

摘要

美國亞利桑納（University of Arizona）大學的 Robert A. Williams, Jr. 教授，為傑出的法律學家；其研究議題廣泛，包含了國際法與原住民族權利、國際人權以及後殖民理論研究。原住民族的權利論述與主張，為近年來臺灣社會中常見的議題，亦是臺東大學南島文化研究所（以下簡稱本所）近期關懷的重點之一，雖然目前已訂定《原住民族基本法》，但因行政機關與立法機關的怠惰，僅係《原住民族基本法》深陷泥沼之冰山一角，尤有甚者，行政機關與司法系統對於該法之漠視，造成原住民族生存權、財產權與自由權等基本人權的侵害。本次透過邀請 Robert A. Williams, Jr. 教授來訪，除了希望本所師生可以吸收他的研究經驗，讓本所學生接觸原住民族權利、原住民族法律等議題外，也期待增進本所學生對於原住民族現況之瞭解，對於本所學生在研究議題提供了不同的視角。Robert A. Williams, Jr. 教授於 2009 年 11 月 29 日至 12 月 05 日來臺訪問，除了在本所發表一場公開演講外，另外還在國立清華大學科技法律研究所、國立臺灣大學法律學院發表演講及座談，和臺灣的法律學界師生有密切的互動，也對臺灣法律學界提供許多刺激與啟發。藉著 Robert A. Williams, Jr. 教授的訪臺交流計畫，也介紹本所和其他學術單位的研究成果與發展，提升本所和其他學術單位在國際學術界的能見度與知名度。

關鍵詞：Robert A. Williams, Jr.、原住民族權利、訪臺交流、南島所

Abstract

Robert A. Williams, Jr. is professor of law and American Indian studies at the James E. Rogers College of Law, University of Arizona. A member of the Lumbee Indian Tribe, he is author of *The American Indian in Western Legal Thought: The Discourses of Conquest* and coauthor of *Federal Indian Law*.

His research interests cover wide range topics, including Public International Law and Indigenous Peoples Rights, International Human Rights and Post-Colonial Theory studies.

The subjects such as indigenous people human rights and indigenous claims for traditional territory have been a huge controversy in Taiwan in recent years, which have been one of research focuses at the Graduate Institute of Austronesian Studies in National Taitung University (IOAS). By inviting Professor Williams to do an academic visit in Taiwan, IOAS' faculties and graduate students can benefit a lot from his research experience and enable the students to get involved in the area of human rights, such as anthropology and indigenous people, as well as enhance our students to understand the current development of indigenous peoples' rights movement world-wide. In addition, Professor Williams' visit offers our students a variety of perspectives in the research topics.

After careful planning and intensive contacts with other academic institutions, Professor Williams visited Taiwan from 29th of November to 5th of December. He has delivered three public lectures and a roundtable during his stay in a number of academic institutions, including the Institute of Law for Science and Technology at National Tsing Hua University, and National Taiwan University College of Law. He had close interaction with scholars and students in the circle of the discipline of Law and anthropology, and provided many inspirations and refreshing ideas.

In Sum, Professor Williams' visit offers a great opportunity for IOAS international exposures, and builds an academic bridge for research collaboration with international scholars and institutions.

Key Words: Robert A. Williams, Jr, International Law and Indigenous Peoples Rights, visiting Taiwan and academic exchange, Institute of Austronesian Studies

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講題: The Protection of Indigenous Peoples' Rights to Property and Self-Determination: The North American Experience.

一、Robert A. Williams, Jr.個人基本資料

ROBERT A. WILLIAMS, JR.

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Director, Indigenous Peoples Law and Policy Program
The University of Arizona James E. Rogers College of Law
Tucson, Arizona 85721
Office: (520) 621-5622 Fax: (520) 621-9140
e-mail: williams@law.arizona.edu

Member: Lumbee Indian Tribe of North Carolina, Enrollment Number 132,069.

EDUCATION:

Legal:

Harvard Law School, Cambridge, Massachusetts (J.D., June 1980).

Honors and Activities:

H.E.W. American Indian Fellowship Recipient (1977-1980);

Native American Law Students Association;

Research Assistant to Brandeis Professor of Law, Charles M. Haar.

Undergraduate:

Loyola College, Baltimore, Maryland (A.B. English Literature, May, 1977).

Honors and Activities:

Editor-in-Chief, College Newspaper, *The Greyhound*;

Dean's List (six semesters);

Who's Who Among Students in American Colleges and Universities, 1977.

EMPLOYMENT HISTORY:

Academic:

Permanent Tenured Appointment -- 1998 to Present:

E. Thomas Sullivan Professor of Law and American Indian Studies,
Director, Indigenous Peoples Law and Policy (IPLP) Program,

The University of Arizona James E. Rogers College of Law, Tucson,
Arizona.

2005 (Summer term):

Visiting Professor
University of Victoria Law School,
Victoria, British Columbia, Canada.

2004 (Winter and Spring terms):

Oneida Indian Nation Visiting Professor of Law,
Harvard Law School, Cambridge, Massachusetts.

2003 & 2002 (Winter and Spring terms):

Visiting Professor of Law,
Harvard Law School, Cambridge, Massachusetts.

2001 & 2000 (Winter and Spring terms):

Visiting Professor of Law and Bennet Boskey Visiting Lecturer of Law,
Harvard Law School, Cambridge, Massachusetts.

1999 (Winter term):

Visiting Professor of Law, Harvard Law School, Cambridge, Massachusetts.

1992-93:

Cross Distinguished Visiting Professor of Law, University of Washington
School of Law, Seattle, Washington.

1990-1992:

Director, Office of Indian Programs, University of Arizona, Tucson, Arizona
(held joint appointment as Professor of Law while Director).

Fall Semester 1986:

Marks Distinguished Visiting Professor of Law, University of Arizona College of Law, Tucson, Arizona.

1984-1986:

Associate Professor of Law, University of Wisconsin Law School, Madison, Wisconsin (Assistant Professor 1984-1985; received tenure and promotion to rank of Associate Professor, May, 1986).

1981-1984:

Assistant Professor of Law, Rutgers Law School, Camden, New Jersey.

1980-1981:

Teaching Fellow, Boston College Law School, Newton, Massachusetts.

Professional:

1980-81:

Legal Consultant, Regional and Urban Planning Implementation, Inc.,(RUPI), Cambridge, Massachusetts (performed legal and planning analyses for private and public sector clients).

TEACHING AREAS:

Course Curriculum:

Federal Indian Law (I & II); International Law and Indigenous Peoples Rights; International Human Rights; Tribal Courts and Customary Law; Property Law; Critical Race and Post-Colonial Theory.

Clinical Course Instruction:

Faculty Supervisor, Tribal Law Clinic (1989-2000); Faculty Supervisor, Indigenous Peoples Law and Policy Clinic (2000 to Present).

HONORS AND AWARDS:

2006:

Henry and Phyllis Koffler Prize for Outstanding Accomplishments in Public Service, The University of Arizona.

2004:

Oneida Indian Nation Visiting Professor of Law, Harvard Law School, Cambridge, Massachusetts, Winter and Spring terms, 2004 (inaugural holder of Chair).

2001-2002:

Soros Senior Justice Fellowship Award (to research and write *Like a Loaded Weapon: The Rehnquist Court, Indian Rights and the Legal History of Racism in America*).

1992:

Gustavus Meyers Human Rights Center Award (for *The American Indian in Western Legal Thought: The Discourses of Conquest*, as one of the outstanding books published in 1990 on the subject of prejudice in the United States).

1989-1991:

John D. and Catherine T. MacArthur Foundation Award: Program on Peace and International Cooperation (eighteen month fellowship award to research and write a book on North American Indian visions of international law and peace);

National Endowment for the Humanities Award: Division of Research Programs (eighteen month fellowship award to research and write a book on North American Indian visions of international law and peace).

1989-1990:

Outstanding Faculty Member Award: University of Arizona Office of Minority Student Affairs (annual University-wide award to individual faculty member for contributions and service to minority students and campus-wide issues).

1988-1989:

Outstanding Native American Faculty Award: University of Arizona System.

1985-1986:

American Council of Learned Societies/Ford Foundation Fellowship (one year fellowship award to research and write a book on the history of the American Indian in Western legal thought).

PUBLICATIONS:

Books:

LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS AND THE LEGAL HISTORY OF RACISM IN AMERICA (University of Minnesota Press, 2005);

D. GETCHES, C. WILKINSON, & R. WILLIAMS, FEDERAL INDIAN LAW: CASES AND MATERIALS, 5th ed. (West Publishing Co. 2005) (law school textbook);

D. GETCHES, C. WILKINSON, & R. WILLIAMS, FEDERAL INDIAN LAW: CASES AND MATERIALS, 4th ed. (West Publishing Co. 1998) (law school textbook);

LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 (Oxford University Press 1997);

D. GETCHES, c. WILKINSON & R. WILLIAMS, FEDERAL INDIAN LAW, 3rd ed. (West Publishing Co. 1993) (law school textbook);

THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (Oxford University Press 1990) (Recipient of the Gustavus Meyers Human Rights Center Award as one of the outstanding books published in 1990 on the subject of prejudice in the

United States. Sponsoring organizations for this national award include B'nai B'rith and the NAACP).

Selected Law Review and Journal Articles:

“The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources Under the Inter-American Human Rights System,” 14 *Harvard Human Rights Journal* 33 (2001)(with S. James Anaya);

“The White Man’s Indian Law: What’s the Problem,” 2 *Ayaangwaamizin:International Journal of Indigenous Philosophy* 3 (1998-99) (peer refereed academic journal);

“Vampires Anonymous and Critical Race Practice,” 95 *Michigan Law Review* 741 (1997) (Representing Race Symposium Issue, lead article);

“‘The People of the States Where They Are Found Are Often Their Deadliest Enemies’: The Indian Side of the Story of Indian Rights and Federalism,” 38 *Arizona Law Review* 981 (1996) (Major Issues in Federalism Symposium Issue);

“The Sixth Annual McDonald Lecture on Constitutional Studies -- Sovereignty, Racism, Human Rights: Indian Self-Determination and the Postmodern World Legal System,” 2 *Review of Constitutional Studies/Revue D’études Constitutionnelles* 146 (1995);

“Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace,” 82 *California Law Review* 981 (1994) (Critical Race Theory Symposium Issue);

“Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World,” 96 *West Virginia Law Review* 1133 (1994) (Environmental Justice Symposium Issue);

“Columbus’s Legacy: Law As An Instrument of Racial Discrimination Against Indigenous Peoples’ Rights of Self-Determination,” 8 *Arizona*

Journal of International and Comparative Law 51, (1992) (Indigenous Rights Symposium Issue);

“The Rehnquist Court’s Perpetuation of European Cultural Racism Against American Indian Tribes,” 39 *Federal Bar and News Journal* 358 (1992);

“Comment: Human Behavior and Global Change,” 9 *Arizona Journal of International and Comparative Law* 199 (1992);

“The Rights and Status of Indigenous Peoples Under International Law During the Classical Era Treaty Period (1600-1840),” 5 *Law and Anthropology* 238 (1990);

“Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World,” 1990 *Duke Law Journal* 660 (Frontiers of Legal Thought Symposium Issue);

“Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an Indian Cultural Context,” 24 *Georgia Law Review* 1019 (1990) (Women in the Law Symposium Issue);

“Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in The Narrative Traditions of Federal Indian Law,” 31 *Arizona Law Review* 237 (1989) (Indian Law Symposium Issue);

“Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan,” 59 *Colorado Law Review* 427 (1988) (Natural Resources Symposium Issue) (also selected for inclusion in Volume 20 of the *Land Use & Environment Law Review*, a peer refereed journal which publishes an annual anthology of the outstanding articles appearing during the year in the land use and environmental law field);

“Learning Not To Live With Eurocentric Myopia: A Reply to Professor Lawrence’s ‘Learning to Live With the Plenary Power of Congress Over the Indian Nations,’” 30 *Arizona Law Review* 439 (1988);

“Jefferson, the Norman Yoke, and American Indian Lands,” 29 *Arizona Law Review* 165 (1987);

“Taking Rights Aggressively: The Perils and Promise of Critical Legal Studies for Peoples of Color,” 5 *Law and Inequality Journal* 103 (1987);

“The Algebra of Federal Indian Law: The Hard Trail of Americanizing and Decolonizing the White Man’s Indian Jurisprudence,” 1986 *Wisconsin Law Review* 219 (1986);

“Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982,” 22 *Harvard Journal on Legislation* 355 (1985);

“The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought,” 57 *Southern California Law Review* 1 (1983);

“State and Local Development Incentives for Successful Enterprise Zone Initiatives,” 14 *Rutgers Law Journal* 41 (1982).

SCHOLARLY PRESENTATIONS (most recent invited lectures):

Ruth Chance Lecture, Visiting Scholar in Residence, Boalt Center for Social Justice, University of California, Berkeley, September 25, 2006;

Plenary Session Speaker, American Society of International Law, Washington, D.C., March 30, 2006;

Keynote Speaker, “New Voices in Indigenous Research,” University of California Berkeley American Indian Graduate Students Association Annual Conference, March 11, 2006;

Keynote Speaker, University of Oklahoma Tribal Sovereignty Conference, March 8, 2006; *Keynote Speaker*, National Association of Student Personnel Administrators Western Regional Conference, Tucson, Arizona, November 10, 2005;

Plenary Speaker, Western Humanities Alliance Conference, Tucson, Arizona, October 20, 2005;

Featured Speaker, Stanford University Program in American Studies, October 5, 2005;

Keynote Speaker, Morris K. Udall Scholar Awards Banquet, Tucson, Arizona, August 13, 2005;

Featured Speaker, University of Seville, Spain, International Conference Series on Human Rights and Indigenous Peoples, July 24, 2005;

Opening Speaker, 2nd Session, Legal Borderlands: Law and the Construction of American Borderlands Conference, September 10-11, 2004, Pomona College, sponsored by the *American Quarterly* (American Studies Association) and the Hart Institute for American History, Pomona College.

Biever Guest Lecturer Series, “Like a Loaded Weapon, the Rehnquist Court, Indian Rights, and the Legal History of Racism in America,” Loyola Law School, New Orleans, March 14, 2005.

Opening Speaker, First Annual Southwest Indian Law & Policy Conference: “Indian Perspectives on Land,” University of Arizona, March 25, 2005, Tucson, Arizona.

Dreyfus Lecture, Tulane Law School, New Orleans, Louisiana, March 2002.

GRANTS and CONTRACTS (most recent):

2006

Principal Investigator, \$200,000 Grant from the Technology and Research Initiative Fund (TRIF) “Anyplace Access for Arizona (AAA),” “*ArizonaNativeNet*: Bridging the Digital Divide between Native Nations in Arizona and the Higher Education Resources, Knowledge and Expertise of the University of Arizona” (24 month grant period);

Principal Investigator, \$40,000 Grant from the Pascua Yaqui Tribe, Tucson, Arizona, to support IPLP Clinic tribal courts work for 2006-2007;

Principal Investigator, \$25,000 Grant from the Hul'Qumi'Num Treaty Group, British Colombia, Canada, to support IPLP Clinic human rights work for 2006-2007.

2005

Principal Investigator, \$1,000,000 Grant, Department of Justice, Indigenous Peoples Law and Policy Project (congressional earmark) (2005-08);

Principal Investigator, \$200,000 Grant, Department of Education, Indigenous Peoples Law and Policy Project (congressional earmark) (2005-07);

Principal Investigator, \$50,000 Grant, Arizona Board Of Regents "Arizona Reach Out (ARRO) Grant," "The *ArizonaNativeNet* Tribal Leadership Distance Learning Education Project" (18 month grant, 2005-06);

Principal Investigator, \$25,000 Grant from the Pascua Yaqui Tribe, Tucson, Arizona, to support IPLP Clinic tribal courts work for 2005-2006;

Principal Investigator, \$25,000 Grant from the Hul'Qumi'Num Treaty Group, British Colombia, Canada, to support IPLP Clinic human rights work for 2005-2006.

二、Robert A. Williams, Jr. 訪臺交流行程

(一) 學術行程

2009.11.29—12.05

Robert A. Williams, Jr. 是美國亞歷桑納大學法學院教授，對於原住民族權、原住民族法律以及後殖民理論等議題，有著極為重要的論述與探討。臺東大學南島文化研究所獲得南島學術研究計畫辦公室補助，邀請他於 11 月 29 日至 12 月 05 日來臺訪問，進行以下學術交流活動：

12 月 1 日 (二) 清華大學科技法律研究所

講題：Seminar on “The Protection of Indigenous Peoples’ Rights to Property and Self-Determination: The North American Experience”

12 月 2 日 (三) 臺東大學知本校區人文學院南島文化研究所三樓展覽室

講題：Seminar on “The Rule of Law and Indigenous Peoples Human Rights in Historical and Contemporary Perspective”

12 月 4 日 (五) 臺灣大學法律學院霖澤館第一會議室

講題：The Protection of Indigenous Peoples’ Rights to Property and Self-Determination: The North American Experience and Its Implication for Taiwan

12 月 4 日 (五) 臺灣大學法律學院霖澤館第一會議室

座談：Roundtable on the Indigenous Peoples’ Rights: The Cases of North America and Taiwan.

(二) 詳細行程

Sunday November 29	Arrive in Taipei
Monday November 30	Academic and Community Visit in Taipei
Tuesday December 1	地點：清華大學科技法律研究所 主題： Seminar on “The Protection of Indigenous Peoples’ Rights to Property and Self-Determination: The North American Experience”
Tuesday December 1	Arrive in Taitung
Wednesday December 2	地點：臺東大學知本校區人文學院南島文化研究所三樓展覽室 主題： Seminar on “The Rule of Law and Indigenous Peoples Human Rights in Historical and Contemporary Perspective”
Thursday December 3	Visit Paiwan and Rukai communities
Thursday December 3	Arrive in Taipei
Friday December 4	地點：臺灣大學法律學院霖澤館第一會議室 演講： The Protection of Indigenous Peoples’ Rights to Property and Self-Determination: The North American Experience and Its Implication for Taiwan 座談：Roundtable on the Indigenous Peoples’ Rights: The Cases of North America and Taiwan
Saturday December 5	Depart for Tucson, Arizona, U.S.A.

三、Robert A. Williams, Jr.訪台學術活動

(1) 台東大學場次

The Rule of Law and Indigenous Peoples' Human Rights in Historical and Contemporary Perspective:

"The Idea of the Savage in Colonial Legal Thought and Discourse"



Professor Robert A. Williams, Jr.

E. Thomas Sullivan Professor of Law and American Indian Studies
Director, Indigenous Peoples Law and Policy Program
University of Arizona College of Law,
Tucson, Arizona, USA



The Idea of the Savage and Colonization of Taiwan's Indigenous Peoples



- The Han sailor, **Chen Di**, describes the indigenous peoples of Taiwan as **Dong Fan**
東番
or "Eastern Savage" in his *Record of the Eastern Seas* (1603)
- Dutch called Taiwan's indigenous peoples "**Indians**" or "**blacks**", based on their colonial experiences in Asia.
- **生番** "raw/wild" used to define those people who had not submitted to Qing rule
- **熟番** "cooked/tame" for those who had.
- Japanese colonial policy stereotyped Taiwanese as "vicious, violent and cruel" and concluded "this is a pitfall of the world; we must get rid of them all."




"We sailed hence, always in much distress, till we came to the land of the lawless and inhuman Cyclopes. Now the Cyclopes neither plant nor plow, but trust in providence, and live on such wheat, barley, and grapes as grow wild without any kind of tillage, and their wild grapes yield them wine as the sun and rain may grow them. They have no laws or assemblies of the people, but live in caves on the tops of mountains; each is lord and master in his family, and they take no account of their neighbors."

Homer, *The Odyssey*, Book IX

The Idea of the Savage and the Development of the Roman *ius gentium* ("Law of Nations")



Provinces of the Roman Empire
This map is not based on a specific timeframe.





"Grande Ludovisi"



Museo Nazionale Romano, Palazzo Altemps Collection

Japan and the Taiwan Expedition of 1874: The Mudan Incident

- The pretext for Japan's military action was related to events that took place three years earlier when 54 Okinawan fishermen shipwrecked on the island were killed by Taiwanese indigenous peoples.
- Colorful woodblock prints depicting the submission of the Taiwanese to Japanese forces were popular in Japan following the Taiwan Expedition.

**Wars against the Infidels:
The European Crusades to the Holy Lands, 1096-1270 A.D.**

The European Law of Nations and the Doctrine of Discovery

... And, in order that you may enter upon so great an undertaking with greater readiness and heartiness endowed with the benefit of our apostolic favor, we... give, grant, and assign to you and your heirs and successors, kings of Castile and Leon, forever, together with all their dominions, cities, camps, places, and villages, and all rights, jurisdictions, and appurtenances, all islands and mainlands found and to be found, discovered and to be discovered towards the west and south... With this proviso however that none of the islands and mainlands, found and to be found, discovered and to be discovered... be in the actual possession of any Christian king or prince.

POPE ALEXANDER VI, INTER CAETERA DIVINAE, 1493

European Discovery Era and the Idea of the Savage

The Wildermann

Theodor DeBry, South American cannibals., ca.1590.

European Colonial Empires in North America (c. 1750)

Johnson v. McIntosh (1823)

CHIEF JUSTICE MARSHALL:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. ... But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle.... This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

Johnson v. McIntosh (1823)

CHIEF JUSTICE MARSHALL:

“The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.”

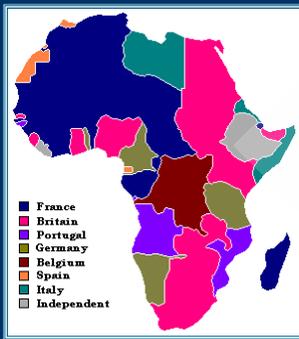
“Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.”

The Peace of Westphalia, 1648



Established modern European state system and following principles:

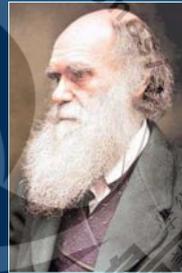
- Sovereignty of nation-states and the fundamental right of political self-determination
- Legal equality between nation-states
- Internationally binding treaties between states
- Non-intervention of one state in the internal affairs of another state
- *Cuius regio, eius religio* (“Whose rule, his religion”)



The Berlin Conference era map of Africa (c. 1885)

ARTICLE 11.

“The Signatory Powers exercising sovereign rights or authority in African territories will continue to watch over the preservation of the native populations and to supervise the improvement of the conditions of their moral and material well-being. They will, in particular, endeavor to secure the complete suppression of slavery in all its forms and of the slave trade by land and sea.”

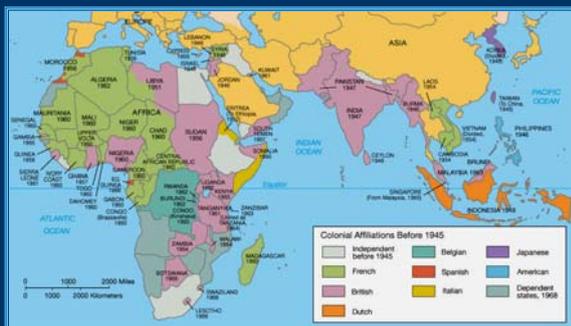


Charles Darwin (1809-1882)

“At some future period, not very distant as measured by centuries, the civilised races of man will almost certainly exterminate and replace throughout the world the savage races”

Charles Darwin, *The Descent of Man* (1871)

The United Nations Decolonization Process and the “Blue Water Thesis”



United Nations Human Rights System

Charter of the United Nations:

Commits Member States to “the principle of equal rights and self-determination of peoples” and to promote respect “for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”

Universal Declaration of Human Rights:

Declares an array of human rights principles premised on the affirmation of the fundamental dignity and equality of human beings.



The United Nations International Covenant on Civil and Political Rights

Article 1:

"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."

Article 27:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to those minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."



UN Human Rights Committee

General Comment No. 23 (interpreting article 27)

"With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law."



UN Committee on the Elimination of Racial Discrimination General Recommendation No. 23 on Indigenous Peoples (1997)

"In many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms ... they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized."

United Nations Declaration on the Rights of Indigenous Peoples

(as adopted by the UN General Assembly, September 13, 2007)

Recognizes:

- the right to self-determination and to determine and develop priorities and strategies for exercising their right to development;
- the right to maintain and develop their distinct political, economic, social and cultural identities and characteristics as well as their legal systems;
- the right not to be subjected to genocide or ethnocide, or actions aimed at or affecting their integrity as distinct peoples, their cultural values and identities, including the dispossession of land, forced relocation, assimilation or integration, the imposition of foreign lifestyles and propaganda;
- the right to observe, teach and practice tribal spiritual and religious traditions;
- the right to maintain and protect manifestations of their cultures, their language, archaeological and historical sites and artifacts;
- the right to restitution of spiritual property taken without their free and informed consent, including the right to repatriate human remains, and protection of sacred places and burial sites.

United Nations Declaration on the Rights of Indigenous Peoples (as adopted by the UN General Assembly, September 13, 2007)

Article 26

"Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."

Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."

United Nations Declaration on the Rights of Indigenous Peoples (as adopted by the UN General Assembly, September 13, 2007)

Article 28

"Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent."

2008 Report of the UN Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples, S. James Anaya

“The United Nations Declaration on the Rights of Indigenous Peoples represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law....[T]he Declaration reflects and builds upon human rights norms of general applicability, as interpreted and applied by United Nations and regional treaty bodies, as well as on the standards advanced by ILO Convention No. 169 and other relevant instruments and processes.”



(2) 臺灣大學場次

美洲國家組織人權系統有關原住民族財產權與自決權的保障： 以北美洲原住民族的經驗為例



Robert A. Williams, Jr.

E. Thomas Sullivan Professor of Law and American Indian Studies
Director, University of Arizona Indigenous Peoples Law and Policy Program



理解北美法制有關原住民族財產權與自決權的 「執行落差 (Implementation Gap)」

「在世界原住民族的第一個國際十年 (1994-2004) 間，許多國家引進國際原住民族人權標準，紛紛進行立法程序與憲法改革，據以作為承認原住民族地位及其實體權利的基礎。...即便法制上確立那些進展，立法建設與日常生活的現實仍存有「執行落差 (implementation gap)」；法律的落實與遵守受到眾多外在阻礙與問題所侵擾。」

聯合國原住民族人權與基本自由狀況特別報告員
2006年年度報告
Mr. Rodolfo Stavenhagen



The European Law of Nations and the Doctrine of Discovery

... And, in order that you may enter upon so great an undertaking with greater readiness and heartiness endowed with the benefit of our apostolic favor, we... give, grant, and assign to you and your heirs and successors, kings of Castile and Leon, forever, together with all their dominions, cities, camps, places, and villages, and all rights, jurisdictions, and appurtenances, all islands and mainlands found and to be found, discovered and to be discovered towards the west and south... With this proviso however that none of the islands and mainlands, found and to be found, discovered and to be discovered... be in the actual possession of any Christian king or prince.

POPE ALEXANDER VI, INTER CAETERA DIVINAE, 1493

The British Empire and the Doctrine of Discovery



Johnson v. McIntosh (1823)

CHIEF JUSTICE MARSHALL:

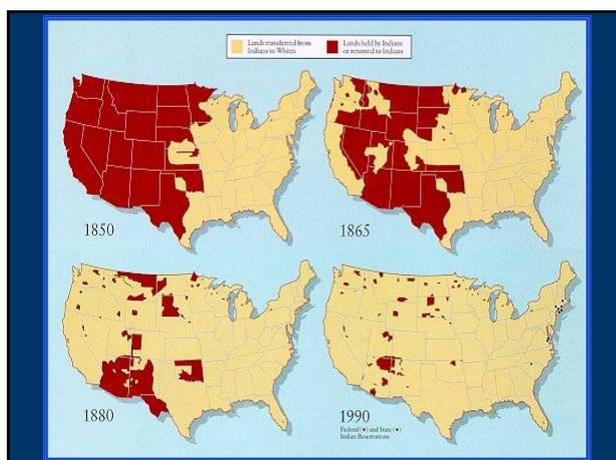
On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. ... But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle.... This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

Johnson v. McIntosh (1823)

CHIEF JUSTICE MARSHALL:

“The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.”



Tee-Hit-Ton Indians v. United States (1955)

At 587,000 square miles, Alaska is as wide as the lower 48 states and larger than Texas, California and Arizona combined.

JUSTICE REED:
 ... The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation. Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conqueror's will that deprived them of their land.

New Zealand and the Doctrine of Discovery

See *Wi Parata v the Bishop of Wellington* (1877), holding that the rights of natives to their land were not something that could be recognized in the courts of New Zealand:

".. [I]n the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice".

Mabo v. Queensland (1992)

"... The great voyages of European discovery opened to European nations the prospect of occupying new and valuable territories that were already inhabited... To these territories the European colonial nations applied the doctrines relating to acquisition of territory that was terra nullius... Various justifications for the acquisition of sovereignty over the territory of "backward peoples" were advanced. The benefits of Christianity and European civilization had been seen as a sufficient justification from medieval times. See Williams, *The American Indian in Western Legal Thought* (1990) and *Johnson v. McIntosh* (1823)."

R. v. Syliboy (1929)
 1 D.L.R. 307

"...But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty, even of ownership, were not recognized. Nova Scotia had passed to great Britain not by gift or purchase or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession, and the Indians passed with it...."

The Idea of the Savage and Colonization of Taiwan's Indigenous Peoples

- The Han sailor, **Chen Di**, describes the indigenous peoples of Taiwan as **Dong Fan** 東番 or "Eastern Savage" in his *Record of the Eastern Seas* (1603)
- Dutch called Taiwan's indigenous peoples "*Indians*" or "*blacks*", based on their colonial experiences in Asia.
- 生番** "raw/wild" used to define those people who had not submitted to Qing rule
- 熟番** "cooked/tame" for those who had.
- Japanese colonial policy stereotyped Taiwanese as "vicious, violent and cruel" and concluded "this is a pitfall of the world; we must get rid of them all."

Inter-American Human Rights System (OAS)

Instruments

Charter of the Organization of American States

Proclaims the commitment of Member States to protect fundamental human rights.

American Convention on Human Rights

Article 2: "All persons are equal before the law and have the rights and duties established in the Declaration, without distinction as to race, creed, sex, language, or any other factor."

American Declaration on the Rights And Duties of Man

Affirms many of the same rights as those in Universal Declaration of Human Rights, and includes the right to property:

Article 23: "Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home."

Inter-American Human Rights System (OAS)

Institutions:

Inter-American Commission on Human Rights

Authority based on OAS Charter; Comprised of 7 independent experts

Can issue State reports, theme reports and adjudicate individual, group and inter-state complaints.

Submit case to Inter-American Court, if state is both a party to the American Convention and has agreed to Court's jurisdiction.

Inter-American Court of Human Rights

Established by American Convention on Human Rights; Comprised of 7 Judges

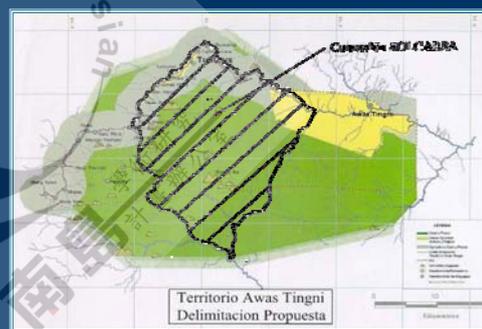
Can adjudicate individual, group and inter-state complaints and issue advisory opinions.

The Case of Awas Tingni vs. Nicaragua



Inter-American Court of Human Rights
Judgment of August 31, 2001

The Case of Awas Tingni vs. Nicaragua Background of the Case



The Case of Awas Tingni vs. Nicaragua

Decision of the Inter-American Court

Nicaragua violated the right to property (article 21) by granting concessions to exploit the resources on Awas Tingni traditional lands and by not titling and demarcating those lands in favor of the community. The right to property includes the collective right of indigenous peoples to the enjoyment of their traditional lands and natural resources.

"...For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."

The Case of Dann vs. the United States

Inter-American Commission on Human Rights

Report of October 2001 (Released July 2002)

"Where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, [indigenous peoples have the right to] recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost."

The Case of the Maya Indigenous Communities of the Toledo District vs. Belize

Inter-American Commission on Human Rights
(2004)

The independent nature of indigenous peoples' property right:

"Accordingly, the organs of the inter-American human rights system have recognized that the property rights protected by the system are not limited to those property interests that are already recognized by states or that are defined by domestic law, but rather that the right to property has an autonomous meaning in international human rights law. In this sense, the jurisprudence of the system has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition...."

CASE OF SAWHOYAMAXA INDIGENOUS COMMUNITY V. PARAGUAY

INTER-AMERICAN COURT OF HUMAN RIGHTS
(JUDGMENT OF MARCH 29, 2006)

- 1) Traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title;
- 2) Traditional possession entitles indigenous people to demand official recognition and registration of property title;
- 3) The members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and
- 4) The members of indigenous peoples who have unwillingly lost possession of their lands to third parties are entitled to restitution or to other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights.

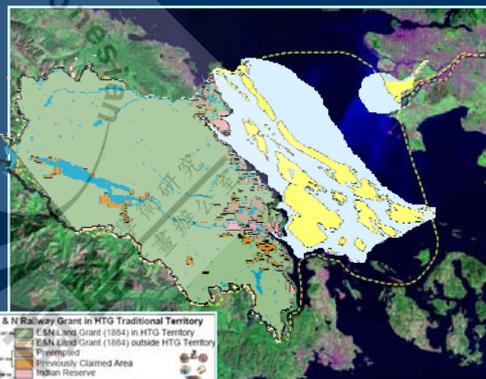
Case of the Saramaka People v. Suriname

Inter-Am. Ct. H.R., Judgment of November 28, 2007
(Preliminary Objections, Merits, Reparations, and Costs)

In order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory does not amount to a denial of their survival as a tribal people, the State must abide by the following three safeguards:

- The State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within their territory.
- The State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory.
- The State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment."

The Hul'qumi'num Indigenous Peoples of Canada and the 1884 E & N Railway Grant



PETITION
to the
INTER-AMERICAN COMMISSION ON HUMAN
RIGHTS
submitted by
THE HUL'QUMI'NUM TREATY GROUP
against
CANADA

Submitted May 10, 2007

112. By unilaterally granting rights and interests in the traditional lands and resources of the Hul'qumi'num peoples to private third parties without ever consulting them, seeking their consent, or offering restitution or payment of just compensation in return for a valid extinguishment of their aboriginal title and property rights and by permitting damaging logging and other development activities on these lands used, occupied and relied upon by the Hul'qumi'num for their cultural survival, Canada is acting in violation of the right to property, the right to restitution for its taking, the right to cultural integrity, the right to consultation and other human rights belonging to the Hul'qumi'num as indigenous peoples.

HTG's Claim of "Irreparable and Immediate Harm"

9. Within the area of the original E & N Railway grant, HTG's research... has been able to confirm a threatening, dramatically accelerating pace of land development and related clear-cutting of forest lands in one key area of Hul'qumi'num traditional territory, North Cowichan, in the Cowichan Valley Regional District (CVRD).

10. ...A satellite-photo map prepared by HTG in connection with this Supplemental Request, "Selected Current Rezoning and Subdivision Applications in the Paldi Area," shows the rapid pace of private development activity in one key area of the CVRD region within the traditional lands of the Hul'qumi'num covered by the E & N Railway grant.



HTG's Request for Precautionary Measures

50. ...Based on the irreparable and imminent harm from clear-cutting of forest lands and other land development activities outlined in its petition and the acceleration of private and commercial land development activities described in the current request, HTG respectfully requests the Commission to call upon Canada to:

(a) suspend consideration and/or approval of all official community plans and zoning amendments, subdivision activity, alterations to agricultural lands reserves and development permit applications and any other land or natural resource development activities on lands traditionally used and occupied by the Hul'qumi'num indigenous peoples within the CVRD and North Cowichan District that are located within the E & N Railway grant area, and ensure that such development activity does not resume or occur, until a mutually agreed upon suitable arrangement is negotiated between the government of Canada and the Hul'qumi'num indigenous communities concerned...





Professor Robert A. Williams, Jr. 羅伯特·威廉斯 教授

時間：98.12.02 (三) 12:00-14:00

地點：台東大學知本校區，人文大樓三樓南島所展覽室

演講：The Rule of Law and Indigenous Peoples Human Rights in Historical and Contemporary Perspective
法治國原則與原住民族人權：歷史與當代的視野探究

台東大學 場次相關資訊

台灣大學 場次相關資訊

時間：98.12.04 (五) 10:00-12:00

地點：Rm 2101, Tsai Research Hall, College of Law, NTU (台大法律學院萬才館101室，辛亥路與復興南路口)

演講：The Protection of Indigenous Peoples' Rights to Property and Self-Determination
The North American Experience and Its Implication for Taiwan

座談：Roundtable on the Indigenous Peoples' Rights : The Cases of North America and Taiwan

09:40-10:00 Registration

10:00-10:10 Welcoming Remark

Moderator：Chao-Ju Chen (陳昭如) Associate Professor, National Taiwan University (國立台灣大學副教授)

10:10-10:50 Lecture

Speaker：Professor Robert A. Williams, Jr.

E. Thomas Sullivan Professor of Law and American Indian Studies & Director of the Indigenous Peoples Law and Policy Program, James E. Rogers College of Law, University of Arizona。

Topic：The Protection of Indigenous Peoples' Rights to Property and Self-Determination: The North American Experience and Its Implication for Taiwan。

10:50-11:20 Roundtable Discussion

Discussants：Awi Mona (Chih-Wei Tsai) (蔡志偉) Assistant Professor, National Taiwan University (國立台灣大學助理教授)

Shu-Ya Lin (林淑雅) Assistant Professor, Providence University (靜宜大學助理教授)
Chuanju Cheng (鄭川如) Ph.D. Candidate, School of Law, University of Washington in Seatle (美國華盛頓大學法學院博士候選人)

11:20-11:30 Response by Speaker

11:30-12:00 Floor Discussion

四、參考文獻

作者：Robert A. Williams, Jr.

(一) 專書

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五、計畫成果自評

Robert A. Williams, Jr.教授此次來臺的三場演講，分別在清華大學、臺東大學以及臺灣大學，三所學術機構分別均為臺灣法學以及南島民族的研究重鎮。Robert A. Williams, Jr.在清華大學及臺灣大學帶給臺灣法律學界的學子們第一手的新知；Robert A. Williams, Jr.教授在聯合國、美洲國家組織等國際組織進行原住民族人權主張與訴訟的相關經驗，也給予了臺東大學、清華大學以及臺灣大學的聽眾們更高層次的視野經驗。

在各個不同的演講場次中，為了能獲得與聽眾最有效的互動效果，Robert A. Williams, Jr.教授皆有不同的配合與調整。Robert A. Williams, Jr.教授由於著作豐富，研究議題廣泛，且在相關田野經驗相當豐富，再加上演說方式生動活潑，因此與各學術機構之師生或研究人員有著良好的交流，臺灣的法學界與原住民族權利的議題也藉由此機會得到不少新知與刺激。Robert A. Williams, Jr.教授訪臺交流計畫亦為本所和其他學術單位提高了國際學術界的能見度與知名度。綜言之，本次計畫執行成果相當豐富且成功，為一規劃、執行皆完善之計畫。若有機會，本所擬將循此一模式繼續申請辦理，也懇請 貴南島學術計畫辦公室多多支持。