All contemporary discussion about the rights of indigenous peoples in international law is based on the ILO’s work on this issue. The ILO has adopted the only two international Conventions dealing with indigenous and tribal peoples – in the modern sense of “indigenous”, as compared to the pre–Second World War meaning of the term when applied to “native” workers in colonial settings: Convention No. 107 (1957) and Convention No. 169 (1989). These norms reflect two conflicting paradigms in the approach to indigenous policies during the last century: the first is based on the principle of assimilation; while Convention No. 169 presents a human rights-based approach to indigenous policies from the standpoint of multiculturalism.

The concern with the rights of indigenous and tribal peoples by the ILO is far from evident at first glance. As stated by Virginia Leary, “[t]he ILO’s adoption of Conventions on indigenous peoples …, Conventions which are not limited to labour issues, might be interpreted as an anomaly.” Nearly all the reservations that have been expressed about the ILO’s role in this area – not only by outside observers but at important junctures also by parts of the ILO constituency as well – overlook the fact that many indigenous and tribal peoples are the very model of the informal economy with which the ILO has become concerned in more recent years. These instruments have provided guidance on what needs to be done to allow groups who are either outside or at the margins of national societies and economies to survive in the face of other economic and social models.

In addition, both Conventions deal with the fact that when these groups do enter the workforce, they are almost always at the bottom of the scale, and uniquely vulnerable to abuses that are tied closely to their social situation and within the ILO’s area of responsibility. And these peoples are found in most parts of the world – some 350 million in all.

The ILO’s initial concern with indigenous peoples was a manifestation of its work in the pre-Second World War colonial context. Rodriguez-Pinero notes that “the notion of ‘native labour’ was a translation of the notion of ‘trust of civilization’ into the ILO’s realm of activity, referring widely to the duty of protection over ‘indigenous workers’ living in a ‘lower scale of civilization’, both in formerly colonial territories and in post-colonial states.” After the Second World War, the international trust doctrine evolved to cover indigenous peoples in independent countries.

Another path into this subject came from the Americas, and corresponds more closely to present-day concerns. The First American Regional Labour Conference, which was part of a wider attempt to shift the focus of the ILO away from Europe and make it more universal, took place in 1936. When the Office asked American States which issues should be prioritized in the region, they pointed to the working and living conditions of “indigenous populations” – which, in their case, did not refer to populations of dependent territories but to the relevant populations of their own countries. For two decades, the “living and working conditions of indigenous populations”

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1 This section draws on the writings and experience of the author, as well as on the excellent study by L. Rodriguez-Pinero: Indigenous peoples, post-colonialism and international law. The ILO regime (1919-89) (Oxford, Oxford University Press, 2006). It will be noted that this author and Mr. Rodriguez-Pinero differ on important details of motivation for the ILO’s involvement, but on none of the facts.

2 V. Leary: La utilización del Convenio No. 169 de la OIT para proteger los derechos de los pueblos indígenas (San Jose de Costa Rica, Instituto Interamericano de Derechos Humanos, 1999).

3 L. Rodriguez-Pinero, paper submitted to the ILO Century Project Workshop, op. cit.
was a distinct item on the agenda of the periodic American regional conferences, leading to the first international expert missions and the first reports ever published by an international organization concerning indigenous peoples. This period is marked by the influence of “indigenism”, a transnational community linking academics and policy-makers in the search for a “scientific” solution to the so-called “Indian problem.” The ILO assumed the main tenets of the movement, including the objective of social and cultural integration, recourse to cultural anthropology, and the emphasis on development intervention, and turned them into international law.

Two important developments occurred in the early 1950s. The first was the transition from a regional to an international policy, as reflected in the publication of the 1953 book, *Indigenous Peoples,* and the establishment of the short-lived ILO Committee of Experts on Indigenous Labour. The second was the passage from theoretical studies to specific action, with the launching in 1952 of an historic milestone – the Andean Indian Programme (AIP).

The AIP was an ambitious macro-development project, led by the ILO and involving several other parts of the new UN system. It lasted for nearly two decades and covered six countries, and its explicit objective was to promote the integration of indigenous populations in the Andean region. Despite the shortcomings of this first generation of international development projects, the AIP had two important effects for the ILO’s future work in indigenous issues. It had an undeniable demonstration effect for other states with indigenous and tribal populations, showing the benefits – in terms of “development” – of the ILO’s further involvement in these issues. And it consolidated the ILO’s leadership role on this issue vis-à-vis other international organizations and agencies, including the UN.

One of the recommendations of the second session of the ILO Committee of Experts on Indigenous Labour in 1954 was the adoption of a “comprehensive recommendation” formulating “general standards of social policy” in relation to indigenous groups. At the peak of the AIP, the Conference adopted the Indigenous and Tribal Populations Convention (No. 107) and its accompanying Recommendation (No. 104) in 1957. These were the first international standards dealing with the rights of indigenous and tribal populations in independent countries, and aimed well beyond the Americas. The rest of the UN system took part in the deliberations, and was to participate in supervision of the Convention, though in fact they never did so. The Convention is conceived as an applied anthropology handbook to lead states’ development policies towards indigenous groups. Under the general objective of integration – a notion that incorporated simultaneously notions of development, cultural change, and nation-building – the Convention and its accompanying Recommendation contain practical guidance on a wide range of issues, including land reform, education, health, professional training and micro-industry. Some of these subjects go beyond the ILO’s usual fields of action. Convention No. 107 was eventually ratified by only 27 countries, 14 of them in Latin America, but also included an interesting selection of other countries including India, Pakistan, Bangladesh (on separation from Pakistan), Iraq, Egypt and Malawi.

The implementation of Convention No. 107 was not supervised seriously for over a decade. The end of the AIP in 1972 meant, in practice, the end of the Organization’s indigenous policy and the dismantling of internal structures that were responsible for the subject, and the 1957 instruments on indigenous and tribal peoples were very close to being consigned to history. In addition, the integrationist focus of Convention No. 107 ran afoul of other developments.

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The emergence of the international indigenous movement in the mid-1970s, and the first institutional moves in this realm by the United Nations Centre for Human Rights, suddenly reawakened the ILO’s indigenous policy from its state of lethargy. Convention No. 107 was rediscovered as being the only international instrument dealing with indigenous and tribal peoples, and started being targeted by newly-established indigenous groups and activists as the embodiment of the assimilation policies they sought to reverse. The Office began to review this Convention, and to take an active part in the emerging discussions at the international level.

Rodriguez-Pinero, who is practically alone in researching this period of the ILO involvement with the subject, has written that the Office was essentially reacting to a perceived threat to its primacy from the sudden interest of the UN in the subject, and that subsequent ILO work was intended to pre-empt UN action on it. The recollection of the author of this chapter (who as a junior official was the only ILO staff member working on the subject from the early 1970s until the mid-1980s) is that the revival of the ILO’s interest paralleled that of the UN in reacting to a change in the international climate and to the criticism of Convention No. 107. The Convention was recognized as having the wrong focus, and even as being destructive to the aspirations of the emerging indigenous movement.

There was also a concern that the UN’s intention to adopt new standards could encounter political obstacles with which the ILO’s tripartite processes might be able to deal better – which proved prescient. Francis Blanchard, Director-General throughout this period, had been closely involved with the AIP, and allowed the work to proceed. That being said, inter-organizational rivalry might have played a role.

Reacting to severe criticism from the emerging indigenous movement and from other observers of the integrationist and colonialist orientation of Convention No. 107, as well as to pressure on Director-General Blanchard from Jef Rens, the former ILO Deputy Director-General who had been responsible for much of the ILO’s work on this subject during the 1950s and 1960s, the Office proposed to the Governing Body a Meeting of Experts to consider revising the Convention. This colourful meeting in 1986 was the first exposure of the emerging international indigenous community to the ILO, as the usual tripartite participants were supplemented by indigenous members of trade unions, employers’ organizations and government ministries, and by a selection of concerned non-governmental organizations. The Meeting of Experts concluded that the Convention should be revised to remove its integrationist tone – although positions differed on how far the revision should go. The Governing Body decided to place the item on the Conference agenda for 1988 and 1989. After a decidedly unusual ILO Conference discussion that included delegates on all benches who had never encountered the ILO before, the Indigenous and Tribal Peoples Convention (No. 169) was adopted.

Two points of vocabulary in Convention No. 169 are crucial. With regard to coverage, the ILO position has been to look beyond the notion of “first nations” prevalent in the Americas – and later in the United Nations – and to focus on the social situation of the people concerned, rather than on descent alone. Conventions Nos. 107 and 169 therefore cover indigenous and tribal populations/peoples – or what might be described as tribal populations, whether or not they are indigenous in the anthropological sense of the term. In the rest of the international system, the term “indigenous” is now being used to refer to the same peoples covered by Convention No. 169. However, the rejection by countries such as India – which has some 80 million “tribal” people – of the notion that any population group in the country precedes any other, has allowed a number of countries to claim that standards using the term “indigenous” alone do not apply to them. Politically, its importance is that the UN discussions beginning in the mid-1970s reflected a bottom-up initiative from groups who considered themselves “first nations”, with claims built on
prior occupancy rather than the ILO’s “social policy” focus. For instance, the ILO standards apply to groups such as the “garifuna” in Central America, descendants of escaped slaves who live in a way similar to Amerindians but who clearly are not indigenous.

The second point is the word “peoples” in Convention No. 169 – which replaces “populations” in Convention No. 107. The adoption of this term has marked discussions in international forums since the mid-1980s. It is important in law because both the UN International Covenants on human rights provide that “All peoples have the right to self-determination”. The use of the term “peoples” therefore carries potentially heavy consequences. The ILO was the first to be able to adopt the term “peoples” – although in so doing Convention No. 169 provided that the use of this term did not determine its meaning in international law.

Convention No. 169 rejected the notion of integration as the basis for national policy, and replaced it with respect, consultation and participation, and recognition of the continued right of these peoples to exist. As of mid-2008, the Convention has been ratified by only 20 countries, but its influence on both national and international policies has far exceeded the expectations that this low number might imply. The development policies adopted by the World Bank, the Asian and American Development Banks, the UNDP and a number of governments, have taken the Convention as the indisputable floor for action. Countries including Denmark, the Netherlands and Spain have ratified it as a guide for their international development policies. It has had a significant effect on the countries that have ratified it, and has provided a model for action in a number of other countries.

Finally, ILO action on fundamental rights at work has also been influenced. It is no coincidence that indigenous and tribal peoples suffer more from workplace abuses than any other identifiable ethnic group. Denmark, and later the European Union and others, have funded an ILO project to promote Convention No. 169, which has carried out both studies and practical assistance to communities and to countries. Surveys by the ILO’s Special Action Programme on forced labour have identified problems affecting these peoples in particular. And both the Global Reports under the Declaration and the Committee of Experts have frequently remarked on discrimination against them.

The ILO was not acting in a vacuum by the time it began to review Convention No. 107. The UN had completed a study on indigenous peoples in 1981, and in the same year established the Working Group on Indigenous Populations as an organ of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights. The Working Group’s efforts to produce UN standards on indigenous peoples finally yielded the Declaration on the Rights of Indigenous Peoples in 2007 – but it looks unlikely that the United Nations will draft a Convention on the subject. In addition, after proposals agreed upon at the World Conference on Human Rights in 1993, the Permanent Forum on Indigenous Issues was established in 2000 as an organ of ECOSOC, composed jointly of members of indigenous peoples and of governments; while the new Human Rights Council has established a “mechanism” on indigenous rights. The titles of these bodies reflect a continuing lack of comfort with the term “peoples”. The ILO and the UN together established in 1989 what evolved into an Inter-Agency Support Group on Indigenous Affairs, a coordinating body at the Secretariat level that has exercised a considerable influence on UN-system deliberations.

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5 Later note: In August 2010 two further ratifications were received, from Nicaragua and the Central African Republic.
6 http://www.ilo.org/public/english/standards