The Indigenous Maroons of Jamaica

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In 1739, after over 80 years of successfully resisting the English Government, the English concluded two peace treaties with the Maroons in Jamaica guaranteeing freedom and lands to the Maroons in perpetuity. The treaties, like many other aspects of indigenous and traditional culture and peoples, are seen by many as relics of the past, good for folklore and tourism, but not legally enforceable. However, ever since their signing, the Treaties have been respected and relied upon continuously to this day by the Maroons and their descendants, as a basis for the definition of the relationship between Maroons and the Government of Jamaica, and the apportioning of mutual rights and responsibilities between the respective parties.

As legally concluded documents, which certainly once upon a time were performed by both parties, the question naturally arises as to whether the Treaties are enforceable by the Maroons today and if so how, to what extent, where, and against whom – the British Government and/or the Government of Jamaica. The enforceability of the treaties has implications, not just for some basic assumptions of the common law system of land ownership which Jamaica received from the English, but also for the cultural identity, as well as the economic and political autonomy of the Maroon communities that have traditionally lived on lands the subject of the treaties.

This Paper therefore assesses the 1739 Maroon treaties signed in Jamaica against the backdrop of a similar pattern of law making in the region and indeed around the world at the time, as well as in light of current international law on the rights of indigenous peoples and the status of treaties signed with them. In the Paper the common law method and tools of legal construction and interpretation will be applied, as will the methods and tools of legal construction established and applicable according to the traditional customs of the Maroons.

Re-Righting Reception Theory with the Rights of Indigenous Peoples in Jamaica Settled or Conquered? According to English common law, a territory may be settled, conquered or ceded. This is known as the doctrine of reception. The common law applicable to territories differs according to whether the territory is settled, conquered or ceded. This is known as the doctrine of reception. The common law applicable to territories differs according to whether the territory is settled, conquered or ceded. If the territory is settled, the settlers are deemed to have brought with them the law that was applicable in England at the time of the settlement, that is, “so much of the English law as...applicable to their own situation, and the condition of an
infant colony.” If the territory is conquered or ceded, those laws which were already well-established in the territory would generally remain in force until and unless amended or revoked by the Crown, either by prerogative or statutory enactment, or by the colonial authorities in the territory with the consent of the Crown. In 1494, Christopher Columbus, it is said, ‘discovered’ Jamaica on behalf of Spain. The island was not terra nullius, as living on the island were Tainos (American I

In 1655 England under the authority of Oliver Cromwell, who was then Lord Protector of England during an interregnum, sent General-at-Sea William Penn and General Robert Venables to conquer Hispaniola from the Spanish but they failed. They then came upon neighboring Jamaica and immediately took control of the island. There were approximately 180 Spanish soldiers at Passage Fort where the English forces landed. The Spanish fled to the town of St. Jago de la Vega as they were greatly outnumbered by the English forces. There was little resistance from the few Spanish residents on the island who eventually also fled. The island was placed under military jurisdiction until the restoration of Charles II in 1660 who adopted Cromwell’s conquest of the island and in 1662 appointed Lord Windsor as Governor.

In 1662 Lord Windsor disbanded the military forces which had occupied the island during the protectorate. English settlers subsequently settled the island. It has therefore been argued that England ‘conquered’ Jamaica. However, Jamaica has also been considered as ‘settled’, because at the time of English ‘conquest’, there were only a few remaining Spanish settlers, with no Spanish government and no institutionalized lex loci of Spain in existence. Thus it has been said that “[t]he position of Jamaica remains anomalous”, “controversial” and “confusing.” Varying pronouncements over time include that “the land was conquered, but the inhabitants by whom it was settled were not.” Alternatively, it has been said that the Spanish abandoned or surrendered Jamaica to the English and hence Jamaica was settled not conquered. In 1769 Lord Mansfield presiding in the Court of King’s Bench in R. v. Vaughan said that Jamaica was to be considered as a colony (ie settled) and not as a conquest.

According to two authors, the vexed question of whether, based on the facts, Jamaica was settled or conquered, was not finally determined by a Court of law until 1867 in the case of Jacquet v. Edwards, a decision of the Jamaican Court of Appeal. The Court of Appeal found that
(1) Jamaica was originally conquered territory but is to be treated as a settled colony because “by the acts and conduct of the Crown the colonists became entitled to the same rights and privileges as they would have been entitled to had the colony been a settled one”. Codlin concludes that “Jamaica, having been conquered, was eventually settled after the conquerors had left and should, therefore be regarded as a settled territory.” In typical European superiority complex style, the designation of a “discovered” territory was in relation to whether there was a recognized European government in place on the territory at the time of settlement or conquest. As the Spanish Government had, it is said, abandoned Jamaica before the English arrived in Jamaica in 1494, there was not much of a conquest, apart from the few remaining Spaniards who scarcely put up a resistance. However, what is often overlooked, historically and legally, is that there were already African communities living on the land, some having been free Africans, some runaways from the Spanish plantations and some descendants of the original Tainos, which had for the most part recreated their traditional African forms of community governance and customary law in Jamaica. If therefore the Spanish Government abandoned Jamaica, then all the island would have been owned and occupied by the descendants of the original owners, the Tainos, as well as by the other African inhabitants, the Maroons, who were in possession not through or by virtue of anyone, but by their own seizure and expansion of abandoned lands in the hills and valleys of Jamaica.

Even the English common law doctrine of ‘possession’ undoubtedly renders the Maroons as having better title to their lands than the English. In this respect, Jamaica as we know it was never terra nullius to the Spanish or English, as the Tainos were there before Columbus and the Spanish. There is no evidence, archaeologically or otherwise, of any pre-Taino peoples living on the land subsequently called Jamaica. By 1655 when England under Cromwell invaded, the Spanish Government had already abandoned the island. Only those Spaniards who desired to stay remained on the island. Most of the Tainos having been decimated by forced labor; the plantations were abandoned, leaving Taino and African Maroons who by this time had already established sustainable communities in the interior hills and valleys of the island. The Taino and African Maroons were well-established in Jamaica before the English. When the English did invade or ‘conquer’, the remaining Spaniards fled, but the Maroons never did. The Maroons fought and were never defeated – never conquered. Therefore the argument could be made that the Maroons have a better claim than the English to all of Jamaica, as they were there during and after the Spanish abandonment of the island, and before the English arrived, and were never conquered by the English. Therefore, even if not ‘indigenous’ in relation to the Spanish
invasion, the Maroons are certainly indigenous in relation to the English acquisition of Jamaica. In fact, this notion of English conquest of Jamaica is sustainable only through purely European spectacles, as the sections of lands of the island under the control of the Maroons were never conquered. The English may have caused the few remaining Spanish to flee and may say that they ‘conquered’ the Spanish, but they never conquered the Maroons.

When the English invaded the Maroons repeatedly during the 17th and 18th centuries, the English repeatedly were defeated, thus forcing the English to sue for peace, which resulted in the 1739 Treaties. Thus, contrary to Lord Chief Justice Cockburn’s obiter, not all the land in Jamaica was conquered. In this respect, it becomes patently clear that certainly in relation to the English colonizers in Jamaica; the Maroons were and are indigenous. Were it not for the Treaty a legitimate argument could be made that all of Jamaica rightly belongs to the Maroons. However the historical fact is that the Maroons did conclude Treaties with the English and it is within those Treaties that the Maroons ground their rights to their lands in Jamaica to this day. Hence, despite the alluring intrigue in the foregoing argument of their pre-invasion rights, it is nevertheless the Treaties with which we have to contend to clarify the legal position of Maroon lands in Jamaica today.

However, the analysis of ‘who came first’ clearly shows that the Maroons are indigenous to an English-occupied Jamaica. The Treaties Various African peoples in Central and South America and the Caribbean, from as early as 1580, signed treaties with the invading European nations. Generally such treaties recognized Maroon communities as independent or autonomous polities and confirmed the rights of Maroons to certain lands. Many treaties also secured for the colonizers Maroon assistance in maintaining the security of the colony against internal and external aggression.

The 1739 Treaties came about to end over 80 years of war in Jamaica between the Maroons and the English/British Government. They were signed two related but separate Maroon communities in Jamaica: the Leeward Maroons (in the west of the island) and the Windward Maroons (in the east).

The treaties signed by the Leeward and then the Windward Maroons, with the English, were nearly identical. Of the fifteen clauses in the Leeward Maroon treaty, “Three in particular provide the legal foundation for territorial sovereignty, self-government and jurisdiction.”
“Third. That they shall enjoy and possess, for themselves and posterity forever, all the lands situate and lying between Trelawney Town and the Cockpits, to the amount of fifteen hundred (fifteen thousand) acres, bearing north-west from the said Trelawney Town.

Twelfth. That Captain Cudjoe, with his people, and the captains succeeding him, shall have full power to inflict any punishment they think proper for crimes committed by their men among themselves, death only excepted; in which case, if the captain thinks they deserve death, he shall be obliged to bring them before any Justice of Peace, who shall order proceedings on their trial equal to those of other free negroes.

Fifteenth. That Captain Cudjoe shall, during his life, be chief commander in Trelawney-Town, after his decease, the command to devolve on his brother, Captain Accompong; and in case of his decease, on his next brother Captain Johnny; and failing him, Captain Cuffee shall succeed: who is to be succeeded by Captain Quaco and, after all their demises, the governor, or commander in chief for the time being shall appoint, from time to time, whom he thinks fit for the command. “

Unlike the Treaty signed with Leeward Maroons, the subsequent Treaty signed with the Windward Maroons: (i) referred to the Windward Maroons having surrendered; (ii) did not quantify how much land was agreed to the Windward Maroons. Since then it has been assumed that the Windward Maroons have the right to all their traditional lands which they had at the time of the Treaty and which they continue to live on to this day.

Cudjoe’s Act 1739 sought to incorporate the 1st Treaty with the Leeward Maroons into Jamaican law. Quao’s Act 1739 sought to incorporate the 2nd Treaty with the Windward Maroons into Jamaican law. The Maroons have however consistently stated that these “laws” do not accurately reflect the Treaties that were signed, according to their oral history. Firstly, the Leeward Maroons claim that it was in fact 15,000 acres that was agreed and not a mere 1,500.

It is as a result of the glaring inadequacy of the Windward Treaty lands that, according to the Maroons, led to the Government of Jamaica in 1740 granting Nanny a land patent of an additional 500 acres, where she subsequently founded New Nanny Town, later named Moore (really ‘more’) Town. (As a result, Moore Town is not considered as Treaty land.) So after years of fighting the Maroons in a futile attempt to seize lands from them, the British were forced to sign Treaties with them. As one British official is reputed to have said, if the British did not sign the treaties when they did, the whole island of Jamaica would have likely fallen under Maroon control in the not too distant future. However, the British Government, and subsequently their successors in title, the Jamaican independent Government,
reneged on much of the treaty terms, endorsed by the Parliament and the Courts over time. Divergent views of the Treaties A caveat however in any contemporary assessment of the extent to which there was a meeting of the minds when the treaties were concluded, is that “[t]reaty making was one of the first encounters between two very different legal systems” and “when two very different societies are engaged in a common enterprise, their embers are likely to view it differently”.

Thus “the interpretation of such a document by the two parties may be quite distinct to begin with, and their reinterpretations of it over time, as circumstances change, may diverge markedly.” “For the European colonizers, treaties were binding contracts guaranteeing their political and territorial authority... (especially against rival colonial powers); whereas, for the Maroons, the treaties signified their status as nations and suggested implicit recognition by the colonizers of the validity of their legal and political organization.” The Maroons would not have considered any implications from the English perspective of concluding such treaties, but would have seen such treaties as the acceptance of their freedom and right to continue to live as they had previously, according to their own customs and traditions, independent of the colonizers, even if that meant perhaps ‘minor’ compromises, as in the case of the Maroons in Jamaica, living with a European in their midst and agreeing to return runaway slaves to plantations and to help the colonizer defend Jamaica in times of war with an external foe. It has been stated that for the English, the treaties “were a means to contain a dangerous enemy” by “establishing a relationship between the Crown and a people who had thereby agreed to become a special class of subjects.” Whereas, for the Maroons, the treaties were ‘blood treaties’ and therefore “sacred agreements”, guaranteeing their “eternal freedom, their right to self-government, legal self-regulation and jurisdiction within their community.” The Maroons see the Treaties as binding upon all subsequent generations of Maroons, the validity of which “could be affected only by renewed bloodshed, that is, a resumption of war.” To this day, the Treaties are cited as the basis of Maroon sovereignty and legal authority. From the outset therefore there may have been a divergence of views and objectives. Though it has been argued that after the conclusion of the Treaties, the English government innocently “acting on its understanding, tried shortly after emancipation [in 1834] to abrogate the treaties, alter the rights and status of the Maroons, and merge them in the general free population of the island”, in reality this tactic by the English was an example of “conscious manipulation...to gain political advantage”.

The intention on the part of the English is clearly seen through the Colonial Office
records, and that was to deceive the Maroons into accepting peace. Colonial Office records show that the English seemed impressed by the Spanish model of pacifying “old Runaway Negroes” who over time became “good Subjects” by allotting them land and a general amnesty in exchange for peace and their help to capture fugitive slaves. However, as John Guthrie, one of the English signatories to the first of the Maroon Treaties wrote in 1739, he was obliged to tie himself up by a solemn oath. Therefore, whether or not the English intended to, the fact is that a solemn oath, in writing, was concluded, despite the recognition that the motivation for the war against the Maroons, as well as the overtures for peace, was land-grabbing. Treaty Breaches the post-Treaties history between the English and the Maroons can be divided into two periods – (1) from 1739 to emancipation in 1834; and (2) from 1834 to the present. The relationship during the first period has been characterized as “compatible” while the relationship during the second period has been characterized as one in which the “differences in the underlying conceptions of the Treaties and of the Maroon government relationship have been progressively revealed and argued.” That is an understatement of the actions and attitudes of the Government of Jamaica in the post-treaties era. From as early as 1791, the Government of Jamaica passed a series of laws calculated to undermine Maroon sovereignty and the Treaties. In 1791 Jamaica passed an Act of Parliament providing for Special Courts to try the Maroons. In 1832 the Government of Jamaica passed an Act declaring all Maroons as “free subjects of Her Majesty’s Island”. In 1842 an Act was passed providing that all Maroon lands be vested in Her Majesty for the purpose of being allotted to individual Maroons, who were entitled to only two acres each. In 1956, the Chief Justice of Jamaica delivered a scathing judgment in R. v. Mann O. Rowe [1956] 7 JLR 45 (involving a Maroon, the ex-Secretary of State of Accompong, charged for possession of ganja on Maroon lands), in which the Chief Justice denied any autonomy of the Maroons according to Jamaican law. The then Chief Justice reasoned that “although the arrangement between the Government of Jamaica and the maroons took the form of a treaty, that document was in reality ‘the articles of agreement’ in which were set out, inter alia, the conditions under which His Majesty granted his pardon to rebels...” He continued to assert that “[t]here is today no difference or distinction whatever in the rights and obligations as defined by the law of this Island between the persons residing in the former Maroon
settlements and those of any other British subject in Jamaica.” The 1962 Jamaica Constitution Order in Council passed by the UK Parliament granted Jamaica ‘independence’, whilst retaining Her Majesty Queen Elizabeth II as Head of State. From a legal standpoint, this represents the legal basis and foundation of the establishment of Jamaica as an independent nation state.

However, there is no reference anywhere in the Order in Council or the Constitution of Jamaica, to the Maroons. It can therefore reasonably be assumed that the British and/or Jamaican Legislature did not consider the Maroons as a separate community from Jamaica. But what about the 1739 Treaties signed between the British and the Maroons? On the eve of Jamaican independence in 1962, Member of the UK Parliament, Tom Driberg, raised the very same issue in the House of Commons. However, the UK Parliament declined to intervene or express any official response. Therefore, the issue of the legal effect of the Treaties on the post-independent Government of Jamaica has remained unaddressed and ambiguous at best. This has resulted in there being occasional clashes between the Maroons and the Government of Jamaica mostly in relation to Maroon land and self-government.

The Government of Jamaica continues from time to time to try to tax some Maroon community lands. This has led to fairly recent violent protests by Maroons in 1990s. In 2007, the Government of Jamaica purported to grant prospecting licenses to foreign miners to mine traditional Maroon lands in Cockpit Country. What is needed is the formalization and regulation of the relationship between Maroons and Government of Jamaica. Status of the Treaties national or international law? Such treaties were originally deemed as valid and part of the Laws of Nations. However, after the European powers had already softened the indigenous peoples such as the Maroons, and as the European powers sought to consolidate their empires, they including Britain unilaterally decided to treat such treaties as no longer subject to international law, but to domestic law, which meant subject to the whim and fancy of the colonial powers to amend, abrogate, limit and terminate rights and obligations as they so pleased. The distinction is important in the Roman legal tradition of the European colonizers, as the European powers well knew, for by subsequently deeming the treaties as only valid domestically, then the principle of statehood in international law would deprive the indigenous peoples of any recourse to international law, thereby allowing the illegal disenfranchising of indigenous lands and sovereignty to be remediable in theory only by national courts or tribunals, in effect denying indigenous peoples of any real remedy for the wrongs committed against them. That is precisely what was done through the calculated avoidance of the rights of indigenous peoples being addressed by the
Great Powers at international conferences, thus indigenous peoples’ rights never became the subject of international law. This is hardly surprising as indigenous peoples were not invited and were not present at such international conferences, nor were there interests represented other than as paternalistically and pejoratively, to the advantage of the expansionist colonizing nations. Thus, as part and parcel of the planned and accepted or acquiesced genocide of indigenous peoples the Great Powers deprived indigenous people of nationhood, or international legal personality, of sovereignty, rendering them, as the Maroons are widely seen today, as bereft of any rights or identity over and beyond that of any other national of the colonizers nation. This, sad to say, has been accomplished with the complicity of the law, lawyers and judges, both nationally and internationally, and ranks in this author’s mind among one of the worst crimes against humanity, the attempted genocide of indigenous peoples worldwide. English Common Law Contract law for the purposes of balanced analysis let us assume that the validity and enforceability of the Treaties is justiciable in a Jamaican court, applying English common law principles. Additionally, as the British colonizers, drafters of the Treaty terms, are of the common law tradition, what follow is a common law assessment / analysis of the legal validity and enforceability of the Treaties. In common usage, a treaty may be defined as “an agreement between states; a formal contract or agreement negotiated between countries or other political entities.” Even if the term “treaty” is interpreted just as a contract between the British Government as sovereign and its subjects, the Maroons, it would still be binding, not capable of being discarded and ignored by subsequent Act of Parliament. Just as contracts entered into between the Government of Jamaica and private corporations, whether national or international, remain binding even after the election of a new government, so too would the 1739 Maroon Treaties be legally binding. In regard to the Maroons territories which they owned by virtue of the Treaties, such lands would be subject to compulsory acquisition by the Government but with appropriate compensation, as guaranteed by the 1962 Constitution of Jamaica. But that again would depend on whether the Treaties and the Maroons could legally be said to be subject to the rights and obligations of the laws and Constitution of Jamaica. In practical reality, the Maroons have never had their states recognized juridical, resulting in most if not all Maroons today having acceded to Jamaican nationality and citizenship, thereby subjecting themselves to the rights and obligations of the laws and Constitution of Jamaica. This of course would not preclude the possibility of dual nationality. Intention to create legal relations/obligations and rights It may also be misleading to rely solely on Colonial Office. Correspondence and official documentation to evince an intention, or in the case of the British, a lack of intention
to be bound by the Treaties, written as they were by the British.

In addition, the negotiations that led to the signing of the Treaties are often misrepresented by the British in the Colonial Office papers. Thus it has been said that “[i]n spite of the circumstances that led to treaties, official correspondence often gave the impression either that the initiative for peace treaties came from the Maroons or that the authorities badly mauled them and forced them to sign such treaties.” However, as history objectively reflects, it was the British who, unable to defeat the Maroons, who had become a very serious threat to the Jamaican slave plantation society, decided to negotiate peace and the Treaties with the Maroons. It has been said that the British recognized Maroon “freedom and partial independence in exchange for their loyalty and support” and that Maroon societies thus became “encapsulated structures” or “special class of subjects”. What is clear is that both the British and the Maroons agreed to a common text, the Treaty document, which sets out expressly the nature of the future relationship between the two. From that fact one can infer to both parties the intention to create legal relations. Breach of contract Breaches of contract may be minor, material or fundamental. Minor breaches do not normally result in the termination of a contract, as they usually are the method of performance, which can often be easily agreed. A material breach is a breach that has serious consequences on the outcome of the contract. A fundamental breach is one so serious that the contract has to be terminated. Undoubtedly, several aspects of the Treaties, such as the obligation on the Maroons to return runaway slaves, have been rendered void by emancipation in 1834. Others, including the right of the Colonial Government to have a superintendent (overseer) live in the Maroon communities, have been abandoned. However, the most important aspects of the Treaties which are of the most relevance to this day concern Maroon treaty and traditional lands. These terms of the Treaties, despite the in operation of other terms of the treaties, would still be valid, as the common law principle of severability of contractual terms confirms. No breach without remedy a fundamental principle of English common law is that every wrong shall be remedied in law. Therefore, English contract law provides several remedies for the wronged party, including damages (monetary compensation), as well as specific performance, which is an order by the Court to the party in breach to adequately perform the particular obligation as agreed by the contract. In respect of non-treaty lands, which were traditionally occupied and used by the Maroons prior to, during and/or after the Treaties, would equally have a legal basis for title in common law, under the doctrine of ‘adverse possession’, for it cannot be denied that the Maroons have exercised far in excess of the required twelve (12) years open, quiet, continuous of their traditional lands. Even though there
have been Government attempts to allot the communal Maroon lands to individuals, as well as to ‘take back’ Maroon lands over time, the fact that the majority of Maroon lands remain largely communal land, that is untaxed (Accompong), shows British and now Jamaican Government acquiescence so as to effectively prevent any adverse claim of ownership by the Government of Jamaica. The Government of Jamaica would therefore be prevented by the common law doctrine of estoppe (laches) from claiming ownership of traditional non-treaty Maroon lands. This Government recognition, even albeit limited, of Maroon autonomy, has also been acquiesced by the State’s recognition of traditional Maroon courts and territorial jurisdiction.

International Law Interpretation

In international law treaties may be defined as “consensual agreements between two or more subjects of international law intended to be considered by the parties as binding and containing rules of conduct under international law for at least one of the parties.” However there is no doubt that the treaties were intended by both parties to be binding. The mere fact that the term “treaty” was used indicates that the terms were not seen by either party as between sovereign and subject, but between two equally sovereign entities as to how best to co-operate, co-exist, achieve peace, share the resources and protect the common interest in the isle of Jamaica. Pacta sunt servanda the concept known by the Latin formula pacta sunt servanda (“agreements must be kept”) is arguably the oldest principle of international law. The principle is listed together with ‘good faith’ among the universally recognized principles of international law. "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." So serious is the principle that a party is not authorized to invoke the provisions of its internal law as justification for its failure to perform a treaty. The only limit to the "pacta sunt servanda" rule is to be found in the notion of "peremptory norm of general international law" (or jus cogens). The principle has also come to be a pillar in commercial contract law. The principle has come to have specific application to indigenous peoples, by virtue of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007. Treaties with Indigenous Peoples between the 18th and 20th centuries many treaties were signed between indigenous peoples in various parts of the world and various colonial European nations. “The first treaties between indigenous peoples and European imperial powers were mostly based on the need for commerce and peace, and for this purpose trade companies were given extensive powers to enter into treaty relationships with indigenous peoples in the name of their respective State.” The entire fictional and fundamentally unjust legal doctrine of terra nullius was used by European powers during the period of European expansionism, to justify the enslavement, exploitation and decimation of indigenous
peoples and the theft and rape of their lands and resources.

So fictional and detached from the obvious reality of indigenous peoples living on the land first was this legal doctrine, that the doctrine has come to be severely criticized in more recent times, especially regarding the rights of such persons who were there before the colonizers. International law has come to be known as the law of peace, but this is only more recently, as historically, international law was the law of conquest. The papal endorsement of conquest provided the Spanish colonizers with a just cause or ‘justa causa’, that is a ‘holy war of conquest.’ This rationale for plundering indigenous peoples and their lands was not only used by Portugal and Spain, but also by other European colonial powers including England and France. This was later followed, albeit somewhat modified, by the USA in their notion of ‘manifest destiny.’

However, early in the 16th century the purely Christian basis of might is right began to gradually be replaced by a more huanis theory based on natural law, that is, might is right if it were for a ‘just cause’, a concept first developed in Roman law as part of ‘jus gentium.’ Under that theory, promoted mostly at first by Francisco de Vitoria, indigenous peoples had a natural and human right to their lands, subject to four major duties to: “(1) leave a free passage into their lands for the colonizers; (2) allow the colonizers to trade among them; (3) share the wealth of their lands; (4) permit the propagation of Christianity.” If those ‘duties’ were not fulfilled by indigenous peoples, Vitoria argued that a ‘just war’ against the ‘rebels’ was justified. “Vitoria’s theory reflected what was to be the justification for any acquisition of territory by colonizers in the following centuries.

Therefore, notwithstanding the rejection of the theory of discovery and the recognition of indigenous right of ownership, Vitoria provided a legal framework for the conquest of indigenous territories.” Vitoria is also ‘credited’ as one of the fathers of the ‘trusteeship theory’ whereby indigenous peoples, although as humans were entitled to their lands, were not capable of governing themselves and their lands and was thus an early proponent of the European ‘civilizing mission’ justification for conquest and colonialism. Therefore, as international law and scholarship evolved in the 15th and 16th centuries, “indigenous nations were deemed to have the legal capacity to sign treaties until the interests of States parties changed and these treaties were simply disregarded.” However, as the conscience of the world has evolved and rightfully so in regard to the rights of indigenous people, so too must the oppressive and fundamentally unjust legal doctrines which facilitated the great injustice and genocide, be condemned and repealed, as has been done with the Mabo case, and national and international laws be appropriately realigned and reinterpreted to provide true remedies, reparations and ultimate justice for the indigenous peoples of the world, including the Maroons in Jamaica. “Because of this historical function of the law, a
contemporary role of law must be to attempt to correct the inequities that centuries of enduring the unjust system of slavery and exploitation wrought.” “Just as the law played its role in subjugating Caribbean [and African] peoples, so must it assist in ‘liberating’ them”. “The law must seek to decolonize society, not merely by a ‘patchwork’ method of attempting to fit inadequate law into a proper social context, but by a conscious propulsion of new law, and indeed, if warranted, new legal systems, to promote a more egalitarian social, economic and political system.” Efforts toward that objective have in fact occurred in several countries where large numbers of indigenous peoples exist, including Canada, New Zealand, Australia and the USA, where the laws have recognized native title/indigenous title, and other elements of self-government, albeit limited. International Laws regarding the Rights of Indigenous and Tribal Peoples to their treaty & traditional lands. The rights of indigenous and tribal peoples to respect for their treaties and traditional lands, are well-established in international law and, thereby, are increasingly being recognized in national laws and by national courts. The International Labor Organization (ILO) Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, which was adopted on 27 June 1989, entered into force on 5 September 1991), applies to:

(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. The Convention also clearly establishes that “Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

"According to Article 14:

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized...

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

**Article 15 provides that:**

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In cases in which the State retains the ownership of mineral or subsurface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmers for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

**Article 17 states that:**

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.

2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community. United Nations Declaration on the Rights of Indigenous Peoples 2007

With an overwhelming majority of 143 votes in favor, only 4 negative votes cast (Canada, Australia, New Zealand, and United States) and 11 abstentions, the United Nations General Assembly (GA) adopted the Declaration on the Rights of Indigenous Peoples on September 13, 2007. The Declaration took more than 20 years of negotiation between nation-states and Indigenous Peoples. Most importantly regarding the validity and enforcement of Treaties with indigenous peoples, Article 37 expressly states that “Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honors and respect such treaties, agreements and other constructive arrangements.

"**Article 26 further provides that:**"
1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. 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.

3. 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 people’s concerned.

**Article 10 establishes that:**

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. Article 32 explains that:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. As land is fundamental to a host of traditional knowledge, cultural and medicinal,

**Article 31 of the Declaration is quite far-reaching. It states that:**

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

The Jamaican legal framework does not recognize the right of the Maroon communities to the use and enjoyment of property in accordance with their system of communal property, but rather a privilege to use land. Jamaica has a duty to recognize the right to property of the Maroon communities, within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such right. The right of the members of communities, to collectively own territory has not, as yet, been recognized by any domestic court in Jamaica. Are the Maroons ‘indigenous’ or ‘tribal peoples’ within the meaning of international law? It is unanimously accepted in international law scholarship that there is no internationally agreed definition of ‘indigenous people’. One of the more widely acclaimed definitions of ‘indigenous’ developed at the United Nations level is that of the first United Nations Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, J. Martinez Cobo, in 1986: indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. However, over time, that definition has been subject to much criticism, chief of which being that by limiting the concept of ‘indigenous peoples’ to ‘pre-invasion’ or ‘pre-colonial’ societies, it excludes from protection indigenous peoples who may have been/are being oppressed by equally ‘original’ inhabitants who have become dominant in the polity, or who have never been subject to invasion or colonization (such as arguably some communities in Asia and Africa). The Special Rapporteur in his Report emphasized the importance of self-identification by the individual as belonging to an indigenous community as well as recognition and acceptance of the individual as a member of the community (the right of indigenous peoples to define what and who is indigenous). This principle of self-identification is also recognized as fundamental to determining ‘indigenous and tribal people protected by ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries. Self-identification is therefore the sole foundational criteria for indigently, in recognition of the fact that ‘[t]o presuppose knowledge of the particular “community” or even appropriate criteria would be fundamentally unjust.” Therefore the only
internationally agreed criteria of ‘indigenous people’ is self-identification as ‘indigenous’. Nonetheless, in practice, there will be imposed some objective criteria to be referenced so that intended benefits of the classification and recognition of peoples as indigenous are not abused by peoples who do not fit within some basic criteria. Thus, Chairperson-Rapporteur of the United Nations Working Group on Indigenous Populations, Professor Erica-Irene Daes, purposely refrained from advancing an all-encompassing definition, commenting that “the concept of ‘indigenous’ is not capable of a precise, inclusive definition which can be applied in the same manner to all regions of the world.” Instead, she suggested some ‘factors’, some but not necessarily all of which would be ‘relevant to the understanding’ of the term ‘indigenous’. These are:

(a) [P]riority in time, with respect to the occupation and use of a specific territory;

(b) [T]he voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;

(c) [S]elf-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and

(d) [A]n experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist. So while the majority of definitions of ‘indigenous peoples’ include criteria of pre-invasion continuity, evolving international norms are applying a wider, less restricted definition of ‘indigenous’, reflecting the recognition internationally that while indigenous peoples have certain characteristics or features in common, at the same time the term encompasses a variety of diverse realities and idiosyncrasies, which sometimes greatly differ from each other. Accordingly, there is no universally accepted definition which is deemed to incorporate all possibilities of acceptable criteria, and the preference internationally is to accommodate “the distinctive idiosyncrasy of each community concerned.” In that respect, [C]ommunity in any one instance will be established on a “case by case” basis.’ It is this kind of inclusiveness which the International Labor Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries aims at. Although the Convention applies a definition of ‘indigenous peoples’ which expressly requires “descent from the populations which inhabited the country, or a
geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries”, the fact that the Convention is equally applicable to tribal peoples “whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations”, as it is to indigenous peoples, is significant. Regarding the ILO definitions, two points can be made: (1) the definition of indigenous in the Convention dates back to the original 1957 Convention which the 1989 Convention replaced, and therefore harks back to a time when the generally accepted definition of ‘indigenous’ was still very much limited to conquest. Much has changed regarding the agreed suitability of having a strict as opposed to a more inclusive definition; and (2) the Convention itself, while made during an era of strict definitions of ‘indigenous’ obviously shows the decision and intent of its makers to legitimate and equate the rights of so-called non-indigenous (that is, post-conquest or not pre-conquest) peoples to that of indigenous peoples, on the basis of social, economic, cultural, distinctiveness and tradition. Nonetheless, it has been argued that, for practical purposes, a general definition of ‘indigenous peoples’ is “necessary and opportune, as it attracts certain essential prerogatives and rights under international law and...a concept of great normative power for many relatively powerless groups that have suffered grievous abuses”. For that reason, the test of indigenity has been said to be a subjective as well as objective one, the objective indices to be satisfied including some, but not necessarily all, of the following: occupation of ancestral lands since pre-invasion of colonial societies; common ancestry with original occupants of lands; historical continuity in land occupation; preservation of a peculiar culture, religion and/or language; preservation of a distinctive system of government and social institutions based on customary law; and the intent to develop and transmit ancestral lands and cultural identity as distinctive peoples, to future generations. Similar to the ILO, the World Bank has also maintained a broad definition of the peoples and communities who are the intended beneficiaries of preferential policies. The World Bank’s Operational Directive imposes special requirements in respect of projects affecting indigenous peoples. The directive promotes legal recognition by the state of the customary or traditional land tenure systems of indigenous peoples, as well as indigenous peoples’ participation in decision making regarding project planning, implementation and evaluation. In reality, therefore, the precise applicability of the term ‘indigenous peoples’ may vary according to the country and circumstance, but what is clear is that
the concept and intent of international norms to protect those communities which

(1) Are culturally distinct, and

(2) historically and/or contemporaneously are marginalized within the greater polity, must be given effect, even if the term ‘indigenous’ is not recognized or used by the State or laws. Thus, international classifications and definitions can, as they ought to, be liberally and fundamentally interpreted, for in practical terms, it is tradition, and the narration of community identity, that ultimately inform the legitimacy of claims for protection of community resources, including traditional lands. The debate and tensions over the definition and applicability of the term ‘indigenous’ will continue to rage on, in national and international fora, because with the recognition as ‘indigenous’ comes a host of international law rights of communities and obligations on states, which usually represent competing interests. The superficial nature of the distinction between ‘indigenous’ and non-indigenous has however clearly been recognized in the jurisprudence and judgments of the Inter-American Court of Human Rights, particularly in respect of the Surinamese Maroons. Jurisprudence of the Inter-American Court of Human Rights re: the Surinamese Maroons In the Case of the Moiwana Community v Suriname (Judgment of June 15, 2005), the N’djuka Maroon community of Moiwana took the State of Suriname before the Inter-American Commission and Court for its role in and failure to remedy the attack on and massacre of over 40 men, women and children in the Moiwana community in November 1986, by members of the armed forces of Suriname. The Court, while recognizing that the Moiwana community members are not indigenous to the region, as they only settled there in the late 19th century, held that the communal rights of indigenous communities to property under Article 21 of the American Convention on Human Rights must also apply to the tribal Moiwana community members, on the basis of their “traditional occupancy of Moiwana Village and its surrounding lands”. The Court therefore held that “the Moiwana community members may be considered the legitimate owners of their traditional lands; as a consequence, they have the right to the use and enjoyment of that territory.” This is so even though the Moiwana Village territory formally belonged to the State of Suriname and the Moiwana community members had no formal legal title to the lands, either collectively or individually. The Court’s Judgment is novel in that for the first time it gives judicial recognition to the argument that a strict definition and interpretation of who are entitled as beneficiaries of the rights of indigenous peoples would tend to exclude claimants who, although not indigenous, nevertheless have similar attributes to indigenous peoples, such as in this case a traditional relationship to their lands, to warrant applying the rights of indigenous peoples. The Court was however restating and applying its earlier
jurisprudence that “in the case of indigenous communities who have occupied their ancestral lands in accordance with customary practices – yet who lack real title to the property – mere possession of the land should suffice to obtain official recognition of their communal ownership.” In the Case of the Saramaka People v. Suriname ( Judgment of November 28, 2007), the Saramaka Maroons in Suriname took the State of Suriname before the Inter-American Commission and Court for the State’s approval of the construction of a hydroelectric dam in the 1960s that flooded traditional Saramaka territory, as well as for the State’s failure to recognize the Saramaka’s right to the use and enjoyment of their traditional territories and for the State’s failure to provide the Saramaka people with effective access to justice for the protection of their fundamental right to own property in accordance with their communal traditions. In addressing the issue of whether the Saramaka people are a tribal community subject to special measures to ensure the full exercise of their rights, the Court observed that the Saramaka are one of six distinct Maroon groups in Suriname whose ancestors were African slaves forcibly taken to Suriname during European colonization in the 17th century, and that therefore they were not indigenous to the region. The Court analyzed the organization and social structure of the Saramaka, according to the expert evidence provided, and that they maintain “their own customs and traditions.” The Court went on to comment that their culture is also similar to that of tribal peoples insofar as the members of the Saramaka people maintain a strong spiritual relationship with the ancestral territory they have traditionally used and occupied... Their sacred sites are scattered throughout the territory, while at the same time the territory itself has a sacred value to them. In particular, the identity of the members of the Saramaka people with the land is inextricably linked to their historical fight for freedom from slavery... The Court also considered the economy of the Saramaka as tribal too, in that most of their food came from farms and gardens traditionally cultivated by them. The Court thus concluded that “the Saramaka people make up a tribal community whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs, and/or traditions. The Court proceeded to apply its reasoning in the Moiwana case and found that: the Court’s jurisprudence regarding indigenous peoples’ right to property is also applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival. The Court thus concluded: the
Saramaka people make up a tribal community protected by international human rights law that secures the right to the communal territory they have traditionally used and occupied, derived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival, and that the State has an obligation to adopt special measures to recognize, respect, protect and guarantee the communal property of the members of the Saramaka community to said territory.

Interestingly, this case was unanimously decided by the Judges of the IACHR, including Judge Margarette Macaulay of Jamaica. Applying the ILO Convention definition of tribal peoples and the jurisprudence of the Inter-American Court of Human Rights, the Maroons of Jamaica are to be considered as tribal communities, in respect of which indigenous peoples’ rights to property are applicable, because in common with indigenous peoples, the Maroons share “distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law to guarantee the physical and cultural survival of the community.” The Inter-American Court has declared that the aim and purpose of the special measures required on behalf of the members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States. The Inter-American Court of Human Rights had held previously that, rather than a privilege to use land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples ought to obtain title to their territory in order to guarantee its permanent use and enjoyment. This title must be recognized and respected, not only in practice, but also in law, in order to ensure its legal certainty. In order to obtain such title, the territory traditionally used and occupied by the members of the indigenous and tribal communities must first be delimited and demarcated, in consultation with such people and other neighboring peoples, so as to give effect to the right of communities to own property collectively. The requirement for special measures, including the duty to delimit, demarcate and give title, was part of the Court’s orders in the Moiwana and Saramaka cases. Conclusion Although the 1739 Maroon Treaties are valid and enforceable under English common law, and certainly are valid and enforceable according to Maroon customary law, the best way of enforcing the remaining valid terms of the Treaties may very well be to seek recourse under international law, where the tribunal would not necessarily be compromised by the doctrine of precedent (R. v. Mann O. Rowe), or hindered by the persuasiveness only of international law. The Maroons qualify under the definition as a tribal and indigenous people. The
relationship of the Maroon communities to their treaty lands and traditional lands are to be treated by all concerned, including the Government of Jamaica, in accordance with the international laws, procedures and precedents established as being applicable to indigenous peoples. Pursuant to Article 21 of the American Convention on Human Rights, which Jamaica ratified on July 19, 1978, the Government of Jamaica ought to respect the special relationship that members of the Maroon communities have with their territories, in a way that guarantees their social, cultural, and economic survival. Such protection of property under Article 21 of the Convention, read in conjunction with Articles 1(1) and 2, places upon Jamaica “a positive obligation to adopt special measures that guarantee members of indigenous and tribal peoples the full and equal exercise of their right to the territories they have traditionally used and occupied.” (para. 91 Inter-American Court of Human Rights, Case of the Saramaka People v. Suriname, Judgment of November 28, 2007).

The Maroon communities are therefore protected by international human rights law that secures to the communities the right to their treaty territories, as well as to communal territories they have traditionally used and occupied, derived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival, and Jamaica therefore has an obligation to adopt special measures to recognize, respect, protect and guarantee the communal property right of the Maroon communities (para. 96 Inter-American Court of Human Rights, Case of the Saramaka People v. Suriname, Judgment of November 28, 2007).

Like the earlier Case of the Moiwana Community v. Suriname, the Case of the Saramaka People v. Suriname clearly establishes that even non-‘indigenous’ communities (applying the pre-colonial contextual definition) are entitled to the application of the rights of indigenous peoples, where such communities exhibit “distinct social, cultural, and economic characteristics including a special relationship” with their ancestral or communal territories, which “they have traditionally used and occupied, derived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival.” Even though Jamaica does not recognize the Maroons as indigenous peoples, nor does Jamaica recognize the jurisdiction of the Inter-American Court of Human Rights, it is nonetheless bound by the American Convention on Human Rights. Additionally, Jamaica since August 7, 1978 recognizes the competence of the Inter-American Commission on Human Rights, which has unequivocally issued the same jurisprudence regarding the rights of indigenous and tribal peoples. Therefore the Government of Jamaica ought to implement the following special measures:

1) Delimit, demarcate and grant collective title over Maroon treaty and traditional lands to the respective Maroon communities, through previous, effective
and fully informed consultations with the said communities.

(2) Grant the Maroon communities’ legal recognition of their collective juridical capacity.

(3) Remove or amend the legal provisions that impede protection of the right to property of the Maroon communities and adopt, in its domestic legislation, and through prior, effective and fully informed consultations with the Maroon communities, legislative, administrative and other measures to recognize, protect, guarantee and give legal effect to the right of the Maroon communities to hold collective title to the territories which they have traditionally used and occupied, as well as to manage, control and distribute said territories in accordance with their customary laws.

(4) Adopt legislative, administrative and other measures to recognize and ensure the right of the Maroon communities

    (a) To be effectively consulted, in accordance with their traditions and customs,

    (b) the right to give or withhold their free, informed and prior consent in regard to development or investment projects that may affect their territories, and

    (c) To reasonably share in the benefits of such projects.

(5) Grant and/or allocate the necessary funds and resources to assist the Maroon communities in organizational capacity-building, in terms of skills-training, as well as seed money to finance micro-projects and cottage industry. Failure to do so may be actionable by the Maroon communities under the Constitution and several laws of Jamaica, as well as under international law (the American Convention of Human Rights) to the Inter-American Commission of Human Rights. In the interest of amicable resolution to the centuries of ambiguity and mistrust, the Maroons and the Government of Jamaica should try to negotiate the issue of the 1739 Maroon Treaties within the context of clarifying and maintaining the wider longstanding mutually-beneficial relationship between the Government of Jamaica and the Maroons of Jamaica without compromising the historical and legal continuity of the Maroon communities themselves.