To: Lieutenant James B. Donovan
via Richard Hartshorne

From: Phoebe Morris

Subject: Judicial Notice in International, German and French Law

I transmit herewith two copies of the preliminary draft of the memorandum on judicial notice in international, German and French practice.
PART I. Judicial Notice in International Practice

There is no well formulated rule in international practice which corresponds in any way to the carefully formulated rules on judicial notice which exists in Anglo-American practice. This stems without doubt from the well established rule that international tribunals are free to estimate the respective values of the various kinds of evidence submitted (1), and to the practice of including in the rules of procedure established for ad hoc tribunals the rule that, subject to the foregoing general provision, the court will examine any evidence tendered by the parties (2). Even though there is an occasional statement by jurists that international tribunals should not dispense with proof even in cases of notoriety (3), there is a body of precedents which indicates that international courts have in fact applied rules on judicial notice, in many cases approximating the Anglo-American rule.

1. International Law. International tribunals have ruled that, because of their quality, they may be presumed to know international law (4).

2. Treaties. International tribunals have likewise taken judicial notice of treaties (5). It was likewise the rule in the various commissions which heard tort claims against Mexico under the treaties signed during the twenties. Art. 23 of the rules of 1 September 1928 adopted for the British-Mexican Commission is typical: "The Commission will receive and consider all written statements, documents and other evidence which may be presented to it by the respective Agents." Feller, Mexican Claims Commission, 1923-1932 (N.Y. 1935), p. 491.

3. Witenberg, La théorie des preuves devant les juridictions internationales, 46 Recueil des Cours, p. 35 (1936). He asserts that the rule on notoriety has been applied only in cases which presented no danger but that, even so, the international judge should not be allowed to rule on this point.


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1. A rule expressly enunciating this principle was voted down as a truism, when the first rules for the Permanent Court were being framed in 1922. Preparation of the Rules of Court, Ser. B, no. 2 (Leiden, 1922), pp. 148, 164, 303, 467. See also the award on the Parker claim, in the arbitration between the United States and Mexico under the treaty of 8 September 1923, 1927 Opinions 39. This point will be elaborated in a subsequent memorandum.

2. This was generally true of the Mixed Arbitral Tribunals established by Art. 304 of the Treaty of Versailles. Art. 88 of the rules of 20 April 1920 set up for the Franco-German tribunal is fairly typical: "All methods of proof are admitted before the Tribunal, subject to the conditions stated in Paragraph 18, subparagraph 2 of the Annex to Article 296 of the Treaty, the arbitrators being guided only by their conscience and by equity in the evaluation of proof." 1 Rec. M.A.T. 44, 56. It was likewise the rule in the various commissions which heard tort claims against Mexico under the treaties signed during the twenties. Art. 23 of the rules of 1 September 1928 adopted for the British-Mexican Commission is typical: "The Commission will receive and consider all written statements, documents and other evidence which may be presented to it by the respective Agents." Feller, Mexican Claims Commission, 1923-1932 (N.Y. 1935), p. 491.

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notice of treaties (5).

3. Municipal Law  International tribunals have usually held that they are not obliged to know municipal law, in the absence of explicit provisions to the contrary in the treaty which constituted them.

The Permanent Court of International Justice has taken the position that it may be obliged to secure such knowledge through the evidence supplied by the parties or through its own investigations (6). Continental commentators have approved the Court's willingness to undertake independent research on points of municipal law (7).

In estimating the value of the practice of the Permanent Court of International Justice, it should be borne in mind that the Permanent Court operated on a fixed basis, and that its jurisdiction had been broadly defined. Thus, certain differences in result may reasonably be found in the awards of ad hoc tribunals designed to handle specific problems. This difference derives not only from the decisions of the tribunals themselves but also from the rules of procedure set up under authority of the treaty which established them.

Thus, the Mixed Arbitral Tribunals functioning under Article 304 of the Treaty of Versailles, stressed their peculiar function under the treaty, took cognizance of national law, and even construed it (8). In the Chamizal case, at the request of the American Agent, the tribunal took judicial cognizance of the proceedings of the boundary commission established by the treaty of 1 March 1899 (9).

The difficulty has probably been more often solved in recent years in the rules of procedure established by such courts. Attention is directed to Article 6 of the rules of 4 September 1936, governing the procedure before the United States-Mexican Commission (10).


8. See Witenberg, Les tribunaux arbitraux mixtes et le droit international privé, 56 Clunet 981, 999 (1951).


Printed or published copies of any public document, reports and evidence taken in connection therewith, and printed or published under or by authority of either Government may be filed with the Commission and referred to from time to time by either Agent in support of or defense to claims without being copies into the record, printed or otherwise proved, where the portion thereof so relied upon is properly identified in the pleadings or briefs. Matter so filed and referred to will be given such weight as the Commission may deem proper in the circumstances of each case. Copies of all such printed or published documents, when filed with the Commission, shall also be furnished or made available to the opposing Agent for his use. Official publications of laws, statutes, and judicial decisions and published works of recognized authority on subjects within the cognizance of the Commission may be referred to without being formally proved.

As it is customary in protocols establishing ad hoc tribunals to make procedure stipulations and to authorize the tribunal to set up any additional rules which may be required, there would seem to be no barrier to the inclusion of such a stipulation in the protocol or in the proposed rules of procedure.

Notoriety. International tribunals have explicitly recognized that certain facts are so notorious as to require no proof.

In the Fabien, the arbitrator who was the President of the Swiss Confederation pointed out that even in ordinary courts notice could be taken of facts so notorious as to render proof unnecessary, and held that the reason for this rule was even more forcible in international arbitration, unless prevented by explicit provisions (11). This rule was argued at great length in the Spanish Treaty Claims Commission as to the existence of an insurrection in Cuba and the lack of power in Spain to control it (12). A divided commission did consider the conditions prevailing in Cuba to be such that the usual burden of proof was varied.

Other important examples of the application of this rule by arbitral tribunals are:

1. Johnson claim, U.S.-Peru, 1868 - condition of province of Lambayeque in January 1868;
2. Weil claim, U.S.-Mexico, 1868 - occupation of Matamores by France, 26 September 1864;

11. Moore, History of arbitrations to which the United States has been a party (1895); Ralston, Law and Procedure of International Tribunals, Supplement (Stanford University Press, 1936), p. 104-5.

12. See Fuller, Special report (1907), pp. 163, 189, 198, 201.
4. Veloz-Marina, Victoria, Yigie - dated of Allied intervention in Spain, 1823;
5. Mazapil Copper Co., Great Britain-Mexico - certain dates of revolutionary activity;
6. Ward case, Great Britain-Mexico - area of Zapatista action;
7. Petri case, France-Mexico - date of occupation of Coyocacan by the Zapatistas
8. Polish warships' Danzig anchorage - promise to Poland after 1918 of free and secure access to sea (P.C.I.J.).
Part II. Judicial Notice in German and French Law

1. Article 291 of the German Code of Civil Procedure states: Facts which are notorious to the court need not be proven.
   There are two kinds:
   A. "Generally known facts" ("Erfahrungsaetsze")
      a. Historical Events, excluding scientific disputes
      b. Geographical facts
      c. Credible facts published in newspapers or through radio without reservation (RGZ 102,343). According to Jonas (ZPO, 1938) and Baumbach (ZPO, 1943) newspapers and radios are presently the carriers of notoriety proper.
   d. Public notices
   Applications: The Date
      Situation of localities (Gaupp Article 291.1)
      Distance of localities (Gaupp Article 291.1)
      Jurisdiction of a place (Dresden Sachs. Arch. 4, 356)
   Those facts are notorious although the judge may seek, or call for, information or have to quote references to books and other sources.
   Notoriety is flexible and changes in time and place. A fact which is notorious today may lose its character next month (date of Easter for example).
   B. Facts known to the judge through his office ("gerichtskundig")
   Those are principally facts known to the judge from former proceedings conducted by him (RG Gruch 66, 480, RGZ 113, 17). It is not sufficient that these facts are only contained in the files of the court (RG Recht 32, 105), like registration in land books, commercial registers (RGZ 13, 371)

2. Iura novit curia: arg e contrario from article 292 of the German ZPO.
   Judicial notice extends to
   a. Laws of Reich and Laender
   b. Municipal laws
   c. Town Laws
   d. Local police notices (RGZ 43, 418)
   e. Corporate economic structure of the Nazi system (Gliederung der Wirtschaft) (Stein Art. 293)
   f. "Tarifordnungen" (RG JW 37, 1177)
   Not:
   a. Customary law
   b. Usage
   c. By-laws
   d. Foreign laws
   e. "Tarifverträge" (RG JW 37, 1177)

3. German, French, British and American law are identical on the following:
   (a) Judicial notice must be requested although the facts need not be proven (difference between "Beweis- und Behauptunglast")
   (b) The above specific categories of facts which may be judicially noticed are practically the same in all laws. Anglo-Saxon law determines usage by case law. French and German law are satisfied with general textbook statements without detailing instances.
   (c) As a result of the broad statements in German and French textbooks which have no judicial precedents it appears that newspaper facts receive greater credence in German and French law than they do in Anglo-Saxon law. In other words,
it is easier under German law to allege and prove a fact to be notorious than it is under Anglo-Saxon law.

(d) A fact might be notorious under all laws, but the judge may seek or call for additional information.

(e) The principal kinds of facts judicially noticed under all laws are the following:

- Domestic laws and ordinances regardless of the source
- Domestic political organizations, boundaries, capitals
- Domestic officials, their identity and authority
- Genuineness of official documents
- Official acts, elections, census, legislative proceedings
- Records of prior proceedings
- Generally known facts of history, natural science and geography
- Times and distances
- Meaning of words

4. Since the adoption of the "judicial notice" status does not eliminate the duty upon the litigants and the court to procure and to present the laws physically, the question arises in what form the law has to be produced.

Compared with Anglo-Saxon standards, German and French courts take the most liberal view on this issue. They neither require a copy of a statute or decree contained in an official publication, nor do they require a publication commonly recognized, but are satisfied with almost any printed text of renowned law publishers. Actually, continental lawyers and courts prefer private law treatises and the leading commentaries to the bare wording of the statutes as contained in official publications, because text and commentary can be found in one and the same source. As far as can be ascertained, there has never been any dispute in the courts of France or Germany regarding the genuineness or veracity of such private editions. It should, however, be noted that in contrast to American legal life, law publishing in Germany and France is only the business of a very few selected and selective printing establishments and that, except for the printing of "doctor" dissertations, no outsiders enter the field. There are no lists issued by the courts containing the names of the publishing houses unofficially or officially "accredited" for judicial notice. The world-wide known editions of "Dalloz", "Sirey", "Librairie de Droit", etc., and of "Beck", "de Gruyter", "Heymann", "Springer", "Bensheimer", "Vahlen" and "Stilke" contain practically all German and French statutes down to the local ordinances, including commentary thereto, and are accepted on their face value. Most lawyers and many courts do not even have bare texts, not to speak of official texts. The weight given to those sources, all of which are unofficial, is so great that Gaupp-Stein (Code of Civil Procedure, p.844) calls the hearing of experts on any kind of law "entirely improper" ("Durchaus unangemessen"). The same attitude has been taken by French law. (cf. Boquel, De L'Office du Juge en Matiere d'Application)

1. cf. New York Civil Practice Act, Sec.391: "A printed copy of a statute or other written law of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree, or ordinance, by the executive power thereof, contained in a book or publication, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the judicial tribunal thereof, is presumptive evidence of the statute, law, proclamation, edict, decree or ordinance."

2. cf. Par.378 of the Uniform Proof of Statutes Act.

3. "Certainly there are no better guides for one seeking information on civil law than the leading treatises, or, perhaps for German law, the leading commentaries." (Russbaum, "The Problem of Proving Foreign Law", The Yale Law Journal, April 1941, p.1025.)
5. While in England there is some authority to the effect that the written law of a foreign country must be proved by an exemplification (authenticated text) and cannot be proved by the printed statute book of such country, the weight of authority in the United States is to the effect that a foreign written law may be received in evidence when it is shown to be contained in a statute book and that the book has been officially published by the government which made the law, or that such book is an official publication of such foreign country. The matter of "official publication", which is so irrelevant under German and French law, therefore takes a major place in the Anglo-Saxon technique of proving foreign laws. Since German and French laws will be relevant before Anglo-American courts or courts composed in part of Anglo-American judges, the question has to be decided as to what such "official publications" in Germany and France are.

6. From the outset, it should be noted that the term "official publication" is ambiguous and has a double connotation. On the one hand, it means a regulation printed in an official publication, i.e., issued by or under the auspices of the government printer or by a publishing house financed by public funds. On the other hand, the term is used in a different, more restrictive sense in that it means the official text, i.e., the only text which is binding in case there should be any conflict with texts printed in other publications, official or unofficial.

Taking the term "official publication" in its first meaning, it should be kept in mind, that, both in France and Germany, statutes, decrees and ordinances of any kind are published in many official publications. Aside from the official sources ("Journal Officiel" and "Reichsgesetzblatt"), which are discussed below, the various legislative and executive branches of the German and French governments and their provincial and municipal subdivisions publish a multitude of official bulletins and gazettes, reproducing regulations from all sources pertinent to the work of the agencies concerned. These official publications are compiled for the convenience of the officials and the public, but their evidentiary force is not greater than that of private publishing houses. No attempt is made to list those official publications in France and Germany. A good survey is to be found in Neuberger, "Official Publications of Nazi Germany", (Library of Congress, 1942), and in Jacques de Dam-pierre (Archiviste-Paleographe, Charge de l'Inventaire, General des Publications Officielles Francaises) "Les Publications Officielles des Pouvoirs Publics" (Paris, 1942).

7. While there are many official publications, there can be only one official text, namely, the decisive one, in case of conflict of text between official publications or between official or unofficial publications.

The matter of which text is the authentic one is regulated both in France and Germany under statute.

I. Germany

(a) Statutes (gesetze) are officially published in the Reichsgesetzblatt (Art. 17 of the Weimar Constitution). The text published therein is the official text, not the text of the manuscript as signed by the Reichs President or the Fuehrer. This text only has the "presumptio iuris et de iure" of authenticity ("Anscheutz", 1. Actually, experience shows that those editions are sometimes less carefully edited than the private ones.
Since 1922 the Reichsgesetzblatt appears in two parts pursuant to the public notice of the German Ministry of the Interior of March 6, 1944 (RGBI., 1923, p. 232), which also regulates the distribution of materials between the two parts. The ruling is that Part II of the RGBl. shall contain:

1. International treaties;
2. Publications regarding:
   - Budget;
   - Industrial property and copyright;
   - Army affairs;
   - Railroad, shipping and waterways;
   - Coal and soft coal industry;
   - Affairs of the Reichstag and Reichswirtschaftsfat;
   - Affairs of the Reichsbank and private banks of issue;
   - Affairs of the Gold Discount Bank and the Bank of German Industrial Debentures.

All other items contained in the aforesaid list have to appear in Part I.

The aforesaid prerogative of the RGBl., which is published by the government printer in Berlin, applies only to statutes of the Reich, i.e., laws promulgated by the legislature proper. A different rule applies to regulations of the provinces (Laender), and all rules and regulations of degrees lesser than that of a statute, both for Reich and "Laender". The principal official sources for those texts are discussed hereafter.

(b) "Rechtsverordnungen" (decrees) of the Reich, i.e., regulations directed to or affecting the individual citizens as contrasted with "Verwaltungsverordnungen" (administrative decrees and ordinances) are officially published in one of the three following official publications, at the option of the legislature:

- "Reichsministerialblatt" (formerly "Zentralblatt" for the German Reich); or
- "The Reichsgesetzblatt"; or
- "The Deutsche Reichsanzeiger".

The text prescribing official publication is to be found in the decree of October 13, 1923 on the publication of "Rechtsverordnungen". Actually, many German decrees of the Reich are published in all three official sources. Since there are sometimes deviations between these most official sources, the question has arisen as to which text among those three is the "most" official. The German commentaries agree (cf. Schiller, On the Publication of "Rechtsverordnungen", Archiv für Öffentliches Recht, 1925, p. 287) that in the case of such conflict, the text appearing in the first published source (date of issue) shall govern.

According to the same Decree of October 13, 1923, "Rechtsverordnungen" concerning civil service affairs and emoluments of civil servants are to be published in the Reichsbesoldungsblatt.

The "Rechtsverordnungen" on postal, telegraphic and cable affairs are to be published in the "Amtsblatt" of the Reichs Postal Ministry.

The same law of 1923 provides that emergency decrees under Article 48 of the Weimar Constitution shall be officially published either in the "Reichsanzeiger" or in the official Bulletins of the various German Ministries of the Reich.

Under the Hitler regime, this system did not basically change, except that promulgation in the "Reichsgesetzblatt" is only a matter of principle, no longer a matter of law. The Nazi crown jurists have held that it was within the discretion of the Fuehrer to choose any other way of publication and thereby to make a law official.
(Laforet, Administrative Law, 1937, p.137). For example, the law on the German Labor Front was "promulgated" by radio and in the newspapers, and the radio transcripts and the newspapers are the official sources. Other laws were promulgated by announcement in factories, etc.

Otherwise, the decree of October 13, 1923 remained in force under Hitler.

(c) "Verwaltungsverordnungen" (administrative orders and decrees) not containing duties imposed upon the citizen need not be published at all in any one of the official sources mentioned above. It is sufficient that there are "zugestellt" (notified), in particular, to the administrative agencies or governmental subdivisions concerned.

(d) It should be borne in mind that the aforesaid rules apply only to statutes, laws and regulations of the Reich, and that, until 1933 and after, each of German "Laender" had, and continued to keep, its own constitution and official ways of publishing laws and regulations. In principle, these rules follow the jurisprudential division of regulations into statutes, decrees and administrative ordinances as indicated above.

To give examples: Art. 80 of the Prussian Constitution provides that all statutes (acts of the legislature) must be published in the "Preussische Gesetzessammlung". Decrees are not covered by this article. The text expressly provides that the decree be published in the aforesaid official source. Otherwise, it is sufficient that the decree be published in the "Preussische Staatsanzeiger" or the official bulletins and organs of the respective Prussian Ministries.

The distribution between the various official sources is regulated by the Prussian law on the publication of decrees, of August 9, 1924 (Pr.G.S.1924,p.597). Decrees on civil service matters are only and always published in the Prussian "Besoldungsblatt".

In Bavaria, Art. 75 of the Bavarian Constitution provides that all laws and decrees (note the difference from Prussia) be published in the Bavarian "Gesetz- und Verordnungsblatt".

It should be noted that since 1933 all those provincial laws are derivative Reich laws and, therefore, subject to the Reich Decree of October 13, 1923 on official publications. Generally speaking, there is little systematic planning on the whole matter to be found since 1933 and considerations of politics and propaganda seem to have been prevalent. To give an example, the official source for Bavarian laws and regulations is no longer the Bavarian "Regierungsanzeiger", but Hitler's newspaper, the "Voelkischer Beobachter", has become the official source and an official section has been inserted in this newspaper (cf. Notice to all Bavarian Ministries of June 12, 1934, Bavarian State Gazette, June 16, 1934, No.135.)

II France

(a) All acts of the legislature (Lois) must be published in the "Official Journal of the French Republic", which, under Vichy, was officially named "Official Gazette of the French State". Laws are judicially to be noticed only when and after they have been published in the "Official Journal". The prerogative of the "Official Journal" has been established by Decree-Law of November 5, 1870. Until such date, the "Bulletin des Lois" was the official source. The "Bulletin" continues to appear up to the present date. Although it is an official publication, it is no longer the official source.

(b) Decrees (decrets) and any other acts of the executive branch affecting the public in general (reglements administratifs) are subject to the same rules (Court of Cassation, Civil Chambers, August 4, 1845 D.P. 1845.1.335) Circular of the Ministry of Interior of December 19, 1846 D.P. 1847.3.22), Decrees and administrative regulations of a local or individual nature need not be published in the "Official Journal", although they may be published. It is sufficient when they are inserted...
in the administrative bulletin of the prefecture concerned or posted in the
interested community. Even promulgation by constant application without physical
publication (usage) was considered sufficient. (Court of Cassation, Criminal Chambers,
March 25, 1854 D.P. 1854. 5. 568).

Such local ordinances and regulations must be published in the "Official
Journal" only in case the text of the regulations provides so (Court of Cassation,
Reg. Feb. 28, 1898 D.P. 1898. 1. 484).

(c) Administrative decisions (decisions administratives) need not be published
anywhere. It suffices that they are made known to the party concerned (Court of
Appeals, Douai, January 24, 1906, D.P. 1910. 2. 1201). The same applies to pre-
fectorial orders and ordinances (arrêts prefectoraux). They must be posted or
published in the usual traditional forms (formes accoutumées) (Court of Cassation,
Criminal Chambers, December 21, 1901 D.P. 1903. 1. 588).

Individual administrative decisions are published by notification to the party
concerned (Dallos, Laws and Decrees, p. 683).

(d) Municipal orders and ordinances are either notified individually or posted
locally in case they affect a number of persons (Art. 96 of the law of April 5, 1884).
No such form of publication is prescribed.