupation of Iran.

15 Shall we assume without further comment
16 by the President that the same ruling applies?

17 THE PRESIDENT: All these have been rejected.
18 We expected you to hand in a list that would be
19 simultaneously translated as you read it.

20 MR. BLAKENEY: I am sorry. I did not so
21 understand, Mr. President.

22 THE PRESIDENT: That is why we adjourned
23 at ten to twelve.

24 MR. BLAKENEY: I can make the tenders very
25 quickly, I think.

1 In connection with the preceding document
2 I wish to refer to prosecution exhibit No. 15,
3 Treaties Governing Land Warfare, and specifically
4 to Hague Convention The Fifth, the 18th of October,
5 1907, Rights and Duties of Neutral Powers and
6 Persons, Articles I and II.

7 THE PRESIDENT: We have given no decision
8 on that document. The relevancy of that has not
9 been argued.

10 MR. BLAKENEY: I refrain from reading the
11 articles in question because in the absence of
12 the document to which they relate they would be
13 meaningless alone.

14 As my next document I tender for identi-
15 fication the book "Events Leading Up to World War
16 II" published by United States Government Printing
17 Office.

18 CLERK OF THE COURT: Defense document
19 No. 559 will receive exhibit No. 2325 for identi-
20 fication only.

21 (Whereupon, the document above re-
22 ferred to was marked defense exhibit No. 2325
23 for identification only.)

24 MR. BLAKENEY: And I offer in evidence
25 excerpts therefrom relating to the Baltic States.

1 Defense document No. 559-A, it should be.

2 THE PRESIDENT: The excerpt is rejected.

3 MR. BLAKENEY: I next tender for identi-
4 fication defense document No. 563 consisting of the
5 Treaty of Non-Aggression Between the U. S. S. R.
6 and Esthonia, published by the Foreign Ministry of
7 Japan.

8 THE PRESIDENT: The last excerpt can be
9 marked for identification although rejected. The
10 document just tendered is rejected, but may be
11 marked for identification.

12 CLERK OF THE COURT: Defense document 563
13 will receive exhibit No. 2326 for identification only.

14 (Whereupon, the document above re-
15 ferred to was marked defense exhibit No. 2326
16 for identification only.)

17 MR. BLAKENEY: It is offered in evidence.

18 CLERK OF THE COURT: Defense document
19 No. 559-A will receive exhibit No. 2325-A, being
20 an excerpt from the book. That is for identification
21 only as well.

22 (Whereupon, the document above re-
23 ferred to was marked defense exhibit No. 2325-A
24 for identification only.)

25 THE PRESIDENT: Let me put the position

1 clearly. Parent documents are tendered for identi-
2 fication only in any case. Excerpts are tendered
3 outright and are rejected, but are marked for
4 identification only at the request of the defense.

5 MR. BLAKENEY: Document No. 563, which was
6 given for identification only No. 2326, is not an
7 excerpt but was offered in its complete form.

8 THE PRESIDENT: That has been rejected.

9 MR. BLAKENEY: I next offer in evidence a
10 further excerpts from the book "Events Leading Up
11 to World War II" which has been marked for identi-
12 fication exhibit 2325, consisting of defense docu-
13 ment No. 560, excerpts relating to Poland.

14 THE PRESIDENT: That has been rejected, but
15 marked for identification only.

16 CLERK OF THE COURT: Defense document
17 No. 560 will receive exhibit No. 2327 for identi-
18 fication only.

19 (Whereupon, the document above re-
20 ferred to was marked defense exhibit No. 2327
21 for identification only.)
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1 MR. BLAKENEY: I offer a further excerpt
2 from exhibit 2325, being defense document 561,
3 excerpts relating to Roumania.

4 THE PRESIDENT: That has been rejected but
5 marked for identification only.

6 CLERK OF THE COURT: Defense document 561
7 will receive exhibit No. 2328 for identification
8 only.

9 (Whereupon, the document above
10 referred to was marked defense exhibit 2328
11 for identification.

12 MR. BLAKENEY: I now offer in evidence
13 defense document 564, being a convention defining
14 aggression, entered into among the various nations
15 and published by the Foreign Ministry of Japan.

16 THE PRESIDENT: The relevancy of that has
17 not been argued.

18 MR. BLAKENEY: While that is true, Mr.
19 President, this relates also to the question of the
20 Baltic States, and I assume stands on the same
21 ground as the other documents in relation thereto.

22 THE PRESIDENT: In fact you are pressing
23 it and we have to decide the question of its relevan-
24 cy.

25 MR. BLAKENEY: I beg your Honor's pardon.

1 I mis-stated the matter. It does not relate to the
2 Baltic States but to Roumania, and I do not press
3 for its admission, because I am willing to concede
4 that if the other documents are irrelevant this
5 document is irrelevant.

6 THE PRESIDENT: There is nothing for us to
7 decide.

8 CLERK OF THE COURT: Defense document 564
9 will receive exhibit No. 2329 for identification
10 only.

11 (Whereupon, the document above referred
12 to was marked exhibit No. 2329 for identification.)

13 MR. BLAKENEY: I now offer in evidence
14 the New York Times for the 20th of December 1941,
15 defense document No. 516, on the subject of Timor.
16 I call attention to the fact that the excerpt is
17 mis-dated the 19th of December. For identification
18 I offer the entire bound volume containing the issue
19 for the 20th of December.

20 THE PRESIDENT: What about the excerpt?

21 MR. BLAKENEY: I have an excerpt, defense
22 document No. 516, which I will offer in evidence.
23 This document of course is not covered by the Tribu-
24 nal's ruling and stands in quite a different case.

25 THE PRESIDENT: If it is not objected to

1 we will allow it to go in.

2 Mr. Comyns Carr.

3 MR. COMYNS CARR: Your Honor, the only dis-
4 tinction between this document and the other on
5 which the Tribunal ruled this morning is that the
6 subject of Timor does enter to a certain extent into
7 the inquiry of this Tribunal, because Portugal is
8 mentioned in the conspiracy counts, not elsewhere.

9 THE PRESIDENT: This may have a bearing on
10 issues and be relevant and material so far as it con-
11 tains statements of fact and we know their source.

12 MR. COMYNS CARR: It might, your Honor,
13 but, in our submission, it has not in fact.

14 THE PRESIDENT: It is in an entirely diff-
15 erent category from those documents argued this morn-
16 ing.

17 MR. COMYNS CARR: Yes, I would submit
18 partly different, your Honor, not quite entirely.

19 The allegation in the indictment in our
20 case is that the accused included in their con-
21 spiracy to occupy, and to take possession of the
22 possessions of other countries in the Pacific and
23 Indian Oceans, Portugese Timor. This document
24 purports to show that the Allies, after the out-
25 break of the Pacific War, anticipated that move

1 as far as Timor was concerned by entering there to
2 defend it, just as it was alleged that they did the
3 same thing with regard to Persia, Greenland, and
4 Iceland, documents as to which the Tribunal has
5 already rejected.

6 THE PRESIDENT: But the Japanese did invade
7 Timor and they did not invade Greenland or Iceland.

8 MR. COMYNS CARR: No, they did subsequent-
9 ly invade Timor, but our submission is that this
10 action of the Allies might have been the answer to
11 a charge of actually invading Timor, which is not
12 made, but could not be an answer to the charge of
13 conspiring to do so, and therefore this document,
14 although it does relate to something which is the
15 subject matter of the indictment, is really on the
16 same basis as the other.

17 THE PRESIDENT: Major Blakeney.

18 MR. BLAKENEY: If counts 4 and 5 of the
19 indictment charge conspiracy to dominate Timor,
20 among other regions, and if the only shred of evi-
21 dence in the case on such conspiracy is that the
22 Japanese occupied Timor, it must be highly relevant
23 to know what the condition of Timor was at the time
24 they occupied it or before that time.

25 THE PRESIDENT: In what count or appendix

1 is Portugal or Timor mentioned?

2 MR. BLAKENEY: Portugal is mentioned in
3 counts 4 and 5 and 53 to 55 of the indictment.
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1 THE PRESIDENT: That is to say in conspiracy
2 and in crimes -- in conventional war crimes and crimes
3 against humanity.

4 MR. BLAKENEY: If the evidence tendered is such
5 as to show only that Japan, once war was underway,
6 attacked its enemies where it could find them then it
7 is obviously extremely irrelevant on the question of
8 whether the occupation standing alone is evidence of
9 conspiracy.

10 THE PRESIDENT: And the conspiracy is alleged
11 to have continued up to the time of the surrender, that
12 is, beyond the invasion of Timor.

13 We have decided to admit that document on the
14 usual terms.

15 CLERK OF THE COURT: Defense document No. 516
16 will be given exhibit No. 2330 for identification only
17 and the excerpt therefrom, bearing the same document
18 number, will receive exhibit No. 2330-A.

19 (Whereupon, the document above re-
20 ferred to was marked defense exhibit No.
21 2330 for identification; the excerpt there-
22 from being marked defense exhibit No. 2330-A
23 and received in evidence.)

24 MR. BLAKENEY: I shall read one or two excerpts
25 from exhibit No. 2330-A, commencing with the beginning:

1 "Portugal Bids the Allies Quite Timor;

2 "They Say 'No' as Axis Warns Lisbon

3 "By Daniel T. Brigham

4 "By Telephone to the New York Times" --

5 THE PRESIDENT: We receive this only as a
6 statement of fact, the source of which is indicated
7 and for whatever probative value it has.

8 MR. BLAKENEY: (Reading continued)

9 "Berne, Switzerland, Dec. 19-- Portugal demands
10 that Britain and the Netherlands withdraw their occupation
11 forces from Portugese Timor immediately, Premier and
12 Foreign Minister Antonio de Oliveira Salazar told a special
13 session of the National Assembly in Lisbon today.

14 "(In London a spokesman asserted that 'we
15 won't budge', The United Press reported.)

16 "Dr. Salazar acknowledged that the island, which
17 lies between Australia and the Netherlands Indies, was
18 of 'greatest importance to the defense of Australia',
19 but asserted that a Japanese attack there could not be
20 regarded as 'probable'.

21 "Pending the Allied reply to the Portuguese
22 protest, the Premier said, the government is studying
23 'the necessity of increasing the small garrison on the
24 island'".

25

I skip the next paragraph:

1 "In opening his speech the Premier told Parliament
2 that 'I am not here to make a speech, but to put before
3 the National Assembly an exposition, a simple exposition,
4 of the facts.' He continued:

5 "Wednesday morning two armed contingents that
6 appear to have been of Australian and Netherland nation-
7 ality debarked forcibly at Deli, invoking as their reason
8 the defense of the colony from an imminent Japanese
9 aggression. (In Batavia it was said the occupation was
10 carried out Thursday.) I pass over in silence certain
11 campaigns carried on in the world press during recent
12 weeks on the subject of Timor and on the subject of
13 Portuguese foreign policy -- ridiculous and interested
14 campaigns in which the presence of fourteen Japanese on
15 the island was taken as the pretext for fears of Japanese
16 infiltration.

17 "On Dec. 4 last the British Foreign Secretary,
18 in a conversation with the Portuguese Ambassador to
19 London, mentioned the strategical position of Timor, which
20 is essential to the defense of Australia and on the subject
21 of which the British General Staff has been obliged to
22 preoccupy itself. The British Government, he said, had
23 three questions to ask. These were:

24 "1. What would be the attitude of the Portuguese
25 Government in case of a Japanese attack on Timor?

1 "12. Would the Portuguese Government be disposed
2 to accept British aid if the island was attacked?

3 "13. If the answer is in the affirmative, would
4 there not be advantage in studying now a plan for joint
5 occupation?

6 "14. It is our conviction that a Japanese attack
7 against the Portuguese possession of Timor can under no
8 circumstances be considered as probable.

9 "15. However, as a prudent measure of foresight and
10 owing to the existence of our alliance with Great
11 Britain, the government did not hesitate to answer in
12 the following manner: First, we would resist with force
13 any Japanese aggression against Timor -- as we would
14 against any other Portuguese possession or against any
15 aggressor; second, given our intention to resist, we
16 would not only accept British aid, we would expect it
17 under the treaty of alliance, the more so since there
18 exists no reason why the Japanese should attack our
19 possession, and the attack, should it come, would come
20 only as a result of our alliance with Great Britain or
21 as a prelude to subsequent attacks against British
22 possessions.
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24 "16. On Dec. 7 the British Government acknowledged
25 receipt of this communication in the warmest terms, and,
after consultation with the Australian Government,

1 suggested that a Portuguese officer be sent immediately
2 to Singapore to confer with the British Command there.'

3 "Says Offer was Accepted

4 "The Premier and Foreign Minister -- and Minister
5 of War -- told his listeners that his government had
6 accepted this offer and had sent the Governor of Timor
7 instructions to this effect:

8 "The aid to be studied is in the same measure
9 as that which is due to the Portuguese under the treaty
10 this country has with the British. This will come in the
11 form of British and Netherlands troops under British
12 command. The hypothesis to be envisaged is solely that
13 of a Japanese aggression against Timor. This accord
14 does not come into effect merely on the basis of simple
15 menace or fears thereof, more or less well founded.
16 The collaboration of foreign troops is not reciprocal
17 except that through Japanese attack on our possessions
18 we have already lost our neutrality, and that, finally,
19 all foreign troops will be withdrawn once their presence
20 is no longer required.'

21 "British and Netherland representations, however,
22 became increasingly insistent, the Premier went on, as
23 Allied fears of a Japanese attack increased. But while
24 the British Ambassador in Lisbon was trying to convince
25 the Portuguese Government of the necessity of immediate

1 measures, those forces were being debarked on the
2 island of Timor 'and those troops did not land with the
3 object of negotiation, but to call upon the Governor to
4 grant immediate permission.'

5 "'Naturally the modest police garrison on the
6 island could do nothing to resist,' Dr. Salazar said.

7 "The Premier added that 'the colony remains calm'
8 and that 'we are at present studying the means of increasing
9 the garrison there as the simplest manner of bringing
10 peace back to that island exposed as it is to the
11 convulsions of war.'

12 "A formal note of protest demanding that the
13 Allies immediate withdraw from Timor was being prepared
14 in the Foreign Office late tonight. It is to be handed
15 to the British Ambassador early tomorrow."

16 That is the end of the excerpt.
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1 MR. BLAKENEY: I next tender for identifica-
2 tion the volume containing the New York Times for the
3 11th of April 1941, defense document No. 517.

4 CLERK OF THE COURT: Defense document No.
5 517 will receive exhibit No. 2331 for identification
6 only.

7 (Whereupon, the document above
8 referred to was marked defense exhibit No.
9 2331 for identification.)

10 MR. BLAKENEY: And I offer in evidence the
11 excerpt therefrom entitled "Agreement whereby United
12 States Becomes Protector of Greenland," already re-
13 jected by the Tribunal's ruling this morning.

14 THE PRESIDENT: The excerpt is rejected but
15 will be marked for identification only.

16 CLERK OF THE COURT: The excerpt from exhibit
17 No. 2331, bearing the same document No. will receive
18 exhibit No. 2331-A for identification only.

19 (Whereupon, the document above
20 referred to was marked defense exhibit No.
21 2331-A for identification only.)

22 MR. BLAKENEY: And I next offer in evidence
23 defense document No. 562, being further excerpts from
24 the book "Events Leading up to World War II," relat-
25 ing to the Greenland matter.

1 THE PRESIDENT: Rejected, but to be marked
2 for identification only.

3 CLERK OF THE COURT: Defense document No.
4 562 will receive exhibit No. 2332 for identification
5 only.

6 (Whereupon, the document above
7 referred to was marked defense exhibit No.
8 2332 for identification.)

9 MR. BLAKENEY: I now offer in evidence --
10 I now tender for identification the volume contain-
11 ing the New York Times for the 8th of July 1941,
12 defense document No. 518.

13 I regret to have to call attention to
14 another error in date. This is marked the 9th but
15 should be the 8th of July.

16 CLERK OF THE COURT: Defense document No.
17 518 will receive exhibit No. 2333 for identification
18 only.

19 (Whereupon, the document above
20 referred to was marked defense exhibit No.
21 2333 for identification.)

22 MR. BLAKENEY: And I offer in evidence the
23 excerpt therefrom, consisting of the message of
24 President Roosevelt to Congress in relation to Iceland,
25 defense document No. 518.

1 THE PRESIDENT: Rejected, but to be marked
2 for identification only.

3 CLERK OF THE COURT: Defense document No.
4 518, being an excerpt from exhibit No. 2333, will
5 receive exhibit No. 2333-A for identification only.

6 (Whereupon, the document above
7 referred to was marked defense document No.
8 2333-A for identification.)

9 MR. BLAKENEY: I now offer in evidence
10 defense document No. 553, being the Nippon Times
11 Magazine for the 20th of February 1947.

12 CLERK OF THE COURT: Defense document No.
13 553 will receive exhibit No. 2334 for identification
14 only.

15 (Whereupon, the document above
16 referred to was marked defense exhibit No.
17 2334 for identification only.)

18 MR. BLAKENEY: And I offer in evidence the
19 excerpt therefrom bearing the same document number,
20 being the complete article entitled "A-Bomb Decision."

21 MR. COMYNS CARR: Your Honor, I am not quite
22 sure, nor is my friend, whether this document was
23 included in the ruling of the Tribunal this morning.
24 I mentioned it in the list of documents to which
25 my argument applied.

1 THE PRESIDENT: It is included.

2 MR. COMYNS CARR: In that case I have to
3 submit that it is equally objectionable with the
4 other documents, although the reason is perhaps not
5 quite the same. The document purports to be an
6 account by Secretary -- former Secretary for War
7 Stimson, of the reasons which led the United States
8 to use the A-bomb in the last stages of the Pacific
9 war.

10 THE PRESIDENT: Was Mr. Stimson the Secre-
11 tary of State when the atom bombs were dropped?

12 MR. COMYNS CARR: Yes -- Secretary of War.

13 THE PRESIDENT: Well, we want full argument
14 on this, as much as you can offer.

15 MR. COMYNS CARR: In my submission, the
16 question of the choice of weapons on the Allied side
17 in the war has no bearing upon any issue before this
18 Tribunal. It certainly can have no bearing on the
19 charges of conspiracy or planning or waging, or
20 initiating or waging war, and in my submission equally
21 it can have no bearing on the charges of class B and C
22 offenses.

23 THE PRESIDENT: Except as perhaps from the
24 time the bombs were dropped. The dropping of those
25 bombs could not have obliterated any offense already

1 committed.

2 MR. COMYNS CARR: No, your Honoe. I can not
3 say whether there are any charges after that date.

4 THE PRESIDENT: You are charging conspiracy
5 up to the time of the signing of the instrument of
6 surrender, I think.

7 MR. COMYNS CARR: Yes, your Honor, con-
8 spiracy concerning each and every defendant. I was
9 thinking of specific offenses. But, assuming there
10 are any such, in my submission nobody has ever sug-
11 gested that there is any law of war which forbade
12 the use of such a weapon, and if there were it could,
13 in my submission, afford no excuse for the commission
14 of offenses by the Japanese against prisoners of war.
15 And for those reasons, in my submission it can be of
16 no assistance to this Tribunal to consider Mr. Stim-
17 son's views and reasons for authorizing the use of
18 that weapon.

19 THE PRESIDENT: Yes, Major Blakeney.

20 MR. BLAKENEY: If my learned friend were
21 familiar with the preparation of the Hague Convention
22 IV, the Laws and Customs of War on Land, he would know
23 that there is law prohibiting the use of certain types
24 of weapons. He would know, at all events, that the
25 prohibition is expressed in this Convention and he

1 would then be faced with the question whether we are
2 not remitted to the conduct of nations to determine
3 what it means.

4 THE PRESIDENT: Assuming, but without
5 deciding that the atom bombs or the dropping of them
6 constituted war crimes, what effect do you contend
7 that has on the issues?

8 MR. BLAKENEY: There might be several
9 answers to that, Mr. President. One, for example,
10 is the well-recognized right of retaliation.

11 THE PRESIDENT: Retaliation follows, does
12 not precede.

13 MR. BLAKENEY: And the charges that war
14 crimes by the Japanese, and specifically by these
15 defendants, not only preceded but followed and were
16 of different natures.

17 The Tribunal will remember that the prosecu-
18 tion produced evidence relating to the atomic bomb
19 question, and if my memory does not deceive me there
20 was also evidence of measures taken by the Japanese
21 thereafter. Moreover, as in all cases of interpreta-
22 tion of treaties, we have the best possible indication
23 of the meaning of this Hague Convention in the conduct
24 of other parties to it.

25 If we could concede that officials of Japan
were violating Hague Convention IV as they are charged

1 with violating it, in planning certain measures
2 violative of its provisions, we should find ourselves
3 in the same dilemma when we find that the high officials
4 of the United States were planning the use of this
5 weapon from 1941, the same dilemma of knowing whether
6 the Convention has one or two different meanings.

7 And in fact, as a separate question, I think
8 the Tribunal would be entitled to draw the conclusion
9 from this document that the Hague Convention of 1907
10 is obsolete or obsolescent.

11 THE PRESIDENT: Mr. Carr.
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1 MR. COMYNS CARR: Your Honor, I do not
2 claim the right to be heard again on this matter, but
3 I do submit that if my learned friend is arguing to
4 this Tribunal about Hague Convention No. 4 he should
5 at least inform the Tribunal which of the provisions
6 of Hague Convention No. 4 he is talking about.

7 THE PRESIDENT: That may be necessary for
8 the purpose of the prosecution but not for the
9 Tribunal. We know what he is talking about.

10 Major Blakeney, it might be arguable -- I
11 don't say it is -- that the dropping of the two bombs
12 on Japan justified some if not all of the things done
13 by Japan after they were dropped, but what about the
14 events that occurred before? You rely, of course, on
15 the obsolescence of the Hague Convention, but have
16 you any other argument?

17 MR. BLAKENEY: Beyond that, of course, we
18 don't contend that this particular evidence has any
19 bearing on previous events. Other evidence will have
20 to be adduced to supplement it in that respect. And
21 as to the events occurring after this we submit it
22 is plainly relevant in the way of retaliatory measures.

23 THE PRESIDENT: That is over a brief three
24 weeks.

25 MR. BLAKENEY: Those three weeks, of course,

1 might be enough to convict one of these defendants.
2 My recollection is that the evidence covering those
3 three weeks was rather voluminous. Manila, for
4 example.

5 THE PRESIDENT: We will consider the matter.

6 We will recess for fifteen minutes.

7 (Whereupon, at 1435, a recess was
8 taken until 1505, after which the proceedings
9 were resumed as follows:)

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1 THE PRESIDENT: By majority the Tribunal
2 rejects defense document 553, purporting to be an
3 excerpt from the Nippon Times Magazine relating to
4 the atom bomb decision and to alleged observations
5 by Mr. Stimson. It was in the New York Times. The
6 document will be marked for identification only.

7 CLERK OF THE COURT: Defense document No. 553,
8 to-wit, the Magazine of the Nippon Times, will receive
9 exhibit No. 2334; and the excerpt therefrom, bearing
10 the same document number, will receive 2334-A; both
11 for identification only.

12 (Whereupon, defense document No. 553
13 was marked defense exhibit No. 2334 for iden-
14 tification; and the excerpt therefrom,
15 bearing the same document number, was marked
16 defense exhibit No. 2334-A for identification.)

17 THE PRESIDENT: Major Blakeney.

18 MR. BLAKENEY: I have thus far been tendering
19 evidence of the conduct of nations which defines our
20 international law. I turn now to a related point already
21 inferentially touched upon, that of responsibility of
22 individuals for acts performed in their representative
23 capacity as agents of governments. As bearing upon
24 the all-pervading question of the case -- whether there
25 has heretofore been formulated or recognized by the

1 community of nations any principle of such a respon-
2 sibility -- I wish first to call attention to the
3 provisions of some existing treaties. First, I
4 refer to Hague Convention IV, of 18 October 1907, Laws
5 and Customs of War on Land, one of the few treaties
6 purporting in any way to impose responsibility for
7 violations of its own provisions. The significant
8 part of this convention, which is included in prosecu-
9 tion exhibit 15, is its Article 3, appearing on page
10 11 of the exhibit:

11 "Article 3. A belligerent party which
12 violates the provisions of the said Regulations shall,
13 if the case demands, be liable to pay compensation.
14 It shall be responsible for all acts committed by
15 persons forming part of its armed forces."

16 I wish to read into evidence also part of
17 Article 29 of the Geneva (Red Cross) Convention of
18 27 July 1929, prosecution exhibit 15, at page 147, the
19 more common expression of intention that nations
20 shall discipline their own nationals for breaches of
21 the terms of the convention. I read the first para-
22 graph of Article 29:

23 "The Governments of the High Contracting
24 Parties whose penal laws may not be adequate, shall
25 likewise take or recommend to their legislatures the

1 necessary measures to repress in time of war all acts
2 in contravention of the provisions of the present
3 Convention."

4 Substantially similar provisions appear in
5 Hague Convention X, 18 October 1907, prosecution
6 exhibit 16, Article 21, at page 13; the Convention of
7 1912 on Suppression of the Abuse of Opium and Other
8 Drugs, prosecution exhibit 17, Articles 1, 6, 9 and
9 20; and other conventions, which I shall not read.

10 Although the best evidence on the point is
11 perhaps the absence of mention in international con-
12 sensual acts of any principle of individual criminal
13 responsibility, there is also evidence in abundance
14 that the question has been repeatedly mooted and the
15 principle suggested to the nations for adoption. Some
16 of this evidence I now tender.

17 First, and most celebrated, of these instances
18 is the proposal for trying Wilhelm of Hohenzollern
19 and others as criminals of World War I. In this
20 connection I offer in evidence the "Report Presented
21 to the Preliminary Peace Conference by the Commission
22 on the Responsibility of the Authors of the War and on
23 the Enforcement of Penalties," 29 March 1919. I
24 should have said I tender it for identification,
25 defense document 353.

1 CLERK OF THE COURT: Defense document No. 353
2 will receive exhibit No. 2335 for identification only.

3 (Whereupon, the document above
4 referred to was marked defense exhibit
5 No. 2335 for identification.)

6 MR. BLAKENEY: And I now offer in evidence
7 the excerpt therefrom, bearing the same document
8 number, and consisting of Annex II, thereof.

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1 THE PRESIDENT: Mr. Conyns Carr.

2 MR. COMYNS CARR: May it please the Tribunal,
3 I submit that this document is objectionable, but
4 now on a very different set of reasons from those we
5 were discussing before. This is apparently designed
6 as the foundation for a legal argument, and it raises
7 the question how far it is proper in a legal argu-
8 ment to consider the earlier views of those who take
9 part in the making of a treaty. The document con-
10 sists of the reservations presented by the two
11 United States members, Mr. Robert Lansing and Mr.
12 James Brown Scott, and the two Japanese members,
13 M. ADACHI and S. TACHI, to the majority report of the
14 Commission on Responsibility of the Authors of War
15 and on Enforcement of Penalties. Actually both the
16 United States of America and Japan were signatories
17 of the Treaty of Versailles, and in the case of the
18 United States Mr. Lansing, one of the signatories
19 of these reservations, was also a signatory of the
20 treaty on behalf of his country.

21 The treaty contains Part 7 Penalties, includ-
22 ing Article 227, which has already been cited in argu-
23 ment, in an earlier argument before this Tribunal.
24 The first sentence of it is: "The Allied and Associated
25 Powers publicly arraign William II of Hohenzollern,

1 formerly German Emperor, for a supreme offence against
2 the international morality and the sanctity of treaties."
3 And it proceeds to provide for his trial by a court
4 of five judges appointed by the United States of
5 America, Great Britain, France, Italy and Japan, and
6 to give to the tribunal unlimited discretion as to
7 punishment if he should be found guilty.

8 In those circumstances, in our submission,
9 it is irrelevant to consider whether the representa-
10 tives of two of those same powers on the previous
11 commission, including one of the signatories of the
12 treaty, at an earlier stage held different views.

13 We appreciate that in the case of internation-
14 al law it is customary to take into consideration
15 contemporaneous declarations by the signatories, but,
16 in our submission, only for the purpose of explaining
17 and not of contradicting the treaty ultimately arrived
18 at.

19 THE PRESIDENT: Do you concede that, Mr, Carr,
20 if the words of the treaty are plain and admit of
21 no other ambiguity?

22 MR. COMYNS CARR: If they are plain I would
23 not concede that even explanation from contemporary
24 statements is admissible. But in no circumstances
25 can a contradiction be admissible.

1 THE PRESIDENT: Mr. Blakeney, what Mr. Carr
2 said can hardly be controverted, but you may, if you
3 are allowed to bring up this question of individual
4 responsibility later, adopt the arguments of the
5 American and Japanese delegates. You are always at
6 liberty to do that. But tendering them as evidence
7 is another matter.

8 MR. BLAKENEY: I appreciate that, of course,
9 your Honor. But I would like to make one or two ob-
10 servations on these points also, if I may.

11 I would like to point out for one thing that
12 the Treaty of Versailles was not ratified by the
13 United States of America. If it is going to be relied
14 upon as showing the attitude of that nation on this
15 question, which, by the way, is the same argument
16 exactly which I advanced in support of my evidence
17 this morning, then we cannot certainly draw any infer-
18 ence that it represents the attitude of the United
19 States of America.

20 If, moreover, the Treaty of Versailles takes
21 the opposite view from that of these delegates, never-
22 theless it takes that view only to the extent of
23 arraigning Wilhelm of Hohenzollern, in rhetorical lan-
24 guage, and providing for his trial.

25 This commission was discussing a far broader

1 question, and the fact of the eventual decision on
2 the political plane, as appears from this document,
3 is the evidence which we are contending for on the
4 general question.

5 We do not contend that the framers of the
6 treaty adopted the views of these dissensions in
7 connection with the Kaiser himself. It did not adopt
8 those views.

9 We contend that this evidence goes to a
10 quite different point; that here the representatives
11 of the nations had presented to them, and considered,
12 a much more far-reaching question of individual
13 criminal responsibility, and they declined to adopt
14 it. And evidence subsequently to be tendered would
15 show that the principle has again and again been offered
16 to the nations for their adoption, and has not been
17 adopted, which we submit is probative on the question
18 of whether such a principle has ever existed prior to
19 this time.

20 THE PRESIDENT: By international custom
21 there is no individual responsibility you say, and
22 custom is proved as a matter of fact. Is that your
23 attitude, Major Blakeney?
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1 MR. BLAKENEY: My attitude is that the
2 customary law should be proved as a matter of fact,
3 but if I understand correctly, the Tribunal has pro-
4 hibited me from proving those things as matters of
5 fact.

6 THE PRESIDENT: The United States Supreme
7 Court has told you how to prove these things and it
8 is not in just the way you intend. I think it is
9 the case of the Paquete Habana and another boat --
10 I have forgotten the boat but I think it was some
11 years ago. I can get the authority in a matter of
12 minutes.

13 MR. BLAKENEY: Yes, I am conscious that our
14 method of proof here is somewhat unusual but, of
15 course, we are trying to prove the negative.

16 THE PRESIDENT: I cannot speak for the whole
17 of the Tribunal on this but I do think they will
18 allow you to prove the matter in the way indicated
19 by the United States Supreme Court in that case and
20 others.

21 MR. BLAKENEY: I am sorry, your Honor, that
22 we seem to have adopted a method of proof which does
23 not meet with your approval, but in my experience
24 when it is necessary to prove customs or law based
25 on customs, it is done by witnesses or documents

just as any other fact.

1
2 THE PRESIDENT: This Tribunal may allow
3 you to prove the matter the way you intend; I do not
4 know, Major Blakeney, but I am pointing out what the
5 United States Court says is the right way.

6 MR. BLAKENEY: I am sorry that I am not
7 familiar with that method and, of course, am prepared
8 only to proceed in this way at this time.

9 THE PRESIDENT: Is there anything else you
10 can go along with until we can get that authority?

11 MR. BLAKENEY: Yes, sir. Language section,
12 I am on page 7 near the top of my script.

13 On the subject of standards of international
14 conduct I should like to offer in evidence a document
15 which may be considered to be the last word on this
16 subject, the Charter of the United Nations, defense
17 document No. 548.

18 THE PRESIDENT: In the meantime we are
19 reserving our decision on the Lansing and Scott report.

20 MR. BLAKENEY: This is Department of State
21 publication No. 2553, which is tendered for identifi-
22 cation.

23 CLERK OF THE COURT: Defense document
24 No. 548 will receive exhibit No. 2336 for identifi-
25 cation only.

1 (Whereupon, the document above
2 referred to was marked defense exhibit
3 No. 2336 for identification only.)

4 MR. BLAKENEY: I wish to read therefrom
5 Articles 39, 41 and 42, they being the provisions
6 for action to be taken by the United Nations in the
7 event of a breach of the peace or an act of aggres-
8 sion.

9 THE PRESIDENT: Yes, Mr. Comyns Carr.

10 MR. COMYNS CARR: Your Honor, I regret to
11 have to be so constantly objecting but in my sub-
12 mission this document, excellent and valuable as it
13 is, can have no bearing on the issues you have to
14 try here. It is an agreement arrived at long after
15 the events with which we are dealing and in my sub-
16 mission can throw no light on them. I do not know
17 that I can usefully amplify that.

18 THE PRESIDENT: On what ground are you
19 tendering that one, Major Blakeney?

20 MR. BLAKENEY: The ground is that if this
21 document, being the latest and best considered
22 document on the subject of international responsi-
23 bility doesn't refer to the matter of individual
24 responsibility, even with the experience of all these
25 advanced antedating the document, referred to by

1 Mr. Comyns Carr, the nations must not recognize
2 any such principle of any individual criminal
3 responsibility for breach of international agree-
4 ments.

5 THE PRESIDENT: In the course of a few
6 weeks the United Nations may adopt or reject -- I
7 cannot say what they are going to do -- the law as
8 laid down in the Nuernberg judgment because of matters
9 before them.

10 MR. BLAKENEY: Of course, none of us knows
11 what principles nations may adopt in future but my
12 submission is that the failure to adopt it at
13 San Francisco when the Charter of the United Nations
14 was adopted shows that the nations then either did
15 not recognize the existence of the principle or did
16 not consider punishment for violation of it by criminal
17 proceedings to be wholesome and thus worth perpetuating
18 in the Charter; and this in the course of the most
19 comprehensive attempt in history at preserving the
20 general peace and at enforcing international obliga-
21 tions.

22 THE PRESIDENT: The case I referred to a few
23 minutes ago is the case of Paquete Habana and the Lola,
24 decided in the year 1899 and reported in 175 United
25 States Reports at 677. I have not the report itself.

1 A reference to it appears in Pitt Cobbett Cases in
2 International Law, Volume 1, the 5th edition, page 1,
3 et seq.

4 Mr. Justice Gray for the Court indicated
5 that the source of international law generally
6 resorted to was such works of judicial -- well,
7 this is hardly sufficient; I had better read the
8 lot:

9 "Proceeding next to consider the question
10 in the light of jurists and commentators it is
11 pointed out that such works were resorted to by
12 judicial tribunals not for the speculations of those
13 authors concerning what the law ought to be but for
14 trustworthy evidence of what the law really was."

15 Pitt Cobbett ad's this: "International
16 law is a body of living rules resting on the general
17 assent of civilized nations. Such assents find its
18 expression for the most part in usage which when
19 sufficiently general give rise to custom. For proof
20 of usage regard must be had to the records of the
21 actual practice of states as well as to the works of
22 accredited writers on international law."

23 That is the method of proof open to you,
24 Major Blakeney, as far as I can discover the law.
25

1 MR. BLAKENEY: I quite agree with that
2 definition, your Honor, and suggest that proof of
3 actual practice of states is what I have been offer-
4 ing today. As to the works of accredited writers,
5 I have prepared some evidence of that nature, though
6 not on this specific point. I should like to urge
7 that Mr. Pitt Cobbett's words state much better than
8 I can the exact relevance and propriety of the docu-
9 ment now under consideration. He says -- I am para-
10 phrasing -- that the rules of international law rest
11 on the general consent.

12 This evidence now tendered shows one of
13 the chief powers of the world, speaking through its
14 secretary of state and representative, not giving
15 assent to the principle in question. Therefore, I
16 again submit that it is strictly relevant to the issue
17 under consideration.

18 THE PRESIDENT: Now what Mr. Lansing and
19 others said is not; what the League of Nations did
20 may be. They are not accredited writers; never were.
21 You can adopt their argument if you are allowed to
22 argue this question later.

23 MR. BLAKENEY: We had, of course, assumed
24 that we would be allowed to argue all questions of
25 law in the case, and therefore were trying to lay the

1 foundation of fact.

2 THE PRESIDENT: The practice of states is
3 not to be found in what Mr. Lansing said.

4 MR. BLAKENEY: Mr. Lansing, of course, was
5 Secretary of State at the time.

6 THE PRESIDENT: Well, have you anything to
7 add, Major Blakeney?

8 MR. BLAKENEY: No, sir, nothing further on
9 this point, your Honor.

10 THE PRESIDENT: Are you tendering any other
11 document of the kind?

12 MR. BLAKENEY: Yes, I have already tendered
13 document 353.

14 THE PRESIDENT: Well, we are reserving our
15 decision on those documents. We will give it tomorrow,
16 if we are allowed to do so. We propose to recess now,
17 but do you wish to say anything?

18 MR. BLAKENEY: Will your Honor indulge
19 me just a moment. I have been handed another authority
20 which I would like to read to you since you are going
21 to consider the matter further. It is very brief.
22 I am reading from Fenwick Cases on International Law,
23 1935, page 17.

24 THE PRESIDENT: What edition?

25 MR. BLAKENEY: Apparently the only edition.

1 This discussion comes under the case of
2 The Lola and The Paquete Habana. I quote:

3 "Chancellor Kent says: 'In the absence
4 of higher and more authoritative sanctions, the or-
5 dinances of foreign states, the opinions of eminent
6 statesmen, and the writings of distinguished jurists,
7 are regarded as of great consideration on questions not
8 settled by conventional law."

9 THE PRESIDENT: Mr. Justice Gray may have
10 included eminent statesmen -- I was not reading from
11 the report -- but I do not think he did.

12 MR. BLAKENEY: It was not said to be
13 Mr. Justice Gray, Mr. President, but Chancellor Kent
14 whose word I was reading.

15 THE PRESIDENT: I know that. Mr. Justice
16 Gray may have agreed with him.

17 Mr. Smith.

18 MR. SMITH: Your Honor, I would like to
19 refer to the course of decisions in the Supreme
20 Court of the United States very briefly. That court
21 up until about ten or fifteen years ago held that
22 where a statute was plain and unambiguous on its
23 face there was no room for construction.

24 THE PRESIDENT: We are not discussing any
25 statute now.

1 MR. SMITH: Well, I was referring to the
2 observation, your Honor, made about a year ago as
3 to the course of decisions in the Supreme Court. In
4 recent years in a whole series of cases the Court
5 has held that it has a right, notwithstanding clear
6 language of the statute, to look at the legislative
7 history to see what the Congress had in mind.

8 THE PRESIDENT: That does not apply in
9 the British Empire.

10 We will recess until half-past nine
11 tomorrow morning.

12 (Whereupon, at 1600, an adjourn-
13 ment was taken until Tuesday, 4 March 1947,
14 at 0930.)

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