

GLOBAL ADMINISTRATIVE LAW AT THE INTERNATIONAL LABOUR ORGANISATION: THE PROBLEM OF SOFTER STANDARDS

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Nowadays, labour standards are addressed in a variety of ways at the international level: through the United Nations Global Compact, through the Organisation for Economic Co-operation and Development guidelines for multinationals, through labelling schemes run by non-governmental organisations, through corporate codes of conduct and so on.¹ Nevertheless, the International Labour Organisation (ILO) remains the most important international setter, interpreter and enforcer of labour standards. When thinking about global administrative law in relation to labour standards, the ILO is the obvious place to start.

The ILO is a particularly interesting case study because its approach to standard-setting and enforcement has undergone significant development in recent years. Traditionally, the ILO set relatively detailed, 'legalistic' standards in conventions. If a state chose to ratify a particular convention it laid itself open to various supervisory mechanisms, including a requirement to make regular reports and the possibility of complaints from interested parties. It will be argued that these processes create a relatively obvious

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¹ For an overview, see B. Hepple, 'New Approaches to International Labour Regulation', 1997 26 *Industrial Law Journal* 353; H. Arthurs, 'Reinventing Labor Law for the Global Economy', 2001 22 *Berkeley J. Emp. & Lab. L.* 271.

‘administrative space’. The ILO has acknowledged this by creating and observing procedural fairness norms – an example of global administrative law – when a state is accused of a breach of a convention.

More recently, the ILO has adopted what might be described as ‘softer’ standards in the shape of the 1998 Declaration on Fundamental Rights and Principles at Work. The Declaration identifies four ‘core labour rights’ and seeks to focus the attention of the ILO and its member states on achieving broad compliance with these rights. The Declaration is not subject to the usual ILO supervisory machinery. Instead, it has its own ‘promotional follow-up’, a reporting mechanism that is intended to be used to direct the ILO’s technical assistance to the states that need it most. There is a vigorous debate about whether or not the ILO has made the right move in adopting the Declaration. On the one hand, there are those who argue that the ILO has successfully reinvented itself for modern times.² On the other hand, there are those who argue that the ILO has watered down its standards and weakened its role.³

It is not the purpose of this paper to enter into this debate. Here, the focus will be on the implications of these softer standards for global administrative law. The difficulty is that softer standards and ‘promotional’ mechanisms give rise to a relatively limited administrative space, and thus generate demand only for the most basic administrative

² B.A. Langille, ‘The ILO and the New Economy: Recent Developments’, 1999 15 *International Journal of Comparative Labour Law and Industrial Relations* 229 regards the Declaration as an essential development but acknowledges some potential pitfalls.

³ Most notably P. Alston, ‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime’, 2004 15 *European Journal of International Law* 457.

law standards. In these circumstances – and they may not be confined to the ILO – global administrative law seems to be swimming against the prevailing tide.

HARD STANDARDS AND HARD ENFORCEMENT: GLOBAL ADMINISTRATIVE LAW IN ACTION

Since its foundation in 1919, the ILO has agreed some 185 detailed Conventions on various aspects of labour law,⁴ from the Hours of Work (Industry) Convention in 1919⁵ to the revised Seafarers’ Identity Documents Convention of 2003.⁶ Conventions have the legal status of treaties.⁷ They can only be adopted if they have the support of at least two-thirds of the delegates at the International Labour Conference.⁸ States are then invited to ratify each new Convention.⁹ The ILO also agrees softer standards in the form of Recommendations.¹⁰ These are not subject to ratification. They may be used either to supplement a Convention by explaining its requirements more fully, or in place of a Convention where one cannot be agreed. The discussion in this section will focus on Conventions.

The ILO Constitution envisages two main mechanisms for the enforcement of ratified Conventions. Under Article 24, an employers’ association or a trade union may make a

⁴ For a general account of the work of the ILO, see H. Bartolomei de la Cruz, G. von Potobsky and L. Swepston (1996), *The International Labor Organization: the International Standards System and Basic Human Rights*.

⁵ Convention No. 1.

⁶ Convention No. 185.

⁷ ILO Constitution, Article 20.

⁸ Above note 7, Article 19(2).

⁹ Above note 7, Article 19(5).

¹⁰ Above note 7, Article 19(1) and (6).

‘representation’ to the effect that a state is not complying with a Convention it has ratified. The Governing Body may invite the state to respond. If there is no response, or if the response is unsatisfactory, the Governing Body may publish the complaint and (where appropriate) the response.¹¹ Detailed Standing Orders set out the procedures to be followed in dealing with representations.¹² Under Article 26, there is a ‘complaints’ procedure. This differs from the ‘representation’ procedure both in terms of who can complain and in terms of the possible outcome of the complaint. A complaint may be brought by another state which has ratified the same Convention,¹³ by a Conference delegate, or by the Governing Body.¹⁴ As with a ‘representation’, the Governing Body may invite the state to respond.¹⁵ The Governing Body may then choose to refer the complaint to a three-member Commission of Inquiry.¹⁶ The Commission of Inquiry investigates the complaint and produces a report, with recommendations where appropriate.¹⁷ If any government involved in the complaint is unhappy with the report, it may refer the case to the International Court of Justice (ICJ)¹⁸ which has the power to ‘affirm, vary or reverse’ the Commission’s findings.¹⁹ If the Commission’s (or ICJ’s) recommendations are not carried out by the offending state, the Governing Body may invoke Article 33 of the Constitution and recommend to the Conference that action should be taken ‘as it may deem wise and expedient to secure compliance therewith’.

¹¹ Above note 7, Article 25.

¹² *ILO Standing Orders: Representations, Articles 24 and 25 of the Constitution.*

¹³ Above note 7, Article 26(1).

¹⁴ Above note 7, Article 26(4).

¹⁵ Above note 7, Article 26(2).

¹⁶ Above note 7, Article 26(3).

¹⁷ Above note 7, Article 28.

¹⁸ Above note 7, Article 29.

¹⁹ Above note 7, Article 32.

These formal procedures have been supplemented with two other mechanisms not envisaged in the Constitution itself. One is the Committee on Freedom of Association.²⁰ Upholding freedom of association has been regarded by the ILO as a basic obligation of membership long before it became popular to speak of ‘core labour rights’. The Committee on Freedom of Association is a nine-member committee of the Governing Body which has responsibility for investigating complaints from trade unions and employers’ associations regarding freedom of association, and reporting back to the Governing Body. Importantly, a complaint may be made to this Committee regardless of whether the state in question has ratified the two main ILO Conventions in this field, on freedom of association²¹ and collective bargaining.²² A second mechanism not envisaged in the Constitution but nevertheless of fundamental importance is the regular supervisory work of the Committee of Experts for the Application of Conventions and Recommendations (CEACR).²³ Article 22 of the Constitution requires states to make an annual report on their efforts to comply with the Conventions they have ratified. CEACR may request clarifications if it is not satisfied with a state’s annual report. It may report problems to the Conference Committee on the Application of Conventions. This Committee may initiate a debate with the state concerned and, if problems remain, may publicise the matter in its report to the full Conference. This mechanism is useful because it does not need to be triggered by a complaint.

²⁰ For a useful introduction, see F. Maupain, ‘The Settlement of Disputes within the International Labour Office’, 1999 2 *Journal of International Economic Law* 273, at 277.

²¹ ILO Convention No. 87 (1948), *Freedom of Association and Protection of the Right to Organise*.

²² ILO Convention No. 98 (1949), *Right to Organise and Collective Bargaining Convention*.

²³ See, generally, above n. 20, at 276-7.

It is submitted that these various mechanisms give rise to a clear-cut area of ‘administrative space’ in the ILO.²⁴ The ILO can be regarded as an ‘administrative actor’, policing the subjects of ILO regulation – the states – for their compliance with its norms. It seeks information from states, judges that information against agreed standards, and where there is a breach, takes steps to secure compliance (through adverse publicity, recommendations for change and so on). The ILO’s role under these mechanisms is clearly administrative in the sense that it can be distinguished from legislation and adjudication. It is true that three out of the four mechanisms considered so far are triggered by complaints. This may give the appearance of adjudication, not administration. But this is clearly incorrect. The complaint acts as a trigger for an examination of whether the state in question has fulfilled its obligations, either under a ratified Convention or under freedom of association principles. At the end of the process, there are no winners or losers. Instead, there is a judgement about compliance. All four mechanisms can therefore be regarded as classic examples of administrative activity.

It also seems correct to say, following the model set out in Kingsbury *et al.*, that the ILO’s administrative activities give rise to a need for global administrative law, in the sense that they are not completely under the control of the member states.²⁵ One reason for this particular to the ILO setting is the Organisation’s tripartite structure. Each member state sends four delegates to the International Labour Conference: two government representatives, one representative of worker organisations and one representative of employer organisations. The delegates vote as individuals. The smaller

²⁴ Following the methodology set out in B. Kingsbury, N. Krisch and R. Stewart (2004) ‘The Emergence of Global Administrative Law’, International Institute for Law and Justice Working Paper 2004/1, at 7-14.

²⁵ Above note 24, at 13.

Governing Body, which meets more frequently, is also tripartite. It consists of twenty-eight government representatives, fourteen worker representatives and fourteen employer representatives, selected in accordance with Article 7 of the Constitution. In fact, tripartism is carried through into most aspects of the ILO’s work: its committees are generally tripartite in nature. Moreover, the ILO also makes use of independent experts in certain settings, most notably CEACR. Thus, it cannot be argued that the states themselves control the ILO’s administrative processes.

A Case Study: Burma/Myanmar

In fact, the ILO itself has acknowledged that it ought to observe basic administrative law standards, and in particular procedural fairness norms,²⁶ when operating its supervisory procedures.²⁷ In order to illustrate this point – and to critique the ILO’s approach – it is helpful to use a case-study. The discussion will focus on proceedings concerning the problem of forced labour in Burma/Myanmar. This case-study is interesting because it involves a full use of all the ILO’s supervisory procedures and some explicit consideration by ILO bodies of procedural fairness issues. The discussion will be organised around four core elements of procedural fairness: notice of the allegations being made, the use of appropriate rules of evidence, an opportunity for the ‘accused’ state to be heard, and promptness in deciding on the complaint. These elements are familiar to the English administrative lawyer, and it will be assumed here that they would

²⁶ Above note 24, at 24-5, identify procedural fairness norms as a component of global administrative law.

²⁷ Above note 24, at 20-22, note the importance of self-regulation as a source of global administrative law.

command acceptance in other systems too. Indeed, the fact that they are present in the ILO’s practice tends to confirm this.

Burma/Myanmar has been a member of the ILO since it achieved independence in 1948.²⁸ In 1962, there was a military coup, and since then the government has subjected its people to widespread and gross violations of basic human rights. The international community has responded with sanctions of various kinds. The World Bank and IMF stopped lending to Burma/Myanmar in 1988, and states have imposed various measures including the suspension of aid programmes and the withdrawal of tariff preferences. In 1955, prior to the coup, Burma/Myanmar had ratified the ILO’s Forced Labour Convention.²⁹ But the human rights abuses in the country include the routine use of forced labour: individuals are commonly compelled to work as porters for the army, or to work on government construction projects. This puts Burma/Myanmar in breach of the Forced Labour Convention.

The ILO’s supervisory bodies have for many years criticised the state for failing to comply with the Convention. Successive reports of the CEACR have drawn attention to the Village Act 1907 and the Towns Act 1907, which empower officials to requisition local people to assist in the performance of public duties under threat of penalty.³⁰ CEACR has called for the legislation to be repealed and for steps to be taken to ensure that forced labour does not occur in practice. The Conference Committee on the

²⁸ For a useful summary of the situation in Burma/Myanmar and the international response, see P. Bowers (2004), *Burma* (House of Commons Library Research Paper 04/16).

²⁹ ILO Convention No. 29 (1930).

³⁰ The most recent is CEACR (2004), *Individual Observation concerning Convention No. 29, Forced Labour, 1930 Myanmar (ratification: 1955)*.

Application of Standards has also paid special attention to the forced labour problem in Burma/Myanmar on a number of occasions.³¹ In 1993, the International Confederation of Free Trade Unions (ICFTU) made a representation under Article 24. The Governing Body set up a tripartite committee which examined the representation and concluded that Burma/Myanmar was in breach of the Forced Labour Convention.³² The committee’s report was approved by the Governing Body in 1994.³³ A complaint under Article 26 of the ILO Constitution was presented in 1996 by worker representatives. The Governing Body referred the complaint to a Commission of Inquiry which, after a detailed investigation, again found that Burma/Myanmar was in breach of the Convention.³⁴ As is well-known, this led ultimately to the first-ever use of Article 33 by the International Labour Conference to call on states and other international organisations to review their relations with Burma/Myanmar and to ensure that they were doing nothing to contribute to the problem of forced labour.³⁵ To this day, the ILO continues to review the position.³⁶ Although the government of Burma/Myanmar has repeatedly expressed willingness to co-operate with the ILO and to eliminate forced labour, there is virtually no evidence of change on the ground.

³¹ The Conference Committee’s most recent discussion is (2004), *Individual Observation concerning Convention No. 29, Forced Labour, 1930 Myanmar (ratification: 1955)*.

³² ILO (1993), *Report of the Committee Set Up to Consider the Representation Made by the International Confederation of Free Trade Unions Under Article 24 of the ILO Constitution Alleging Non-Observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)*.

³³ ILO Governing Body, 261st Session, November 1994 (GB.261/13/7).

³⁴ ILO (1998), *Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)*.

³⁵ ILC (2000), *Resolution Concerning the Measures Recommended by the Governing Body under Article 33 of the ILO Constitution on the Subject of Myanmar (88th Session)*.

³⁶ At the time of writing, the most recent discussion was at the 292nd Session of the Governing Body in March 2005.

Throughout these long and complex procedures, the ILO supervisory bodies have emphasised the importance of observing procedural fairness norms. A first basic principle is that *the ‘accused’ should be fully informed of the allegations being made*. The government of Burma/Myanmar could hardly have protested ignorance of the accusation that it was using forced labour in breach of its convention obligations. Its attention had been drawn to the issue on numerous occasions by the CEACR and the Conference Committee on the Application of Standards.³⁷ Nevertheless, in relation to both the representation and the complaint, the ILO bodies ensured that the government was given full details of the allegations being made. For example, the Governing Body’s first response to the Article 26 complaint was to invite the government of Burma/Myanmar to comment on the allegations and to send a representative to participate in further discussions of the issue before the Governing Body.³⁸ The Governing Body did not decide to set up the Commission of Inquiry until it had received the government’s comments and determined that there were major differences between the allegations made and the government’s claims.³⁹

The only significant limit on the information given to the government was that some witnesses were allowed to remain anonymous. This practice was adopted by the Commission of Inquiry, which travelled to neighbouring countries (since the government refused to consent to a visit to Burma/Myanmar) to interview some of the alleged victims of forced labour.⁴⁰ This does create some difficulties in terms of procedural fairness,

³⁷ Above notes 30 and 31.

³⁸ At its 267th Session, November 1996. For a convenient summary, see above note 34, paras. 4-5.

³⁹ At its 268th Session, March 1997. Above note 34, para. 8.

⁴⁰ For details, see above note 34, at paras. 77-98.

because it can be difficult to challenge or discredit witnesses without knowing their identity. However, the practice is common where those witnesses might be placed in danger if anonymity is removed. In English administrative law, for example, bodies which receive evidence from informers or sensitive security sources are allowed to limit the information they pass on to the accused.⁴¹ Given the Burma/Myanmar government’s history of human rights abuses, and in particular its use of violence to suppress its critics, the granting of anonymity to witnesses was felt by the Commission of Inquiry to be essential.⁴² It is submitted that, under the circumstances, this did not undermine the overall fairness of the proceedings.

A second fundamental component of a fair hearing is that *the decision-making body should observe appropriate rules of evidence*. These rules should be designed to ensure that the information before the body is relevant, and satisfies minimum standards of reliability (direct testimony rather than hearsay, for example). The tripartite committee which investigated the Article 24 representation was limited in the evidence it could hear – it had no power to conduct its own fact-finding mission, for example – so the most interesting body to examine from this perspective is the Commission of Inquiry. At an early stage, the Commission rejected the idea that its procedures should be strictly adversarial:

Furthermore, the Commission considered that its role was not to be confined to an examination of the information furnished by the parties themselves or in support of their contentions. The Commission would take all necessary measures to obtain as complete and objective information as possible on the matters at issue.⁴³

⁴¹ See, for example, *R v. Gaming Board, ex p. Benaim and Khaida* [1970] 2 QB 417, at 431 (per Lord Denning MR).

⁴² Above note 34, para. 82.

⁴³ Above note 34, para. 14.

This allowed the Commission to consider two main additional sources of information. One was written submissions from other interested parties, such as governments, companies, trade unions and NGOs.⁴⁴ The Commission invited these submissions, but was also prepared to consider information that was volunteered by bodies it had not specifically contacted.⁴⁵ The other source was oral testimony collected by the Commission itself on a fact-finding mission to India, Thailand and Bangladesh.⁴⁶ As noted above, the Commission had planned to visit Burma/Myanmar as part of its investigations, but this request was refused by the government.⁴⁷ The Commission asked NGOs and international organisations to identify individuals who might be able to contribute information about the situation in Burma/Myanmar, and then conducted relatively informal interviews with them. The Commission also took evidence from witnesses during more formal hearings in Geneva.⁴⁸ These witnesses included individuals with first-hand experience of forced labour in Burma/Myanmar, and researchers who had investigated the problem.

These procedures – particularly those adopted during the Commission’s visit to the region – do give rise to some concerns about fairness, particularly when viewed from an Anglo-American adversarial perspective. Were the interviewees selected by the NGOs a representative sample? Did they have direct experience of forced labour, or might they have been reporting hearsay? Was it fair to deny the Burma/Myanmar government an opportunity of cross-examining these witnesses? How reliable were the written

⁴⁴ Above note 34, paras. 19-21.

⁴⁵ Above note 34, para. 22.

⁴⁶ Above note 40.

⁴⁷ Above note 34, paras. 69-70.

⁴⁸ Above note 34, paras. 55-68.

representations from actors with important interests at stake: companies with interests in Burma/Myanmar, or campaign organisations? Of course, at one level, these concerns can be met with the simple response that the evidence of forced labour in Burma/Myanmar is overwhelming anyway, whatever sources are used. But it is important to ask whether the procedures would be fair if they were used again in less clear-cut circumstances. Importantly, the Commission itself showed some awareness of the issues. It made clear that it preferred oral testimony to written evidence because of its higher probative value, though in reaching its conclusions it did take into account the large volume of written material it had received.⁴⁹ It acknowledged the importance of checking and corroborating the accounts of witnesses.⁵⁰ It also emphasised the cumulative effect of the large volume of evidence it gathered: this helped to overcome potential problems with particular sources of information.⁵¹ Nevertheless, it is submitted that in a more contested case, stricter rules of evidence might need to be observed.

A third key component of a fair procedure is that *the accused should have an opportunity to respond to the allegations made*. In this respect, the ILO bodies have behaved with scrupulous fairness. States are entitled to respond to the CEACR’s observations during the regular reporting process, an opportunity frequently used by the Burma/Myanmar government. Its arguments – that it is about to repeal the offending legislation, and that what may appear to be ‘forced’ labour is in fact voluntary community service – have been repeatedly questioned by CEACR.⁵² The tripartite committee which heard the

⁴⁹ Above note 34, paras. 77-78.

⁵⁰ Above note 34, para. 84.

⁵¹ Above note 34, para. 523.

⁵² Above note 30.

representation,⁵³ and the Commission of Inquiry,⁵⁴ also invited the government to make submissions, as did the Governing Body at the outset and conclusion of both inquiries.⁵⁵ Interestingly, the Burma/Myanmar government has not always availed itself of these opportunities. Although it made submissions to the tripartite committee and to the Commission, it did not attend the oral hearings in Geneva at which witnesses were examined. This worried the Commission. However, it concluded that the government’s absence was a deliberate choice, and that no doubt was thereby cast on the fairness of its procedures:

In the light of the foregoing, the Commission considered that the Government of Myanmar had been duly informed of the dates on which the Second Session would be held and that it had been given adequate opportunity to participate in the proceedings. The Commission therefore concluded that the Government of Myanmar had abstained in full knowledge that it was not availing itself of its right to be present at the hearings.⁵⁶

This shows an awareness of procedural concerns on the part of the Commission, but importantly also illustrates the Commission’s determination not to allow the Burma/Myanmar government to disrupt proceedings by making unfounded claims of unfairness.

A final element of procedural fairness, recognised by the Commission of Inquiry in particular, is that *complaints should be resolved without undue delay*:

Finally, the Commission was aware that its procedure had to ensure that the complaint would be examined expeditiously, avoiding undue delay and thereby ensuring a fair procedure.⁵⁷

This became particularly relevant when the Burma/Myanmar government refused to participate in the Geneva hearings. The Commission was faced with a choice between

⁵³ Above note 32, para. 7.

⁵⁴ Above note 34, especially para. 18.

⁵⁵ Above note 38, and at its 273rd Session, November 1998.

⁵⁶ Above note 34, para. 58.

⁵⁷ Above note 34, para. 15.

adjourning the hearings in the hope that the government could be persuaded to participate, or continuing with the hearings regardless of the government’s absence. As noted above, its decision to do the latter was based partly on its conclusion that the government had deliberately chosen to absent itself. But it was reinforced in this view by the need to conclude its investigations as quickly as possible.⁵⁸ This is an important consideration in view of the complexity of the Commission’s procedures.

In sum, the ILO’s ‘hard’ standards, or conventions, are accompanied by formal supervisory mechanisms (both routine and complaints-based) that give rise to a clear-cut need for the procedural fairness norms commonly found in administrative law. The Commission of Inquiry acknowledged this point quite explicitly when discussing its own procedures: ‘the rules of procedure had to safeguard the right of the parties to a fair procedure as recognized in international law’.⁵⁹ There is a recognition both of the importance of fair procedures and of their status as *legal* standards. This aspect of the ILO’s work thus provides an excellent example of global administrative law in action.

SOFT STANDARDS AND SOFT ENFORCEMENT: NO SPACE FOR GLOBAL ADMINISTRATIVE LAW?

In recent years, the ILO’s focus has – arguably at least – shifted away from detailed Conventions and their enforcement through formal procedures. This came about as a result of the 1998 Declaration on Fundamental Principles and Rights at Work. This

⁵⁸ Above note 34, para. 58.

⁵⁹ Above note 34, para. 13.

involved emphasising respect for four ‘core labour rights’, to be scrutinised through various ‘promotional’ reporting mechanisms rather than the formal procedures just discussed.⁶⁰ The Declaration has been regarded by many commentators as an effective response by the ILO to a legitimacy crisis: to calls for the Organisation to focus less on standard-setting and more on enforcement.⁶¹ The WTO’s Singapore Ministerial Declaration,⁶² and indeed the very presence of the WTO as an effective enforcer of standards on the international stage, contributed to this legitimacy crisis. In my view, it is possible to exaggerate the extent to which the Declaration has changed the ILO’s approach. Part of the purpose of the Declaration was to encourage states to ratify the Conventions associated with the four core labour rights, a campaign which has had considerable success.⁶³ Soft and hard approaches to enforcement may – and indeed probably should – blur into each other. But the issue I want to focus on in the present paper is the ILO’s approach to the softer standards and its implications for global administrative law. I will begin by introducing the Declaration and its follow-up mechanisms, before turning to the question of global administrative space and global administrative law.

⁶⁰ ILO (1998), *Declaration on Fundamental Principles and Rights At Work (and Follow-Up)* (ILC 86th Session).

⁶¹ For discussion, see Langille, above note 2, at 231-7. For a critique of this view, see Alston, above note 3.

⁶² WTO (1996), *Singapore Ministerial Declaration*, para. 4, and see Langille, above note 2, at 240-1.

⁶³ The latest statistics are available on the ILO’s website at: <http://www.ilo.org/ilolex/english/docs/declworld.htm>. The fundamental conventions are: Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87); Right to Organize and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Equal Remuneration Convention, 1951 (No. 100); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182).

The Declaration identifies four labour rights as being at the core of the ILO’s work: freedom of association and the right to engage in collective bargaining, freedom from forced labour, freedom from child labour, and freedom from discrimination.⁶⁴ Importantly, states are deemed to support these core rights simply by virtue of their membership of the ILO, regardless of whether or not they have ratified the relevant Conventions. This had the major advantage of enabling the ILO to ‘get round’ one of the major limits on its ability to enforce standards. But it had consequences. Because the Declaration does not depend on states’ consent, the ILO could not employ the same enforcement mechanisms in respect of the Declaration rights that it does in respect of ratified Conventions. It was clear that states would not accept the Declaration unless a softer enforcement mechanism was employed. Agreement was reached on two ‘follow-up’ mechanisms set out in an annexe to the Declaration. Throughout, the emphasis is on the ‘promotional’ nature of the mechanisms.

The first mechanism is the annual follow-up.⁶⁵ This involves collating reports from those member states which have not ratified any or all of the Conventions connected to the core labour rights in the Declaration. In accordance with Article 19(5)(e) of the Constitution, each member state is to explain ‘the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention’. This obligation applies to all

⁶⁴ ILO, above note 60, para. 2.

⁶⁵ ILO (1998), *Follow-Up to the Declaration*, Part II.

unratified Conventions regardless of whether or not they are included in the Declaration. But it is given extra force in relation to the core Conventions because the reports are collated and considered together by the Governing Body. A committee of experts reviews the reports and draws any important issues to the attention of the Governing Body.

The second follow-up mechanism is the Global Report.⁶⁶ This is produced annually on one of the four core labour rights, thus giving a four-year cycle of reports on the Declaration as a whole.⁶⁷ It is compiled by the Director-General, drawing on information from the annual reports just described, and from the Article 22 reports submitted by states which have ratified the fundamental Conventions. The Annex describes the purpose of the Global Report as being to: ‘provide a dynamic global picture relating to each category of fundamental principles and rights noted during the preceding four-year period, and to serve as a basis for assessing the effectiveness of the assistance provided by the Organization, and for determining priorities for the following period, in the form of action plans for technical cooperation designed in particular to mobilize the internal and external resources necessary to carry them out’.⁶⁸ The emphasis here is on gathering information and enabling the ILO to improve its provision of technical assistance.

When these reporting procedures were first introduced, they were interpreted in some quarters as being quite similar to the ILO’s existing supervisory mechanisms involving CEACR, discussed above. It was thought that all the elements of a mechanism for

⁶⁶ Above note 65, Part III.

⁶⁷ The reports thus far are: ILO (2000), *Your Voice at Work*; (2001) *Stopping Forced Labour*; (2002) *A Future Without Child Labour*; (2003) *Time for Equality at Work*; (2004) *Organizing for Social Justice*.

⁶⁸ Above note 65, Part III, para. A1.

securing compliance with standards were in place. The ILO would gather information about states’ practices, judge their accounts in the light of the Declaration rights, and ‘punish’ non-compliant states by publishing critical comments in the reports and by condemning them in subsequent discussions. Some delegates felt that the Declaration would inevitably develop in this direction, even though they believed that this was not the framers’ original intention and, more generally, not appropriate. The representative of the government of Pakistan summed up the issues thus:

The follow-up mechanism is promotional in name only. The annual review and the global report have a built-in adversarial content. A major element of the follow-up mechanism, the global report, was added despite the concerns or objections of many countries. The global report, despite earlier assurances to the contrary, is duplicative and will entail double scrutiny. It will be country-specific and case-specific. It is likely to target countries – if not now, then later.⁶⁹

Other delegates positively hoped that the Declaration would ‘harden’ over time. For example, the US government representative stated, in the debate on the adoption of the Declaration:

The Declaration and follow-up that we are to put in place today in this plenary has two important elements. First, a clear political and moral recommitment to the fundamental rights and principles enshrined in the ILO, and secondly the accountability of all member States through the new reporting mechanisms. We believe it essential that this must be a dynamic and serious process with a really credible follow-up, holding us all up to scrutiny for these fundamental rights, or it will prove a short-lived result and we will fall short of the legacy of those who have gone before us.⁷⁰

Those who were concerned that the ILO was ‘watering down’ its formal standards and procedures – worker organisations in particular – consoled themselves with the thought that the follow-up might take on an administrative character. The ILO’s freedom of association procedures, discussed above, offered a possible analogy in the sense that their

⁶⁹ ILC 86th Session, 1998, discussion in plenary on *Report of the Committee on the Declaration of Principles*, statement by Ms Janjua.

⁷⁰ Above note 69, statement by Mr Samet.

constitutional basis is similar to that of the Declaration, but over time the procedures have become much more legalistic in their operation.⁷¹

If this interpretation of the follow-up had prevailed, it would have created an obvious space for global administrative law. Formal procedural fairness norms could easily have been attached to a process of this kind. For example, states ought to have been given an opportunity to comment on the ILO’s findings before critical comments were published in the reports, and to participate in discussions of the reports. Indeed, the Declaration itself provided that states which were not represented on the Governing Body should be permitted to participate in its discussions of the annual reports so that they could provide ‘clarifications which might prove necessary or useful during Governing Body discussions to supplement the information contained in their reports’.⁷²

However, this hoped-for or feared ‘hardening’ of the follow-up has not taken place. Instead, a softer view has triumphed.⁷³ The global reports illustrate this very clearly. The first of the global reports, *Your Voice at Work*, drew heavily on the core conventions on freedom of association and collective bargaining.⁷⁴ The ILO derived a series of propositions from the conventions as to the component parts of the rights at issue (freedom from employer interference, limits on state control and so on) and used them as headings for the different sections of the report. This approach was much criticised during the debates. For example, the US employer delegate said: ‘The fundamental flaw

⁷¹ See Langille, above note 2, at 246-7.

⁷² Above note 65, Part II, para. B4.

⁷³ See also Alston, above note 3.

⁷⁴ ILO (2000), *Your Voice at Work*.

of the Global Report is this failure to recognise the qualitative and substantive difference between the Declaration follow-up and existing supervisory procedures’.⁷⁵ It was felt that the report should have looked at freedom of association and collective bargaining as ‘general principles’, rather than as legal concepts with a technical meaning. In subsequent years, the ILO changed its approach in response to these criticisms. The second global report, on forced labour, was much more thematic in its approach and was organised around the main economic sectors in which forced labour might prevail.⁷⁶ Delegates welcomed the change.⁷⁷ Perhaps most significantly, the 2004 report, which returned to the subject of freedom of association and collective bargaining, is quite different in character from its predecessor in 2000.⁷⁸ It attempted to provide information about bargaining levels and bargaining coverage in different sectors of the economy and devoted less attention to problems with specific aspects of freedom of association and collective bargaining.

The soft interpretation of the follow-up is, of course, controversial. On the one hand, it is arguable that since states are bound by the Declaration regardless of whether or not they have ratified the relevant conventions, there is a good technical justification for ensuring that the follow-up does not mirror the supervisory mechanisms which are triggered by ratification. On the other hand, the soft interpretation can be seen as a successful strategic move by those states which were in breach of the core labour rights and wanted to avoid

⁷⁵ ILC, 88th Session, Sixth Sitting (Tuesday 6 June 2000), statement by Mr Potter.

⁷⁶ ILO (2001), *Stopping Forced Labour*.

⁷⁷ In 2001 the same delegate is much more enthusiastic about the report: ‘although more needs to be done to make the report less legal, we particularly appreciate the less legalistic orientation of the Global Report this year as compared to last year’. ILC, 89th Session (2001), statement by Mr Potter.

⁷⁸ ILO (2004), *Organizing for Social Justice*.

creating another source of public criticism. But my concern is with the global administrative law implications of the soft interpretation. Does the soft follow-up give rise to any administrative space at all?

It was noted above that the administrative process of judging compliance with standards involves three main components: gathering information, assessing the information against the relevant standards, and where a breach is discovered, taking steps to secure compliance. The follow-up clearly involves the first of these components, gathering information. The annual report involves the collection of country-specific information, and the global report uses that information to build a wider picture of the issues surrounding the right in question. The second component, judging the information, does exist to some extent but in a much less clear-cut and formal way than it does in the ILO’s hard procedures, discussed above. The global reports cite those states which are failing to comply with the Declaration rights, but in the context of more general discussions of the worldwide picture. And in discussions – the Conference discussion of the global report, and the Governing Body discussion of the annual reports – delegates tend to confine their comments to the regional or global situation and to the ILO’s role in providing technical assistance. The third component – taking steps to secure compliance – is present only in a relatively limited sense. It is true that both reports involve a review of ILO technical assistance. But technical assistance is only available to states which request it. Thus, it helps those states which support the norms and are struggling to comply with them, but it is entirely irrelevant to those states which are not making any such efforts. The reports and their associated debates do involve some public criticism of recalcitrant states, which

in ILO terms is regarded as a sanction, but as noted above, the criticism is relatively limited: the reports are not strongly worded and delegates tend to avoid explicit condemnation of particular states. Overall, the follow-up seems to fall more into the category of information-gathering than judging compliance with standards.

Of course, the activity of information-gathering is clearly administrative, and must give rise to some, albeit limited, administrative law standards. For example, the ILO must be expected to gather information from reliable sources and to present it in a fair and accurate way. But the norms discussed earlier in relation to the hard standards do not seem to be applicable here. If there is no real judging and no real condemnation, there is no need to give states a chance to comment on the ILO’s evidence and conclusions, either through written submissions or formal hearings. Thus, the move to softer standards and softer follow-up procedures has squeezed out most of the administrative space, and thus most of the need for global administrative law. And importantly, this is reflected in the ILO’s practice. In relation to the hard standards, actors within the ILO acknowledged the need for procedural fairness norms and discussed what shape they should take. In relation to the Declaration follow-up, the discussions are focused on the importance of maintaining its soft character and, implicitly, thereby avoiding the need for any strong procedural fairness norms.

It should not be inferred from this discussion that global administrative law is of no value in analysing the ILO’s activities. The ILO’s formal supervisory mechanisms give rise to an obvious administrative space and thus to a need for global administrative law, a point

readily acknowledged by the ILO itself. Even when the ILO is using softer standards, global administrative law may still be of some limited relevance, as noted above. But the importance given to softer standards in recent years does reduce the scope for global administrative law quite significantly. Formal participation rights simply do not fit with reporting mechanisms which have no real element of judging or punishing. At the ILO, global administrative law does not seem to fit with the zeitgeist.

CONCLUSION

The real question for the global administrative law project is whether the developments at the ILO are unique to that setting, or whether they are mirrored in other contexts. My sense is that the trend towards softer standards is a wider one. The UN Global Compact – which uses the ILO Declaration as the source of the labour rights it contains – is another example of the phenomenon.⁷⁹ It uses broad, general standards and avoids technical definitions. And it focuses on reporting positive achievements rather than on judging compliance. In the EU, the Commission now makes use of a range of ‘soft law’ procedures and instruments to address employment issues, such as the open method of co-ordination, often in place of traditional legislation.⁸⁰ States are set ‘benchmarks’ to attain rather than binding legal rules with which to comply. If the trend towards softer standards is a more general one, it suggests that the global administrative space is shrinking, and that the role for administrative law techniques may be diminishing.

⁷⁹ For details, see <http://www.unglobalcompact.org/Portal/Default.asp?>.

⁸⁰ For discussion, see J. Kenner (2003), *EU Employment Law: From Rome to Amsterdam and Beyond* (Hart Publishing), chapter 11.

But I do not want to conclude the discussion on a gloomy note. Even if there is a trend towards softer standards, global administrative law does still have an important role to play. First, regulation theorists make important links between soft and hard approaches to enforcement. The famous Ayres and Braithwaite pyramid envisages the use of persuasion in most cases, with sanctions reserved for a few situations in which the subjects of regulation are particularly recalcitrant.⁸¹ The ILO has been able to use the Declaration very successfully to persuade many states to sign up to the conventions governing the core labour rights.⁸² Thus, we should not infer that an emphasis on soft approaches at a particular point in time necessarily signals the demise of harder approaches and thus of global administrative law.

Second, global administrative law itself may do something to stop the trend towards softer approaches. The methodology of global administrative law as developed by Kingsbury *et al.* is to identify administrative spaces and then create administrative law norms which fit those spaces.⁸³ But some actors might want to employ the opposite approach: to apply detailed administrative law norms even where the administrative space is relatively limited. For example, those countries which were hostile to the ILO Declaration could have forced the Organisation to notify states which were to be criticised in the global report and to allow them to comment. They could have argued that being named in the report amounted to a judgement of breach by the ILO, and a sanction in the form of public criticism. If the ILO had gone down this route, the character of the

⁸¹ I. Ayres and J. Braithwaite (1992), *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press).

⁸² Though cf. Alston, above note 3.

⁸³ Above note 24.

global report would have changed from soft to hard. In other words, the introduction of global administrative law norms would have enlarged the administrative space. I do not want to suggest that the purpose of the global administrative law project is to change the nature of international organisations’ activities. But I do want to highlight the fine line between identifying an administrative space and creating one. For better or worse, global administrative law itself may have transformative potential.