JULIUS CAESAR'S NOTES ON THE STATUS OF POWS

by

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While acting as counsel for the Lord Admiral in D. Admirallus contra Thomam Gorge militem before the High Court of Admiralty1, Dr Hamond decided to address a question on the law of war. After having quoted various civil and canon law authorities, he apologetically remarked that for some specific works on the subject ('particuler treatises de bello, or de re militari'), he was unable to provide more detailed references, as he did not have the books at hand while writing his opinion – although, apparently, they would have been available in his library2. The remark was duly written down by the Admiralty judge, Julius Caesar3, and, in its context, it reflects the growing specialisation of arguments on questions of ius gentium at a time when topics of international law were increasingly becoming the subject-matter of a specialized, monographic literature. The phenomenon can be observed and studied in the legal literature of the time, but Caesar's notes provide a rare insight in the way these doctrinal developments were passed on to forensic practice, at least among the English civil lawyers of Doctors' Commons who practised in the High Court of Admiralty4.

1. La 135, ff. 95v–103 (s.d.). The abbreviation La refers to the Lansdowne Mss. in the British Library.
2. For a full quotation of the passage in Hamond's opinion, infra, note 17.
4. For an assessment of the purpose of these notes, Sir Julius Caesar's Notes on Admiralty Cases: An Alternative to Judicial Reporting?, in: C. Stebbings (ed.), Law Reporting in England, London–Rio Grande 1995, 89–112. The present contribution, as can be inferred from the source-material quoted throughout most notes, is entirely based on the annotations Caesar made when he sat as the judge in the London Court of Admiralty (1582–1606). The nature of these notes and their relation to, mostly, specific cases (apart from a few opinions or discussions on more abstract or general questions), explain why only some features of the law of war will be dealt with; other aspects are simply not raised, or too briefly, and have therefore been omitted. One topic which might have been included is the law of reprisals; though not necessarily linked with war and warfare, it is obvious from Caesar's notes that, in practice, it often was; one civil lawyer even argued that 'represaliae instar belli sunt' (La 130, f. 133v). Also excluded from the present survey are the exceptionally elaborate arguments which appear in cases where opinions by eminent jurists were introduced, and which require a separate treatment (as I have attempted in, e.g., Civil Law in the Practice of the High Court of Admiralty at the Time of Alberico Gentili, Cambridge PhD, 1994; Alberico Gentili and Thomas Crompton, An Encounter between an Academic Jurist and a Forensic Practitioner, [Studia Forensia Historica, I], Leiden 1992; Consilium Facultatis Juridicae Tbingensis. A Legal Opinion on a Case of Maritime Warfare (1593), [Studia Forensia Historica, II], Leiden 1993; Sir Julius Caesar and the Merchants of Venice, in: F. Battenberg and F. Ranieri (eds.), Geschichte der Zentraljustiz in Mitteleuropa, [Festschrift für Bernhard Diestelkamp zum 65. Geburtstag], Weimar–Köln–Wien 1994, 195–219.
Sources and authorities

When dealing with the law of war, the English civil lawyers’ use of authorities broadly reflects the conventions commonly found in contemporary literature on international law topics, though the relative importance of non-legal sources is much less than in many doctrinal treatises of the time. These non-legal sources include: references to Biblical, Ancient, and more recent history; theological treatises; literary works, in particular from Classical Antiquity. These sources cannot be dismissed as a mere conventional, but legally irrelevant, display of cultural sophistication. In many cases, the various historical references, for example, serve the purpose (at least, to some extent) of testifying to certain customs or practices among different eras\(^5\), and thus tend to establish the universality and a justification of these practices in the law of nations\(^6\).

References to legal authorities only partly match today’s approach to the sources of international law. Treaties (unless a specific section or passage is at stake in the case under discussion) were hardly viewed or cited as authorities; while, as a rule, they were not law-creating instruments, they could occasionally be adduced in order to document a general or a foreign practice in international relations\(^7\). More surprisingly in a court where most litigants were merchants or connected with commercial activities, customary law plays only a minor role in legal arguments; when it appears, its tenor is often disputed and may need to be proved\(^8\); in a more general sense, established usages in international relations are referred to by counsel through other, in particular non-legal, sources (e.g. the historical sources, already mentioned). Case law does not appear as such, but indirectly, continental-style reports (Decisiones) are cited, even on questions of international law. These authorities are perhaps more doctrinal than judicial, but remain linked with some forensic practice; the compilation referring to decisions of the Genuese Rota, and N. Boerius’ collection related to the practice of the Bordeaux Parliament (and especially the much-quoted Decisio 178), are such examples. Civil law (viz. Roman and Canon law) provides the quasi-totality of authorities which correspond, in the modern theory of sources, to doctrine and ‘general principles’; moreover, concepts such as ‘natural law’, ius gentium a.o. are often referred to in connection with civil law authorities. The civil law authorities quoted by Admiralty practitioners remain on the whole traditional, reflecting the attachment of English academic book-collectors to mos italicus\(^9\). Accordingly, general or

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5. According to late-Tudor and early-Stuart churchmen, whose sermons and writings often served the purpose of justifying a war, the Bible provided precedents for customs of war: J.R. Hale, Incitement to Violence? English Divines on the Theme of War, 1578 to 1631, now in: J.R. Hale, Renaissance War Studies, London 1983, p. 497.
6. Infra, regarding the sovereign’s power to act against foreign nationals (La 130, ff. 162v et seqq.).
7. For an example, Sir Julius Caesar and the Merchants of Venice, l.c.