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SUPERVISOR: Professor Debbie Collier

Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the Masters in International Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signed this 15th day of March 2021

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GLOSSARY

ACFTU – All-China Federation of Trade Unions.

CCP – Chinese Communist Party.

ICCRR – International Convention on Civil and Political Rights, 1966.

ICESCR – International Convention on Economic, Social and Cultural Rights, 1966.

ILO – International Labour Organisation.

ITUC – International Trade Union Confederation.

LCL – Labour Contract Law of the People's Republic of China Order No. 65 of 2007.

LL – Labour Law of the People's Republic of China Order No. 28 of 1994.

PRC – The People's Republic of China.

TUL – Trade Union Law of the People's Republic of China Order No. 18 of 2009.

UDHR – Universal Declaration of Human Rights, 1948.

ABSTRACT

In recent years, the People's Republic of China has been expanding its presence in Africa and developing enterprises across the African continent. China is now one of the largest investors and trading partner in Africa. The impact of this investment on labour standards, and the expectation of Chinese investors in this regard, is likely to be a concern for host countries. The purpose of this study is to consider whether China's approach to freedom of association and the right to collective bargaining is compatible with international labour standards, which have been ratified by most African countries. This is achieved by comparing the relevant laws in China, that regulate freedom of association and collective bargaining, against the international standards set by the International Labour Organisation's (ILO) Conventions and Recommendations. In particular, the provisions of the Freedom of Association Convention (No. 87) and the Collective Bargaining Convention (No .98), among others, together with the findings of the ILO Committee on Freedom of Association, are used to determine an international standards 'comparator'. The Chinese Labour Law, Trade Union Law and Labour Contract Law are subsequently evaluated against this comparator in order to determine the extent of compliance of the Chinese labour system with international labour standards.

The outcome of the comparison shows a broad degree of compliance with international standards relating to the formal recognition in law of the rights to freedom of association and collective bargaining as well as the identification of vulnerable classes of workers such as women, migrant workers and rural workers. However, two major discrepancies in the Chinese legal system were found: first, in relation to trade unions - the existence of one centralised representative organisation known as the All-China Federation of Trade Unions (ACFTU), with overarching authority, infringes the establishment, autonomy, independence and functioning of smaller grass-roots trade unions. Second, the right to strike was found to be suppressed in China.

Ultimately, the Chinese formulation of the right to freedom of association and the exercise thereof is inherently different to the international standards. The right is conceptualised and practiced within the Chinese socialist market economy under the guidance of the Communist Party which is the supreme power in the democratic dictatorship. Therefore, the Chinese experience and understanding of the right to freedom of association and the right to strike may be fundamentally different to African states in terms of its content, ideological underpinning, exercise and enforcement. These findings demonstrate a need for African

countries that host Chinese investment to proactively guard against the labour rights violations that may occur due to the differing domestic legal frameworks.

I. INTRODUCTION

a. Background

> 'I am a true believer that the success of the world in development and peace depends on Africa's success, and China's cooperation with Africa is fundamental for Africa's success.' - Antonio Guterres[1]

In 2006, the Chinese Government issued its African Policy document which initiated the major establishment and development of a new strategic partnership with Africa which was to be characterised by 'political equality and mutual trust, mutually beneficial economic cooperation, and cultural exchanges'.[2] This was reaffirmed at the 2006 Beijing Summit where the Forum on China-Africa Cooperation (FOCAC) officially implemented the strategic partnership. Thereafter, in 2013, President Xi Jinping emphasised in his speech at the Nyerere International Convention Center in Tanzania that China's relations with African states would be governed by 'the principles of sincerity, real results, affinity and good faith' which ultimately seek to balance the interests of all parties.[3] The impact of these agreements and goals were swift and far reaching. China has been Africa's largest trading partner since 2009 with trade exceeding 10 Billion US dollars in the year 2000 and growing rapidly to almost 220 Billion by 2015.[4]

As of 2015, South Africa has become the largest proportional destination for Chinese investment on the continent.[5] Furthermore, in terms of infrastructure development, China and the African Union (AU) signed a memorandum of understanding in 2015 promoting transportation networks and industrialisation across Africa.[6] Two notable projects that have emerged from this, include the 951m Bouregreg Valley Cable-Stayed Bridge (first of its kind) in Morocco and the 1860.5km Tanzania-Zambia railway.[7] China's involvement in Africa is vast and cannot be addressed in detail here. Essentially, it has impacted every sphere of life on

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[1] United Nations Secretary General, speaking during a joint interview with Chinese correspondents at the UN headquarters in New York, 30 August 2018. Available*: http://www.xinhuanet.com/english/2018-08/31/c_137433113_2.htm.*

[2] The Secretariat of the Chinese Follow-up Committee of the Forum on China-Africa Cooperation *China-Africa 500: Facts About China, Africa and Relations Between the Two* (2015) at p130, 131.

[3] Ibid.

[4] Ibid p136; see also *http://www.sais-cari.org/data-china-africa-trade#:~:text=The%20value%20of%20China%2DAfrica,followed%20by%20Nigeria%20and%20Egypt.*

[5] Ibid at p136.

[6] Ibid at p137.

[7] Ibid at p138, p140.

the continent: transport[8], energy production[9], food/medical and monetary aid[10], education[11], debt cancelation[12], agricultural technology[13], investment[14] and even peacekeeping missions[15] to name a few.

In 2017, *McKinsey & Company* released a comprehensive report that provided 'a fact-based picture of the Africa-China economic relationship' through large-scale data collection and interviews.[16] The interviews included over a hundred senior African business and government leaders as well as owners or managers of over one thousand Chinese firms and factories across eight African countries that cumulatively account for roughly two-thirds of Sub-Saharan Africa's gross domestic product (GDP).[17] Notably, South Africa was identified as a 'robust partner' due to its clear strategic policy of developing and deepening connections with China.[18]

However, China's track-record in Africa has not been unblemished and there have been allegations of serious acts of misconduct and labour rights abuses.[19] Consequently, a negative narrative has been engendered concerning China-Africa relations in some spheres.[20] While the specific facts and circumstances of these events are beyond the scope of this investigation, the comments of a Zambian official recorded in one of the abovementioned interviews reveal the nature and extent of the concerns. This official stated that wide-spread labour violations carried out by Chinese firms are the result of groups of entrepreneurs that are ignorant of the differences between Zambian and Chinese labour regulations' and practices.[21] Starkly, the

[8] Op cit note 2 at p138, p139.
[9] Ibid at p140.
[10] Ibid at p138, p142.
[11] Ibid atp146, p147.
[12] Ibid at p139.
[13] Ibid at p142.
[14] Ibid at p141.
[15] Ibid at p144.
[16] Irene Yuan Sun, Kartik Juyaram and Omid Kassiri 'Dance of the Lions and Dragons: How are Africa and China Engaging, and How Will the Partnership Evolve?' (2017) *McKinsey & Company* at p9.
[17] Ibid.
[18] Ibid at p12; Chris Alden & Yu-Shan Wu *South Africa-China Relations: A Partnership of Paradoxes* (2021) Palgrave Macmillan.
[19]Raphael Kaplinsky 'What Does the Rise of China Do for Industrialisation in Sub-Saharan Africa' (2008) 35 *Review of African Political Economy* 115 at p7-22; Chris Alden and Martyn Davies 'A profile of the operations of Chinese multinationals in Africa' (2010) 13 *South African Journal of International Affairs* 1 at p83-96.
[20] Tukumbi Lumumba-Kasango 'China-Africa Relations: A Neo-Imperialism or a Neo-Colonialism? A reflection' (2011) 10 *Africa and Asian Studies* 2; Fantu Cheru and Cyril Obi 'De-coding China-Africa relations: Partnership for Development or '(neo) colonialism by invitation?" (2011) September-October *World Financial Review*; Timothy S. Rich and Sterling Recker 'Understanding Sino-African Relations: Neocolonialism or a New Era?' (2013) 20 *Journal of International and Area Studies* 1 at p61-76.
[21] Op cit note 16 at p65.

converse is also true – African states know very little about the labour laws and regulations of our most prominent investor and trade partner.

b. Purpose of this Research

The goal of this minor dissertation is twofold. First, there is a dearth in accessible scholarship on the law, structures and functioning of the Chinese trade union system. Second, the extent to which Chinese trade union and collective bargaining practices and legislation are compliant with the international standards of the International Labour Organisation (ILO), is an important consideration in the context of China-Africa relations and in predicting future abuses on the African continent if it is to be presumed that Chinese enterprises will function based on legitimate expectations from their own domestic experiences.[22] The major factors shaping the encounter between Chinese managers and African workers involve their 'worldviews and mutual expectations which are rooted in their respective classes and national histories, particularly their experiences with socialism and post socialism.'[23] Based on this, African states can exercise their agency[24] in an informed manner by establishing clear expectations and agreement on issues such as trade unions, collective bargaining and dispute resolution procedures in order to prevent future abuses and ensure a harmonious relationship going forward.

c. *Structure of this Research*

In chapter II, a 'Comparator' of best practice is established from international law, in particular the provisions in the core ILO Conventions and the accompanying Recommendations relating to freedom of association and collective bargaining, together with the findings of the ILO Committee of Freedom of Association.[25] Thereafter, in chapter III, the relevant laws of the People's Republic of China (PRC) on freedom of association and collective bargaining are considered and assessed against the international standards established by the comparator. In

[22] Ching Kwan Lee 'Raw Encounters: Chinese Managers, African Workers and the Politics of Casualisation in Africa's Chinese Enclaves' (2009) *The China Quarterly* 199 p647-666.
[23] Ibid at p648.
[24] There is already compelling evidence that African states have been exercising their agency in the negotiating process with China: Giles Mohan & Ben Lampert 'Negotiating China: Reinstating African Agency into China-Africa Relations' (2013) 112 *African Affairs* 446 p92-110.
[25] The detail of the Report of the CFA precludes this Comparator from being an exhaustive account as the degree of specificity reflected in these compilations is beyond the scope of this dissertation - only the topics that align with the already extracted common themes will be included and those excluded should be considered for further research.

the concluding chapters, the dissertation summarises key findings of the study and proposes further research that may benefit China-Africa relations in the future.

II. ESTABLISHING A COMPARATOR FOR FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING BASED ON INTERNATIONAL LABOUR STANDARDS

a. Introduction

The purpose of this chapter is to establish a comparator for freedom of association and collective bargaining based on international standards, against which the Chinese law (discussed in chapter III) can be evaluated.

What follows is a synthesis of the primary ILO Conventions and Recommendations in order to establish a coherent model of the minimum standards accepted by the international community relating to freedom of association and collective bargaining. International Conventions are legally binding treaties that can be ratified by member States. On the other hand, Recommendations only serve as non-binding guidelines.[26] In practice, a Convention generally lays down the basic principles to be implemented by ratifying countries, while a related Recommendation supplements the Convention by providing more detailed guidance on how it could be applied.[27] Conventions and Recommendations are drawn up by the tripartite representatives and are adopted at the annual International Labour Conference.[28] The core Conventions relevant to freedom of association and collective bargaining include Convention No. 87[29], Convention No. 98[30] and then the later Convention No. 154[31]. The two main Recommendations include Recommendation No. 91[32] and Recommendation No. 163[33]. All other Conventions and Recommendations that are cited to supplement this will be referenced accordingly.

The content of the various legal texts has been separated into broad themes to establish the characteristics of the comparator that will be applied in the next chapter. The separation into themes is not intended to be a strict separation in the formal sense as there is overlap and common ground between them. The discussion of the themes, extracted from the international law, will be elaborated by a consideration of the jurisprudence of the Committee on Freedom of Association.

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[26] Rules of the Game: An introduction to the standards-related work of the International Labour Organisation (2019) Fourth edition International Labour Office, Geneva: ILO p18.
[27] Ibid.
[28] Ibid.
[29] Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).
[30] Right to Organise and Collective Bargaining Convention, 1949 (No. 98).
[31] Collective Bargaining Convention, 1981 (No. 154).
[32] Collective Agreements Recommendation, 1951 (No. 91).
[33] Collective Bargaining Recommendation, 1981 (No. 163).

There are five broad themes which have been identified and separated into the sub-headings that follow. First, the right to freedom of association itself will be addressed with a focus on its nature, application and the groups that may claim it along with those who may be excluded. Second, the right to organise and form unions will be addressed with a focus on the free establishment, membership, autonomy and prohibition on dissolution thereof. Third, this section considers the different forms of protection afforded to workers and their union and includes formal recognition, access to information, legislative protection, independence and a prohibition on interference. Fourth, various industrial relations mechanisms will be addressed including dispute settlement mechanisms, consultations, enhancing the capabilities of stakeholders, access to the workplace and contractual rights in collective agreements. The fifth section considers industrial action and the right to strike by establishing that the right is affirmed in international law before focusing on its content such as acceptable conduct and procedural fairness. Each theme will be concluded with a brief summary of the main points therein.

b. Freedom of Association and Collective Bargaining: Scope, Application; Flexibility and Exceptions

The entrenchment of the right to freedom of association is one of the core principles of the ILO.[34] It is from this right that the right to organise and collective bargaining trace their lineage.[35] The ILO endeavours to create variable and flexible standards that may result in the content and manifestation of these rights to be different from state to state.[36] This is intended to accommodate countries with 'diverse cultural and historical backgrounds, legal systems and level of economic development'.[37] This is vital as reservations to ILO conventions are not permitted.[38] However, some standards allow for 'flexibility clauses' in which differing or lower protections can be adopted by a country but this is only after 'consultation with social partners and the making of a declaration to the Director General of the ILO'.[39]

This section outlines the nature of the right to freedom of association. Typically, labour markets can be divided into common groupings such as urban v rural, public v private and formal v informal employment. The foundational Conventions include No. 87, No. 98 and No.

[34] ILO Constitution 1919, ILO Declaration of Philadelphia 1944, ILO Declaration on Fundamental Principles and Rights at Work 1998.
[35] Op cit note 26 at p33-36.
[36] Ibid at p22.
[37] Ibid.
[38] Ibid.
[39] Ibid.

154, which establish a broad and far reaching right to freedom of association that extends to all sectors of the economy. Thereafter, Recommendation No. 163, No. 205[40] and No. 149[41] will address the specific needs of women, migrant labourers, disabled workers, women, refugees and rural workers. Finally, Convention No. 151[42] will address public employees (outside of the military and police force) and the findings of the CFA will address the position of informal or casual labourers and those engaged in essential services.

i. Who is Included?

The right to collective bargaining applies to all branches of economic activity.[43] Thus, the starting point is one that holds that all workers possess and may claim these rights. The international labour standards are designed to give expression to the principle of non-discrimination in trade union matters - Convention No. 87 uses the phrase 'without distinction whatsoever' to emphasise that freedom of association should be guaranteed without discrimination of any kind based on 'occupation, sex, colour, race, beliefs, nationality and political opinion'.[44] Moreover, the system that is envisioned is an expansive one where collective bargaining is possible at any level, including that of 'the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels'.[45] Thus, both public and private employees should be able to establish organisations of their own choosing to further and defend the interests of their members.[46] Moreover, 'civilians working in the services of the army' should have the right to form trade unions despite the possible 'exclusion of non-civilians' (addressed below).[47]

The rights to freedom of association and collective bargaining allow for variability depending on the context and the needs of vulnerable groups of workers. These groups include: disabled workers, women, migrant workers, refugees and rural workers. First, trade unions and workers representative bodies must be consulted to ensure the protection of disabled workers.[48] Second, the vulnerable position of women in the work place is noted and workers representatives must be 'consulted in an effort to create gender inclusion and the necessary

[40] Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205).
[41] Rural Workers Organisation Recommendation, 1975 (No. 149).
[42] Labour Relations (Public Service) Convention, 1978 (No. 151).
[43] Supra note 31 art 1(1).
[44] Supra note 29 art 2; Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association (2018) 6 ed International Labour Office, Geneva: ILO para 315 at p59.
[45] Supra note 33 art 2 (4)(1), ibid CFA 2018 para 315 at p59.
[46] Ibid CFA 2018 para 337 at p63.
[47] Ibid para 350 at p65
[48] Supra note 40 art 5(15) (h).

societal engagement'.[49] Third, the vulnerable position of migrant workers is highlighted and the need for 'effective representation and protection by workers organisations' against the harsh realities of xenophobia is emphasised (along with the need for civil society engagement around such topics).[50] Furthermore, the CFA has held that the right to organise must be 'guaranteed for both documented and undocumented migrant workers'.[51] Fourth, the vulnerable position of refugees is noted as well as the need for 'equal opportunity and participation' in the work place and workers organisations.[52] Finally, labour systems are comprised of both rural and urban sectors; and the requirements and processes that are suitable for the one do not seamlessly transfer to the other. In reality, the rural sector faces different practical and structural challenges from that of the urban sector. For this reason, Recommendation No. 149[53] seeks to provide specific protections and measures that the rural workers[54] require. It should be an objective of national policy concerning rural development to facilitate the 'establishment and growth, on a voluntary basis, of strong and independent organisations of rural workers' as an effective means of ensuring the 'participation of rural workers, without discrimination in economic and social development' and in the benefits resulting therefrom.[55]

The status of workers is important as there is a tendency for states to deny the right of freedom of association to 'informal' or 'casual workers'.[56] Thus, the CFA has accounted for this practice by making the existence of a formalised 'employment relationship' (and not a formal employment contract) the necessary prerequisite that establishes the right to freedom of association and thereby protecting workers rights regardless of their employee status.[57]

It should be noted that the military and police service (addressed below) should be considered as separate groups distinct from persons employed by the public authorities.[58] Convention No. 151 explicitly recognises that this group may be excluded from the provisions of other Conventions and thus serves to remedy this lack of recognition and protection.[59] Specifically, 'public employees shall enjoy adequate protection against anti-union

[49] Supra note 40 art 9(24).
[50] Ibid art 10(27)(b)-(d).
[51] Op cit note 44 CFA 2018 para 321 at p60.
[52] Supra note 40 art 11(34) and (35).
[53] Supra note 41.
[54] Defined at ibid art 1(2)(1).
[55] Ibid art 2(4).
[56] Op cit note 22.
[57] Op cit note 44 CFA 2018 para 327 at p61, para 328 at p61.
[58] As defined in supra note 42 art 2.
[59] Ibid art 1.

discrimination' regarding their employment such as 'prejudicial conditions or dismissal due to union activities or membership.'[60] Moreover, public employees 'organisations shall be independent' and protected against any form of 'interference regarding their establishment, functioning or administration.'[61]

ii. Who is Excluded?

In practice, all the workers within member states fall under the protection of the relevant Conventions and Recommendations.[62] However, there is a tendency to exclude the police services, public servants and the armed forces from the purview of the international mechanisms.[63] For example, the common language between the relevant texts holds that 'the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.'[64] Essentially, while the Conventions recognise the exclusion of some groups of workers, a member state may create special modalities of the provisions of the Conventions so that they still apply to these groups in an altered manner.[65] Ultimately, the CFA has emphasised that any state that denies the right to freedom of association must clearly define the members of the armed forces who are excluded and must do so in a restrictive manner.[66]

A further group that may be denied or only enjoy a limited form of the right to freedom of association are those determined to be 'essential workers' by the state.[67] In this regard, the CFA has determined what constitutes an essential service and when it is appropriate to limit the right to freedom of association.[68] Typically, the issue is not with the basic right itself but rather with the accompanying right to strike and the danger of prolonged strikes of essential workers.[69] Determining essential services is complex; and the concept of an essential worker is not absolute, in the sense that a 'non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal

[60] Supra note 42 art 4(1), art 4(2)(a)-(b).
[61] Ibid art 5(1)-(2).
[62] Op cit note 26 at p22-25.
[63] Jelle Visser 'Trade Unions in the Balance: ILO ACTRAV Working Paper' (2019) International Labour Organisation at p11.
[64] Supra note 31 art 9(1); supra note 29 art 5; supra note 33 art 1(2).
[65] Supra note 33 art 1(3).
[66] Op cit note 44 CFA 2018 para 344 at p64.
[67] Timo Knäbe & Carlos R. Carrión-Crespo 'The Scope of Essential Services: Laws, Regulations and Practices' (2019) Working Paper 334, International Labour Office, Sectoral Policies Department – Geneva: ILO p9.
[68] Ibid at p10.
[69] Ibid.

safety or health of the whole or part of the population.'[70] Ultimately, the CFA has held that in order to determine situations in which a strike could be prohibited, the criterion is the existence of a 'clear and imminent threat to the life, personal safety or health of the whole or part of the population'.[71] Therefore, in terms of determining an international standard, the rights of essential workers may be limited or denied only in specific instances or for particular groups[72] but the CFA does not support a blanket ban on the exercise of the right to freedom of association.

iii. Form and Function

The right to collective bargaining must be promoted and effectively facilitated by any number of methods depending on the conditions of a state. In this regard, three predominant themes reflected in this section are the primacy of law, the definitions of the rights in international law and the variability thereof to account for different labour systems. The most consistently used phrase between the Conventions and Recommendations holds that the provisions affirming the rights of freedom of association and collective bargaining may be 'applied by national laws or regulations, collective agreements, arbitration awards or in any other manner consistent with national practice'.[73] The CFA emphasises the importance of drafting and promulgating laws entrenching the right of workers to establish and join organisations of their own choosing in full freedom as the right cannot be said to exist unless 'such freedom is fully established and respected in law and in fact'.[74] Furthermore, Recommendation No. 198[75] highlights the role of international labour standards as guides that must be taken into account when drafting laws relating to freedom of association and collective bargaining.[76]

In addition, different systems of industrial relations are envisioned and catered for by the provisions of the Conventions and Recommendations. More specifically, collective bargaining system that take place within the framework of voluntary conciliation and arbitration machinery or institutions.[77] Thus, there is not a *one size fits all* model of industrial relations. Furthermore, the wording of these instruments is intentionally broad and sweeping

[70] Op cit note 67 at p10.
[71] Ibid.
[72] For a comprehensive list of types of workers that have been determined to be essential and non-essential see ibid at p10-11.
[73] Supra note 30 art 1; supra note 33 art 4.
[74] Op cit note 44 CFA 2018 para 472 at p87.
[75] Employment Relationship Recommendation 2006 (No. 198).
[76] Ibid art 1(2).
[77] Supra note 33 art 6.

so as to catch as many forms of systems as possible. This is particularly clear in the defining of an organisation[78], collective agreements[79] and collective bargaining.[80]

iv. Summary

In sum, international labour standards for the scope and application of freedom of association and collective bargaining rights require that a state promulgate laws or regulations that explicitly affirm these rights in all sectors of the economy (both private and public). The right must be conferred without any discrimination of any kind based on occupation, sex, colour, race, beliefs, nationality and political opinion. The formal employee status or informal status of the worker cannot be used to deny these rights. The laws of a state should include specific modalities for the achievement of these rights for vulnerable classes of workers such as women, migrant labourers, disabled workers, refugees and rural workers. Moreover, persons employed by the public authorities are a separate group (distinct from police and military) that must be afforded the same right to freedom of association and collective bargaining as other workers. In contrast, it is permissible to exclude the military and police force from exercising the right to freedom of association. Furthermore, essential workers may enjoy a limited form of the right to freedom of association and collective bargaining and a state may prescribe limitations on the right to strike. Ultimately, any laws denying or limiting the right to freedom of association and collective bargaining must be clear, precise and not overly broad – the restriction must be reasonable and the least restrictive means available to achieve the purpose.

c. Right to Organise: Establishment, Membership, Autonomy, Dissolution and Suspension

The starting point of the right to organise is the obligation on the state to not frustrate the realisation of this right and to adapt measures according to their national conditions that ultimately promote freedom of association and collective bargaining.[81] The bedrock of freedom of association and the right to organise is a high degree of autonomy and independence away

[78] Supra note 30 art 10: an organisation of workers or of employers who have come together to further and defend the interests of workers or of employers.
[79] Supra note 32 art 2(1): collective agreements are understood to refer to all agreements in writing regarding working conditions and terms of employment concluded between an employer (a group of employers or one or more employers' organisations), on the one hand, and one or more representative workers' organisations (or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations), on the other.
[80] Supra note 33 art 2: negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other
[81] Supra note 32 art 5.

from the control or influence of the state.[82] Thus, the right to organise should not be viewed as a limited right nor is it intended to be for the small scale. However, an effective collective bargaining system does not only establish representative workers organisations but also necessitates that employers may form their own representative organisations. In this way, workers' and employers' organisations shall have 'the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration, to formulate their own programmes and to participate in activities'.[83]

Organisations are free to determine the systems and structures of their own functioning. But broadly speaking, a representative democratic structure should be preferred.[84] In this way, representatives are elected from among the workers and they are thereby instructed to negotiate for the achievement and furtherance of the interests of their electorate. Thus, parties to collective bargaining should provide their respective negotiators with the 'necessary mandate to conduct and conclude negotiations, subject to any provisions for consultations within their respective organisations'.[85]

Essentially, states should facilitate the 'establishment and growth, on a voluntary basis, of free, independent and representative employers' and workers' organisations'.[86] Furthermore, in countries where collective bargaining takes place at several levels, the parties to negotiations should seek to ensure that there is co-ordination among these levels.[87] Thus, a widespread and coordinated collective holds far more power to bargain with employer's organisations in order to adequately pursue and achieve the interests of workers. Hence, the three main above-mentioned areas that will be addressed are the establishment of organisations, membership thereof and the autonomy that they possess. Thereafter, the issue of the dissolution or suspension of these representative organisations will briefly be addressed.

i. Establishment

The CFA has presided over a number of cases that focused on the structure and functioning of the trade union system of various countries.[88] Thus, there is a broad account of good practice in terms of systems that are acceptable or unacceptable as far as affirming the rights to freedom

[82] Op cit note 44 CFA 2018 para 475 at p87.
[83] Supra note 29 art 3(1).
[84] Op cit note 33 CFA 2018 para 676 at p127.
[85] Supra note 33 art 2(6).
[86] Ibid art 2.
[87] Ibid art 4(2).
[88] Op cit note 44 CFA 2018 para 6 at p6, para 9 at p7.

of association and collective bargaining are concerned.[89] The three practices that have been found to be contrary to these rights include: a single centralised trade union system[90], the requirement of prior authorisation[91] to establish new trade unions from pre-existing trade unions at a higher level and the need to comply with unreasonable registration formalities that in fact give the state a wide discretion to deny the establishment of new trade unions.[92] As stated at the outset, the ILO's international standards are often vague and flexible to allow differing states to construct their own unique systems.[93] However, this section will indicate that the CFA has established the parameters of this degree of variability and has ultimately rejected the structuring of some labour relations systems.

First, the CFA has held that a legal obligation that requires trade unions to obtain the consent of a central trade union organisation in order to be established and registered is contrary to the right of freedom of association.[94] This issue relates to that of autonomy as a central organisation that has the sole power and authority to recognise new trade unions is an inherent obstacle for workers to establish freely the organisation of their own choosing and is therefore contrary to freedom of association.[95] Furthermore, the Committee of Experts on the Application of Conventions and Recommendations has found (the CFA confirming) that the maintenance of a single trade union confederation in law would unjustly deny workers the freedom and opportunity to create another confederation if the workers so wished and thus infringes the right to freedom of association.[96]

Second, the CFA has held that any requirement of prior authorisation to establish a new trade union would nullify the right to freedom of association.[97] The examples listed of the kinds of requirements that are unacceptable include prior consent to form the trade union organisation itself, the need to obtain discretionary approval of the constitution or rules of the organisation and finally authorisation for taking steps prior to the establishment of the organisation.[98] However, the CFA is not saying that the workers seeking to establish a new trade union are absolved from complying with the reasonable administrative formalities such as publicity and

[89] Op cit note 44 CFA 2018 para 6 at p6, para 9 at p7.
[90] Ibid para 454 at p82, para 497 at p92.
[91] Ibid para 419 at p77.
[92] Ibid.
[93] Op cit note 26 at p22.
[94] Op cit note 44 CFA 2018 para 454 at p82, para 497 at p92.
[95] Ibid para 497 at p92.
[96] Ibid para 493 at p91.
[97] Ibid para 419 at p77.
[98] Ibid.

later registration.[99]

Third, following on from above, the CFA highlights the unjustifiable practice of legislating unreasonable formalities in such a complicated way as to frustrate or hinder the establishment of new trade unions and the conferring of wide discretionary powers to state officials that ultimately amounts to the ability to nullify freedom of association.[100]

ii. Membership

The topic of membership is not particularly problematic if the establishment and autonomy sections here mentioned are generally complied with in a state.[101] The two issues that will be addressed are the unreasonable setting of a threshold requirement in terms of numbers of individuals required to establish a union and the affirmation of the potential for cross-border membership of trade union confederations.

Governments are often faced with the reality of a proliferation of trade unions that must be equally respected and consulted. This is a pragmatically challenging reality and thus in order to prevent smaller organisations from existing (in favour of fewer organisations with larger membership numbers) minimum number thresholds are imposed by law that would seek to disqualify the smaller organisations. The CFA has noted this practice and has broadly held that the 'legally required minimum number of members must not be so high as to hinder in practice the establishment of trade union organisations'.[102] The case law brought before the Committee gives a rough margin of acceptable limits as a minimum of 30[103] workers to establish a trade union has been found to be too high and in another instance a minimum of 20[104] was found to be acceptable. The acceptability of these numbers was context dependent and thus the specific national conditions within each would have informed these findings. In this way, they should not be viewed as concrete limits but rather as a rough guideline.

A high degree of free and voluntary coordination is encouraged to better developed and increase the relative power of these representative organisations. For this reason, workers' and employers' organisations shall 'have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to

[99] Op cit note 44 CFA 2018 para 419 at p77.
[100] Ibid.
[101] Cf. below *iii) Autonomy* p24; Cf. above *i) Establishment* p21; see also op cit note 44 CFA 2018 para 475 at p87.
[102] Op cit note 44 CFA 2018 para 435 at p80.
[103] Ibid para 440 at p80.
[104] Ibid para 446 p81.

affiliate with international organisations of workers and employers.'[105] Thus, the right to membership goes beyond the domestic sphere as organisations have the right to make cross-border confederations.

iii. Autonomy

The autonomy of workers to establish these unions or organisations implies the possibility of forming parties that are independent from all pre-existing organisations or any political party.[106] Furthermore, this right entails the ability of workers to form more than one workers organisation per enterprise.[107] This notion is supported by the CFA who have held in the past that it is contrary to the right of freedom of association to prevent two enterprise trade unions from coexisting or to require a single union for each enterprise, trade or occupation.[108] Thus, while it may be ill-advised for workers or employers to create a proliferation of competing organisations, any law that imposes a centralised monopolistic trade union system would run contrary to the right of autonomy and freedom of association of these workers and employers organisations.[109] Ultimately, freedom of association grants these grass-roots organisations the power to draft their own constitutions, organise their activities and formulate their programmes independently and without constraint, interference or imposition from other organisations at a higher level.[110]

iv. Dissolution and Suspension

The CFA considers the dissolution and suspension of a trade union organisation as being serious measures that should only occur in rare instances.[111] Furthermore, due to the need to fully guarantee the rights of the affected parties, an order of dissolution should only occur after a final judicial decision has been given.[112] Similarly, the 'suspension of the legal personality of trade union organisations represents a serious restriction on trade union rights and in matters of this nature the rights of defence can only be fully guaranteed through due process of law.'[113]

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[105] Supra note 29 art 5.
[106] Op cit note note 44 CFA 2018 para 475 at p87.
[107] Ibid para 479 at p88.
[108] Ibid para 480 at p88, para 481 at p88, para 482 at p88.
[109] Ibid para 486 at p89.
[110] Ibid para 584 at p109.
[111] Ibid para 1007 at p187.
[112] Ibid para 1007 at p187.
[113] Op cit note note 44 CFA 2018 para 1003 at p187.

v. Summary

In sum, international labour standards for the right to organise require a trade union system that is not dominated by a single centralised trade union. Furthermore, the establishment of a trade union cannot be made subject to the prior authorisation of a pre-existing union and all formalities for registration must be reasonable and cannot be designed to frustrate or prevent the registration of new unions. Moreover, trade unions must be autonomous and be able to be independent of all other unions and political parties. Finally, a formal independent judicial decision is required to suspend or dissolve a trade union.

d. Protection Mechanisms

This section on protective mechanisms builds onto the other sections in the comparator as the next logical step that is required according to international standards. For example, the right to organise section above determined the requirements for the establishment of trade unions and the subsequent need for legal protection in the form of the formal recognition of these unions will be addressed here. Similarly, the right to organise section above emphasised the need for autonomous trade unions and this section will address the protection of this independence through the prohibition on interference. Furthermore, the industrial relations mechanisms section below raises the issues of enhancing the capabilities of stakeholders and the contractual rights in collective agreements and thus the overlapping protection that will be addressed here is the right to access to information to ensure that trade unions can bargain effectively. Finally, the most generally overlapping topic that is applicable to the right to freedom of association and the right to organise that will be addressed here is the legal protection against acts of intimidation, threats, and violence against trade unions, their representatives and the workers themselves.

Thus, this section will consider the legislative protection afforded to unions and worker representatives that prevent the use of intimidation, threats and violence. The decisions of the CFA and the international law will illustrate the innumerable ways in which states or employers can unlawfully stifle or wholehearted infringe the free exercise of the right to freedom of association and collective bargaining. Thereafter, the independence and prohibition on interference will be addressed by focusing on the practice of puppet organisations, mandating strict functions to unions, anti-union discrimination and the prevention of international trade union solidarity. Next, the CFA's emphasise on the importance of the protection afforded

through formal legal recognition and registration will be raised. Finally, the protection of access to information will be addressed by highlighting the imbalance of power between employers and worker's organisations. Thus, in order to genuinely protect the rights and interests of workers in collective contracts and to ensure that fruitful negotiations are possible, workers organisations should be granted access to all relevant information. This section will be concluded with a summary of the essential international labour standards.

i. Legislative Protection

The first level of protection was briefly stated at the point of establishing the right to freedom of association and collective bargaining above.[114] To reiterate, each 'Member of the ILO for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.'[115] Furthermore, workers' and employers' organisations shall not be liable to be dissolved or suspended by the administrative authority.[116] Thus, the first line of protection is a serious undertaking by the state to respect and promote the right to organise. Thereafter, the public authorities 'shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.'[117] More specifically, the law of the land 'shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.'[118] Stated differently, the 'measures taken with a view to promoting collective bargaining shall not be so conceived or applied as to hamper the freedom of collective bargaining and should account for the needs of both rural and urban workers.'[119] Ultimately, the vital need to protect[120] the safety and position of workers representatives is affirmed in the international law.

Notably, the creative forms and measures that employers or the state could adopt to interfere, intimidate or threaten workers is non-exhaustive.[121] This section will address the more serious forms such as violence, threats thereof, criminal allegations, arrest and detention of workers or their representatives that all lead to the creation of a 'climate of fear and violence' in a state.[122] The subtler and more generalised prohibition on interference will be addressed separately below. Ultimately, workers should have the right to establish organisations in a

[114] Cf. above *i) Establishment* above p21.
[115] Supra note 29 art 11.
[116] Ibid art 4.
[117] Supra note 29 art 3(2).
[118] Ibid art 8(2), supra note 41 art 7(4), Rural Workers Organisations Convention 1975 (No. 141) art 3(5).
[119] Supra note 32 art 8.
[120] Workers Representatives Recommendation 1971 (No. 143) art 3(5), supra note 41 art 8(2) (b) (i) - (iii).
[121] Ibid Recommendation No. 143 art 6(2)(a) - (f) for a list of common examples.
[122] Op cit note 44 CFA 2018 para 90 at p21, para 114 at p25, para 115 at p25.

climate of complete security 'irrespective of whether or not they support the political or socio-economic model of the Government'.[123]

First, acts of physical violence against trade unionists constitute a 'grave violation' of the principles of freedom of association and the failure to legislatively protect against such acts amounts to 'impunity' and is 'highly detrimental' to the exercise of trade union rights.[124] Furthermore, attacks against 'trade unionists, their families, trade union premises' and property constitute 'serious infringement' of trade union rights and civil liberties.[125] Therefore, the CFA has emphasised that all States have the undeniable duty to promote and defend a social climate where respect of the law reigns as the only way of guaranteeing respect for and protection of life and the freedom of association.[126]

Second, the arrest, detention and sentencing of trade unionists for exercising legitimate activities in relation with their right of association undoubtedly constitutes a violation of the principles of freedom of association.[127] Moreover, the CFA has cautioned against the arrest and sentencing of trade unionists on grounds of the 'disturbance of public order' as the vague and overly general nature of the charge would likely make it possible to repress activities of a trade union nature.[128] Essentially, if trade unionist are going to be arrested and charged then it must be for severe acts that are clearly defined in the law. The CFA has also identified the practice of 'preventative detention of union leaders' for activities connected with the exercise of their rights and have declared it to be contrary to the principles of freedom of association.[129] Finally, even the mere 'allegations of criminal conduct' should not be used to 'harass' trade unionists by reason of their union membership or activities.[130]

ii. Independence and Prohibition on Interference

This form of protection is focused on the unequal power relation between an employer and the workers. Within this dynamic, the exertion of power can be explicit or subtle and thus protection must account for both. The CFA has emphasised that the mere existence of 'legislative provisions prohibiting acts of interference on the part of the authorities, or by organisations of workers and employers in each other's affairs, is insufficient if they are not

[123] Op cit note 44 CFA 2018 para 319 at p60.
[124] Ibid para 90 at p21.
[125] Ibid para 115 at p25.
[126] Ibid para 114 at p25.
[127] Ibid para 121 at p26.
[128] Ibid para 157 at p32.
[129] Ibid para 137 at p29.
[130] Ibid para 80 at p19.

accompanied by efficient procedures to ensure their implementation in practice.'[131] The four forms of interference that will be addressed below include anti-union discrimination, puppet organisations, the prevention of international solidarity and mandating a function to unions that would limit their rights.

The first obvious threat to workers is anti-union discrimination. Thus, workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.[132] More specifically, workers shall be protected against acts which are calculated to 'make the employment of a worker subject to the condition that they shall not join a union or shall relinquish trade union membership.'[133] Furthermore, workers shall also be protected against acts which are calculated to 'cause the dismissal of or otherwise prejudice a worker by reason of union membership or participation.'[134]

With regard to the representative organisations themselves, workers' and employers' organisations shall enjoy 'adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.'[135] Broadly stated, this provision affirms the abovementioned requirement that these organisations must be independent and autonomous in a real sense and cannot be mere 'puppets' who are vulnerable to 'undue influence or coercion'.[136] In particular, the targets of this provision would be acts which are 'designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations.'[137] These acts would constitute unlawful interference under international law.

The potential conflict between legitimate trade union activities and political activities will be addressed further in the final section of the comparator relating to industrial action and the right to strike. However, for this section, it should be noted that due to the right to freedom of association and the accompanying independence and autonomy attaching to that right, trade unions are 'free to join international trade union confederations regardless of the political structures and belief of their host state'.[138] The CFA has indeed confirmed that international

[131] Op cit note 44 CFA 2018 para 1217 at p227.
[132] Supra note 30 art 1(1).
[133] Ibid art 1(2)(a).
[134] Ibid art 1(2)(b).
[135] Ibid art 2(1); Labour Administration Recommendation 1978 (No. 158) Preamble, supra note 41 art 7(1), op cit note 44 CFA 2018 para 1187 at p223.
[136] Ibid CFA 2018 para 1232 at p231.
[137] Supra note 30 art 2(2); Op cit note 44 CFA 2018 para 1215 at p227.
[138] Ibid CFA 2018 para 1036 at p194, para 1037 at p194.

trade union solidarity constitutes one of the fundamental objectives of any trade union movement and therefore any organisation, federation or confederation shall have the right to affiliate with international organisations without intervention by the political authorities.[139]

The final form of intervention relates to legislatively mandating a certain function to a trade union organisation which would inherently limit their freedom to choose their own activities by prescribing a single option at the exclusion of all others. The facts of the case presided over by the CFA involved legislation that obliged trade unions to educate workers and employees by conducting 'socialist emulation campaigns at the workplace in order to strengthen their ideological convictions'.[140] Ultimately, the CFA found the law to be contrary to the right to freedom of association as it inherently 'prevented the establishment of trade union organisations that are independent of the public authorities and of the ruling party, and whose mission should be to defend and promote the interests of their constituents and not to reinforce the country's political and economic systems'.[141] Therefore, the mandating of this function in law constitute an act of intervention that cannot be condoned.

iii. Formal Recognition

The relative power that workers gain through collectivisation and organisation is only effective if these bodies are recognised as legitimate and are therefore interacted with as such. In this way, recognition is a vital protection that ensures the effective functioning of workers and employers organisations. The CFA has emphasised that 'the right to official recognition through legal registration is an essential facet of the right to organise since that is the first step that workers' or employers' organisations must take in order to be able to function efficiently, and represent their members adequately.'[142] Unregistered trade unions pose a difficult problem as their legitimate actions may be declared unlawful by a state.[143] In this regard, the Committee of Experts has emphasised that in situations where the state has frustrated registration or denied attempts to register trade unions, that these organisations and their activities 'should not be totally banned' or declared unlawful but instead 'every opportunity should be provided to rectify the absence of formal recognition' and the state may not hinder this process.[144]

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[139] Op cit note 44 CFA 2018 para 1036 at p194, para 1037 at p194.
[140] Ibid para 733 p138.
[141] Ibid.
[142] Ibid para 449 at p82.
[143] Conference Committee on the Application of Standards: Extracts from the Record of Proceedings (2017) International Labour Conference 106th Session, Geneva: ILO see p25, p64, p73, 96.
[144] Ibid at p64.

Thus, formal recognition of organisations for the purposes of collective bargaining is required but it may also be dependent on the satisfaction of pre-established criteria and requirements that were created through consultation with representatives of workers and employers organisation.[145] This collectively agreed upon benchmark ensures the effective functioning of a collative bargaining system as the appropriate bodies gain their legitimacy to carry out their mandate while inadequate bodies who may stifle the running of the system are rejected. Notably, this is a distinct scenario from that raised above involving the exclusion of minority trade union organisations merely due to the fact that they are small. Furthermore, in affirmation of the principle against domination and the creation of puppet organisations, no recognition shall be granted to 'associations of workers established, dominated or financed by employers or their representatives'.[146]

iv. Access to Information

The right to access to information lends itself to the following section but it has been included here because the way it is phrased in the Conventions and Recommendations seems to suggest that it serves more of a protectionist purpose and an overall need for transparency. To reiterate, workers and workers organisations are often not on a level playing field with employers and their organisations. Thus, in order to genuinely protect the rights and interests of workers and to ensure that fruitful negotiations are possible, workers organisations should be granted access to all relevant information in the spirit of transparency. Moreover, Recommendation No. 149 reaffirms this reality in the case of rural workers who may be even more disadvantaged due to lower literacy rates. Thus, the right of access to all relevant information necessary to negotiate effectively and fruitful has been entrenched.[147] Therefore, appropriate 'measures adapted to national conditions should be taken, if necessary, so that the parties have access to the information required for meaningful negotiations.'[148]

Furthermore, the 'public authorities should make available such information as is necessary on the over-all economic and social situation of the country and the branch of activity concerned, to the extent to which the disclosure of this information is not prejudicial to the national interest.'[149] This provision affirms the right to access to information but limits it to the public authority and offers an escape route should the information be determined to be

[145] Supra note 33 art 3(a) – (b).
[146] Supra note 32 art 2(2).
[147] Supra note 41 art 14-15.
[148] Supra note 33 art 7(1).
[149] Ibid art 7 (2)(b).

'prejudicial to the national interest'. However, this position is not the end point and the applicable Conventions have expanded the reach and power of workers. For example, 'public and private employers should, at the request of workers' organisations, make available such information on the economic and social situation of the negotiating unit and the undertaking as a whole, as is necessary for meaningful negotiations.'[150] Thus, this right to access applies to both the public and private employer. Furthermore, where the disclosure of some of this information could be 'prejudicial to the undertaking', its communication may be made 'conditional upon a commitment that it would be regarded as confidential to the extent required'.[151] Thus, the escape route has been severely closed-off in order to ensure an effective exercise of this right through the compromise of a non-disclosure or confidentiality agreement. In this way, the representative bodies are privy to the relevant information and can negotiate in an informed manner without prejudicing the employer.

v. Summary

In sum, international labour standards require a variety of protections to be afforded to trade unions, their representatives and workers. These protections include: first, legislative provisions guarding against acts that cause a climate of fear in the labour system such as physical violence, intimidation, threats, arrest and detention of trade unionists. Second, protections against anti-union discrimination, the creation of puppet trade unions, restrictively mandating certain functions to unions and the denial of international union solidarity that ultimately serve to ensure the independence of trade union organisations. Third, the formal recognition of these unions by a process of registration that cannot be denied or made to be so complicated and unworkable that registration becomes an impossibility. Finally, trade unions shall benefit from the protectionist right to information so that they can know the financial position of the employer (both private and public) and thus negotiate in the best interests of the workers on an equal footing.

e. Industrial Relations Mechanisms

In the space of competing interests between the employer and a workers organisation, disputes are inevitable. This section will focus on the international standards relating to industrial relations mechanisms that are required to orchestrate an effective labour system that is prepared

[150] Supra note 33 art 7 (2)(a).
[151] Ibid.

for periods of contestation but also proactive in such a way that may decrease the likelihood or longevity of disputes.

The first requirement relates to the establishment in law of a safety net of procedures for voluntary negotiations that include conciliation, mediation and arbitration. However, the imposition of an immediate and compulsory referral to arbitration is contrary to international standards as this would nullify the workers power through strike action.

The second requirement relates to measures intended to prevent or minimise the potential fallout between parties through actively consulting with worker's representatives regarding all matters that have an impact on them – such as drafting rules, regulations or setting of minimum standards. Notionally, if workers are active participants in the process and can voice their concerns and pursue their interests at every corner from the very start, then it may be less likely that a serious fallout would occur further down the line.

Furthermore, worker's representative bodies may be constituted by ordinary workers themselves and thus they may lack the necessary skills or knowledge to bargain effectively on behalf of their electorate. Thus, the third requirement is the obligation on the state or even employers themselves to facilitate the enhancing of the capabilities of these representatives so that they can negotiate more effectively from the start and hopefully prevent the emergence of a dissatisfied workforce.

Fourth, the result of these consultations and enhanced capabilities would be the drafting of collective agreements that must be binding on the employer and enforceable by worker's representatives. Fifth, for any of the other four abovementioned requirements to be carried out effectively, worker's representatives must be given the right of access and entry to the work premises in order to communicate with the workers in general otherwise the right to organise and to freedom of association would be infringed. This section will be concluded by a brief summary of the essential requirements.

i. Settlement of Disputes

An issue that is repeatedly addressed in the Conventions and Recommendations is the fair procedures and mechanisms that must be in place when a dispute comes about. Ultimately, bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.[152] Furthermore, measures shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery

[152] Supra note 31 art 5 (2)(e).

for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.[153] The CFA echoes this provision that affirms the independence and autonomy of representative organisations to negotiate beneficial collective agreements.[154] Ultimately, collective bargaining and the functioning of these organisations inherently entails some degree of disagreement or dispute arising. Typically, workers will demand better conditions or an increase in wages and employers will deny this demand. Thereafter, the organisations of the respective parties will meet to negotiate potential terms of settlement.

However, these negotiations include the possibility of a stalemate and mechanisms are also needed to address and alleviate such a situation. The typical measures that are listed include conciliation, mediation and arbitration to deal with collective disputes.[155] However, legislation should not mandate that, failing agreement between the parties, the points at issue in collective bargaining 'must be settled by the arbitration of the authority as this would not conform with the principle of voluntary negotiation' and would likely stifle all recourse to an effective strike (addressed below).[156]

Essentially, measures and conditions at a national level should provide the procedures for the settlement of labour disputes and assist the parties to find a solution to the dispute themselves.[157] While these measures are vitally important, it is equally important to note that a dearth or inadequacy of measures should not derail or threaten the collective bargaining system. To reiterate, collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules.[158]

ii. Consultation and Engagement of Stakeholders

A further basic principle of the Conventions and Recommendations is the active and constant participation of workers organisations in the development of any regulations pertaining to them.[159] Broadly speaking, the establishment of rules of procedure agreed upon between employers' and workers' organisations should be encouraged by the state.[160] Thus, any rules that may impact them first have to be presented to them and their views must be heard through

[153] Supra note 30 art 4, Supra note 33 art 8.
[154] Op cit note 44 CFA 2018 para 1231 at p231.
[155] Supra note 135 art 10.
[156] Op cit note 44 CFA 2018 para 1416 at p261.
[157] Supra note 33 art 8.
[158] Supra note 31 art 5(2)(d).
[159] Supra note 40 art 8(i).
[160] Supra note 31 art 5(2)(c).

a process of social dialogue and tripartite consultation.[161] For example, organisations of employers and workers shall take an 'active part in the preparation, development, adoption, application and review of labour and socio-economic standards, including relevant laws, policy and regulations'.[162]

Ultimately, the provisions encourage collaboration and consultation in the decision making process so that the voices of the representatives are heard and play a direct role in the formulation of law and policy.[163] Essentially, measures taken by any public authorities to encourage and promote the development of collective bargaining shall be the subject of prior consultation and, whenever possible, agreement between public authorities and employers' and workers' organisations.[164] To reiterate, consultation that is consistent and on-going is encouraged.[165] Furthermore, consultations should aim to create, if necessary, appropriate 'infrastructure, administrative capacity, institutions and labour inspection' to ensure a robust system of collective bargaining and collective agreements.[166]

iii. Enhancing Capabilities of Stakeholders

While it is beneficial in terms of representative democracy that representatives are often democratically elected, these individuals may lack the education, knowledge and experience necessary to carry out their mandate effectively. Therefore, measures should be taken that ensure 'negotiators, at all levels, have the opportunity to obtain appropriate training'.[167] To this end, public authorities may provide assistance to workers' and employers' organisations, at their request, for such training.[168] Furthermore, the content and supervision of the programmes of such training should be determined by the appropriate workers' or employers' organisation concerned.[169] In an effort to protect the autonomy of these organisations as well as the democratic character of their functioning, any training that these role players receive should be

[161] Supra note 40 art 8(i); op cit note 44 CFA 2018 para 1525 at p284, para 1524 at p284, para 1530 at p285, para 1536 at p286.
[162] Supra note 135 art 5(1); Ibid CFA 2018 para 1525 at p284, para 1530 at p285, para 1540 at p286, para 1541 at p286.
[163] Employment Relationship Recommendation 2006 (No. 198) art 3, art 20.
[164] Supra note 31 art 7; ibid art 20; supra note 135 art 2(7); op cit note 44 CFA 2018 para 1540 at p286, para 1541 at p286.
[165] Supra note 40 art 11.
[166] Ibid art 23(c).
[167] Supra note 33 art 5(1).
[168] Ibid art 4(2).
[169] Ibid art 5(3).

without prejudice to the right of workers' and employers' organisations to choose their own representatives for the purpose of collective bargaining.[170]

A further pragmatic inclusion is the requirement that physical facilities should be provided (taking into account the appropriate size, needs and capabilities) to representatives so that they may effectively carry out their functions on site.[171] Furthermore, while workers and representatives have this right to be educated about their rights and trained to negotiate effectively, the right to education has in fact been broadened beyond simply ones legal rights but also to educational programmes aimed at improving adult literacy rates in general.[172]

iv. Contractual Rights in Collective Agreements

The rights of collective bargaining become actualised when the agreed upon demands of the employer and the workers are transformed into a valid and binding document – a collective agreement. Notably, contractual rights and remedies would also blend into the abovementioned area of protections.[173] Ultimately, machinery appropriate to the conditions existing in each country should be established, by 'means of agreement or laws or regulations as may be appropriate under national conditions, to negotiate, conclude, revise and renew collective agreements, or to be available to assist the parties in the negotiation, conclusion, revision and renewal of collective agreements.'[174]

Collective agreements are contracts like any other. Thus, they are open to manipulation or trickery for the unwitting signatory. The rules and principles relating to collective agreements reflect some of the universal rules of contract law and are thus not particularly ground breaking. However, the ultimate goal is to affirm the notion that collective agreements must be taken seriously and adhered to. In this way, collective agreements are not a mere formality to do business and are instead a vital enforcement mechanism for worker and employers alike.

First, collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded.[175] Thus, due to their binding nature, employers and workers should not be able to include in the contracts of employment themselves any stipulations contrary to those contained in the collective agreement.[176] Second, building on from the first,

[170] Supra note 33 art 5(4).
[171] Supra note 120 art 9(1)-(2).
[172] Supra note 41 art 16-17.
[173] Cf. above *d) Protection Mechanisms* p25.
[174] Supra note 32 art 1(1).
[175] Ibid art 3(1).
[176] Ibid.

any stipulations in contracts of employment which are in fact contrary to a collective agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement.[177] Third, it must be recognised that in the negotiation of terms of employment and of collective agreements that the workers possess far less power to effect beneficial provisions for themselves compared to the might of the employer. Thus, any stipulations in the contracts of employment which are more favourable to the workers than those prescribed by a collective agreement should not be regarded as contrary to the collective agreement as was highlighted above .[178] Fourth, the above mentioned rules of content and interpretation do not necessarily need to be reflected in the legislation of a state if they are uniformly seen as binding and adhered to under the basic common law of contract in a state.[179] This is a pragmatic provision that attempts to avoid the potentially drawn-out process of legislative enactment if the parties can be immediately bound by agreement instead. Fifth, it must be emphasised that the negotiation process is an instance of the autonomy of representative organisations. Thus, while general oversight and dispute settlement bodies are important, making the validity of collective agreements subject to the prior approval of the authorities of the state would ultimately be contrary to the principles of collective bargaining.[180]

Furthermore, the stipulations of a collective agreement should apply to all workers of the classes concerned employed in the undertakings covered by the agreement unless the agreement specifically provides to the contrary.[181] At first glance, this provision may seem to be obvious and slightly redundant – the contract applies to all workers that it applies to unless it does not. However, what it is in fact guarding against is a situation of interpretation of the collective agreements that seek to purposefully exclude certain classes of workers. Thus, to deal with this situation, any disputes arising out of the interpretation of a collective agreement should be submitted to an appropriate procedure for settlement established either by agreement between the parties or by laws or regulations.[182] Thus, the first point seeks to make a presumption that a worker is covered and explicit exclusion is necessary. Thereafter, an internal or external dispute settlement body and procedure can be relied upon to resolve the matter. As a guiding principle, any machinery that is established to appropriately deal with any disputes

[177] Supra note 32 art 3(2).
[178] Ibid art 3(3).
[179] Ibid art 3(4).
[180] Op cit note 44 CFA 2018 para 1438 at p266.
[181] Supra note 32 art 4.
[182] Ibid art 5.

arising out of collective agreements must be created and applied for the purpose of ensuring respect for the right to organise.[183]

v. Access to the Workplace

There is a tendency for some states or employers to frustrate or explicitly violate the right to organise and freedom of association by barring workers representatives from entering the premises of the workplace.[184] Thus, workers are prevented from effectively conveying their lists of demands or grievances and workers representative are inhibited from communicating relevant information and receiving their mandate from their electorate. The CFA has made it clear that Governments should guarantee the access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers in order to both apprise them of the potential advantages of unionisation in order to recruit them and also to enable them to carry out their representation duty and function.[185]

vi. Summary

In sum, international labour standards require the establishment in law of procedures for voluntary negotiations that include conciliation, mediation and arbitration. However, the imposition of an immediate and compulsory referral to arbitration is contrary to international standards as this would nullify the workers power through strike action. The second requirement demands the active consultation of worker's representatives regarding all matters that have an impact on them – such as drafting laws, regulations or setting of minimum standards. The third requirement is the obligation on the state or even employers themselves to facilitate the enhancing of the capabilities of these representatives through education so that they can negotiate more effectively from the start and hopefully prevent the emergence of a dissatisfied workforce. The fourth requirement demands the drafting of collective agreements that must be binding on the employer and enforceable by worker's representatives. Finally, worker's representatives must be given the right of access and entry to the work premises in order to communicate with the workers in general otherwise the right to organise and to freedom of association would be infringed.

[183] Supra note 30 art 3.
[184] Op cit note 44 CFA 2018 paras 1580-1594 at p297.
[185] Ibid.

f. Industrial Action and the Right to Strike

This section addresses the ultimate power that the right to freedom of association, the right to collective bargaining and the right to organise provide to a collective of workers – the right to strike. The above-mentioned section on dispute resolution mentioned procedures such as consultation, conciliation, mediation and arbitration that aim at ending a stalemate or settling a dispute. Notably, the workers are still at a relative power disadvantage in these processes and an employer could simply refuse their propositions and demands. If this were the end of the matter and the workers had no further recourse, then this would amount to a system of collective begging and not collective bargaining.[186] Thus, the right to strike is the final coercive power at the worker's disposal to force the employer back to the negotiating table to reach a settlement.

This section will begin by establishing the existence of the right to strike in international law by looking at Conventions and Covenants such as the UDHR, ICESCR and ICCPR as well as the historical understanding of the ILO's conventions as elucidated by the International Trade Union Confederation (ITUC). The jurisprudence of the South African courts and those of foreign courts such as the United Kingdom and Canada will then be relied upon to illustrate the acceptance and entrenchment of the right to strike in both African and Western jurisdictions. Thereafter, a brief argument asserting that the right to strike has become part of customary international law will be made. The second section will address the content of the right to strike by detailing the various acceptable forms that it may take and the possible limitations that can be reasonable imposed. An overwhelming requirement that will be raised is the need for strike action to be peaceful in order to be lawful. Finally, the third section will briefly establish the need for a fair and impartial body to determine the lawfulness of strike action as a state may unreasonably restrict the exercise thereof. The section will be concluded by a summary of the main requirements under international law.

i. Establishing the Right

The collectivisation or unionisation of workers allows them to overcome the limitations inherent in entering individual and even collective contracts of employment and thereby to achieve fair conditions of employment and to participate in making decisions which affect their own lives and society at large. 'In the absence of a right to strike, it remains difficult (if not

[186] International Trade Union Confederation (ITUC) 'The Right to Strike and The ILO: The Legal Foundations' March 2014 at p15.

impossible) for workers to achieve these goals given the unequal power in the employment relationship.'[187] It is the combination and exercise of the right to associate, assemble and then of peaceful expression that establishes the right to strike.[188] Thus, the freedom of association implies not only the right of workers and employers to form freely organisations of their own choosing, but also the right to 'pursue collective activities for the defence of workers' occupational, social and economic interests'.[189] Notably, the existence of a right to strike has become disputed[190] in recent years. However, this investigation will continue on the assumption that the dispute was ultimately moot from its conception and will thus not be addressed in detail.

The international foundation for the freedom of association, expression and the subsequent right to strike can be sourced in many Declarations and Conventions outside of the abovementioned ones produced by the ILO and member states. For example, the Universal Declaration of Human Rights (UDHR) states that 'everyone has the right to freedom of opinion and expression'[191], 'everyone has the right to freedom of peaceful assembly and association'[192] and 'everyone has the right to form and to join trade unions for the protection of his interests'[193]. Furthermore, the International Covenant on Civil and Political Rights (ICCPR), states that 'everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests'[194]. Moreover, the International Covenant on Economic, Social and Cultural Rights (ICESCR) ensures 'the right of everyone to form trade unions and join the trade union of his choice'[195], 'the right of trade unions to establish national and international federations'[196], 'the right of trade unions to function freely'[197] and 'the right to strike'[198]. Thus, 'freedom of assembly and freedom of opinion and expression are a *sine qua non* for the exercise of freedom of association'.[199]

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[187] Op cit note 186 p13
[188] Op cit note 44 CFA 2018 para 77 at p18, para 754 at p143.
[189] Op cit note 186 p14.
[190] For more see Employers' Statement in the Committee on the Application of Standards of the International Labour Conference on 4 June 2012, available online at *http://www.uscib.org/docs/2012_06_04_ioe_clarifications _statement.pdf.*
[191] Universal Declaration of Human Rights 1948 art 19; op cit note 44 CFA 2018 para 234 at p44, para 239-241 at p45.
[192] Ibid UDHR art 20.
[193] Ibid art 23(4).
[194] International Covenant on Civil and Political Rights, 1966 art 22.
[195] International Covenant on Economic, Social and Cultural Rights, 1966 art 8(1)(a).
[196] Ibid art 8(1)(b).
[197] Ibid art 8(1)(c).
[198] Ibid art 8(1)(d).
[199] Op cit note 33 CFA 2018 para 205, p39.

The ILO's understanding during the time before the enactment of the Conventions, was that the 'freedom of association was considered in tandem with industrial action, self-evidently seeing the two as linked'.[200] Furthermore, it was 'the stated view of the International Labour Office that there was an "intimate relationship between the right to combine for trade union purposes and the right to strike" with a strong case being made for international legislation relating to both.'[201]

Thereafter, the existence of the clear 'interdependence' between the right to collectivise and strike has been 'universally recognised' in the domestic courts of many nations.[202] The judgments of the highest courts in the United Kingdom, Canada and South Africa will be relied upon to briefly sketch the universality of this recognition. In 1942, the House of Lords held that the 'right of workmen to strike is an essential element in the principle of collective bargaining'.[203] In South Africa, with its explicit constitutional right to strike, the Constitutional Court has held that:

> Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargaining effectively with employers. Workers exercise collective power primarily through the mechanism of strike action.[204]

And in another case, that:

> ...it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system.[205]

Finally, in Canada, the Supreme Court pointed out that:

> 'To take away an employee's ability to strike so seriously detracts from the benefits of the right to organise and bargain collectively as to make those rights virtually meaningless.'[206]

Ultimately, the irrefutable international right to collective bargaining gives further support

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[200] J Nicod 'Freedom of Association and Trade Unionism: An Introductory Survey' (1924) 9 *I. L. Rev*. 467.
[201] Freedom of Association: Report and Draft Questionnaire (Geneva: ILO, 1927), ILC, Tenth Session at p75, p138 and p143.
[202] Op cit note 186 at p16.
[203] *Crofter Hand Woven Harris Tweed Co Ltd and Others v Veitch and Another* 1942 435 (AC) p463.
[204] *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) para 66.
[205] *National Union of Metal Workers of South Africa v Bader Bop (pty) Ltd and Another* 2003 (2) BLLR 103 (CC)
[206] *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983) 44 O.R. (2d) 392 (SC).

to the existence of 'the right to strike as a derivative right of freedom of association'.[207] This is a necessity due to the fact that the right to collective bargaining is, on the workers' side, 'without practical effect in the absence of a right to strike'.[208] Essentially, without it, a right to collective bargaining amounts to no more than a right to collective begging.[209]

Do the relevant ILO Conventions affirm a right to strike? The answer was not explicitly stated in the two interlinking instruments produced by the ILO, namely Convention No. 87 and Convention No. 98. Rather, there was a consensus that the right to strike was encompassed in these provisions in an implied way. This consensus was confirmed by 'subsequent interpretation of these guarantees by the CFA and the Committee of Experts'.[210] Notably, there was 'no challenge made by the Employers' Group to ILO jurisprudence on the right to strike as developed by the Committee of Experts and CFA in relation to Convention 87 for nearly 40 years'.[211] Therefore, it was this broader historical consensus that made the explicit inclusion of the right to strike unnecessary as any conception of freedom of association and expression entailed it.

Furthermore, an argument could be made that finds the right to strike as being a part of customary international law.[212] The ILO has identified '89 countries from all regions of the world (Asia, Africa, Americas, Europe and Middle East) whose constitutions incorporate the right to strike.'[213] Notably, it is also common across the world that the exercise of the right to strike is subject to 'certain conditions or restrictions', but the principle of this right as a 'means of action of workers' organisations is almost universally accepted'.[214] In terms of the requisite state practice and *opinio juris*: state practice reflected in most countries' constitutions, laws, and decisions of national courts confirm the right to strike and while the limits may vary from country to country, there is an international consensus that the right exists and that any limits must be reasonable.[215] Further, the *opinio juris* is satisfied as 'states respect this right out of a sense of legal obligation, not merely a moral one'.[216] Ultimately, this research has briefly[217] set out this argument in favour of the existence of a customary international law right to strike as

[207] Op cit note 186 p15.
[208] Ibid.
[209] Ibid.
[210] Ibid at p17.
[211] Op cit note 186 at p17.
[212] Ibid p90.
[213] Ibid.
[214] Ibid.
[215] Ibid.
[216] Ibid.
[217] For a more detailed and comprehensive account see ibid at p90-96.

a safety net to rebut any arguments that rely on the absence of ratification of specific Conventions and the lack of an explicit right therein.

ii. The Content: Acceptable Conduct, Limitations and Requirements

Due to the implied nature of the right, there is no definition of what constitutes legitimate strike action in any Conventions. This is concerning given the varying forms that it may take and the efforts of a state to potentially limit the legitimate exercise of strike action. However, the CFA has produced a substantial body of jurisprudence relating to the right to strike in international law through the cases brought before it. Thus, these decisions and the findings therein provide the best source for establishing the content and parameters of the right to strike in international law.

Notably, the CFA has accepted a number of forms of strike action which include but are not limited to typical work stoppages[218], wild-cat strikes[219], occupation[220] of the workplace, go-slow[221] or work-to rule[222] and sit-down strikes.[223] However, there are three common themes that limit the right to strike. First, the strike must remain peaceful to be lawful. Second, the strike must be in pursuance of a legitimate motive to be lawful. Third, the trade union that calls the strike should expect to comply with reasonable rules and procedures.

The first requirement that has been consistently affirmed holds that any lawful strike action must be 'conducted in a peaceful manner'.[224] Thus, the first legitimate restriction and exclusion to the right to strike is the use of violence as pickets and occupations may cease to be lawful when the action is no longer peaceful.[225]

The second possible limitation may be recognised in the subject matter that is the cause of the strike – the requirement of a legitimate and lawful motive. Some of the demands pursued through strike action include: occupational (seeking to guarantee or improve workers' working or living conditions), trade union (seeking to guarantee or develop the rights of trade union organisations and their leaders), or political.[226] The contentious topic would be the political strike. The CFA has clearly found that strikes of a 'purely political nature' do not fall within

[218] Bernard Gernigon, Alberto Odero & Horacio Guido 'International Labour Organisation Principles Concerning the Right to Strike' (1998) 137 *International Labour Review* 4 at p12; op cit note 44 CFA 2018 para 783 at p148.
[219] Ibid CFA 2018.
[220] Op cit note 218 p12.
[221] Ibid; op cit note 44 CFA 2018 para 784 p148.
[222] Ibid note 218; ibid note 44.
[223] Ibid note 44.
[224] Op cit note 218 at p12; op cit note 44 CFA 2018 para 156 at p32, para 208 at p40, para 221 at p42, para 784 at p148, para 937 at p175, para 971 at p181.
[225] Ibid note 218 at p17.
[226] Ibid p13.

the protection of Conventions Nos. 87 and 98.[227] However, it should also be noted that the CFA and the Committee of Experts have rejected the notion that 'the right to strike should be confined to industrial disputes that are likely to be resolved through the signing of a collective agreement'.[228] The Committee of Experts has also concluded that the occupational and economic interests sought through strikes are not limited to 'better working conditions or collective claims of an occupational nature', but may be broader and include 'the seeking of solutions to economic and social policy questions'.[229] This notion is echoed by CFA who have found that trade unions should be able to have recourse to protest strikes aimed at criticising a government's economic and social policies.[230] Therefore, workers organisations should be able to 'express their dissatisfaction regarding economic and social matters affecting workers interests' in situations beyond the scope of mere 'industrial disputes'.[231]

This is a fairly convoluted requirement as it is difficult (if not impossible) to distinguish between the political and occupational aspects of a strike, since a governmental policy has immediate repercussions for workers or employers.[232] Thus, a trade union that seeks to strike in order to criticise a government's social policy will always be running the risk of striking for a purely political motive.[233]

The third limitation can be found in the need for trade unions to abide by the reasonable laws and regulation in terms the administration and carrying out of strikes. Essentially, trade unions 'must conform to the general provisions applicable to all public meetings' and must respect the 'reasonable limits which may be fixed by the authorities to avoid disturbances in public places'.[234] Importantly, these provisions must be reasonable and not place an undue burden as to substantially limit of frustrate the means of action open to a trade union.[235] Furthermore, the provisions and requirements should be easily understandable and should not involve complicated procedures that would effectively hinder the practical declaration of a lawful strike.[236] The CFA has determined that the a trade union may reasonably be required to follow a 'predetermined itinerary in the progression of its strike action'.[237] However, a 'time

[227] Op cit note 44 CFA 2018 paras 761 and 763 at p145.
[228] Op cit note 218 at p1.
[229] Ibid p14; op cit note 44 CFA 2018 para 64 at p16.
[230] Op cit note 44 CFA 2018 para 763 at p145, para 65 at p16.
[231] Ibid para 751 and 753 at p143; Op cit note 218 at p14.
[232] Ibid note 218 at p15.
[233] Op cit note 44 CFA 2018 para 730 at p137.
[234] Ibid paras 220, 222-223 at p42.
[235] Ibid para 789 at p149.
[236] Ibid para 790 at p149.
[237] Ibid para 227 at p43.

restriction placed by legislation on the right to demonstrate' has been found to be unjustifiable as it may render the right inoperative in practice as the strike will be of little effect.[238] The final noteworthy finding relates to the inherent conflict between the right to strike action and the concurrent state responsibility to maintain public order and peace. The CFA has highlighted that this is a legitimate concern of the state and thus it would be acceptable and reasonable for a trade union to have to get permission through consultation with the authorities and reach agreement as to the location of a strike as some zones may need to be off limits.[239] For example, it has been found that strike action that would seek to block a public highway in the busiest part of a city was unreasonable.[240]

iii. Fair Procedure and Impartiality

Trade Unions exist to level the power imbalance in the labour system between workers, employers and often the government itself. Thus, there is an inherent issue in the possibility that one of the parties that the law seeks to restrain is also the party tasked with determining if certain standards or legal limits have been reached. Therefore, the CFA has sought to minimise the probability of abuse by declaring that the responsibility for declaring a strike illegal should not lie with the government (especially in those cases in which the government is a party),[241] but with an independent and impartial body.[242] Furthermore, the independent judicial authority of a state is the most appropriate body to determine whether strike action is illegal.[243] These requirements stem from the universal principle of *nemo judex in sua causa.*

The need for effective consultation, mediation and arbitration mechanisms are emphasised by both the CFA and throughout the abovementioned Conventions and Recommendations.[244] However, the CFA has highlighted the violation of the right to strike that accompanies the weaponisation of forced arbitration proceedings in a countries legislation. Essentially, if any party had the power to unilaterally request the intervention of a labour authority or compulsory third party arbitrator to decide a dispute then the workers would effectively be barred from every calling a strike to enhance their position which is contrary to the principles of freedom of association.[245]

[238] Op cit note 44 CFA 2018 para 228 at p43.
[239] Ibid para 218 at p41.
[240] Ibid para 216 at p41.
[241] Ibid para 911 at p171
[242] Ibid para 908-909 at p171.
[243] Ibid para 910 at p171.
[244] Ibid para 768 at p146.
[245] Ibid paras 820, 821, 822 at p153.

iv. Summary

In sum, international labour standards require the existence of the right to strike as a necessary corollary of freedom of association. Internationally acceptable forms of strike action include typical work stoppages[246], wild-cat strikes[247], occupation[248] of the workplace, go-slow[249] or work-to rule[250] and sit-down strikes. There are three accepted limitations the right to strike according to international standards: first, the strike must remain peaceful to be lawful. Second, the strike must be in pursuance of a legitimate motive to be lawful. Third, the trade union that calls the strike should expect to comply with reasonable rules and procedures. Finally, the responsibility for declaring a strike illegal should not lie with the government but with an independent and impartial judicial body.

g. Conclusion

The following is a list of international labour standards that are core to the comparator which will be used to assess the position in Chinese law in the chapter three below.

International labour standards for the scope and application of freedom of association and collective bargaining rights require that a state promulgate laws or regulations that explicitly affirm these rights in all sectors of the economy (both private and public). The right must be conferred without any discrimination of any kind based on occupation, sex, colour, race, beliefs, nationality and political opinion. The formal employee status or informal status of the worker cannot be used to deny these rights. The laws of a state should include specific modalities for the achievement of these rights for vulnerable classes of workers such as women, migrant labourers, disabled workers, women, refugees and rural workers. Moreover, persons employed by the public authorities are a separate group (distinct from police and military) that must be afforded the same right to freedom of association and collective bargaining as other workers.

In contrast, it is permissible to exclude the military and police force from exercising the right to freedom of association. Furthermore, essential workers may enjoy a limited form of the right to freedom of association and collective bargaining and a state may prescribe limitations on the right to strike. Ultimately, any laws denying or limiting the right to freedom

[246] Op cit note 218 at p12; op cit note 44 CFA 2018 para 783 at p148.
[247] Ibid CFA 2018.
[248] Op cit note 218 at p12.
[249] Ibid; op cit note 44 CFA 2018 para 784 at p148.
[250] Ibid note 218; ibid note 44.

of association and collective bargaining must be clear, precise and not overly broad – the restriction must be reasonable and the least restrictive means available to achieve the purpose.

International labour standards for the right to organise require a trade union system that is not dominated by a single centralised trade union. Furthermore, the establishment of a trade union cannot be made subject to the prior authorisation of a pre-existing union and all formalities for registration must be reasonable and cannot be designed to frustrate or prevent the registration of new unions. Moreover, trade unions must be autonomous and be able to be independent of all other unions and political parties. Finally, a formal independent judicial decision is required to suspend or dissolve a trade union.

International labour standards require a variety of protections to be afforded to trade unions, their representatives and workers. These protections include: first, legislative provisions guarding against acts that cause a climate of fear in the labour system such as physical violence, intimidation, threats, arrest and detention of trade unionists. Second, protections against anti-union discrimination, the creation of puppet trade unions, restrictively mandating certain functions to unions and the denial of international union solidarity that ultimately serve to ensure the independence of trade union organisations. Third, the formal recognition of these unions by a process of registration that cannot be denied or made to be so complicated and unworkable that registration becomes an impossibility. Finally, trade unions shall benefit from the protectionist right to information so that they can know the financial position of the employer (both private and public) and thus negotiate in the best interests of the workers on an equal footing.

International labour standards require the establishment in law of procedures for voluntary negotiations that include conciliation, mediation and arbitration. However, the imposition of an immediate and compulsory referral to arbitration is contrary to international standards as this would nullify the workers power through strike action. The second requirement demands the active consultation of worker's representatives regarding all matters that have an impact on them – such as drafting laws, regulations or setting of minimum standards. The third requirement is the obligation on the state or even employers themselves to facilitate the enhancing of the capabilities of these representatives through education so that they can negotiate more effectively from the start and hopefully prevent the emergence of a dissatisfied workforce. The fourth requirement demands the drafting of collective agreements that must be binding on the employer and enforceable by worker's representatives. Finally, worker's representatives must be given the right of access and entry to the work premises in

order to communicate with the workers in general otherwise the right to organise and to freedom of association would be infringed.

International labour standards require the existence of the right to strike as a necessary corollary of freedom of association. Internationally acceptable forms of strike action include typical work stoppages[251], wild-cat strikes[252], occupation[253] of the workplace, go-slow[254] or work-to rule[255] and sit-down strikes. There are three accepted limitations the right to strike according to international standards: first, the strike must remain peaceful to be lawful. Second, the strike must be in pursuance of a legitimate motive to be lawful. Third, the trade union that calls the strike should expect to comply with reasonable rules and procedures. Finally, the responsibility for declaring a strike illegal should not lie with the government but with an independent and impartial judicial body.

[251] Op cit note 218 at p12; op cit note 44 CFA 2018 para 783 at p148.
[252] Ibid CFA 2018.
[253] Op cit note 218 at p12.
[254] Ibid; op cit note 44 CFA 2018 para 784 at p148.
[255] Ibid note 218; ibid note 44.

III. APPLYING THE COMPARATOR IN THE CONTEXT OF THE PEOPLES REPUBLIC OF CHINA

a. Introduction

The purpose of this chapter is to compare the relevant laws in the People's Republic of China (PRC), that regulate freedom of association and collective bargaining, against the international standards of the International Labour Organisation's (ILO) Conventions and Recommendations that established the comparator in Chapter II. The main legal texts that will be considered include the Labour Law[256] (LL), the Trade Union Law[257] (TUL) and the Labour Contract Law[258] (LCL).

In the context of the PRC, two preliminary issues to note include their status as a developing country and the political system of the state. With regards to the former, the CFA has held that trade union rights, like other basic human rights, should be respected no matter what the level of development of the country.[259] The later poses a broader issue in that the CFA has considered a democratic political system as being fundamental for the free exercise of trade union rights.[260] Furthermore, the international standards set out above envision these representative organisations having their own specific functions and independent structures irrespective of the country's political system.[261] Thus, the operation of the Chinese 'democratic dictatorship' and 'socialism with Chinese characteristics' under the rule of the communist party may fundamentally be at odds with the international law in terms of both content and functioning.[262]

At this point, it may be appropriate to raise a Chinese proverb: *shānA gāo, huángdì yuǎn* which means 'the mountains are high and the emperor is far away' and commonly denotes the vast size and variability of the Chinese mainland and the lack of uniform compliance to laws and regulations.[263] The phrase typically carries a pejorative tone to refer to non-compliance or corruption due to the historical fact that the Chinese Central Government in Beijing had weak control over regions with their own autonomy and loyalties.[264] Ultimately,

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[256] Labour Law of the People's Republic of China Order No. 28 of 1994.
[257] Trade Union Law of the People's Republic of China Order No. 18 of 2009.
[258] Labour Contract Law of the People's Republic of China Order No. 65 of 2007.
[259] Op cit note 44 CFA 2018 para 53 at p13, para 311 at p56.
[260] Ibid para 69 at p17.
[261] Ibid para 311 at p56.
[262] Constitution of the People's Republic of China 1982 (as amended second session of the tenth National People's Congress March 14, 2004) Preamble.
[263] Alvin Plummer 'Heaven is High, and the Emperor is Far Away' available at *https://stellarreaches.wordpress.com/2020/08/29/heaven-is-high-and-the-emperor-is-far-away/* , accessed on 13 March 2021.
[264] Op cit note 263.

Sean Cooney[265] highlights this reality by stating that the situation is dynamic and the 'extent of labour abuses[266] varies widely depending on location, industry and the ownership structure of enterprises, among other factors'.[267] Moreover, the Chinese economic mega-structure is fraught with complexities in terms of applicable laws and policies. For example, the existence and functioning of the Special Administrative Zones (Hong Kong 1997 and Macau 1999) and the applicability of Chinese law therein is so convoluted in the one country two systems model that it is well beyond the scope of this piece.[268]

Ultimately, the application of the comparator in this section will 'avoid fruitless and abstract condemnation' but rather simply establish *what the law is* and *how it functions* and any deficiencies that may arise will be noted for further research.[269] Many of the short-comings or noncompliance discussed here may be peculiar to China due to its unique character, but many are universal to the developing world.[270] Therefore, as Cooney notes, these realities 'should be borne in mind lest overly harsh and pessimistic judgments about China's predicament undermine the development of feasible reform proposals'.[271]

To preface what follows, it must be highlighted that the Chinese legal system is closely tied to its political system. For example, the Constitution states that it is a 'socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants'.[272] Thereafter, a 'socialist legal system with Chinese characteristics' that is bound by the Constitution which no 'law; administrative or local rules and regulations may contravene' is established.[273] Ultimately, the complex interplay of the rights of the worker in a

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[265] International and comparative labour and employment law specialist, with a focus on Asia. Between 2014 and 2016, Sean served as a Legal Specialist in the Labour Law and Reform Unit at the ILO in Geneva, where he provided advice to governments in countries such as China, India, Myanmar and Pakistan. *https://law.unimelb.edu.au/about/staff/sean-cooney*

[266] Wages are frequently unpaid, see Gerard Greenfield and Tim Pringle 'The Challenge of Wage Arrears in China' (2002) in M. S. Velasco (ed.) *Paying Attention to Wages*, pp. 30–8. Occupational health and safety standards are commonly poor, see Tim Pringle and Stephen Frost 'The Absence of Rigor and the Failure of Implementation: Occupational Health and Safety in China' (2003) 9 *International Journal of Occupational and Environmental Health* 4 p311–16. Migrant workers (rural workers with non-resident status in China's cities) are also habitually discriminated against, see Dorothy Solinger *Contesting Citizenship in Urban China: Peasant Migrants, the State, and the Logic of the Market* (1999) Berkeley: University of California Press.

[267] Sean Cooney 'China's Labour Law, Compliance and Flaws in Implementing Institutions' (2007) 49 *Journal of Industrial Relations* 5 p674.

[268] Thomas E. Kellogg 'Constitutionalism with Chinese characteristics? Constitutional development and civil litigation in China' (2009) 7 *International Journal of Constitutional Law* 2. p232; Mitzi Huang 'Seeds of Legal Discontent - The Luoyang Seed Law Case: A Case Study of the Rule of Law in China' (2005) 3 *Dartmouth College Undergraduate Journal of Law* 1; Xiao Weiyun 'A Brief Discussion of the Judgments of the Court of Final Appeal and the NPCSC Interpretation (2001-2002) 5 *Journal of Chinese and Comparative Law*.

[269] Op cit note 267 p674.

[270] Ibid.

[271] Ibid.

[272] Supra note 262 art 1.

[273] Supra note 262 art 5.

socialist system and the goals of that system itself will become stark below. On the one hand, the worker is a vitally important stakeholder in terms of ideology and the sheer majority of the population. While on the other, the worker is also the functional unit that will drive the economic and social development of the state and broader society. Thus, the PRC has to walk the tight rope of a developing socialist country by balancing respect for workers and worker's rights against potentially hindering economic development.[274]

The brief history that is immediately relevant is as follows: the 'open door' policy reforms in the 1970s under Deng Xiaoping's socialist planned economic system saw all industrial relations being incorporated under the labour administration system of the state which was directly supervised and controlled by government.[275] In this way, there was 'no recognised separation between employer and employees' but rather all conflicts, collective bargaining and collective contracts were 'concluded by the state on behalf of its citizens'.[276] Thus, there was no real and substantive form of freedom of association and right to collective bargaining under an all-powerful government. However, the restructuring of state-owned enterprises and the rapid growth of the private sector permanently changed employment relations in the new market economy that emerged.[277] Thus, in 1995 the new Labour Law Act came into force and collective bargaining spread throughout China and by 2000 was a recognised and established pillar of the country's industrial relations.[278]

In the discussion below the LL, TUL and the LCL of the PRC will be evaluated against the comparator to determine the extent of compliance of the Chinese labour system with international labour standards. This chapter will conclude with a brief summary of the findings and a discussion on the points of compliance and non-compliance.

b. Freedom of Association and Collective Bargaining: Scope, Application, Flexibility and Exceptions

The answer to the question: do the citizens of China even have a legally protected right to freedom of association? is fairly straight forward – yes. On a broad level, the Constitution stipulates that citizens enjoy 'freedom of speech, publication, assembly, association,

[274] Rudolf Traub-Merz 'All-China Federation of Trade Unions: Structure, Functions and the Challenge of Collective Bargaining' (2011) Working Paper No.13 International Labour Office; Global Labour University, Geneva: ILO at p6.
[275] Zheng Qiao et al 'Collective Bargaining in China' (2006) Report on the Survey on Industrial Relations in East Asia, ILO-Japan Multi-Lateral Project p6.
[276] Ibid.
[277] Ibid.
[278] Ibid; See op cit notes 274 and 275 for a comprehensive account of the historical developments.

procession and demonstration'.[279] This is the bedrock from which more specific legislation gives body to the right.

The LL is the overarching legislation that achieves this purpose. The law accords with the constitution and ultimately attempts to 'protect the legitimate rights and interests of labourers, regulate labour relations, establish and safeguard a labour system suited to the socialist market economy, and promote economic development and social progress.'[280] Furthermore, 'labourers shall have the right to participate in, and organise, trade unions in accordance with the law.'[281] Thus, it can be concluded that workers in the PRC do indeed have a broad right to freedom of association and to form trade unions that are legally protected.

i. Who is Included?

The more specific legislation that has been passed to supplement the LL is the TUL of the PRC. Essentially, 'all labourers doing physical or mental work in enterprises, public institutions and government organs within Chinese territory who earn their living primarily from wages shall have the right to participate in and form trade union organisations pursuant to the law, regardless of their nationalities, races, sexes, occupations, religious beliefs or education'.[282] Thus, the right has been extended to certain subgroupings of workers who engage in different forms of work and the right may not be easily limited given the broad grounds of discrimination listed and the general prohibition on hindering the exercise of this right. Therefore, these provisions are compliant with the international standards above[283] as they extend the rights to all sectors of the economy (public and private), list the same grounds of discrimination and may include persons employed by the public authorities.

Notably, this research was unable to determine the position of Chinese workers who have an informal or casual employee status (as opposed to a formal employee status). However, the PRC and All-China Federation of Trade Unions (ACFTU) have earmarked sectors such as 'workers employed by employment agencies' for freedom of association and collective bargaining development.[284] This may be an effort to address the vulnerable position of some of these informal workers; however no firm conclusion can be made here and the topic should be addressed in further research.

[279] Supra note 262 art 35; Op cit note 275 at p7.
[280] Supra note 256 art 1.
[281] Ibid art 7.
[282] Supra note 256 art 3.
[283] Cf. above *iv) Summary* p20.
[284] China (2000-2019): Freedom of Association and the Effective Recognition of the Right to Collective Bargaining, Country Baseline Under The ILO Annual Review at p3.

The LL, TUL and LCL do not explicitly single out the vulnerable groups of workers raised above. However, these groups are accounted for in the ILO Annual Review as policy directives of the Government or ACFTU and include 'migrant workers, women, miners, construction workers, catering industry workers, truck drivers, migrant workers, care workers, domestic workers, sell persons in commercial centres, food delivery workers, real estate agents and security persons'.[285] Notably, many of these groups are highlighted in the international law above.[286] Although the legislation does not explicitly single out these vulnerable groups and afford them specialised protections as required in terms of international standards;[287] these groups and the need for specialised measures is noted and is actively being addressed in China. This is illustrated below with reference to policy directives relating to women and migrant rural workers.

Due to the industrialisation and urbanisation processes in China, migrant workers (particularly rural migrant workers) are the largest proportional group in China's centralised trade union system under the ACFTU.[288] As of 2015, the total number had reached 269 million, 166 million of whom worked outside their hometowns.[289] In 2015, trade unions in China also launched the 'Concentrated Action for Migrant Workers to Join Trade Unions' and increased the broad participation of migrant workers in trade unions, with a view to effectively safeguarding the legitimate rights and interests of this particular group.[290] Furthermore, trade unions have launched the 'National Organising Campaign among Rural Migrant Workers' as part of their efforts to extensively recruit migrant workers.[291] In this regard, particular attention has been given to collective bargaining in 'mining, construction and catering industries' where migrant workers are the majority.[292] Thus, while the law may omit specific protections, the policy directives are compliant with international standards as there is a clear recognition of the distinct position of rural migrant labourers.[293]

The vulnerable position of women in the labour force has been highlighted and accounted for by the ACFTU. In 2012, the State Council of China issued the 'Special Provisions on Labour Protection of Women Workers' which sought to aid the ACFTU in its efforts to 'safeguard the interests of women workers' by protecting their 'rights in collective

[285] Op cit note 284 at p3-5.
[286] Cf. above *iv) Summary* at p20.
[287] Cf. above *iv) Summary* at p20.
[288] Op cit note 284 at p5.
[289] Ibid.
[290] Ibid p3.
[291] Ibid.
[292] Ibid p4.
[293] Cf. above *i) Who is included?* at p16.

bargaining' practices.[294] Furthermore, trade unions at all levels have urged enterprises to sign specialised collective agreements for women workers in accordance with the 'Views on Adoption of the Specialised Collective Contracts for Protection of the Rights and Interests of Women Workers' issued by the ACFTU itself.[295]

Therefore, this section can conclude that the legislation is compliant with international standards in so far as it extends the right to freedom of association and collective bargaining to all sectors of the economy (private and public), lists the comprehensive grounds for discrimination that are protected in this regard and extends the right to persons employed by the public authorities. Furthermore, the position of informal or casual workers is unclear and cannot be established in this research. Notably, the compliance in terms of the specific provisions and protections for vulnerable groups is a more complicated issue. In a strict sense, the law does not single out the position of these groups and afford tailored protections which is not complaint with international standards. However, the ACFTU itself has issued many policy directives regarding women workers, rural workers, and migrant workers. It is at this point that the status and functioning of the ACFTU as a semi-organ of state must be raised.[296] This will be elaborated on in the Establishment[297] section below but the main point is that the policy directives of the ACFTU may not be law but they carry significant weight as something 'akin to law' within the complicated hierarchy of legal measures in the Chinese legal system.[298] Ultimately, this serves to lessen the extent of the non-compliance with international standards.

ii. Who is Excluded

The LL, TUL, LCL and the Law of the PRC on National Defence are silent on the issue of the right of the police and military personnel to organise and form trade unions. However, the People's Police Law of the PRC states that 'no policeman may spread statements that damage the prestige of the State; to join illegal organisations; to take part in such activities as assembly, procession and demonstration; and to take part in strikes.'[299] Thus, limitations are placed on the police force. However, this research was not able to establish the position of Chinese military personnel or of essential workers regarding the right to freedom of association from the sources available through the ILO database and elsewhere. Ultimately though, in terms of

[294] Op cit note 284 p3.
[295] Ibid p4.
[296] Op cit note 274 at piii.
[297] Cf. below *i) Establishment* at p57.
[298] For further explanation, see op cit note 268 Mitzi Huang at p32-33.
[299] People's Police Law of the Peoples Republic of China Order No. 40 of 1995 art 22(1).

international labour standards, it is permissible for China to limit the right to freedom of association and collective bargaining in the context of the defence force and the police.[300]

iii. Form and Function

With regards to the right to freedom of association and collective bargaining, the Chinese Government has enacted legislation committed to advancing the collective bargaining and collective agreements system.[301] The LL, the LCL and the TUL contain clear provisions concerning collective bargaining, collective agreements and the entrenchment of the right to freedom of association.

Essentially, trade unions are legally mandated to safeguard the legitimate rights and interests of labourers, and independently carry out their activities.[302] This is a broad empowerment as both citizens as well as all forms of unions shall have the right to expose and accuse any acts that violate the law, rules and regulations on labour in the PRC.[303] Trade unions shall offer assistance and guidance to workers seeking to conclude labour contracts as well as establish a collective consultation mechanism with the employing unit in order to protect the legitimate rights and interests of workers.[304]

Notably, the role of trade unions includes upholding the overall rights and interests of the whole nation.[305] Thus, there is an important acknowledgement of two levels of collectives – the workers and the broader socialist society. In this way, the position of trade unions within a socialist society is markedly distinguishable from that of a typical Western sphere. At this early stage it is important to note the fact that the legislation explicitly identifies the potential for a balancing act or even a face-off between the rights of workers and the *broader society* of the PRC. This issue will be addressed further in the establishment and autonomy section below.

Furthermore, in terms of the form that recognition of the right may take, it should be noted that the Chinese legal system has a complicated mix of laws, by-laws, regulations, departmental directives and local decrees. Essentially, the hierarchy and binding nature of these different forms is not always clear.[306] Thus, as mentioned above, the ACFTU itself can issue a

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[300] Cf. above *ii) Who is Excluded?* p18.
[301] Recognition of the principle and right to collective bargaining can be found i) The 1999 Constitution (article 35); (ii) the 1992 Trade Union Law (section 3); (iii) the Labour Law (sections 33 and 35); (iv) the Interim Regulation on Private Enterprises; (v) the Regulations concerning the Registration of Social Organisations (sections 9 and 13); and (vi) the Regulations on Collective Contracts (section 33).
[302] Supra note 256 art 88; supra note 257 art 6.
[303] Ibid note 256 art 88.
[304] Supra note 258 art 6.
[305] Supra note 257 art 6.
[306] Op cit note 268 Mitzi Huang.

prerogative regarding the rights of women workers and provinces and districts can subsequently promulgate it despite the ACFTU not being a legislature and the prerogative not being a law in the strict sense.

To conclude, in its approach the PRC mirrors the international standards through the adoption of specific legislation relating to collective bargaining, trade union organisations and collective agreements.

iv. Summary of Compliance

As stated above,[307] international labour standards for the scope and application of freedom of association and collective bargaining rights require that a state promulgate laws or regulations that explicitly affirm these rights in all sectors of the economy (both private and public) and it has been established that China is compliant in this regard. Furthermore, the right must be conferred without any discrimination of any kind based on occupation, sex, colour, race, beliefs, nationality and political opinion and China is again compliant in this regard.

A more nuanced conclusion was established regarding the requirement that the laws of a state should include specific modalities for the achievement of these rights for vulnerable classes of workers such as women, migrant labourers, disabled workers, women, refugees and rural workers as the law itself was silent on the issue but the policy directives of the ACFTU were compliant. Thus, in a strict sense the PRC is not compliant in this regard but if directives of the ACFTU are understood to be 'appropriate according to national conditions'[308]
It is permissible to exclude the and police force from exercising the right to freedom of association and it was established that this is the case in the PRC - the provision excluding this right was clear and precise.

However, the three topics in this research that were not able to be adequately investigated due to a lack of available material included the rights of workers under an informal or casual employment status, the rights of military personnel and the rights of essential workers. Thus, no firm conclusions can be made concerning the compliance with international standards of the rights of these three groups of workers.

c. Right to Organise: Establishment, Membership, Autonomy, Dissolution and Suspension

i. Establishment

[307] Cf. above *iv) Summary* p20.
[308] Cf. above *iii) Form and Function* p19.

The trade union system of the PRC bares very little resemblance to Western jurisdictions across the world as there is one vital characteristic that sets it apart – it is ultimately centralised and hierarchical.[309] In China, there is essentially one all-powerful trade union which functions as the overarching umbrella body for all industry specific unions and their further subdivisions.[310] Consequently, the ACFTU is a powerful body that has grown to over 320 million members (as of 2018).[311]

The three practices that were established above[312] as being contrary to international standards include: a single centralised trade union system,[313] the requirement of prior authorisation[314] to establish new trade unions from pre-existing trade unions at a higher level and the need to comply with unreasonable registration formalities that in fact give the state a wide discretion to deny the establishment of new trade unions.[315] In this regard, the TUL explicitly identifies that the ACFTU shall operate uniformly at a national level as the overarching control unit of all of the trade union organisations.[316] This is synonymous to a single centralised trade union system and is contrary to international standards. Furthermore, trade unions at all levels 'shall be established in accordance with the principle of democratic centralism whereby trade union organisations at the higher level shall lead those at the lower level'.[317] In addition, the 'establishment of a trade union (at any level) must be reported to the trade union organisation at the next highest level for approval.'[318] The combination of the control of higher trade unions and the reporting of new trade unions for approval amounts to prior authorisation which is contrary to international standards. Finally, this research could find no indication that the prescribed formalities were in fact unreasonable and gave the state wide discretion to approve or reject the establishment of new trade unions. To reiterate, the wide discretion was established to reside with the higher trade unions in the centralised system.

Therefore, workers do not have the power or the right to create a parallel confederation of trade unions or a truly independent trade union as they must all fit into the centralised system.[319] Thus, workers can be understood to have an incomplete right to freedom of

[309] Op cit note 274 at p11.
[310] Ibid.
[311] Op cit note 284 at p5
[312] Cf. above *i) Establishment* p21.
[313] Op cit note 44 CFA 2018 para 454 at p82, para 497 at p92.
[314] Ibid para 419 at p77.
[315] Ibid.
[316] Supra note 257 art 2.
[317] Ibid art 9; op cit note 274 at p7.
[318] Ibid art 11.
[319] Op cit note 274 at p7.

association and to organise, given that the ACFTU approves their establishment and if it is in compliance with the functioning and structures thereof.[320] Ultimately, this does not comply with international standards and instead mirrors the abovementioned practices which the CFA have found to be contrary to these rights in the case law.

ii. Membership

The topic of membership includes two main topics - international trade union solidarity and the setting of unreasonable minimum thresholds in terms of numbers of individuals required to establish a union.[321]

First, the TUL states that the 'ACFTU shall, in accordance with the principles of independence, equality, mutual respect and mutual non-interference in internal affairs, improve the relations of friendly cooperation with the trade union organisations of other nations.'[322] Thus, this provision in principle clearly affirms the international law relating to international trade union solidarity. However, the extent of this right may be limited given the lack of independence that will be illustrated below.[323]

Second, the TUL requires '25 or more members as the minimum number of workers to establish a basic level trade union committee of an enterprise, public institution or government organ'.[324] This threshold may be compliant with the international labour standards as 20 was acceptable and 30 considered to be too high. [325] However, these figures provided by the CFA were specific to the relevant cases before them and thus were appropriate in a given context. Therefore, this research cannot conclusively find that this requirement of 25 members would be either internationally compliant or non-compliant as it cannot be known if the CFA would find in the same way for the PRC.

In sum, the international standards relating to international trade union solidarity can be found to be present in principle in the law of the PRC. The second requirement relating minimum thresholds in terms of numbers of individuals required to establish a union is difficult to conclusively determine to be compliant or non-compliant as 25 is the average of the two other numbers cited (one being acceptable, the other not). Thus, an international standard involving an exact number figure would be context specific and cannot be decided here.

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[320] Op cit note 274 at p7.
[321] Cf. above *ii) Membership* at p23.
[322] Supra note 257 art 8.
[323] Cf. below *iii) Autonomy* at p59 and *ii) Independence and the Prohibition on Interference* at p63.
[324] Supra note 257 art 10.
[325] Cf. above *ii) Membership* at p23.

iii. Autonomy

The above mentioned international standards relating to autonomy[326] highlighted some key features: first, that unions must have the possibility of forming parties that are independent from all pre-existing organisations or any political party.[327] Second, any law that imposes a centralised monopolistic trade union system would run contrary to the right of autonomy and freedom of association of these workers and employers organisations.[328] Ultimately, freedom of association grants these grass-roots organisations the power to draft their own constitutions, organise their activities and formulate their programmes independently and without constraint, interference or imposition from other organisations at a higher level.[329]

The discussion on establishment above identified the overarching monopoly and domination of the ACFTU that limits the autonomy of smaller trade unions at lower levels to conduct their activities in an independent manner.[330] First, in terms of political and ideological autonomy, the TUL states that trade unions must 'adhere to the socialist road and people's democratic dictatorship' and must 'insist on the leadership of the Chinese Communist Party and the guidance of Marxism Leninism, Mao Zedong Thought and Deng Xiaoping Theory'.[331] Essentially, the 'CCP has ideological hegemony' as trade unions in China do not have a choice but to be politically aligned to the communist party, to socialism in general and to a prescribed ideological philosophy.[332] Ultimately, this requirement stems from an education for 'totalitarian nationalism' which 'equates love for the nation with the love for the ruling party and ideology' – a 'love for China with the love for the Chinese Communist Party' (CCP) and Chinese socialism.[333]

Second, trade unions are required to 'educate the employees that they represent in order to improve their ideological thoughts and ethics and to ensure that they adopt the attitude towards labour as the nation's master.'[334] Ultimately this type of 'nationalistic education' is very 'ideologically biased and demands people's absolute obedience to the state, the ideology, party and the leaders'.[335] Thus, it is inevitably restrictive and exclusive as it precludes the

[326] Cf. above *iii) Autonomy* at p24.
[327] Op cit note 44 CFA 2018 para 475 at p87.
[328] Ibid para 486 at p89.
[329] Ibid para 584 at p109.
[330] Cf. above *i) Establishment* at p57.
[331] Supra note 257 art 4.
[332] Op cit note 274 at p8.
[333] Yan Wing Leung 'Nationalistic Education and Indoctrination' (2004) 6 *Citizenship, Social and Economics Education* 2 at p119.
[334] Supra note 257 art 7, art 31.
[335] Op cit note 333 at p119.

option for people to support different parties and ideological theories.[336] As an aside, one may argue that this form of education can actually amount to indoctrination.[337] One definition of indoctrination holds that in a situation of 'an unequal power relationship, the stronger one uses authoritarian methods that drill and impose their beliefs, values and views on the weaker one, with the intention that the weaker one would accept their beliefs, values and views, regardless of the evidence.'[338] This research will not investigate if this education listed in the legislation amounts to indoctrination as even if it falls short of this standard, it would render the law non-compliant with international standards.

The other way in which the centralised system of the PRC conflicts with international standards is in the prohibition of other confederations. As stated above, trade unions can be established and can join confederations but they cannot do so outside of the broader umbrella of the ACFTU.[339] Essentially, an alternative confederation that is separate and independent from the ACFTU and the communist party is inconceivable.[340] This reiterates the existence of the centralised trade union structure in the PRC that not complaint with international standards.[341]

In sum, trade unions in the PRC do not have the possibility of forming parties that are independent from all pre-existing organisations or any political party due to the domination of the ACFTU and the CCP. Furthermore, the law has again been found to impose a centralised monopolistic trade union system. Ultimately, trade unions do not have ideological and political autonomy to draft their own constitutions, organise their activities and formulate their programmes independently due to the powers of organisations at a higher level and the overall control of the CCP. Therefore, the law of the PRC was found to be non-compliant with international standards on all counts under the autonomy section.

iv. Dissolution and Suspension

The international standards relating to dissolution and suspension established above held that dissolution is a serious issue that should only occur in rare instances after a final judicial decision has been given and all due process of law has been followed.[342]

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[336] Op cit note 333 at p119.
[337] Ibid.
[338] Ibid at p120; for further possible criteria and debates about the definition of indoctrination see p120.
[339] Op cit note 274 at p7
[340] Ibid.
[341] Cf. above *i) Establishment* at p57.
[342] Cf. above *iv) Dissolution and Suspension* at p24.

In the law of the PRC, there is no provision for a unit or individual to cancel or consolidate a trade union organisation.[343] Furthermore, the acts of canceling or consolidating trade union organisations are explicitly identified as being unlawful.[344] However, if the enterprise, public institution or state organ to which a basic-level trade is cancelled, the relevant trade union organisation shall also be cancelled.[345] Notably, if this cancelation is to occur, the case must be reported to the trade union at the next higher level and the membership of its workers may be reserved.[346] Thereafter, the specific management measures for this group shall be formulated by the ACFTU.[347] Thus, the process of canceling a trade union and the consequent retaining of worker's membership does not seem to occur through a judicial decision but rather by referral to the ACFTU itself and the relevant higher level trade union. In a strict sense, this may not be compliant with international standards as the matter did not go through a judicial process but rather a political process.

Therefore, the law of the PRC is compliant with international standards in so far as it explicitly prohibits the cancelation and dissolution of trade union organisations. However, in the rare instance that it should occur (cancelation of the enterprise, public institution or state organ), the matter does not follow a judicial process but is instead refereed to the ACFTU for handling and this is not compliant with international standards.

v. Summary of Compliance

In sum, there are only two areas in which the law of the PRC was established to be compliant. First, the international standards relating to international trade union solidarity can be found to be present in principle in the law. Second, the law of the PRC is compliant with international standards in so far as it explicitly prohibits the cancelation and dissolution of trade union organisations.

Thereafter, the law of the PRC is not complaint with international standards in the following ways: workers do not have the power or the right to create a parallel confederation of trade unions or even a truly independent trade union as they must all fit into the centralised monopolistic system.[348] Thus, workers can be understood to have a incomplete right to freedom of association and to organise, given that the ACFTU has the power of prior approval of their

[343] Supra note 257 art 12.
[344] Ibid art 53.
[345] Ibid art 12.
[346] Ibid.
[347] Ibid.
[348] Op cit note 274 at p7.

establishment.[349] Trade unions in the PRC do not have the possibility of forming parties that are independent from all pre-existing organisations or any political party due to the domination of the ACFTU and the CCP. Furthermore, trade unions do not have ideological and political autonomy to draft their own constitutions, organise their activities and formulate their programmes independently due to the powers of organisations at a higher level and the overall control of the CCP. Finally, in the rare instance that dissolution of an organisation should occur (cancelation of the enterprise, public institution or state organ), the matter does not follow a judicial process but is instead refereed to the ACFTU for handling and this is not compliant with international standards.

Notably, the international compliance relating to the minimum thresholds in terms of numbers of individuals required to establish a union could not conclusively be determine to be compliant or non-compliant as an appropriate figure would be context specific and cannot be decided here.

d. Protection Mechanisms

i. Legislative Protection

The above section on legislative protection established the forms of conduct that must be guarded against in law for a labour system to be international complaint regarding the right to freedom of association.[350] The serious acts include violence, threats thereof, criminal allegations, arrest and detention of workers or their representatives.[351]

The most serious forms of abuse ultimately include injuries due to violence or threats thereof against the workers or their representatives in order to prevent future trade union activities. The law of the PRC state that any act that 'obstructs' the free 'participation in or organising of trade union activities' is unlawful and the guilty party will be order to make corrections by the Administrative Department of Labour.[352] Furthermore, if the acts amount to violence, personal injuries or threats against the workers or their representatives, then the guilty party shall be investigated for criminal responsibility in accordance with the Criminal Law of the PRC.[353] Thus, the law of the PRC is compliant with international standards to the extent that it identifies the potential use of violence and threats to infringe the exercise of the right to freedom of association and has according declared such conduct to be unlawful under penalty

[349] Ibid.
[350] Cf. above *i) Legislative Protection* at p26.
[351] Cf. above *i) Legislative Protection* at p26.
[352] Supra note 257 art 50.
[353] Ibid; Ibid art 51.

of criminal responsibility.

Ultimately, the law of the PRC does not explicitly list actions such as the making of criminal allegations, arrest and detention of workers or their representatives. Thus, in a strict sense, the omission of explicit recognition and protection against these three forms is not complaint with international standards. However, the prohibition of any conduct that 'obstructs employees from participating in or organising trade unions' could be interpreted to be broad enough to include these three forms within its ambit. Therefore, this research cannot definitively decide the compliance or noncompliance of this omission.

Therefore, the law of the PRC is compliant with international standards regarding the legislative protection afforded to workers and their representatives against acts of violence or threats aimed at hindering the free exercise of trade union activities. However, the law may be found to be noncompliant with regards to the omission of explicit protections against the making of criminal allegations, arrest and detention of workers or their representatives.

ii. Independence and Prohibition on Interference

This section is closely related to the autonomy section above.[354] The independence of trade unions in China is a complicated topic as the law affirms that they are independent in the text but then the centralised structure of the ACFTU and the functions attributed to it would appear to greatly infringe or limit this independence compared to international standards.[355] Thus, trade unions and the ACFTU appear to be independent to the extent that they can function as an organisation with 'quasi-government status' under the influence of the CCP.[356] The four forms of interference that were addressed below include anti-union discrimination, puppet organisations, the prevention of international solidarity and mandating a function to unions that would limit their rights.[357]

First, there is a prohibition on anti-union discrimination and a guilty party may face substantial repercussions. An employer who 'cancels a labour contract because a trade union representative or an employee participated in trade union activities shall be ordered by the administrative department of labour to reinstate the employees, pay them for their lost earning and pay a further penalty of two times the annual income of the employees'.[358] Moreover, anyone violating the law by 'hindering or denying the exercise of legitimate trade union rights,

[354] Cf. above *iii) Autonomy* at p24; *iii) Autonomy at p59*.
[355] Cf. above *v) Summary of Compliance* at p61.
[356] Op cit note 274 at p18.
[357] Cf. above *ii) Independence and Prohibition on Interference* at p28.
[358] Supra note 257 art 52.

illegally canceling or consolidating trade union organisations, preventing trade unions from investigation workplace abuses and accidents and unreasonably refusing to negotiate' shall be be ordered to make corrections and be 'dealt with' by the people's governments.[359] Finally, any employer who unjustifiably 'obstructs the administrative department of labour and their functionaries from exercising their supervision and inspection powers or retaliates against informers' shall be fined investigated for criminal responsibility accordingly.[360] Therefore, this section overlaps with the legislative protection section and clearly indicates strong anti-discrimination laws.

Second, it is more accurate to consider the independence afforded to trade unions as *independence with Chinese characteristics* due to the political and ideological influence of the CCP.[361] This point was raised in the autonomy section but it stands to be repeated.[362] The international standards relating to puppet organisations[363] are complicated in the case of the PRC due to the hierarchy and centralised nature of the ACFTU whereby trade union organisations at the higher level shall lead the trade union organisations at the lower level.[364] The international standards prohibit the interference of both higher level trade unions in the functioning of lower level trade unions as well as the interference of the employer in the functioning of worker trade unions.[365] Essentially, lower level trade unions are not wholly independent to pursue the wishes of the workers that they represent but are better understood to be a *minor cog* in the *larger confederation machine*. Thus, the trade union system of the PRC inherently enforces some degree of puppet organisations within the centralised system. Furthermore, there is no bar to the employer being elected into the employees representative organisation. More specifically, the 'election of employee representatives from the board of directors or board of supervisors of an employing enterprise' is explicitly catered for in the law.[366] Therefore, the law of the PRC is not compliant with international standards relating to the prohibition on puppet organisations.

Third, while it has been noted that China is not a party to international labour standards, it is interesting that the TUL states that the ACFTU shall, 'in accordance with the principles of independence, equality, mutual respect and mutual non-interference in internal affairs, improve

[359] Supra note 257 art 53.
[360] Supra note 256 art 101.
[361] Op cit note 274 at p8.
[362] Cf. above *iii) Autonomy at p59.*
[363] Cf. above *ii) Independence and Prohibition on Interference* at p28.
[364] Supra note 257 art 9.
[365] Cf. above *ii) Independence and Prohibition on Interference* at p28.
[366] Supra note 257 art 39.

the relations of friendly cooperation with the trade union organisations of various other nations.'[367] However, once again, this solidarity would be at the discretion of high level ACFTU committees and a lower level organisation would not be permitted to align with and support a foreign trade union organisation that fundamentally runs counter to the principle and ideology of the ACFTU and CCP.[368] Therefore, while the right to international trade union solidarity is reflected in the law in compliance with international standards, it cannot be considered to exist in substance due to the lack of ideological and political autonomy afforded to trade unions.[369]

Finally, the international standards prohibiting the mandating of specific functions to unions that would limit their right to independence has been addressed in the above section on autonomy.[370] To reiterate, the law states that trade unions must educate their workers in accordance with a prescribed ideology, prescribed political affiliation and ultimately for a prescribed purpose determined by the CCP.[371] Therefore, the law of the PRC is not compliant with international standards relating to independence and the prohibition of interference.

In sum, the law of the PRC is largely not compliant with international standards relating to the safeguarding of the independence of trade unions and the prohibition of interferences. However, the single example of compliance relates to the existence of clear provisions that make anti-union discrimination unlawful and punishable. Thereafter, the law is ultimately not compliant with international standards as the law does not prohibit the establishment of puppet organisations but instead requires them to some degree under a centralised trade union system and the allows for board members of the employing enterprise to serve as representatives in the worker's union. Third, while the law explicitly confirms the right to international trade union solidarity, the political and ideological dominance of the CCP results in this right being noncompliant with international standards. Finally, the law mandates the function of education to unions that restrict their independence due to the prescribed ideological and political affiliation.

iii. Formal Recognition

The abovementioned international standards relating to formal recognition essentially held that the law must provide for ways in which trade unions can officially be registered and recognised

[367] Supra note 257 art 8.
[368] Op cit note 274 at p8
[369] Cf. above *iii) Autonomy* at p59.
[370] Cf. above iii) Autonomy at p59.
[371] Cf. above iii) Autonomy at p59.

in law in order to be able to function effectively on behalf of the workers they represent.[372] Furthermore, the international standards require that any formalities that must be complied with in the registration procedure must not frustrate or hinder the establishment of these trade unions.[373] Finally, the international standards highlighted the position of unregistered trade unions and puppet organisations and held that unregistered unions cannot be declared unlawful but must instead be aided in their formalisation while puppet organisations must not be recognised in law.[374] The LL, the LCL and the TUL contain clear provisions and requirements concerning the lawful establishment of trade unions in the PRC.[375] Thus, there are undoubtedly legal avenues for the formal recognition of trade unions.

However, the formalities for legal recognition include the approval of higher level trade union organisation which essentially amounts to a 'veto power' if they are not compliant with the ACFTU.[376] Furthermore, this research was unable to determine the position of unregistered trade unions in the PRC due to the omission of this issue in the law. Thus, no conclusion as to the compliance of the law with international standards can be made here. Finally, it has already been established that the law of the PRC accepts the existence of some degree of puppet organisations contrary to international standards.[377]

In sum, the law of the PRC is compliant with international standards regarding the existence of clear legal avenues for the formal recognition of trade unions. However, the law is not complaint with international standards with regard to the unfair formalities to register that include the prior approval of a higher level trade union organisation as well as the recognition of some degree of puppet organisation. Ultimately, no conclusion can be made here regarding the position of unregistered trade unions.

iv. Access to Information

The international standards relating to access to information mainly focused on the need for worker's representatives to have access to the facts and statistics of an enterprise in order to negotiate in an informed and effective manner.[378] In the PRC, trade unions have the right to investigate the issues and infringements committed by an enterprise or public institution that

[372] Cf. above iii) Formal Recognition at p29.
[373] Cf. above *iii) Formal Recognition* at p29.
[374] Cf. above *iii) Formal Recognition* at p29.
[375] Cf. above *i) Establishment* at p57.
[376] Cf. above *i) Establishment* at p57; op cit note 274 at p8.
[377] Cf. above *ii) Independence and Prohibition on Interference* at p63.
[378] Cf. above *iv) Access to Information* at p30.

negatively impact the legal rights and interests of the employees.[379] Furthermore, trade unions are also responsible for conducting investigations into more serious matters such as job-related accident resulting in a fatality, injury or other problems seriously endangering the health of employees.[380] Thus, in order for them to conduct a meaningful and effective investigation these abovementioned employing units must give assistance in anyway required.[381] However, this sort of access to information is not the same as the one required by international standards. The international standards refer to the need for access to information in the negotiating stage of collective agreements so that worker's representatives have a realistic and detailed account of the position of the employers enterprise.[382] Therefore, while the law of the PRC clearly contains some form of the right to access to information that can be exercised by trade unions, it is ultimately silent regarding the specific type of access to information required by the international standards. Therefore, the law is not complaint with international standards relating to access to information.

v. Summary of Compliance

In conclusion, this section on protective mechanism will be briefly summarised in three parts – compliant, noncompliant and undetermined. The law of the PRC was found to be compliant with international standards in the following circumstances: the legislative protection afforded to workers and their representatives against acts of violence or threats aimed at hindering the free exercise of trade union activities; and the existence of clear provisions that make anti-union discrimination unlawful and punishable and the existence of clear legal avenues for the formal recognition of trade unions.

The law of the PRC was found to be noncompliant with international standards in the following circumstances: the omission of explicit protections against the making of criminal allegations, arrest and detention of workers or their representatives; the law does not prohibit the establishment of puppet organisations but instead requires them to some degree under a centralised trade union system and then allows for board members of the employing enterprise to serve as representatives in the worker's union; the law does not confirm the right to international trade union solidarity due to the political and ideological dominance of the CCP; the law mandates the function of education to unions that restrict their independence due to the

[379] Supra note 257 art 25.
[380] Supra note 257 art 26.
[381] Ibid art 25.
[382] Cf. above *iv) Access to Information* at p30.

prescribed ideological and political affiliation; the unfair formalities to register include the prior approval of a higher level trade union organisation; and the formal recognition of some degree of puppet organisation.

Ultimately, no conclusion can be made here regarding the position of unregistered trade unions in this research.

e. Industrial Relations Mechanisms

i. Settlement of Disputes

The international standards above for effective dispute settlement included conciliation, mediation and arbitration.[383] However, legislation should not mandate compulsory arbitration if agreement cannot be reached as this would infringe the principle of voluntary negotiation and would stifle recourse to an effective strike.[384]

The system for the settlement of disputes in the PRC is detailed and follows a linear progression that includes negotiation, mediation, arbitration and then legal action in a court of law as a final resort.[385] The labour system functions through a 'tripartite mechanism' made up of the 'people's government, the representatives of the trade union and the enterprise who will jointly discuss and resolve the major issues concerning labour relationships'.[386] In the event that a labour dispute arises or there is a failure to fulfil a labour or collective contract, the following procedure is applicable: first, the worker's trade union will represent them in a consultation process that seeks to reach an amicable settlement. Consultation should always be the first step if the issue is not serious and there is a likelihood of settlement. Second, failing consultation, the parties may enter into a mediation process to settle the dispute.[387] A labour dispute mediation committee may be established within the employing unit.[388] The committee shall be composed of representatives of the staff and workers, the employing unit, and the trade union.[389] Notably, the chairmanship of the committee shall be assumed by a representative of the trade union.[390] If an agreement is reached through mediation in the case of a labour dispute, it shall be implemented by the parties but if no agreement is reached then the parties may refer the matter for arbitration. Third, depending on the type of dispute, the parties can also go

[383] Cf. above *i) Settlement of Disputes* at p33.
[384] Cf. above *i) Settlement of Disputes* at p33.
[385] Supra note 257 art 20; supra note 256 art 77; supra note 258 art 56.
[386] Supra note 258 art 5; op cit note 274 at p21.
[387] Supra note 257 art 28.
[388] Supra note 256 art 80.
[389] Ibid.
[390] Ibid.

straight to arbitration.[391] A labour dispute arbitration committee shall once again be composed of representatives of the administrative department of labour, representatives from the trade union at the corresponding level, and representatives of the employing unit.[392] However, unlike in the mediation proceedings, the chairmanship of the committee shall be assumed by a representative of the administrative department of labour.[393] Finally, if a party to a labour dispute is still not satisfied with the arbitration decision then they may bring a lawsuit to the people's court.[394] Thus, the law of the PRC establishes clear procedures and processes for the settlement of disputes that involve the worker's trade unions at every step. Therefore, the detailed provisions relating to consultation, mediation, arbitration and then legal action in the People's Court are compliant with the international standards.[395]

However, the above procedures for dispute settlement do not mention recourse to the right to strike if a settlement cannot be reached. This is primarily due to the fact that the right to strike may not exist or is severely suppressed in the PRC.[396] Thus, at no point in the laws linear progression of the settlement of disputes is it envisioned that workers engage in a strike to compel the employer to come back to the negotiating table. Ultimately, this amounts in practice to a form of compulsory arbitration and infringes the principle of voluntary negotiation and stifles all recourse to an effective strike as workers have no choice but to continue on to the next stage of dispute settlement.

Ultimately, this section highlights the unique structure and character of Chinese trade unions compared to other jurisdictions. The role and position of trade unions is distinct – they 'do not necessarily side with the workers but rather stand between workers and management and have the task of conciliation as a neutral party'.[397] Thus, trade unions do not only have a 'duty to safeguard workers' rights and interests' but must also consider the 'interests of enterprises, promote economic development as well as long-term social stability.[398] Finally, Chinese trade unions must also 'safeguard the socialist state power of the people's democratic dictatorship.'[399] Therefore, this epitomises the reality of the centralised trade union structure of the ACFTU (functioning as a quasi-government department) under the overall influence of

[391] Supra note 257 art 56.
[392] Supra note 256 art 81.
[393] Ibid.
[394] Ibid art 83.
[395] Cf. above *i) Settlement of Disputes* at p33.
[396] Cf. below *f) Industrial Action and the Right to Strike* at p76.
[397] Op cit note 274 at p21.
[398] Ibid.
[399] Ibid.

the CCP.[400]

In sum, the law of the PRC is compliant with international standards to the extent that it details a comprehensive list of dispute settlement mechanisms include negotiation, mediation and arbitration. However, the lack of recourse to strike action results in a *de facto* system of compulsory arbitration should agreement not be reached which is not complaint with international standards.

ii. Consultation and Engagement of Stakeholders

The international standards above required that organisations of employers and workers must play an active role in the preparation, development, adoption, application and review of labour and socio-economic standards, including relevant laws, policy and regulation.[401]

Due to the centralised model of trade unions in the PRC and the political role of the ACFTU, trade unions have a great deal of power and influence in the creation, development and adoption of and laws and policy.[402] Notably, the state organs must 'listen to the view of the trade unions when drafting or amending the laws, statutory rules, regulations, national economic and social development plans that directly involve the rights and interests of workers'.[403] Finally, the trade union committee shall 'organise the participation of the workers in the 'democratic decision-making, management and supervision' of the relevant enterprises and public institutions.[404]

Therefore, there is a large degree of compliance with international standards regarding the legal requirement of trade unions playing an active role in the preparation, development, adoption, application and review of labour and socio-economic standards, including relevant laws, policy and regulation. This conclusion is to be expected given the centralised system and role of the ACFTU as an intermediary between the CCP and the workers.

iii. Enhancing Capabilities of Stakeholders

The international standards above require measures to be taken by the public authorities and parties to collective bargaining so that their negotiators, at all levels, have the opportunity to obtain appropriate training.[405] Furthermore, this right to training has been broadened to include

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[400] Op cit note 274 at p18; Cf. above *i) Establishment* at p57.
[401] Cf. above *ii) Consultation and Engagement of Stakeholders* p34.
[402] Op cit note 274 at p22.
[403] Supra note 257 art 33: rights and interests include employment, wages, labour safety, workplace hygiene and social insurance.
[404] Ibid art 6, 36-37.
[405] Cf. above *iii) Enhancing Capabilities of Role Players* at p35.

general adult education. In the PRC, this right is broadly affirmed in three ways: first, it is explicitly reflected in the law. Second, the Government of the PRC has been engaging with the ILO to develop its policy and practices. Third, the ACFTU itself has taken measures to affirm and develop the achievement of this right.

First, the State shall take various measures to expand 'vocational training undertakings' so as to develop 'professional skills of labourers, improve their qualities, and raise their employment capability and work ability'.[406] Furthermore, the three role players of trade unions, enterprises and public institutions shall organise the employees to develop 'technological innovation activities', to undertake 'after-hours cultural and technical studies', 'occupational training' and to 'develop recreational and sports activities'.[407]

Second, joint activities have been carried out between the ILO and PRC as recently as May 2019.[408] According to its arrangements, the Ministry of Human Resources and Social Security (MOHRSS) is 'collecting and analysing best practices in collective bargaining at home and abroad, intensifying the capacity building of all parties involved in collective bargaining, and conducting comparative studies of relevant international legal systems.'[409]

Third, the ACFTU has taken measures to promote the participation of professionals specialised in collective consultations and have also made great efforts to launch training programs.[410] In 2014, at the China Institute of Industrial Relations, the ACFTU organised a 'national trade union collective bargaining workshop and a national collective bargaining workshop for trade union trainers'.[411] Furthermore, the ACFTU has required trade unions across China to 'develop local training programs, continuously intensifying their efforts in the training activities and work hard to improve the competency and qualifications of collective bargaining instructors'.[412]

Therefore, there is a high degree of compliance with international standard in both the law and policies of the PRC relating to the enhancement of the capabilities of role players. The law reflects the specific need for training to enhance negotiation capabilities and also affirms the broader right to further education of workers. Finally, the Government and the ACFTU have illustrated policy measures that improve their systems of training.

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[406] Supra note 256 art 66.
[407] Supra note 257 art 31.
[408] Op cit note 284 at p8.
[409] Op cit note 284 at p8..
[410] Ibid at p9.
[411] Ibid.
[412] Ibid.

iv. Contractual Rights in Collective Agreements

The international standards identified above required laws or regulations detailing the requirements and procedures relevant to the negotiation, conclusion, revision and renewal of collective agreements.[413] Furthermore, collective agreements must be binding on the signatories, have overriding power to contrary clauses and a fair dispute settling procedure must be established.[414]

In PRC, the LL establishes the collective agreements system and provides that the 'staff and workers of an enterprise may conclude a collective agreement with the enterprise' on matters relating to 'labour remuneration, working hours, rest and vacations, occupational safety and health, and insurance and welfare'.[415] These agreements must be concluded in adherence to the 'principles of lawfulness, fairness, equality, voluntariness, consensus through consultation, and good faith'.[416] Furthermore, a lawfully concluded labour agreement shall be binding.[417] Ultimately, these provisions are compliant with the international standards as the parties that will negotiate and sign collective agreements are identified and the binding nature of these agreements is affirmed.

Furthermore, a collective agreement shall be concluded by the 'trade union on behalf of the staff and workers with an enterprise' and if a trade union has not yet been set up, such contract shall be concluded by the 'representatives elected by the staff and workers with the enterprise'.[418] These collective agreements can be powerful and influence entire sectors due to the fact that an 'industry-wide or region-wide collective contract will bind all employing units and workers in that region'.[419] Thus, these provisions are complaint with international standards as they provide mechanism that cater for trade unions that have not be set up yet and affirm the overriding nature of collective agreements through the broad application attributed to industry-wide or region-wide collective agreements.

In terms of dispute procedures and bodies, the above section on dispute settlement mechanism would be applicable.[420] Additionally, there are specific functions assigned to the department of labour regarding collective agreements. Notably, the administrative department of labour must 'supervise and inspect the implementation of laws, rules and regulations on

[413] Cf. above *iv) Contractual Rights in Collective Agreements* at p35.
[414] Cf. above *iv) Contractual Rights in Collective Agreements* at p35.
[415] Supra note 256 art 33; supra note 258 art 51.
[416] Supra note 258 art 3.
[417] Ibid; supra note 256 art 35.
[418] Ibid note 256 art 33; ibid note 258 art 51.
[419] Ibid note 258 art 54.
[420] Cf. above *i) Settlement of Disputes* at p68.

labour by the employing unit, and have the power to stop any acts that run counter to laws, rules and regulations on labour and order the rectification thereof.'[421] In order to exercise this function, the administrative department shall thus have the right to 'check the materials relating to labour contracts and collective contracts' and to conduct 'respectful on-the-spot inspection of the workplaces', and both the employing units and the workers shall truthfully provide relevant information and materials.[422] Moreover, concluded agreements must be submitted to the administrative department of labour and if they have no objections will thereafter shall go into effect automatically.[423] Thus, the administrative department of labour serves both as a watchdog mechanism and an enforcement mechanism.

Therefore, it would appear that the law of the PRC on collective agreements is largely compliant with international standards as it details the requirements and procedures relevant to the negotiation and conclusion of collective agreements, the binding nature thereof, the overriding power of industry-wide or region-wide collective agreements and finally the duties of the administrative department of labour supplement the dispute settlement mechanism above.[424]

v. Access to the Workplace

The international standards relating to access to the workplace require Governments to guarantee the access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers in order to both apprise them of the potential advantages of unionisation in order to recruit them and also to enable them to carry out their representative duties and functions.[425]

The right of trade unions to access to the workplace is not explicit in the law. Instead, it is the administrative department of labour that has the right to enter into any employing units premises in order to conduct investigations or on-site inspections and any prevention of the exercise of this will result in a fine or criminal responsibility .[426] In comparison, trade unions may only have a right of access to the workplace by implication. Notably, a trade union committee seeking to convene a meeting or organise activities for employees must do so outside production or work hours.[427] If it is necessary to occupy production or work hours, then

[421] Supra note 256 art 85; supra note 258 art 73, see art 74 for detailed list of matters for inspection.
[422] Ibid note 258 art 75.
[423] Ibid art 54; supra note 256 art 34.
[424] Cf. above *i) Settlement of Disputes* at p68.
[425] Cf. above *v) Access to the Workplace* at p37.
[426] Supra note 256 art 86 and 101.
[427] Ibid art 40.

prior approval of the enterprise or public institution is required.[428] The international standards cater for the need to respect the rights of management so this prior approval to disrupt work in order to hold a meeting may be compliant. However, the only implicit right to access for trade unions is through the combination of three provisions of the TUL. First, trade unions have the legal right and duty to investigate into the infringement of the legal rights and interests of workers and employers cannot prevent the exercise of this right.[429] Second, it is unlawful to 'obstruct the employees from participating in or organising trade unions'.[430] Third, it is unlawful to 'hinder the trade union from organising the employees to exercise their democratic rights through the employee representative assemblies'.[431] Thus, trade unions would require the right to access to the workplace in order to investigate, participate in or organise new trade unions and exercise their democratic rights through the employee representative assemblies. Therefore, it is only through this process of reasoning that the right to access to the workplace can be established.

Ultimately, despite the potential existence of an implicit right to access, the international standards require a firm recognition of the right of trade unions to access to the workplace in order to both recruit new workers and also to enable them to carry out their representative duties and functions. Therefore, the law of the PRC is not compliant with international standards.

vi. Summary of Compliance

The compliance of the law of the PRC relating to the industrial relations mechanism section of the comparator can be summarised as follows:

The law of the PRC is compliant with international standards to the extent that it details a comprehensive list of dispute settlement mechanisms include negotiation, mediation and arbitration. Furthermore, there is a large degree of compliance with international standards regarding the legal requirement of trade unions playing an active role in the preparation, development, adoption, application and review of labour and socio-economic standards, including relevant laws, policy and regulation. Moreover, there is a high degree of compliance with international standard in both the law and policies of the PRC relating to the enhancement of the capabilities of role players to the extent that the law reflects the specific need for training

[428] Supra note 256 art 40.
[429] Supra note 257 art 25.
[430] Ibid art 50.
[431] Supra note 257 art 53.

in order enhance negotiation capabilities and also affirms the broader right to further education of workers. Finally, the law of the PRC pertaining to collective agreements is largely compliant with international standards as it details the requirements and procedures relevant to the negotiation and conclusion of collective agreements, the binding nature thereof, the overriding power of industry-wide or region-wide collective agreements and finally the duties of the administrative department of labour supplement the dispute settlement mechanism above.

The law of the PRC is not compliant with international standards to the extent that the lack of recourse to strike action results in a *de facto* system of compulsory arbitration should agreement not be reached which is not complaint with international standards. In addition, the law is not compliant with international standards requiring a firm recognition of the right of trade unions to access to the workplace in order to both recruit new workers and also to enable them to carry out their representative duties and functions.

f. Industrial Action and the Right to Strike

The international standards relating to the right to strike require the existence of the right to strike in law.[432] Furthermore, some internationally acceptable forms of strike action include typical work stoppages, wild-cat strikes, occupation of the workplace, go-slow or work-to rule and sit-down strikes.[433] There are three accepted limitations: first, the strike must remain peaceful to be lawful.[434] Second, the strike must be in pursuance of a legitimate motive to be lawful.[435] Third, the trade union that calls the strike should expect to comply with reasonable rules and procedures.[436] Finally, the responsibility for declaring a strike illegal should not lie with the government but with an independent and impartial judicial body.[437]

In the case of the PRC it will be difficult to follow the structure of the comparator (establishing the right, the content of the right and the fair procedure and impartiality)[438] due to the fact that the right to strike is a contentious topic in the PRC. Some argue that the right to strike does not exist in a substantial sense for two main reasons: first, the right to strike itself was struck from the Constitution in 1982 and is not reflected anywhere in the legislation.[439] Second, if the right is implicitly accounted for, then it is a dead letter anyway due to the

[432] Cf. above *i) Establishing the Right* at p38.
[433] Cf, above *ii) The Content: Acceptable Conduct, Limitations and Requirements* at p42.
[434] Ibid.
[435] Ibid.
[436] Ibid.
[437] Cf. above *iii) Fair Procedure and Impartiality* at p45.
[438] Cf. above *f. Industrial Action and the Right to Strike* p38.
[439] Op cit note 274 at p22; Kai Chang and Fang Lee Cooke 'Legislating the Right to Strike in China: Historical Developments and Prospects' (2015) 57 *Journal of Industrial Relations* 3 at p444.

enforcement measures of the state and the vulnerable position that striking workers are placed in.[440] This investigation finds merit in both of these arguments.

While, the right to strike is not explicitly reflected in the legislation, it may be considered to be implicit through the combination of the constitutional right to freedom of expression taken together with the provisions of the TUL.[441] More specifically, article 27 is the strongest evidence for the existence of the right to strike in some form as it states that the 'trade union must represent the employees to negotiate with the enterprise when the employees are exercising slow down measures or stop work'.[442] Thereafter, the trade union will make known the views and demands of the workers and propose appropriate resolutions to the employee's grievances.[443] The enterprise or public institution is then obligated to meet the reasonable requirements raised by the employees and the trade union will accordingly help to enable the normal production process to be resumed as quickly as possible.[444] Therefore, this appears to be some degree of recognition for the right to strike as slow down measures and stopping work are two internationally acceptable forms of strike action.[445] However, it has been argued that a more accurate interpretation of this provision is not an affirmation of the right to strike but rather an interpretation that highlights the 'principal legal task of Chinese trade unions' - stopping any strike action as soon as possible so that 'production can be restored'.[446] Ultimately, there is no explicit affirmation of the right to strike in either the Constitution or the legislation of the PRC and the only time two forms of strike action are raised is to detail the procedures on how to stop them as soon as possible in order to restore production. Therefore, the law of the PRC regarding the right to strike is not complaint with the above international standards.

i. Summary of Compliance

In conclusion, this section could not follow the progression of establishing the right, the content of the right and the fair procedure and impartiality because the law of the PRC fails at the first hurdle – the right to strike does not explicitly exist and 'there are no legal rules to regulate strikes in China'.[447] Despite the brief mention of slow down and stop work measures, the

[440] Op cit note 274 at p22.
[441] Ibid.
[442] Supra note 257 art 27.
[443] Ibid.
[444] Ibid.
[445] Cf, above *ii) The Content: Acceptable Conduct, Limitations and Requirements* at p42.
[446] Op cit note 274 at p22.
[447] Op cit note 439 Kai Chang at p444.

content of the right and the fair procedures surrounding it cannot be addressed if they do not exits. Therefore, the law of the PRC is not complaint with the international standards relating to the right to strike, its content and the fair procedures accompanying it.

IV. SUMMARY AND RELEVANCE OF FINDINGS

The comparator in chapter 2 established five core pillars relating to the right to freedom of association and collective barraging that were then applied to the law of the PRC. The five pillars included – (1) freedom of association and collective bargaining: scope, application, flexibility and exceptions;[448] (2) the right to organise: establishment, membership, autonomy, dissolution and suspension.[449] (3) protective mechanisms;[450] (4) industrial relations mechanisms;[451]and (5) industrial action and the right to strike.[452] This section will provide a brief summary of the findings that came out of the application of the comparator to the law of the PRC. Thereafter, key areas of noncompliance with international standards will be flagged for further research and consideration for African states who are increasingly the host nations of Chinese enterprises.

The first pillar established the international standards relating to the scope, application, flexibility and exception to the right of freedom of association and collective bargaining.[453] It was found that the PRC was largely complaint with international standards that required states to promulgate laws or regulations that explicitly affirm these rights in all sectors of the economy - both private and public. Furthermore, these right were shown to be conferred without any discrimination of any kind based on occupation, sex, colour, race, beliefs, nationality and political opinion and China is again compliant in this regard. A more nuanced conclusion was established regarding the requirement that the laws of a state should include specific modalities for the achievement of these rights for vulnerable classes of workers such as women, migrant labourers, disabled workers, women, refugees and rural workers as the law itself was silent on the issue but the policy directives of the ACFTU were compliant. Thus, in

[448] Cf. above *b. Freedom of Association and collective Bargaining: Scope, Application, Flexibility and Exceptions* at p15.
[449] Cf. above *c. The Right to Organise: Establishment, Membership, Autonomy, Dissolution and Suspension* at p20.
[450] Cf. above *d. Protective Mechanisms* at p25.
[451] Cf. above *e. Industrial Relations Mechanisms* at p32.
[452] Cf. above *f. Industrial Action and the Right to Strike* at p38.
[453] Cf. above *b. Freedom of Association and collective Bargaining: Scope, Application, Flexibility and Exceptions* at p52.

a strict sense, the PRC is not compliant in this regard but if directives of the ACFTU are understood to be appropriate according to national conditions then there is compliance with international standards. Moreover, it was established that the police force of the PRC is excluded from exercising the right to freedom of association and the provision excluding this right was clear and precise which rendered it complaint with international standards. Finally, the three topics in this research that were not able to be adequately investigated due to a lack of available material included the rights of workers under an informal or casual employment status, the rights of military personnel and the rights of essential workers. Thus, no firm conclusions can be made concerning the compliance with international standards of the rights of these three groups of workers.

The second pillar established the international standards relating to right to organise.[454] In sum, there are only two areas in which the law of the PRC was established to be compliant. First, the international standards relating to international trade union solidarity can be found to be present in principle in the law. Second, the law of the PRC is compliant with international standards in so far as it explicitly prohibits the cancelation and dissolution of trade union organisations. Thereafter, the law of the PRC is not complaint with international standards in the following ways: workers do not have the power or the right to create a parallel confederation of trade unions or even a truly independent trade union as they must all fit into the centralised monopolistic system. Thus, workers can be understood to have an incomplete right to freedom of association and to organise, given that the ACFTU has the veto power of prior approval over their establishment. Trade unions in the PRC do not have the possibility of forming parties that are independent from all pre-existing organisations or any political party due to the domination of the ACFTU and the CCP. Furthermore, trade unions do not have ideological and political autonomy to draft their own constitutions, organise their activities and formulate their programmes independently due to the powers of organisations at a higher level and the overall control of the CCP. Moreover, in the rare instance that dissolution of an organisation should occur (cancelation of the enterprise, public institution or state organ), the matter does not follow a judicial process but is instead refereed to the ACFTU for handling and this is not compliant with international standards. Finally, the international compliance relating to the minimum thresholds in terms of numbers of individuals required to establish a union

[454] Cf. above *c. The Right to Organise: Establishment, Membership, Autonomy, Dissolution and Suspension* at p57.

could not conclusively be determined to be compliant or non-compliant as an appropriate figure would be context specific and cannot be decided here.

The third pillar established the international standards relating to protection mechanisms.[455] The law of the PRC was found to be compliant with international standards in the following circumstances: the legislative protection afforded to workers and their representatives against acts of violence or threats aimed at hindering the free exercise of trade union activities; and the existence of clear provisions that make anti-union discrimination unlawful and punishable and the existence of clear legal avenues for the formal recognition of trade unions. Thereafter, the law of the PRC was found to be noncompliant with international standards due to the omission of explicit protections against the making of criminal allegations, arrest and detention of workers or their representatives. Furthermore, the law does not prohibit the establishment of puppet organisations but instead requires them to some degree under a centralised trade union system and then allows for board members of the employing enterprise to serve as representatives in the worker's union. Moreover, the law does not confirm the substance of the right to international trade union solidarity due to the political and ideological dominance of the CCP. In addition, the law mandates the function of education to unions that restrict their independence due to the prescribed ideological and political affiliation. Unfair formalities to register trade unions were established and they include the prior approval of a higher level trade union organisation. Finally, no conclusion can be made here regarding the position of unregistered trade unions as this research was unable to find any provisions in the law.

The fourth pillar established the international standards relating to industrial relations mechanisms.[456] The law of the PRC is compliant with international standards to the extent that it details a comprehensive list of dispute settlement mechanisms include negotiation, mediation and arbitration. Furthermore, there is a large degree of compliance with international standards regarding the legal requirement of trade unions playing an active role in the preparation, development, adoption, application and review of labour and socio-economic standards, including relevant laws, policy and regulation. Moreover, there is a high degree of compliance with international standard in both the law and policies of the PRC relating to the enhancement of the capabilities of role players to the extent that the law reflects the specific need for training in order enhance negotiation capabilities and also affirms the broader right to further education

[455] Cf. above *d. Protection Mechanisms* at p62.
[456] Cf. above *e. Industrial Relations Mechanisms* at p68.

of workers. In addition, the law of the PRC pertaining to collective agreements is largely compliant with international standards as it details the requirements and procedures relevant to the negotiation and conclusion of collective agreements, the binding nature thereof, the overriding power of industry-wide or region-wide collective agreements and finally the duties of the administrative department of labour supplement the dispute settlement mechanism above. Thereafter, the law of the PRC was found to not be compliant with international standards to the extent that the lack of recourse to strike action results in a *de facto* system of compulsory arbitration should agreement not be reached. Finally, the law is not compliant with international standards requiring a firm recognition of the right of trade unions to access to the workplace in order to both recruit new workers and also to enable them to carry out their representative duties and functions.

The fifth and final pillar established the international standards relating to industrial action and the right to strike.[457] The law of the PRC is not complaint with international standards as the right to strike does not explicitly exist and there are no legal rules to regulate strikes in China. Despite the brief mention of slow down and stop work measures, the content of the right and the fair procedures surrounding it cannot be addressed as they ultimately do not exits. Therefore, the law of the PRC is not complaint with the international standards relating to the right to strike, its content and the fair procedures accompanying it.

The salient points to take away from these findings for African nations that are hosting Chinese enterprises include: first, in relation to trade unions - the existence of one centralised representative organisation known as the All-China Federation of Trade Unions (ACFTU), with overarching authority that infringes the establishment, autonomy, independence and functioning of smaller grass-roots trade unions. Thus, the concern that is raised for African host nations is the potential non-recognition of smaller trade unions as their authority is not derived from a connection to a higher level union or the ruling party of the state. Second, the legally protected right to strike was found to not exist or be seriously suppressed in China. Strike action is a common and legally protected right across the African continent. Thus, African hosts should be aware of the potential for abuses and suppression of this right. Third, the lack of an explicit right of access to the premise of the workplace for trade unions in China raises concerns for African hosts where this may be a fundamental right and common practice.

Ultimately, the Chinese formulation of the right to freedom of association and the exercise thereof is inherently different to the international standards and thus most African

[457] Cf. above *f. Industrial Action and the Right to Strike* at p76.

domestic legal systems. The right is conceptualised and practiced within the Chinese socialist market economy under the guidance of the Communist Party which is the supreme power in the democratic dictatorship. Therefore, the Chinese experience and understanding of the right to freedom of association and the right to strike may be fundamentally different to African states in terms of its content, ideological underpinning, exercise and enforcement. These findings demonstrate a need for African countries that host Chinese investment to proactively guard against the labour rights violations that may occur due to the differing domestic legal frameworks.

V. CONCLUDING REMARKS, REFLECTIONS AND FUTURE RESEARCH

The purpose of this dissertation was to consider whether China's approach to freedom of association and the right to collective bargaining are compatible with international labour standards, which have been ratified by most African countries. This was achieved by comparing the relevant laws in China, that regulate freedom of association and collective bargaining, against the international standards set by the International Labour Organisation's (ILO) Conventions and Recommendations. In particular, the provisions of the Freedom of Association Convention (No. 87) and the Collective Bargaining Convention (No .98), among others, together with the findings of the ILO Committee on Freedom of Association, were used to determine an international standards *comparator*. The Chinese Labour Law, Trade Union Law and Labour Contract Law were subsequently evaluated against this comparator in order to determine the extent of compliance of the Chinese labour system with international labour standards. The findings suggest that there is a broad degree of compliance with international standards relating to the formal recognition in law of the rights to freedom of association and collective bargaining as well as the identification of vulnerable classes of workers such as women, migrant workers and rural workers. However, two major discrepancies in the Chinese legal system were found: first, in relation to trade unions - the ACFTU is a centralised representative organisation with overarching authority which infringes the establishment, autonomy, independence and functioning of smaller grass-roots trade unions. Second, the right to strike was found to be non-existent or at best suppressed in China.

Ultimately, the Chinese formulation of the right to freedom of association and the exercise thereof is inherently different to the international standards. The right is conceptualised and practiced within the Chinese socialist market economy under the guidance of the Communist Party which is the supreme power in the democratic dictatorship. Therefore, the Chinese experience and understanding of the right to freedom of association and the right to strike may be fundamentally different to African states in terms of its content, ideological underpinning, exercise and enforcement. These findings demonstrate a need for African countries that host Chinese investment to proactively guard against the labour rights violations that may occur due to the differing domestic legal frameworks.

This research relied on the translated legal texts of the PRC provided through the ILO database. Thus, the risk of translation errors or misunderstandings will always be present but this research attempted to mitigate this possibility to the best of its ability. Finally, this research consisted of a textual analysis of the international standards and the Chinese law and further

empirical research should be conducted on labour rights practices and the extent to which implementation of domestic law of the PRC is compliant with international labour standards. Such research would highlight rule of law complexities,[458] and facilitate informed case study research into the abuses of Chinese enterprises on African soil.

The dissertation highlights that international standards on freedom of association and collective bargaining are inherently not created for the context of a democratic dictatorship and socialist market economy, such as that controlled by the CCP in China. Essentially, trade unions in China exercise a distinct function and have a degree of administrative utility for the CCP that makes the international standards ill-fitting. This reality also highlighted an inherent difficulty with international standards – the ILO may claim that they are flexible and can fit differing societies but the Chinese examples raises doubts about the truth of this claim. From the outset, the international standards require a democratic political system. Therefore, African countries that uphold democratic rights and have labour rights relating to freedom of association and collective bargaining that are complaint with international standards should be aware of the inherent differences and disconnects between their own legal systems and that of the Chinese enterprise they are hosting.

[458] Ignazio Castellucci 'Rule of law and legal complexity in the People's Republic of China' (2012) Università degli Studi di Trento.

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