

O DIREITO

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JORGE MIRANDA

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Documentos dos Arquivos Nacionais dos EUA: Direito Internacional no tempo da Presidência de George Washington

PROF. DOUTOR CARLOS SARDINHA* **

Podemos considerar que a independência dos EUA contribuiu decisivamente para a formação de um Direito Internacional mais amigo da Humanidade. A doutrina de Grócio segundo a qual o Direito Natural ou Humano (*jus naturale aut humanum*) deve ser observado pelos Cristãos nas suas relações com povos não-Cristãos, não-Europeus, nomeadamente no que respeita a questões relativas à propriedade¹, está documentada nos inícios da prática constitucional e diplomática da nova República. Os documentos do Senado dos EUA provam que os tratados celebrados com Nações Índias eram aprovados pelo Senado tal

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** A presente pesquisa foi levada a cabo pelo Autor nos Arquivos Nacionais dos EUA (Washington, D.C.) durante o mês de agosto de 2018.

¹ Hugo Grotius, *The Free Sea*, Translated by Richard Hakluyt with William Welwod's Critique and Grotius's Reply, Edited and with an Introduction by David Armitage (Natural Law and Enlightenment Classics, Knud Haakonssen, General Editor), Indianapolis: Liberty Fund, 2004, pp. 14-15: «*But the Indians, when the Portugals [sic] came unto them, although they were partly idolaters, partly Mahometans, and entangled in grievous sins, yet had they both publicly and privately authority over their own substance and possessions which without just cause could not be taken from them. So with most sound reasons (following other authors of greatest account) the Spaniard Victoria concludeth, "Secular or ecclesiastical Christians," saith he, "cannot deprive infidels of their equal power and sovereignty for that color only because they are infidels, unless some injury proceeded from them before." "For faith", as Thomas saith well, "doth not take away natural or human law from whence dominion proceedeth; nay, it is a point of heresy to believe that infidels are not lords of their own goods, and to take from them their goods which they possess for this very cause is theft and robbery no less than if the same be done to Christians."*. Texto original latino: Hugo Grotius, *Mare liberum sive de iure quod Batavis competit ad indicana commercia dissertatio*, Lugduni Batavorum (isto é, Leiden): Ex officina Ludovici Elzevirij, 1609, Cap. II, pp. 6-7 (ver: <https://www.kb.nl/themes/geschiedenis-en-cultuur/nederlandse-geschiedenis/mare-liberum-van-hugo-de-groot>).

como os tratados celebrados com potências europeias, nos termos da Constituição dos EUA². Por exemplo, durante o primeiro ano da Presidência de George Washington (29 de agosto de 1789) o Poder Executivo confiou a ‘Comissários’ (*Commissioners*) a tarefa de «*negotiating and concluding treaties of Peace with the independent tribes or Nations of Indians within the limits of the United States, south of the River Ohio*»³, nomeadamente «... *to negotiate and establish peace between the State of Georgia and the Creek Nation*»⁴. Nas Instruções aos Comissários podemos ler: «*You will find the ostensible and probably the real cause of hostilities between Georgia and the Creeks to consist in a difference of Judgment of three Treaties stated to have been made between the said parties, to wit: at Augusta in 1783, at Galphinston in 1785, and at Shoulder Bone in 1786 - Copies of which you have herewith delivered to you. (...) The main points to be ascertained are: 1.st Whether all the lands belonging to the upper and lower Creeks are the common property of the whole Nation?*

Or

2nd *Were the lands stated to have been ceded to Georgia by the three treaties or either of them acknowledged by the Upper Creeks to be the sole property of the Lower Creeks?*

3rd *Were the acknowledged proprietors of the lands stated to have been ceded to Georgias present, or fully represented, at the said three Treaties?*

4th *Did the Creeks present at the said treaties, act with a full understanding of the Cessions, they are stated to have made?*

5th *Were the said Treaties and Cession freely made on the part of the Creeks, uninfluenced by any threat or implication of force?*

These circumstances and all others connected therewith, must be critically examined into, in order that you may form your judgment on the said treaties with the greatest accuracy.

If the result of your investigation should be, that the said three treaties and the cessions of land therein contained, were made by a full and authorized representation of the Creek Nation - or that the cessions of land was obtained with the full understanding and free consent of the acknowledged proprietors, – and that there were no circumstances of unfairness or constraint of any sort used to induce the Creeks to make the cessions to Georgia, in this case precisely, you are to insist on a formal renewal and confirmation of the said Cessions to Georgia, or such parts thereof as you shall find just. _____ If the Creeks after hearing all your arguments for the renewal of the said Treaties so far

² Constituição dos EUA, Artigo II, Secção 2: “He [o Presidente] shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; (...)”.

³ *Transcribed Treaties and Conventions Presented to the U.S. Senate, 1789-1836*, pp. 119-142: *Instructions to the Commissioners for holding a Treaty with the Southern Indians* (National Archives Microfilm Publication M1258, roll 1).

⁴ *Idem*, pp. 120ff.

as the same may respect the confirmation of such parts of the Cessions of land contained therein as you shall have adjudged just and equitable, should obstinately refuse to confirm the same to Georgia, then you are to inform them that the arms of the Union will be called forth for the protection of Georgia in the peaceable and just protection of the said lands_____ and in case the Creeks attempt any molestation or injury to Georgia, that they will be deemed the enemies of the United States and punished accordingly.

But if it should result from your enquiries that the said treaties and cessions were obtained on the part of Georgia under such circumstances as to preclude the interference of the United States consistently with their justice and dignity, you are not to urge or persuade the Creeks to a renewal or confirmation thereof.»

Como se vê, as instruções dirigidas aos Comissários mostram que o Governo dos EUA esperava que o Estado da Geórgia observasse o Direito Internacional (Direito dos Tratados, nomeadamente) ao aceitar cessões de terras feitas pelos índios durante o período revolucionário (isto é, antes de se reunir o 1.º Congresso dos EUA, 1789-1791) sob pena de não-renovação/confirmação de tais Tratados por parte do Governo Federal e da Nação Creek.

Importante é também a proteção concedida à propriedade dos índios pelo «*Treaty of Peace and friendship made and concluded between the President of the United States of America on the part and behalf of the said States and the undersigned Kings, Chiefs and Warriors of the Creek Nation of Indians, on the part and behalf of the said Nation*»⁵. O Artigo 5.º estabelece que:

«*The United States solemnly guarantee to the Creek Nation all their Lands within the limits of the United States to the Westward and Southward of the boundary described in the preceding Article.*»

No Artigo 6.º podemos ler: «*If any citizen of the United States or other person not being an Indian, shall attempt to settle on any of the Creeks lands, such person shall forfeit the protection of the United States, and the Creeks may punish him or not as they please.*»

A Humanidade enquanto pensamento e valor subjacente ao Direito Internacional a aplicar entre Cristãos, isto é, Norte-americanos e Europeus, por um lado, e não-Cristãos, isto é, não-Europeus, por outro, aparece, por exemplo, num «*Explanatory Article*»⁶ de 1796. Estabelecia-se que cidadãos dos EUA, súbditos britânicos e índios gozassem da mesma liberdade num ambiente favorável ao comércio. De acordo com o «... *third Article of the treaty of amity, commerce and navigation*» concluído em 1794 em Londres entre «*his Britannic Majesty and the United States of America*» «...*it should at all times be free to his Majesty's subjects*

⁵ *Idem*, pp. 143 ss.

⁶ *Transcribed Treaties and Conventions Presented to the U.S. Senate, 1789-1836*, pp. 340-344: *Explanatory Article* (National Archives Microfilm Publication M1258, roll 1).

and to the citizens of the United States, and also to the Indians dwelling on either side of the boundary line assigned by the treaty of peace to the United States, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two contracting parties, on the continent of America (the country within the limits of the Hudson's bay company only excepted) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other...»⁷ «(...) And it being the sincere desire of his Britannic Majesty and of the United States that this point should be so explained as to remove all doubts, and promote mutual satisfaction and friendship: And for this purpose his Britannic Majesty having named for his commissioner, Phineas Bond, esquire his Majesty's Consul General for the middle and southern States of America (and now his Majesty's Chargé d'affaires to the United States) and the President of the United States having named for their commissioner Timothy Pickering, esquire, Secretary of State of the United States to whom, agreeably to the laws of the United States he has intrusted this negotiation; They the said commissioners, having communicated to each other their full powers, have in virtue of the same, and conformably to the spirit of the last Article of the said treaty of amity, commerce and navigation, entered into this explanatory Article, and do by these presents explicitly Agree and declare, that no stipulations in any treaty subsequently concluded by either of the contracting parties with any other State or Nation, or with any Indian tribe, can be understood to derogate in any manner from the rights of free intercourse and commerce secured by the aforesaid third Article of the treaty of amity, commerce and navigation, to the subjects of his Majesty and to the citizens of the United States and to the Indians dwelling on either side of the boundary line aforesaid; but that all the said persons shall remain at full liberty freely to pass and repass by land or inland navigation, into the respective territories and countries of the contracting parties, on either side of the said boundary line, and freely to carry on trade and commerce with each other, according to the stipulations of the said third Article of the treaty of amity, commerce and navigation.»

This explanatory Article, when the same shall have been ratified by his majesty and by the President of the United States by and with the advice and consent of their Senate, and the respective ratifications mutually exchanged, shall be added to and make a part of the said treaty of amity, commerce and navigation, and shall be permanently binding upon his majesty and the United States».

⁷ *Idem*, pp. 340-341.