Trade unions' freedom of association in Cambodia

A study on the Trade Union Law and its possible implications on trade unions in the Cambodian garment industry

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Abstract

The aim of the thesis is to elaborately analyse the Trade Union Law and its possible implications for trade unions' right to freedom of association in the Cambodian garment industry. In addition, the law is evaluated in relation to already existing domestic law and in relation to international law regarding freedom of association.

The majority of the Trade Union Law's provisions are incompatible with international law, as they are either too detailed or too ambiguous. Additionally, the requirements required in order to exercise the right are either too high or not in accordance with best practice. Hence, the adoption of the Trade Union Law suggests that Cambodia violates its obligations deriving from the ratifications of the ILO Convention No. 87 and the UN covenants to respect, protect and fulfil the Articles regulating freedom of association. Furthermore, compared to already existing domestic legislation concerning freedom of association, the Trade Union Law covers more aspects of freedom of association than the Labour Law and Constitution together, offering a more comprehensive protection as it regulates aspects of the right that used to be unregulated. In addition, the mandatory requirements are more burdensome, as they are more technical while the minimum standards are higher.

The law's ambiguous provisions may grant public authorities excessive discretionary power over trade unions, resulting in a significant decrease of organisational autonomy, which in turn makes unions vulnerable to external actors. Additionally, unions may be significantly weakened due to burdensome requirements, as they are either too complex or too hard to fulfil. As a consequence, workers, which in general lack adequate labour law knowledge, are discouraged from forming unions while unions themselves might lose strength and decisiveness, affecting their possibilities to establish themselves as a strong counterpart. On the other hand, considering the fragmentation of the trade union movement and its incapability to advocate for collective interests, a few of the Trade Union Law's provisions might potentially simplify the process of creating a united and well-organized force, which are operating for collective interests.

The thesis concludes that the factor, which is directly decisive for the law's potential implications for trade unions' freedom of association in the Cambodian garment industry, is its enforcement. Considering the widespread corruption in combination with the Government's hostile attitude towards independent trade unions, the thesis suggests that the chances of implementing the law in a fair manner are fairly small.

Keywords:

Cambodia, Trade Union Law, freedom of association, organisational autonomy, garment industry, ILO Convention No. 87.

Abstrakt

Syftet med denna uppsats är att analysera Fackföreningslagen och dess potentiella konsekvenser för fackföreningars föreningsfrihet i den kambodjanska textilindustrin. Utöver detta analyseras lagen i förhållande till redan befintlig nationell lagstiftning samt i relation till internationell rätt rörande föreningsfrihet.

Majoriteten av Fackföreningslagens regleringar är oförenliga med internationell rätt då de antingen är för detaljerade eller för vaga. Dessutom är de obligatoriska rekvisit som måste uppfyllas för att kunna åtnjuta rätten antingen för höga eller så strider de mot god praxis. Därmed tyder antagandet av Fackföreningslagen på att Kambodja bryter mot sina skyldigheter som följer av ratificeringarna av ILO Konventionen No.87 och FN:s konventioner att respektera, skydda och uppfylla de artiklar som reglerar föreningsfrihet. I jämförelse med redan befintlig nationell lagstiftning gällande föreningsfrihet, reglerar Fackföreningslagen fler aspekter av föreningsfriheten än vad Arbetslagen och Konstitutionen gör tillsammans och tillhandahåller följaktligen ett mer omfattande skydd då den reglerar aspekter som tidigare saknade reglering. Utöver detta är de obligatoriska rekvisiten mer betungande då de är mer tekniska medan miniminivåerna är högre.

Lagens otydliga regleringar kan ge offentliga myndigheter enorm diskretionär makt över fackföreningar, vilket innebär en betydande minskning av organisatorisk autonomi, vilket i sin tur gör fackföreningar sårbara för externa aktörer. Dessutom kan fackföreningar bli kännbart försvagade av betungande rekvisit då de antingen är för komplexa eller för svåra att uppfylla. Som följd blir arbetare, som generellt saknar adekvat arbetsrättskunskap, avskräckta från att bilda fackföreningar medan fackföreningarna själva förlorar styrka och beslutsamhet, vilket i sin tur påverkar deras möjligheter att etablera sig själva som en stark motpart. Å andra sidan, med tanke på fackföreningsrörelsens splittring och oförmåga att kämpa för gemensamma intressen, så kan eventuellt ett fåtal av Fackföreningslagens regleringar förenkla processen att skapa en förenad och välorganiserad kraft, som arbetar för kollektiva intressen.

Uppsatsen konkluderar att faktorn, som är direkt avgörande för lagens potentiella följder för fackföreningars föreningsfrihet i den kambodjanska textilindustrin, är dess implementering. Med tanke på den omfattande korruptionen i kombination med regeringens fientliga inställning till fria fackföreningar, finner uppsatsen att chanserna för att lagen kommer att implementeras rättvist är små.

Nyckelord:

Kambodja, Fackföreningslagen, föreningsfrihet, organisatorisk autonomi, textilindustri, ILO konventionen no. 87.

Preface

First and foremost, I would like to thank my supervisor, Vincenzo Pietrogiovanni, for always finding time to answer my questions and meet me. Thank you for your valuable opinions and encouragement but also for challenging me during the writing process. I would also like to express my gratitude to Chea Sophal whom provided valuable recommendations and reading suggestions regarding the Cambodian garment sector. Lastly, I would like to thank my family, and my fiancée Emma in particular. Thank you for always supporting me and encouraging throughout the years.

My study time has finally come to an end as I write my very last words of this thesis. However, I am certain that the best is to come, as I long for meeting our new family member in September.

Lund, May 2017.

Abbreviations

AC	Arbitration Council
BFC	Better Factories Cambodia
CAMFEBA	Cambodian Federation of Employers and Business Associations
CBA	Collective Bargaining Agreement
CCAS	Conference Committee on the Application of Standards
CCAWDU	Coalition of Cambodian Apparel Workers' Democratic Union
CCC	Clean Clothes Campaign
CCHR	Cambodian Centre for Human Rights
CCPR	Committee on Civil and Political Rights
CEACR	Committee of Experts on Application of Conventions and Recommendations
CESCR	Committee on Economic, Social and Cultural Rights
CFA	Committee on Freedom of Association
CLUF	Cambodian Labour Union Federation
CNRP	Cambodian National Rescue Party
CPP	Cambodian Peoples' Party
CRC	Convention on the Rights of a Child
DK	Democratic Kampuchea
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EU	European Union
FFCC	Fact-Finding Conciliation Commission
FTUWKC	Free Trade Union of Workers of the Kingdom of Cambodia
FUNCINPEC	National United Front for an Independent, National, Peaceful and Cooperative Cambodia
GMAC	Garment Manufacturers Association in Cambodia

HRC	Human Rights Committee
HRCO	Human Rights Commission
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICNL	International Centre for Not-for-Profit Law
ICNL	The International Center
ILC	International Labour Conference
ILO	International Labour Organization
ITC	International Trade Center
KNP	Khmer National Party
LAC	Labour Advisory Council
MFN	Most Favoured Union
MoLVT	Ministry of Commerce and the Ministry of Labour and Vocational Training
MoU	Memorandum of Understanding
NGO	Non-Governmental Organisation
NTUC	National Trade Union Confederation
OHCHR	Office of High Commissioner on Human Rights
PRK	Peoples' Republic of Kampuchea
PSWG	Private Sector Working Group
SRP	Sam Rainsy Party
UDHR	Universal Declaration of Human Rights
UN	United Nations
UFK	Union Federation of Kampuchea

UNTAC United Nations Transitional Authority in Cambodia

1. Introduction

1.1 Background

Fashion-focused consumer products, such as clothing, tend to nurture the shopping patterns of consumers to frequent changes. Consumers are therefore urged to choose quantity over quality, which subsequently reduces the price one is willing to pay for a piece of clothing.[1] However, in order to sell clothes to a cheaper price, costs must be cut elsewhere. Consumers are often said to hold the power to change, but how often do we exercise this power or even reflect on the impact we have through consumption?

During the last decades, economists have touted economic globalization as the solution to global prosperity and the end of poverty. One could argue that they have been right; the economic system has indeed resulted in global economic productivity and wealth. The economic output has nevertheless been shared unequally while multinational corporations have gained more power, and thus concentrated wealth and power in fewer hands.[2] The economic globalisation has consequently led to a rise of multinational companies, which have changed the very structures of the global economy by "cutting costs, increasing corporate profits and limiting corporate responsibility to workers."[3] Consequently, this form of unrestrained power in combination with an increasing demand for cheap fashion clothing has driven companies such as H&M and Zara, to relocate the production of their goods to countries with lower costs and fewer regulations, and where employers who ignore the law and violate international labour standards gain a competitive advantage over the obedient ones at the cost of the workers' labour rights.[4] Moreover, the multinational corporations are only legally responsible for their conducts within their domestic nation, and are therefore not legally accountable for violations of labour rights that occur in their supply chains. Workers, on the other hand, are obligated to follow the laws of the land where they work, which usually leaves them incapable of exercising their fundamental labour rights.[5] One of these fundamental rights is the right to freedom of association. The right enables workers to voice and to represent their interests, as it plays a crucial part in the realization of democracy and dignity. According to the International Labour Organization (ILO), the right to organize and form trade unions "is the prerequisite for sound collective bargaining and social dialogue."[6] The right is consequently an important factor in levelling the unequal relationship between workers and employers, and thereby facilitating workers to gain a collective voice and work under safe and decent conditions.[7] Hence, without the right to freedom of association, workers' ability to oppose poverty and inequality is significantly weakened.

In response to this development, organisations such as Clean Clothes Campaign[8] (CCC) have been established in order to ensure that workers' fundamental rights are respected and that

[1] Cho, Gupta & Kim, Style consumption: its drivers and role in sustainable apparel consumption, 2015, p. 661.
[2] A/71/385, para. 8.
[3] Ibid. para. 18.
[4] Ibid. para. 13.
[5] Ibid. para. 9.
[6] http://ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/lang--en/index.htm
[7] A/71/385, para. 1
[8] See more at cleanclothes.org

working conditions in the global garment industries are improving. Due to this type of organisations, the term "informed consumerism" has emerged, as consumers are getting more concerned about the environmental and social impacts of their purchases. Demographically however, this form of consumerism is still a minority.[9] Yet, as awareness regarding these issues increases, consumers become more prone to advocate for increased transparency.[10] Thus, companies are "no longer seen as responsible solely for a product, but for their whole brand and supply chain."[11]

Asia has been labelled the garment factory of the world. The Asia-Pacific region itself accounted for nearly 60% of global exports of garments, textiles and footwear in 2014. While several economies are shaping the global landscape within the region, the country that has experienced the most remarkable growth in the garment sector is Cambodia.[12] The country is known as one of the poorest countries in Asia, as approximately 20% of the population still live under the poverty line.[13] However, the country has had an impressive economic growth over the last twenty years, mainly due to the textile and garment industry indeed, which is considered to be one of Cambodia's growth pillars along with agriculture, construction and tourism.[14] The industry started to emerge in 1994, as foreign investors, predominantly from other Asian countries, wanted to take advantage of the country's lack of quota restrictions to the US market. Today, foreign investors own about 95% of the sector's exporting garment factories,[15] the industry itself is primarily organized in "fractions and supply chains of contractors and sub-contractors"[16] owned by multinational brands such as H&M, Levi's and Adidas, manufacturing goods that will eventually be sold abroad. Thus, since the 1990's, the Cambodian garment industry has become one of the most vital parts of the country's economic life. The sector itself employs more than 600 000 workers in some 640 factories, making up for approximately 70 % of the country's' exports.[17] In 2015, the value of the industry was 11 % of the Cambodian economy while the sector itself constituted 2 % out of the country's 7 % GDP growth.[18] However, Cambodia suffered serious setbacks starting with the food and fuel prices crisis of 2007-2011. Additionally, during the financial crisis in 2009, the export of the garment sector declined by about 20%. Although having to face these challenges, Cambodia has had a strong economic growth overall over the past twenty years.[19]

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[9] International Trade Center (ITC), Consumer Conscience – How environment and ethics are influencing exports, 2009, p. 9.
[10] Baker, The rise of the conscious consumer: why businesses need to open up, The Guardian, 2015, available at: https://www.theguardian.com/women-in-leadership/2015/apr/02/the-rise-of-the-conscious-consumer-why-businesses-need-to-open-up
[11] International Trade Center (ITC), Consumer Conscience – How environment and ethics are influencing exports, 2009, p. 9.
[12] Huynh, Employment, wages and working conditions in Asia's garment sector: Finding new drivers of competiveness, 2015, p. 3.
[13] See: http://www.worldbank.org/en/news/press-release/2014/02/20/poverty-has-fallen-yet-many-cambodians-are-still-at-risk-of-slipping-back-into-poverty
[14] Asian Development Bank and ILO, Cambodia Addressing the Skills gap, 2015, p. 6.
[15] Oka, Improving Working Conditions in Garment Supply Chains: The role of Unions in Cambodia, 2016, p. 649.
[16] Inghammar & Pietrogiovanni, The Role of Globalized Industrial Relations and Collective Agreements for the Promotion of Fundamental Labour Rights in Southeast Asian Garment Industry, 2016, p. 4
[17] Ibid. p. 4
[18] Cambodian Garment and Footwear Sector Bulletin, Issue 5, January 2017, ILO, p. 1.
[19] Kingdom of Cambodia Decent Work Country Programme (DWCP) 2016-2018, ILO, p. 5.

As its industry grew, Cambodia experienced a rapid establishment of trade unions in the garment sector, as workers started to require labour rights. During this period, Cambodia adopted the Constitution of 1993 as well as the Cambodian Labour Law in 1997, which in turn contributed to the large increase of independent trade unions in the sector, as it provided a legal framework by which trade unions were entitled fundamental rights such as freedom of association. Until the adoption of the Labour Law in 1997, there were no independent trade unions in Cambodia.[20] However, as a result, the union movement developed into "a more complex structure of enterprise-level unions, union federations, and union alliances with different affiliations."[21] Consequently, the number of unions skyrocketed starting from about 100 unions in 2001 to 3000 in 2015[22], making the union density of the Cambodian garment sector not only the highest of any other sector in Cambodia but also the highest of any other industry in Asia, with a unionisation level at about 60%.[23]

However, the factories were, and still are, characterized by poor working conditions and recurring abuses of labour law. Yet, since the sector's surge of trade unions, working conditions have improved.[24] The right to establish a trade union and protect the right to represent its members' interests is a vital part in a democratic society and considered to be one of the most important rights of the workers since it "provides the ability to contribute to shaping the economic, social and political development, particularly in terms of humane work and social justice."[25] Over the past ten years, trade unions have played a vital part in advocating for workers' right to freedom of association in Cambodia, which has subsequently improved the working conditions, as workers have gained a collective voice. However, the Cambodian industrial relations institutions have failed to keep up with the rapid economic development and expansion of independent trade unions. This has predominantly been displayed in the garment sector, resulting in distrust between the parties, violations of fundamental human rights and even numerous deaths of trade unionists.[26]

International law regarding the right to freedom of association is comprehensive, as the right is considered a fundamental human right. It is predominantly the UN and ILO, which have developed and established the international protection for the right to be exercised. Cambodia is a member of the UN and ILO, and has ratified a number of Conventions and Covenants, entailing provisions regulating freedom of association. Due to the ratifications of these international instruments, the country is obligated to respect, protect and fulfil the provisions and standards set by these documents concerning freedom of association. In 1969, Cambodia became a member of the ILO. However, it was not until 1999 the country ratified the ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise. Yet, as mentioned above, the right to freedom of association is not solely regulated in ILO Conventions, as UN Covenants also entail provisions concerning the right. The right was nevertheless primarily regulated in the UN Declaration of Human Rights (UDHR). 1n 1966 however, the content of the Declaration was specified into two separate UN covenants: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and in the International Covenant on Civil and Political Rights (ICCPR). Cambodia ratified these UN covenants in 1992. In addition, Article 31 of the Constitution of Cambodia stipulates, "the

[20] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 16-17.
[21] Peng, Phallack & Menzel, Cambodian Constitutional Law, 2016, 513.
[22] CAMFEBA, Cambodia's Trade Union Law: A necessity, 2015, p. 5.
[23] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 71.
[24] Ibid. p. 110.
[25] Ibid. p. VII.
[26] Kingdom of Cambodia Decent Work Country Programme (DWCP) 2016-2018, ILO, p. 22.

Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights (…)."[27] Hence, the obligations, deriving from the ratifications of these international instruments, are expressly acknowledged in the Constitution, implying that the content of these sources are to be conceded as domestic law. Yet, according to Hall, the extent of the legal implications of the Article remains unclear.[28]

Domestically, as was stated above, the right to freedom of association is provided for in both the Constitution and the Labour Law of 1997. However, the process of adopting a new trade union law in Cambodia started already in 2007, when business owners requested new legislation on trade union rights due to the unconstructive and highly confrontational industrial relations environment in the garment sector. The drafting process of the law stretched over almost a decade, while the process itself was controversial as Non Governmental Organizations (NGOs) and both international and Cambodian trade unions claim that it was characterized by a significant lack of transparency and a total absence of consultation with stakeholders.[29] The Cambodian Federation of Employers and Business Associations (CAMFEBA) on the other hand, claims that the drafting process involved significant consultation and tripartite meetings.[30] Despite the controversy, the National Assembly finally adopted the Trade Union Law in April 2016, which is the result of an adopting process that lasted over almost a decade, providing new provisions regarding trade unions and their rights, including freedom of association.

The law has predominantly been subject to criticism from NGOs, human rights advocates and opposition politicians for undermining civil liberties and to be contrary to international law.[31] The law has mainly been criticized for aggravating trade unions' right to freedom of association, which in turn could seriously harm their ability to operate in the interests of their members. In an open letter to Prime Minister Hun Sen, the Human Rights Watch (HRW) argues that the law violates "international labor standards ratified by Cambodia, and severely damage Cambodia's reputation as a garment producing country where rights matter."[32] In addition, the general secretary of the IndustriALL emphasizes that "(a)ny law which does not fully respect these rights will just meet with domestic and international opposition and attention,"[33] while the ITUC General Secretary argues that the law "is a step backwards."[34] The ILO on the other hand, has been more reticent in its statement, proclaiming that it is "essential for the government, together with union and employers, to turn its attention to implementing in a fair and impartial manner."[35] Following the adoption of the law, Clean Clothes Campaign published an open letter to all brands operating in Cambodia requesting

[27] Cambodian Constitution, Article 31.
[28] Hall, Human Rights and the Garment Industry in Contemporary Cambodia, 2000, p. 124.
[29] CCHR, Fact sheet: Trade Union Law, 2016, p. 1.
[30] CAMFEBA, EuroCham Luncheon – Trade Union draft law, 2015, p. 27.
[31] Senkong, Union law violates human rights, finds OHCHR, Phnom Penh Post, 2016, available at: http://www.phnompenhpost.com/national/union-law-violates-human-rights-finds-ohchr
[32] Robertson, Cambodia: HRW Letter to Prime Minister Hun Sen on the Proposed Trade Union Law, Human Rights Watch, 2015, available at: https://www.hrw.org/news/2015/06/07/cambodia-hrw-letter-prime-minister-hun-sen-proposed-trade-union-law
[33] IndustriALL, Deep concern over Cambodian trade union law, 2016, available at: http://www.industriall-union.org/deep-concern-over-cambodian-trade-union-law
[34] ITUC, Cambodia: New Trade Union Law Bad for Workers, 2015, available at: https://www.ituc-csi.org/cambodia-new-trade-union-law-bad?lang=en
[35] See ILO's statement: http://www.ilo.org/asia/info/public/pr/WCMS_466553/lang--en/index.htm

them to publicly support the right to freedom of association.[36] In response to this, various clothing brands such as, H&M and Levi's released statements saying that it is of importance that the law fully respects international standards.[37] On the other hand, garment manufacturers and employer organisations have labelled the Trade Union Law a necessity[38] due to trade union multiplicity and their inability to operate in a peaceful and constructive way. Rivalry within unions and unrepresentativeness amongst them constitute serious problems for the parties to negotiate and establish sustainable relations in the garment factories. Hence, according to the employers in the sector, the newly adopted law is considered to be an adequate tool in order to re-establish and reinforce the industrial relations in the garment sector. The spokesman for the Ministry of Labour argued that the law is more union-friendly than the pre-existing labour laws in the country.[39] In addition, Labour Minister Sam Heng stated that the law is necessary to bring stability to the labour market in order to develop more harmonious industrial relations, and to facilitate bigger investments in the garment sector.[40]

Hence, there are conflicting opinions whether the newly adopted Trade Union Law will improve the industrial relations in the garment sector and thus make the industrial environment more harmonious and sustainable or aggravate the activities of the unions and thereby hinder them to function in an adequate way. Considering the widespread establishment of trade unions in the sector and their positive impact on garment workers' labour rights in general and on their right to freedom of association in particular, the law might imply serious consequences for the young movement and ultimately the workers. Yet, it might offer tools to deal with the complex and premature industrial relations model of Cambodia. Considering the change of attitude that is growing amongst consumers, there is also an interest concerning the law's potential impact on Cambodian garment workers since the new form of consumerism "is just as much about supporting perceived good companies, as boycotting the bad ones."[41] Hence, questions arise regarding what potential implications the law may imply for trade unions' right to freedom of association in the Cambodian garment industry. In addition, questions also arise concerning the content of the Trade Union Law and its relation to already existing legislature on freedom of association stipulated in the Constitution and the Labour Law. It is therefore of importance to examine whether the Trade Union Law and its regulations concerning freedom of association differ from the ones stipulated in the Constitution and the Labour Law. Another important question regarding the Trade Union Law is whether its content is in line with international standards concerning freedom of association. By examining this, consumers will be more aware of the context where workers are manufacturing goods of multinational corporations and whether this meet

[36] Available at: https://cleanclothes.org/news/2016/03/22/open-letter-to-all-brands-sourcing-from-cambodia
[37] See for instance the statement of H&M: http://about.hm.com/en/media/news/Cambodian-Trade-Union-Law.html
[38] For instance, see CAMFEBA's paper "Cambodian Trade Union Law: A Necessity."
[39] Cox, Despite Progress Draft Union Law Has Major Flaws: HRW, Khmer Times, 2015, available at: http://www.khmertimeskh.com/news/18829/despite-progress--draft-union-law-has-major-flaws--hrw/
[40] Thul, Cambodia passes disputed trade union law as tension flares, Reuters, 2016, available at: http://www.reuters.com/article/us-cambodia-unions-idUSKCN0X11HX In contrary, deputy Asia director at Human Rights Watch Phil Roberston's argues that "a dubious trade union law may make global brands think twice about investing or keeping their operations in Cambodia." See: https://www.hrw.org/news/2015/06/07/cambodia-proposed-union-law-rights-disaster
[41] International Trade Center (ITC), Consumer Conscience – How environment and ethics are influencing exports, 2009, p. 9.

international standards, which may imply a change of attitude regarding the consumption of fashion clothing manufactured in Cambodia.

1.2 Purposes

The thesis includes two main purposes. The first one is to examine whether the Trade Union Law's provisions concerning freedom of association are in line with international law and compare them to already existing domestic law regulating the right. By comparing it to international law, the thesis aims to investigate if the Trade Union Law is contrary to international standards, and consequently highlight how these violations are demonstrated. Moreover, by analysing the differences and similarities between the Trade Union Law and already existing Cambodian legislation, the thesis may elucidate a potential change of direction concerning freedom of association in Cambodian legislature. The thesis will in particular focus on the right to form and join unions, organisational autonomy, the right to strike and dissolution or suspension by administrative authority.

Since questions arise regarding the consequences of the newly adopted law, the second purpose of the thesis is to identify and examine the law's possible implications for trade unions in the Cambodian garment industry. Consequently, the context of where the law is to be implemented is presented by examining the industrial relations model of Cambodia in general and the Cambodian trade union movement in particular. The thesis will unravel in what way the law might hamper the Cambodian trade unions' right to freedom of association. In addition, it will discuss how the law may affect the industrial relations in the Cambodian garment industry for the better. Lastly, the Trade Union Law is analysed in relation to Kahn-Freund's theory concerning the role of law in collective labour law in order to reveal what type of legislation the law entails.

1.3 Research questions

Taking this into consideration, this study will answer the following research questions:

- How does the Cambodian Trade Union Law entail freedom of association?

- How does this law align with international standards?

- What differences and similarities can be distinguished between the Trade Union Law and already existing Cambodian legislation concerning freedom of association?

- What characteristics can be distinguished regarding the Cambodian industrial relations models in general and the trade union movement in particular, and what consequences may the Trade Union Law imply for trade unions' freedom to freely organise in the Cambodian garment industry?

- What type of legislation does the Trade Union Law entail according to Kahn Freund's theory concerning the role of law in collective labour law?

1.4 Methods and materials

Since the research questions differ in material and methods being used as well as complexity levels, I have decided to divide them into three separate clusters in order to simplify the presentation of the methodological considerations that have been made.

Primarily, the first research question has been categorized within one cluster since it has been evaluated solely through a legal dogmatic method in order to explore and scrutinize the legal norms and standards concerning freedom of association in the Trade Union Law. The use of this method in legal studies implies the study of the system of norms and the interpretation of norms. The legal dogmatic method is therefore mainly used in order to determine *de lege lata*, namely the law, by studying all relevant sources of law and interpretation of law, such as legislation, case law and doctrine.[42] However, the legal sources being used has solely consisted of the paragraphs concerning freedom of association in the Trade Union Law. Due to the lack of transparency in Cambodia regarding all areas of the legal system, including the absence of an adequate Labour Court[43], legal sources such as preparatory work and case law are absent.[44] Although doctrine concerning the Trade Union Law is scarce, "Labor Rights and Trade Unions"[45] by Chea Sophal provides an adequate presentation of the law, which has been helpful in writing chapter 3.3.2.3 "The Trade Union Law". Additionally, reports by NGOs such as the Cambodian Center for Human Rights (CCHR), employer associations such as Cambodian Federation of Employers and Business Associations (CAMFEBA) and news articles such as the Phnom Penh Post, are being used in order to contextualize the adaption of the law by presenting the views of the parties and to describe the drafting process of the law. One has to know however, that these sources are not scientific journals, yet, they are important in order to contextualize given the absence of legal sources in Cambodia.

Secondly, I have categorized the second and third question within the same cluster, mainly due to the apparent need for a comparative method. They do however, entail a certain degree of legal dogmatic method as well. The comparative method has become more essential than ever due to the fact that no country can no longer escape the effects of international norm-setting and the aftermath of globalization, the comparative method will therefore become even more important in the future.[46] The second research question has therefore been evaluated through a comparative method mainly due to the fact that it is acknowledged as the best method for examination of application of international minimum standards.[47] Additionally, it is of importance to be aware of the fact that the second research question does not only require a comparative method regarding the Trade Union Law in relation to international regulation, but also between the international instruments themselves. Both the ILO Convention and the UN Covenants provide protection concerning freedom of association, however, the right is provided for in three separate Articles while the

[42] Kellgren & Holm, Att skriva uppsats i rättsvetenskap - råd och reflektioner, 2007, p. 46-47.
[43] An adequate Labour Court will be instituted in 2017. See: David and Baliga, Labour courts set to come into play by 2017, Phnom Penh Post, 2016, available at: http://www.phnompenhpost.com/national/labour-courts-set-come-play-2017
[44] Inghammar & Pietrogiovanni, The Role of Globalized Industrial Relations and Collective Agreements for the Promotion of Fundamental Labour Rights in Southeast Asian Garment Industry, 2016, p. 14-15.
[45] Peng, Phallack & Menzel, Cambodian Constitutional Law, 2016. Chapter 22. P. 511-532.
[46] Blanpain, Comparatism in Labour Law and Industrial Relations, Comparative Labour Law and Industrial Relations in Industrialized Market Economies, 2014, p. 3-5.
[47] Ibid. p. 10.

international instruments have separate supervisory bodies. Consequently, the question requires an internal comparison in order to be processed in an adequate way. Hence, Chapter 2.3 entails concluding remarks, where the protection of the international instruments is compared in order to provide a comprehensive presentation of the international regulation of freedom of association.

Moreover, Bogdan has emphasized the importance of having an adequate understanding of the pitfalls of the comparative method, since a bad comparative study might be worse than none at all.[48] One essential part of the comparative method is to use reliable sources of information, original sources are therefore often acknowledged as the best ones to study. However, this is not always possible due to, for instance, language barriers. Since I cannot read or write in Khmer, I have been required to study Cambodian legislature translated into English, which may affect the meaning of some legal concepts, as it is important to be aware of the difficulties in translating legal terms and their actual meaning.[49] Taking this into consideration, the sources used for the third research question have been evaluated with caution since they solely consist of translated domestic legislation on freedom of association. Considering the fact that the second research question includes international sources such as international conventions and covenants rather than domestic sources, this awareness has not been applicable to the same extent. However, although the second research question has been evaluated mainly through English sources, Herzfeld Olsson's dissertation "Facklig föreningsfrihet som mänsklig rättighet" has been of major importance in the writing of Chapter 2 regarding the international protection of freedom of association. Although her dissertation was published over a decade ago, the conclusions and notions regarding the interpretation of the conventions and covenants are adequate to this day.

Furthermore, due to the international sources used for the second research question, problematic considerations arise regarding the status and impact of international labour law, it is therefore necessary to clarify the legal status and effects of the international conventions and covenants on member states in general and on Cambodia in particular. As mentioned above, Cambodia has ratified the ILO Convention and the UN Treaties that are studied in the thesis. Since Cambodia has ratified the ILO Convention No. 87 it is obligated to act in order to ensure the effectiveness of the Convention.[50] To define what this obligation entails, one has to consider the convention being ratified as well as the legal system of the country.[51] Moreover, the International Covenant on Civil and Political Rights (ICCPR) requests each State Party to take necessary steps "to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant".[52] Concerning the International Covenant on Economic, Social and Cultural Rights (ICESCR) each State Party "undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical to the maximum of its available resource (…) to achieving progressively the full realization of the rights recognized in the present Covenant".[53] Consequently, Cambodia is obligated to fulfil these Conventions and Covenants as stated in each Article.

[48] Bogdan, Komparativ rättskunskap, 2003, p. 41.
[49] Ibid. p. 39-40. See also p. 48.
[50] Article 19:5 d in the ILO Constitution.
[51] A more detailed discussion regarding the obligations following Convention No.87 is provided for in chapter 2.1.1.
[52] Article 2:2 of the ICCPR.
[53] Article 2:1 ICESR. A more detailed presentation concerning the obligations of the UN covenants is provided for in chapter 2.2.1.

Moreover, it is of importance to describe the supervisory bodies within the ILO and the UN in order to understand the bodies' legal impact on Cambodia. Concerning the ILO Convention No. 87, it is primarily the Committee of Experts on Application of Conventions and Recommendations (CEACR) as well as the Committee on Freedom of Association (CFA) that handles various cases connected to freedom of association. However, as will be discussed below, the reports of these Committees are not recognized as binding to the member states. Yet, case law regarding freedom of association is extensive and provides clarification regarding the interpretation of the articles. Moreover, the supervisory bodies within the UN Covenants differ from one another, to a certain extent. It is the Human Rights Committee (HRC) that supervises and monitor the implementation of the various articles regulated in the ICCPR. The State Party is obligated to impose reports regarding the observance of the articles, which the Committee gives general comments on.[54] The Committee is considered the pre-eminent interpreter of the Articles regulated in the ICCPR, however, these interpretations are not legally binding. Yet, the state parties are obligated to consider the views of the Committee in good faith, one could therefore argue that the interpretations of the Committee have a certain legal impact on the state parties. The ICESR also has a Committee, which submits general comments on country reports, which are very similar to the ones made by the Human Rights Committee and are considered to have the same legal impact.[55]

The third and last cluster entails the two last research questions. As I consider these questions to be more complex, they require a different approach. Since freedom of association is an essential part in a country's industrial relations model, the features of the industrial relations model of Cambodia has to be discerned. However, in order to distinguish the characteristics of an industrial relations model one has to define what the concept entails. The field of study emerged in the 20th century with a scope that essentially included the whole topic of the employment relationship. However, a more modern approach has been established with a narrower focus, which suggests that the core of modern industrial relations is to be found in the study of trade unions, collective bargaining and labour management relations.[56] Considering space and time constraints, all three subjects cannot be studied and presented in the thesis. Since the thesis is focusing on trade unions and their rights, the characteristics of the Cambodian trade union movement is examined and presented in Chapter 3.

Moreover, "in order to compare what is in fact comparable, one needs to compare the functions institutions perform rather than institutions themselves".[57] The comparative scholar is therefore expected to look for "reality". Thus, it is not sufficient to solely, for instance, compare text of legislation. The core of the method is to examine whether and how laws are applied and how the institutions function in practice. Consequently, one has to be aware of other parameters as well and not only the text of legislation.[58] Due to the lack of transparency, as mentioned above, the comparative analysis lacks depth due to the absence of legal sources. However, by using sources as Cambodian newspapers and NGO reports, the thesis provides an understanding of the Cambodian legislative context where the law is being adopted. For

[54] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 57.
[55] Ibid. p. 229. A more comprehenisve presentation of the supervisory bodies of the ILO and the UN is provided for in chapter 2.1.2 and 2.2.2.
[56] Rocca, Posting of Workers and Collective Labour Law: There and Back Again – Between Internal Market and Fundamental Rights, 2015, p. 55.
[57] Blanpain, Comparatism in Labour Law and Industrial Relations, Comparative Labour Law and Industrial Relations in Industrialized Market Economies, 2014, p. 12.
[58] Ibid. p. 13.

instance, these sources might bring a realistic notion of how trade unions rights are practiced as well as reveal what rights they actually enjoy in reality. However, Blanpain emphasizes that is it problematic to apply a comparative method in studies involving foreign countries solely by a "desk study". Instead, in order to provide an adequate understanding of the country examined, it is necessary "to make frequent visits (…) and to inquire, with the aid of extensive interviews with local scholars and practitioners (lawyers, employers, trade unionists), about the realities of the situation."[59] Since I have not visited Cambodia nor conducted interviews with local scholars or practitioners, the chapter concerning the country's industrial relations model and thereby the presentation of Cambodian "reality" is not comprehensive.

Furthermore, one has to be aware of the fact that these two research questions require more of an interdisciplinary approach since they entail different elements of a specific system. The knowledge gained by conducting a comparative study can serve several purposes, which in turn do not have to interfere with one another. The method can, for instance, be used to acknowledge certain trends and thus forecast future developments in a certain context.[60] Thus, a comparative method is applied, to a certain extent, in order to examine what possible consequences the Trade Union Law might imply for trade unions in the Cambodian garment industry. Yet, specialists in comparative labour law have emphasized that this form of examination entails difficulties regarding collective labour law as it "directly affects the balance of power between political, social and economic forces, in what are often very different cultural and historical contexts."[61] Taking this into consideration, the questions have to be examined by an interdisciplinary approach, which in turn requires a historical, political and economic awareness. Bogdan argues that these components have to be observed in order to understand and examine legislature in an adequate way, which in turn facilitates the interpretation of the law and its role in practice.[62] Hence, a brief politico-historical overview of Cambodia is presented in chapter 3.1 in order to contextualize and describe the society where the law has been adopted. This will potentially provide depth and a better understanding of the eventual consequences the law might entail on trade unions in the Cambodian garment industry.

Finally, after having analysed the Trade Union Law's provisions in relation to domestic and international law and its potential positive and negative implications on trade unions in the Cambodian garment industry, I intend to apply Kahn Freund's theory concerning the role of law in industrial relations on the Trade Union Law. By applying his theory on the Trade Union Law, the analysis is provided a theoretical framework, which offers a more structured and comprehensive presentation of the provisions concerning freedom of association. Otto Kahn-Freund is known as one of the founders of British labour law, writing extensively on industrial relations and labour law in the United Kingdom. In order to understand his explanation of the role of law in industrial relations, one must acknowledge two universal truths. The first universal truth is that "the relation between an employer and an isolated employee is typically a relation between a bearer of power and one who is not a bearer of power",[63] implying that the relation between the parties of an employment contract is unequal. The second one constitutes the inherent conflict "between the aims of management

[59] Blanpain, Comparatism in Labour Law and Industrial Relations, Comparative Labour Law and Industrial Relations in Industrialized Market Economies, 2014, p. 16-17.
[60] Ibid. p. 3-8.
[61] Potobsky, Freedom of Association: The Impact of Convention No. 87 and ILO Action, 1998, p. 196.
[62] Bogdan, Komparativ rättskunskap, 2003, p. 52.
[63] Kahn-Freund, Labour and the Law, 1977, p. 18.

and those of labour."[64] Hence, these two universal truths entail two requirements: a need to address the unequal relationship between the employer and employee and to regulate the existing conflict between management and labour. Law may therefore be applied in different ways in order to address these requirements regarding collective labour law. Firstly, it might be applied in order to deal with the organisation and formation of unions and their recognition. Kahn-Freund acknowledges this as "auxiliary" legislation since it does not settle conditions of employment as it rather set rules for their settlements, which in other words may be described as establishing "rules of the game." Law may also be used to set standards and thereby create rights and obligations directly, which "is used quite obviously to restrict the power of management."[65] This form of legislation is termed "regulatory law." Lastly, Kahn-Freund coined the term "collective laissez-faire" in the 1950s, which he described as "the retreat of law from industrial relations and of industrial relations from the law."[66] Consequently, this term implies a minimum of legislative intervention in the collective labour relations "and an insistence on the autonomy of industrial forces and on their freedom to regulate industrial society without interference from the state."[67] Hence, the Trade Union Law will be analysed in consideration to the theory of Kahn Freund in order to examine what form of legislation the law entails.

1.5 Delimitations

Various limitations have been made due to time and space constraints. The Trade Union Law does not only regulate the right to freedom of association as it, for instance, also encompasses various regulations concerning freedom of expression and peaceful assembly. These rights are nevertheless not covered in the thesis since its purpose is to examine the law's possible implications on Cambodian trade unions' right to freedom of association. Moreover, the right itself is acknowledged as an extensive one, as it entails several rights and aspects; it is therefore not possible to cover all aspects of the right. Hence, the thesis does not provide a comprehensive presentation of freedom of association since it, for instance, excludes the right to collective bargaining. The aspects that are covered in the thesis include voluntary association, organisational autonomy, the right to strike and the prohibition to be dissolved by an administrative authority. These aspects should nevertheless not be acknowledged as more vital than other aspects of the right. The aspects have mainly been selected due to their inter-relationship and their importance for trade unions to operate in an adequate way. Furthermore, the thesis examines the implications of the Trade Union Law on Cambodian trade unions in the garment sector; other actors in the sector such as employer organisations and NGOs are therefore not covered in the thesis. However, the views of these actors concerning the trade union law are included in the thesis in order to provide a comprehensive presentation of the Trade Union Law.

Considering the fact that the thesis is focused on the law's implications for trade unions in the Cambodian garment sector, trade unions and their rights in other sectors of the country such as agriculture and tourism are consequently not covered within the scope of the thesis. Since the Cambodian garment industry accounts for almost 80 % of the country's export while its annual growth has been considerably high over several years, it is vital for Cambodia's

[64] Dukes, Constitutionalizing Employment Relation: Sinzheimer, Kahn-Freund, And the Role of Labour Law, 2008, p. 353.
[65] Davies and Freedland, Kahn Freund's Labour and the Law, 1983, p. 37.
[66] Kahn-Freund, Labour and the Law, 1977, p. 9.
[67] Dukes, Constitutionalizing Employment Relation: Sinzheimer, Kahn-Freund, And the Role of Labour Law, 2008, p. 356.

society in general and economy in particular. Hence, it "constitutes a very intricate and interesting sector in the Southeast Asian business environment"[68], suggesting that the sector is of major interest to study.

Moreover, the ILO Convention No. 87 constitutes the protection of the ILO regarding freedom of association in the thesis. However, it is of importance to be aware that this convention is not the only ILO Convention regulating freedom of association. Yet, due to relevance and space constraints, the ILO Convention No. 11 Right of Association (Agriculture), ILO Convention No. 84 Right of Association (Non-Metropolitan Territories), ILO Convention No. 135 Workers' Representative and ILO Convention No. 141 Rural Workers' Organisations are therefore not presented in this thesis. It is also of importance to emphasize that the ILO Convention No. 87 Freedom of Association and Protection of the Right to Organise is strongly connected to ILO Convention No. 98 Right to Organise and Collective Bargaining. However, since the thesis does not cover the aspect of collective bargaining, the ILO Convention No. 98 has been excluded.

1.6 Disposition

The thesis is divided into seven separate chapters.

Chapter 2 examines the international protection concerning freedom of association by presenting the ILO Convention No.87 and UN Covenants: the ICCPR and the ICESCR. Various aspects of the right are thoroughly elaborated and presented including the right to form and join a trade union, organisational autonomy, the right to strike as well as dissolution or suspension of trade unions. In order to simplify the presentation of international law regarding the right, the international instruments have been divided into two separate sub-chapters, these are nevertheless structured in the same way in order to facilitate the presentation of the international protection. The chapter ends with concluding remarks where the international protection is summarized and various similarities and differences between the international instruments are highlighted.

Chapter 3 presents the Cambodian context by initially provide a brief politico-historical overview of Cambodia with the intention to give the reader an understanding of the country of interest in the thesis. Thereafter, the chapter presents the Cambodian garment industry by describing its actors, number of collective agreements and the workforce. The history and the characteristics of the industrial relations in the Cambodian garment industry are thereafter addressed and presented while the characteristics of the Cambodian trade union movement and its existing challenges are examined and specified. Lastly, the chapter presents the domestic legislature on freedom of association in Cambodia. Hence, the legal system of the country and its already existing legislation on the right is thoroughly elaborated while the drafting process of the Trade Union Law and its provisions are examined and presented.

Chapter 4 entails two separate sub-chapters where the first one analyses the provisions of the Trade Union Law in relation to international law. The provisions are consequently evaluated through an international law perspective, they are therefore examined in order to conclude whether they violate international standards or not, and if so, how these violations are

[68] Inghammar & Pietrogiovanni, The Role of Globalized Industrial Relations and Collective Agreements for the Promotion of Fundamental Labour Rights in Southeast Asian Garment Industry, 2016, p. 4.

demonstrated. The second sub-chapter analyses the similarities and differences between already existing Cambodian legislation on freedom of association and the Trade Union Law. The chapter analyses whether the Trade Union Law resembles or differs from already existing domestic law and how this is demonstrated.

Chapter 5 also contains two different sub-chapters. The first sub-chapter analyses how the provisions of the Trade Union Law may hinder trade unions' right to freedom of association in the Cambodian garment industry. Hence, unlike the previous chapter (chapter 4), this chapter examines the potential implications of the trade union law in the garment sector. The provisions are therefore analysed with a different approach as the characteristics of the garment sector in general and trade unions in particular constitute vital elements when analysing the provisions. In contrast to the first sub-chapter, the second sub-chapter analyses in what way the provisions of the law might improve the industrial relations in the Cambodian garment industry.

Chapter 6 analyses the Trade Union Law in relation to Kahn-Freund's theory concerning the role of law in collective labour law. Hence, the law is analysed in order to unravel what type of legislation the Trade Union Law provides.

Chapter 7 provides the conclusions of the thesis, which aims to discern the underlying patterns of the findings that have been made in the previous chapters.

2. The international protection of freedom of association

2.1 The ILO Convention No. 87

The Director-General of the ILO stated in 1992: "The ILO takes a keen interest in civil and political rights, for, without them, there can be no normal exercise of trade union rights and no protection of the workers."[69] Many of the international instruments acknowledge freedom of association as a fundamental human right as it enables trade unions to promote and protect workers' mutual interests.[70] The right is subsequently interpreted within the ILO as a fundamental human right whose main function is to level the unequal relationship between workers and employers, and thereby facilitate workers to gain a collective voice.[71] It is therefore considered to be the cornerstone of labour law at both national and international level, and its status within the international community, and especially within the ILO, is evident.[72] Over the years, the ILO Convention No. 87 has "proven to be of crucial importance to workers and the development of their organizations"[73], making it an important tool in establishing and promoting the protection of workers' human rights in general, and freedom of association in particular. Hence, the ILO Convention No.87 is widely respected and accepted within the international community as it is acknowledged as one of the "most respected of all international standard-setting instruments in the field of rights".[74] Usually, the ILO Convention No. 87 is referred to as the Convention on Freedom of Association, however, the scope contains far more than just the right to join a trade union. For instance, the convention also regulates trade unions' right to nominate and choose their own representatives and the right to draw up their statutes and rules without state interference. Taking all the aspects of the Convention into consideration, one will understand the importance of the convention in defending civil and political rights.[75]

In 1919, the significance and importance of freedom of association within the international community in general and the ILO in particular, was demonstrated when the right received its first international expression in Article 41 of the ILO Constitution.[76] Freedom of association received further acknowledgement within the ILO when the Declaration of Philadelphia of

[69] International Labour Conference, 79th Session, 1992, Democratization and the ILO, Report of the Director-General, p. 24.
[70] Creighton, Freedom of Association, Comparative Labour Law and Industrial Relations in Industrialized Market Economies, 2014, p. 315-316.
[71] ILO, "Giving globalization a human face", International Labour Conference, 101st Session, 2012, para 49.
[72] Larion, Freedom of Association and Right to Collective Bargaining in ILO Regulations, 2016, p. 226.
[73] Dunning, The origins of Convention no. 87 on freedom of association and the right to organize, 1998, p. 130.
[74] Creighton, Freedom of Association, Comparative Labour Law and Industrial Relations in Industrialized Market Economies, 2014, p. 315.
[75] Dunning, The origins of Convention no. 87 on freedom of association and the right to organize, 1998, p. 150.
[76] Creighton, Freedom of Association, Comparative Labour Law and Industrial Relations in Industrialized Market Economies, 2014, p. 322. This would later come to influence the design of the ILO Convention No. 87.

1944, stated "freedom of expression and of association are essential to sustained progress."[77] In addition, the right was considered a fundamental principle on which the work of the ILO was based upon, while it was said to have a central role in the work to attain universal and lasting peace.[78]

Two years later, in 1946, the Declaration of Philadelphia was annexed to the ILO's Constitution with the purpose to restate the values of the organisation, which solidified and emphasized the status and importance of the right within the ILO even more.[79] In 1948, the ILO Convention No.87 concerning Freedom of Association and Protection of the Right to Organise was adopted. By adopting the Convention, the intention was to transpose the principle of freedom of association as stated in the ILO's Constitution into practical law rules, the content of the Convention is therefore relatively brief and unambiguous.[80] Consequently, even though the right to freedom of association was acknowledged and widely respected as early as 1919, a general consensus implementing such right in a dedicated instrument did not emerge until the late 1940s.[81]

During the 1950s, after the adoption of the ILO Convention No. 87, it became evident that the ILO was in need of "a mechanism whereby it could respond quickly to complaints related to the suppression of trade unions organizations and restrictions on industrial action."[82] As a result, the Committee on Freedom of Association (CFA) was founded in addition to the regular system of supervision, with the intention to solely handle complaints concerning freedom of association.[83] It was also during this era the right to strike received its first explicit recognition by the Committee, declaring that strike action was an integral part of the convention.[84] Due to the adoption of the ICCPR and the ICESCR during the 1970s, the meaning of freedom of association was reviewed as the inter-relationship between the ILO Convention No. 87 and the UN covenants were considered and discussed within the international community.[85] Throughout the 1980s until the end of the Cold War, freedom of association in general and the right to strike in particular was not debated as much as it had been over the years. Bellace argues that one potential reason might be the fall of Communism in Eastern Europe, which decreased the desire of some members to debate and defend freedom of association. Another potential factor might have been the increasing globalization, which started to intensify and put pressure "on employers seeking to remain in business and continue to be profitable at a time when manufacturing was shifting from the advanced market economies to low wage Asian countries."[86]

However, in 1998, the ILO took a major step when adopting the Declaration on Fundamental Principles and Rights at Work, which states that all Member States are committed to respect and promote principles and rights stated in eight so-called core conventions, including freedom of association. By guaranteeing these eight fundamental rights, it "enables the

[77] Article 1 (b) of the Declaration of Philadelphia.
[78] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 61.
[79] Ibid. p. 62.
[80] Larion, Freedom of Association and Right to Collective Bargaining in ILO Regulations, 2016, p. 227.
[81] Potobsky, Freedom of Association: The Impact of Convention No. 87 and ILO Action, 1998, p. 220.
[82] Bellace, The ILO and the right to strike, 2014, p. 44.
[83] See chapter 2.1.2 for a more comprehensive presentation.
[84] For further reading concerning strike action within the ILO, see chapter 2.1.5.
[85] Bellace, The ILO and the right to strike, 2014, p. 50. See chapter 2.2 concerning the UN covenants.
[86] Ibid. p. 54.

persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential."[87] The process had been preceded by criticism from the Employers' group as the ILO was said to "churning out a new Convention every year" despite the fact that the ratification rate amongst the member states had been really low since the 1970s.[88] Additionally, during several years, the ILO had discussed the economic and social implications of the globalization and its potential effects on workers' fundamental rights. As a result, the Declaration therefore proclaimed that all members of the ILO are obligated to respect the fundamental rights that are regulated in the Declaration regardless whether these conventions were ratified or not. Consequently, the Member States are obligated from the very fact of membership, to respect and promote the right to freedom of association.[89] The aim of the Declaration is to "reconcile the desire to stimulate national efforts to ensure that social progress goes hand in hand with economic progress and the need to respect the diversity of circumstances, possibilities and preferences of individual countries."[90] Hence, the intention of the Declaration is not to impose additional obligations on member States as it rather is based on the notion that if a state is voluntarily joining the ILO, the member state has thereby "endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia."[91] Kellerson argues that the adoption of the Declaration constitutes an "intrinsic value" as it "represents a collective decision to pursue social justice (…) drawing on people's aspiration for equity, social progress and the eradication of poverty – rather than by sanctions," which she emphasizes is "not a small achievement."[92] However, the legal impact of the Declaration remains unclear since the scope of the obligation only extends to promoting the right, while the Member States are not subject to any sanctions if they would violate the Declaration.[93] However, the importance of the Convention was once again emphasized in the ILO Declaration on Social Justice for a Fair Globalization in 2008, stating that freedom of association is of particular significance for the achievement of the four strategic objectives of the ILO.[94]

2.1.1 Obligations of the member states

Cambodia became a member of the ILO in 1969. Since the beginning of the 1990s, the ILO itself has been "an active partner in Cambodia's economic, social and democratic recovery, playing an important role in (…) set-up and strengthen democratic institutions."[95] However,

[87] ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-up, 1998 (revised 2010), p. 5-6.
[88] Bellace, The ILO and the right to strike, 2014, p. 55.
[89] Inghammar & Pietrogiovanni, The Role of Globalized Industrial Relations and Collective Agreements for the Promotion of Fundamental Labour Rights in Southeast Asian Garment Industry, p. 2.
[90] ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-up, 1998 (revised 2010), p. 1.
[91] Kellerson, The ILO Declaration of 1998 on fundamental principles and rights: A challenge for the future, 1998, p. 224-225.
[92] Ibid. p. 227.
[93] Seth, Internationall arbetsrätt, 2009, p. 22-23.
[94] ILO, "Giving globalization a human face", International Labour Conference, 101st Session, 2012, para 50. These are: (i) create greater opportunities for women and men to secure decent employment and income; (ii) enhance the coverage and effectiveness of social protection for all; (iii) strenghten tripartism and social dialogue; and (iv) promote and realize standards and fundamental principles and rights at work.
[95] http://www.ilo.org/asia/countries/cambodia/WCMS_412167/lang--en/index.htm

although Cambodia became a member of the ILO by the end of the 1960s, it did not ratify the ILO Convention No. 87 until 1999. However, as was discussed above, due to the adoption of the Declaration on Fundamental Principles and Rights at Work in 1998, the country was obligated to protect and respect the right to freedom of association before it had ratified the convention, as it was a member of the ILO by the time of the adoption of the Declaration. Hence, due to its membership and ratification of the ILO Convention No. 87, Cambodia is obligated to meet a numerous requirements, which will be presented in the following chapter.

Governments are in general aware of the fact that ratification of ILO conventions may have several consequences. As will be described below, the aftermath of ratification "exposes governments to close scrutiny of their labour legislation and practices by international bodies, which may result in forms of public condemnation that most would prefer to avoid".[96] Hence, the ILO itself does not apply material sanctions; its formal criticism of potential violations may nevertheless be used, for instance, by other member states to legitimize sanctions they would like to impose.[97] Consequently, the decisions of the supervisory bodies are not legally binding to the member states, the decisions have nevertheless proved to be efficient since the criticism is publically announced and may be read by the public.[98] Moreover, following ratification, the member state is obligated to submit reports on a regular basis concerning measures being used in order to implement its provisions while these measures are to be communicated to employers' organisations and trade unions in the country.[99] As a result, the supervisory bodies of the ILO possess information concerning the country's national labour legislation and its practices; this information derives nevertheless not only from the government but also from other actors such as trade unions.[100] From an international law perspective, ILO conventions are no supranational acts since ratification is compulsory. In case of ratification however, the ILO Conventions have the same legal impact as treaties, obligating member states to implement their content while the implementation process is governed by its supervisory mechanism.[101] Additionally, the wordings of the ILO conventions and the establishment of ILO standards through case law might obligate member states to pursue a certain policy in national court rulings without enabling individual parties the right to appeal them in court.[102]

The ILO Convention No. 87 does not encompass certain stipulations regarding its methods of application. However, Articles 1 and 11 of the Convention provide that each State "undertakes to give effect to (its) provisions" as well as "to take all necessary and appropriate measures to ensure that workers and employers might exercise freely the right to organise."[103] Hence, member states are necessarily not obligated to adopt legislation in order to implement the provisions of the ILO. Although member states may choose to implement the right by an indirect legislative intervention, the most common method of application is by adoption of

[96] Baccini & Koenig-Archibugi, Why do states commit to international labor standards? – Interdependent Ratification of Core ILO Conventions, 1948-2009, 2014, p. 451.
[97] Ibid, p. 451.
[98] Servais, ILO standards on freedom of association and their implementation, 1984, p. 767.
[99] Ibid. p. 767.
[100] Baccini & Koenig-Archibugi Why do states commit to international labor standards? – Interdependent Ratification of Core ILO Conventions, 1948-2009, 2014, p. 451.
[101] Seth, Internationell arbetsrätt, 2009, p. 21-22.
[102] Ibid. p. 21.
[103] Article 1 & 11 ILO Convention No. 87.

adequate legislation.[104] It is furthermore the Government, who has the ultimate responsibility for defending and promoting the principles through legislation and practice, and to ensure that the principles are respected by all state authorities, including the judicial authorities. Moreover, the trade union rights, which result from the provisions and principles of Convention No. 87, constitute a minimum standard of protection. It is therefore desirable that they may be complemented by additional legislation and adequate labour relations traditions.[105] Primarily, it is the vertical relationship between State and individual that is regulated by the Convention. However, according to Article 11, the State is responsible "to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise."[106] Consequently, the scope of the Convention is wider since the State also has a positive obligation to ensure that the right to organise can be invoked between individuals as well, given the wording of Article 11.

2.1.2 Protection mechanisms of the ILO – The case of freedom of association

All ratified Conventions are primarily handled by the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR). By examining periodic reports, the Committee provides observations and direct requests to the governments concerned. In more difficult situations however, the particular case is communicated to the tripartite Conference Committee on the Application of Standards (CCAS), and thereafter dealt with at the annual session of the International Labour Conference (ILC), where the government concerned might be invited to discuss the matter. Moreover, the CEACR also provides general surveys annually on a specific theme in order to ensure that both the legislation and the practice of the States are in conformity with the ILO Convention concerned.[107] However, in the case of freedom of association, the supervisory mechanism is peculiar.

As was mentioned above, in agreement with the Economic and Social Council of the United Nations (ECOSOC), due to the vital importance concerning the principles of freedom of association, the ILO decided to create, in addition to the regular system of supervision, a special complaints procedure regarding freedom of association in 1950. The complaints mechanism involves two separate bodies; the Committee on Freedom of Association (CFA) and the Fact-Finding and Conciliation Commission (FFCC). The latter of the two is composed of independent persons who have the mandate to undertake more extensive investigations regarding alleged infringements of trade union rights, similar to a commission of inquiry.[108] Yet, the body may only act if the State against which a complaint was filed gives its permission.[109] The procedure itself is acknowledged as relatively long and expensive and has therefore been used in a relatively restrictive manner.[110] In contrast to the FFCC, the special tripartite Committee on Freedom of Association (CFA) requires no such agreement as it is considered to be one of the most used ILO instruments. The CFA is a Governing Body committee, consisting of an independent chairperson along with three governments', trade

[104] ILO, "Giving globalization a human face", International Labour Conference, 101st Session, 2012, para 55.
[105] Digest 2006, para 17 & 18.
[106] Article 11 of the ILO Convention No. 87.
[107] Swepston Human rights law and freedom of association: Development through ILO supervision, 1998, p. 174-175.
[108] Ibid. p. 181.
[109] Ibid. p. 175.
[110] Digest 2006, p. 2.

unions' and employers' representatives.[111] The CFA evolved from a body whose role was originally conceived as a tool to simplify the work of the CEACR. However, over the years it has developed into an independent body that receives and handles complaints submitted by governments, trade unions and employers' organisations, and has to this day examined over 3000 cases.[112]

The most unique characteristic of the FFCC and the CFA is their power to examine complaints regardless of ratification status since the bodies draw their authority directly from the ILO Constitution, which subsequently enable them to handle complaints against States that have not even ratified the ILO Convention No. 87.[113] With this in mind, the CFA has "acquired recognized authority at both the international and national levels, where it increasingly being used for the development of national legislation, as well as in the various bodies responsible for the application of law relating to freedom of association".[114] If the CFA finds that a violation of the standards and principles of freedom of association has occurred it issues a report including recommendations on how the situation should be solved. The government concerned is consequently requested to report to the CFA regarding the implementation of the recommendations that have been given. The body may also establish a "direct contact" mission in order "to address the problem directly with government officials and the social partners through a process of dialogue".[115]

Consequently, the body is not appointed to establish general conclusions since its main function is to handle separate cases. However, the conclusions made by the CFA tend to influence the statements made by the CEACR regarding the interpretation of the Convention.[116] It is exclusively the International Court of Justice (ICJ) that is entitled a formal authorization to provide binding interpretations of the ILO Constitution and its Conventions.[117] Yet, this has only come to the fore on one occasion, in 1932.[118] Neither the CFA nor the CEACR have been accredited this authority, the CEACR has nonetheless stated that as long as its dictums are not contested by the ICJ, they should be accepted as binding and thereby acknowledged.[119] Hence, an interesting question arises concerning the legal impact of the CFA and its comments since the work of the CEACR is strongly influenced by the Committee. However, although it is not accredited a formal authorization, the CFA is considered to play a crucial part in creating and establishing an exhaustive case law regarding the interpretation of freedom of association.

[111] http://ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm
[112] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 69.
[113] Swepston, Comparative Labour Law and Industrial Relations in Industrialized Market Economies, 2014, p. 180.
[114] Digest 2006, p. 3.
[115] http://ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm
[116] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 69.
[117] Article 37 (1) Of the ILO Constitution.
[118] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 70.
[119] Ibid. p. 127.

2.1.3 The right to form and join organisations "without distinction whatsoever"

The freedom to establish and join organisations is *de facto* and *de jure* "the foremost among trade union rights and is the essential prerequisite without which the other guarantees enunciated in Conventions Nos. 87 and 98 would remain a dead letter."[120] The free exercise of this right is comprised by three separate factors, the absence of any distinction, in law and in practice, the absence of the need for previous authorization, and finally, the freedom of choice. All three parts requires to be fulfilled in order to provide an effective protection. The right is provided for in Article 2 of the Convention, which stipulates:

"Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."

The article is designed to give expression to the principle of non-discrimination in trade union matters, and the words "without distinction whatsoever" used in the Article implies that freedom of association should be guaranteed without discrimination of any kind based on, for example, occupation, sex, colour, race, beliefs, nationality, political opinion.[121] The right is therefore to be considered as a general principle, the only exception however authorized by the Convention are the armed forces and police as established in Article 9. Yet, the members of the armed forces should be defined in a restrictive manner.[122]

The right of workers to form and join trade unions as provided for in Article 2 are common in the legislature of the most countries. However, in numerous countries the law excludes a certain group of workers or persons from this right, case law from the CEACR and the CFA suggests that this is often the case regarding domestic workers and workers in the informal sector.[123] Hence, the CFA has emphasized that the guarantee of the right of freedom of association should apply to all workers, without distinction whatsoever, including discrimination in regard to occupation.[124] As a result, workers in both private and public sector (except the armed forces and the police) are entitled the right to form and join organisations. However, another question arises regarding the matter of who is to be interpreted as a worker. According to the CEACR, the Convention may be applied to anyone who is working for living, which in turn indicates that the wording of the Article does not refer to the notion of worker in a legal sense.[125] The Convention therefore covers all workers regardless of the legal status of their employment relationship.[126] Moreover, several countries have legislative restrictions based on nationality regarding the right to organize as they often require citizenship or that a certain amount of the members have to be nationals. These forms of requirements are however incompatible with the convention since it is forbidden to

[120] GS 1994, para 44.
[121] Digest 2006, para 209.
[122] Article 9 of the ILO Convention No. 87. See also Digest 1996, para 219 and its reference to: 330th report, case no. 2229, para. 941.
[123] GS 1994, para 24-29.
[124] Digest 2006, para 216. See also its reference to: 326th Report, Case No. 2113, para. 372.
[125] GS 1973, para 13.
[126] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 136.

discriminate workers that are legally residing in the territory of a given state, it is thus prohibited to obstruct foreigners this right through legislation.[127]

Furthermore, the Article guarantees the right to establish organisations "without previous authorization" from public authorities. The CFA argues "such authorization could concern the formation of the trade union organization itself, the need to obtain discretionary approval of the constitution or rules of the organization, or, again, authorization for taking steps prior to the establishment of the organization."[128] Yet, this right does not mean that the founders of an organisation are allowed to ignore potential formalities prescribed by law. It was stated already in the preparatory work on the Convention that states were free to provide legislative formalities given that they did not impaired in the functioning of the organisations.[129] Hence, national regulations regarding the constitution of organisations are not incompatible with the Convention, they are nevertheless not allowed to hinder the normal functioning of organisations and imply their fundamental right to "defend the interests of its members".[130]

It is subsequently common to pay regard to certain formalities during the establishment of an organisation; the routine and the extent of the registration procedure may nevertheless vary depending on the national legislation. In several countries, the legislation regarding the registration procedure is vague and does not clearly define the procedure in an adequate way, which may be considered tantamount to requiring previous authorization and is therefore considered to be incompatible with the Convention.[131] Consequently, the CFA has "drawn attention to the desirability of defining clearly in the legislation the precise conditions which trade unions must fulfil in order to be entitled to registration and on the basis of which the registrar may refuse or cancel registration, and of prescribing specific statutory criteria for the purpose of deciding whether such conditions are fulfilled or not."[132] Problems also arise with lengthy and complicated registration procedures or when these procedures are practiced in an inconsistent way, which in turn allows administrative authorities to grant or reject a registration request relatively freely.[133] These kinds of procedures might ultimately lead to a denial of the right to organize and therefore impair the guarantees laid down in the Convention and are therefore considered as serious threats to the organisations and their establishments.[134] Additionally, administrative authorities should not be allowed to deny registration due to the notion that the organisation might not be able to exercise its functions or exceed normal union activities.[135]

The third and final aspect of Article 2 entails the right to establish and join organisations of their own choosing in full freedom, which involves the right to choose the structure and composition of the organisation, and to decide whether there should be one or more organisations established in an enterprise and the establishment of federations and confederations.[136] The problem regarding trade union monopoly arises when the legislation,

[127] GS 1994, p. 63.
[128] Digest 2006, para 272.
[129] International Labour Conference, Record of Proceedings, 31st Session, 1948, First Report of the Committee on Freedom of Association and Industrial Relations, p. 477.
[130] Digest 2006, para 57.
[131] GS 1994, para. 73.
[132] Digest 2006, para 302.
[133] GS 1994, para 75.
[134] Digest 2006, para 296.
[135] Ibid. para 297.
[136] GS 1994, para 107.

directly or indirectly, provides that only one trade union may operate for a given category of workers. Yet, it is an essential difference between a trade union monopoly regulated and maintained by law and one voluntary established by groupings of workers. An indirect consequence of legislative provision is, for instance, when a certain percentage of membership is required in order to establish a trade union. Such form of requirement is not in itself incompatible with the convention, it must however "be fixed in a reasonable manner so that the establishment of organizations is not hindered."[137] What is considered to be a reasonable number is dependent on the particular conditions in which a minimum number is determined. A minimum requirement of 20 members did not seem excessive while a requirement of 30 % of the workers concerned or a minimum of 50 persons have been found contrary to Article 2 of Convention No. 87.[138]

Generally speaking, it is often to the benefit of the workers to "avoid proliferation of competing organizations" [139], however, trade union unity directly or indirectly imposed by law infringes the principles of freedom of association laid down in the Convention.[140] Thus, the CFA has emphasized that it is more desirable for a government to seek to encourage trade unions to join together freely in order to establish strong and united unions rather than "impose upon them by legislation a compulsory unification".[141] Moreover, the CEACR has emphasized that, "although it was clearly not the purpose of the Convention to make trade union diversity an obligation, it does at the very least require this diversity to remain possible in all cases."[142] On the other hand, an excessive proliferation of trade unions might potentially harm the trade union movement and ultimately the interests of the workers. Therefore, several countries have adopted the concept of the most representative trade unions in the legislation, which are generally guaranteed a variety of advantages and rights. The CEACR has stated that this sort of provision is not in itself incompatible with the Convention, the determination process has to however, be based on pre-established and objective criteria, and not hinder the functioning of unions that are not considered as most representative.[143] Moreover, the most representative trade unions are not allowed to be entitled rights through legislation, which enables the unions to be the only ones to operate in an effective manner and therefore influence the workers' choice of trade union in an unreasonable way.[144] Consequently, the scope of the rights entitled should only be limited to certain preferential rights, such as, collective bargaining and consultation by the authorities.[145]

2.1.4 Organisational autonomy

The right for trade unions to function freely constitutes one of the core elements of freedom of association since it enables them to pursue the interests of their members in an adequate way. The free functioning of trade unions is regulated in Article 3 of Convention No. 87 and entails four separate rights: the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. In combination with these rights one has to note Article 8 of the

[137] Ibid. para 84.
[138] Digest 2006, para 283-292.
[139] GS 1994, para 91.
[140] Ibid. para 91.
[141] Digest 2006, para 319.
[142] GS 1994, para 91.
[143] Ibid. para 97-98.
[144] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 144.
[145] GS 1994, para 91.

Convention, which stipulates that unions while exercising their rights have to respect the land of the law, given that the law shall not be such as to impair, nor shall it be so applied to impair, the guarantees provided for in the article.[146] Consequently, Article 3 of the Convention provides:

"1. 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 and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof."

In general, overly detailed legislature or restrictive provisions poses a serious threat to the establishment and development of trade unions. As a result, the CEACR has pointed out two fundamental requirements regarding the drawing of trade union constitutions: national legislation should only regulate formal requirements, and unions' constitutions and internal rules "should not be subject to prior approval at the discretion of the public authorities."[147] However, a list of different components that have to be included in the constitution of a union is not in itself incompatible with the Convention, yet, if these are excessively extensive and detailed they may hinder the establishment of trade unions.[148] Furthermore, legislation that regulates how a meeting is conducted, which day the meeting shall be held or require a notice in advance a couple of days before a meeting are all incompatible with the Convention.[149] However, restrictions are considered acceptable if they are not too detailed and their intention is to protect the interest of its members and to ensure that the organisation operates according to democratic principles.[150] For instance, legislation that requires annual meetings, or stipulates that protocol shall be conducted in meetings, or requires a secret and direct voting or a certain majority in decision-making have all been found to be compatible with the Convention.[151]

Moreover, the article entails the right of workers to elect their representatives in full freedom, which is an essential part for trade unions to act freely and work in their members' best interest. Therefore, it is of importance that the authorities do not intervene in the election procedure or determining the eligibility of potential leaders.[152] Provisions which enables authorities to interfere in the election procedure through detailed regulation, or constituting a form of prior control and thus enabling public authorities to impair in the process, or require the presence of labour inspectors or representatives are all incompatible with the Convention.[153] Several countries have certain requirements regarding the eligibility of potential trade union officers, the most common ones being based on nationality and political views, both of these grounds are however incompatible with the Convention. Some legislature disqualifies persons due to their criminal record, regardless of the seriousness of the crime, or those convicted of specific offences. If the crime is not such as to be prejudicial to the mission

[146] Article 8 of the ILO Convention No. 87.
[147] GS 1994, para 109.
[148] Digest 2006, para 379-380.
[149] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 149. See her references to: GS 1994 para. 111.
[150] Digest 2006, para 369.
[151] GS 1959, para 63 & GS 1994 para 110.
[152] Digest 2006, para 391.
[153] GS 1994, para 115.

as a trade union officer the regulation do not constitute ground for disqualification. Hence, if the legislation is excessively broad, by an open-ended definition or a long list, which do not contain any form of correlation between the crime and the qualities required for the exercise of the mission, the legislation is incompatible with the Convention.[154]

Furthermore, the Article also involves trade unions' right to organize their administration, which in turn entails both an external and internal aspect. For instance, the trade unions' right to organize their administration presuppose the right to financial independence and the protection of its resources and property. In general, legislation that concerns the source of the union's funds, the use of its funds, the distribution of its assets or its internal financial administration are compatible with the convention. However, problems arise when the legislation gives the authorities too much power and influence over the union's financial administration, the CFA has consequently stated that "any form of state control is incompatible the principles of freedom of association."[155] The Committee has specified the scope of the control exercised by the public authorities by stating that it should not exceed the obligation to submit periodic reports. Consequently, legislation that enables public authorities to carry out inspections and request information at any given time[156], to investigate books and other documents, or require that specific financial operations have to be approved, entails a danger of interference and are therefore considered incompatible with the Convention.[157]

Ultimately, the Article provides the right for trade unions to organize their activities in full freedom and formulate their programmes, which involves the right to defend the interest of its members by any activity. The main difficulties in practice, however, have been restrictions of political activities and of the right to strike, which will be treated in the next paragraph. Legislation that establishes a close relationship between trade unions and the political party in power has declined, however, problems still remain regarding the right for trade unions to invoke political activities.[158] In the preparatory work on the Convention, it was emphasized that activities carried out by trade unions cannot be limited solely to occupational matters, since the general policy of the reigning government inevitably has an impact on the workers in terms of social security, leave, etc.[159] The CEACR has therefore stated that trade unions have to be able to express their opinions on political issues, on broad policies in general and on a government's economic and social policy in particular, in order to develop the trade unions and acknowledge their role as a social partner.[160] General prohibitions for trade unions to engage in political activities might ultimately lead to difficulties to act at all, since "the interpretation given to the relevant provisions may, in practice, change at any moment."[161] Hence, legislative provisions, which prohibit all political activities, are therefore considered to infringe the principles of freedom of association provided for in the Convention.

[154] GS 1994, para 120.
[155] Digest 2006, para 467.
[156] Ibid. para 490
[157] GS 1994, para 126.
[158] Ibid. para 130.
[159] International Labour Conference, Record of Proceedings, 31st Session, 1948, First Report of the Committee on Freedom of Association and Industrial Relations, p. 476.
[160] GS 1994, para 131.
[161] Digest 2006, para 501

2.1.5 The right to strike

Since strike action might imply serious consequences for employers, workers and third parties, it gives rise to the most controversy. [162] Thus, strike action is considered a complex matter indeed, which the CEACR has emphasized by stating "strike action is often the symptom of broader and more diffuse issues, so that the fact that a strike is prohibited by a country's legislation or by a judicial order will not prevent it from occurring if economic and social pressures are sufficiently strong."[163]

Neither the ILO Constitution, the Declaration of Philadelphia nor any ILO Convention explicitly acknowledges the right to strike. However, already in the preparatory work on the Convention, the right to strike was mentioned. Yet, it was never expressly acknowledged in the Convention.[164] Due to the absence of a provision that expressly recognizes the right to strike, the supervisory bodies within the ILO have been forced to define the scope and meaning of the right. During the 1950s both the CFA and the CEACR acknowledged the right to strike to be a necessary corollary of trade union rights in general and freedom of association in particular, neither of them have ever since departed from this position, instead, they have reiterated and reinforced their positions concerning the right through case law.[165] Furthermore, the supervisory bodies have declared that the protection of the right to strike stems from the principle of freedom of association and Articles 3, 8 and 10 in Convention No. 87, since strike action is acknowledged as a collective right exercised by its members in order to further and defend their interests.[166] The ICJ has never challenged this interpretation, which, as mentioned above, is the only body within the ILO to make binding interpretations of the ILO Constitution and Conventions. In 2012, however, the position of the supervisory bodies was subjected to criticism as the representatives of employers' organisations challenged the ILO's mandate regarding to which extent the right to strike could be read into Convention No. 87. They emphasized that neither the preparatory work of the Convention nor an interpretation based on the Vienna Convention on the Law of Treaties serve to establish principles in detail regarding the right to strike. The Convention itself was said to at most entail a general right to strike, and could therefore not be regulated in detail under the Convention, which the CFA was accused of doing by applying a "one-size-fits-all" approach which lacked respect to the countries' differences regarding economic and social development. [167] Although the criticism lead to the conference being suspended, "the Committee operated as normal at the 102nd (2013) Session of the Conference, and the CFA has continued to function as normal throughout this period of controversy."[168]

Consequently, the right to strike is considered a fundamental right for workers and their trade unions as a legitimate means of defending their economic and social interests. However, the right to strike is not to be interpreted as an absolute right since it may be subject to a general

[162] GS 1994, para 136.
[163] Ibid. para 138.
[164] ILC, 30th Session, 1947, Report VII, Freedom of Association and Industrial Relations, p. 46, 52 & 73-74
[165] GS 1994, para 146-148.
[166] Ibid. para 147.
[167] Swepston, Crisis in the ILO Supervisory System: Dispute over the Right to Strike, 2014, p. 204. However, this is not the first time discussions like these have occurred. For further reading see: Bellace, The ILO and the right to strike, 2014.
[168] Creighton, Comparative Labour Law and Industrial Relations in Industrialized Market Economies, 2014, p. 352.

prohibition under extreme circumstances such as national crisis, although only for a limited period, or be governed by provisions for conditions and restrictions on the exercise of the right.[169] Since the right to strike is based on Article 10 of the Convention, the underlying purpose of the strike must be to protect the interest of the members, the crucial part whether the strike is protected or not depends therefore on whether the purpose is connected to the interest of the members. For instance, political strikes are not considered to fall within the scope of the Convention and lacks therefore protection. However, difficult considerations arise due to the difficulty to distinguish political and occupational aspects of a strike, since a policy adopted by a government may affect the workers in various ways. Consequently, the CEACR has stated that trade unions have to be able to strike on political decisions that directly affect the members' economic and social conditions, such as employment and social protection.[170]

Although the right might be restricted, the member states are obligated to provide protection for the right to strike and refrain from restricting it in an unauthorized way. Hence, the regulation has to be reasonable and not to lead to a total ban or an excessive limitation of the right to be practiced.[171] In a large number of countries, different types of perquisites constitute regular features in the legislature. For instance, it is quite common that the law requires workers and their trade unions to give notice of their intent to strike or impose a so-called cooling-off period, as long as these measures are conceived as an additional step in the process and aims to encourage the parties to engage in negotiations, they may be considered acceptable.[172] Moreover, it is also quite common with legislation, which stipulates that the organisations that intend to take action need an approval by a certain percentage of the workers, this requirement is not in principle incompatible with the Convention No. 87. However, the quorum and percentage required should not make the right to strike very difficult or even impossible, the judgement depends on several factors, such as the type of industry and geographical isolation, which in turn requires an examination on a case by case basis. The member state should also ensure that the result of the vote only exists of the votes cast and that the quorum and percentage level are reasonable.[173] The CFA has stated regarding the quorum, that an absolute majority may be difficult to achieve, especially in unions with a large number of members, and is therefore seriously limiting the right to strike.[174] A provision requiring two-thirds of the members has also been considered difficult to reach and thereby too high whereas a requirement of over half of the members has also been declared excessive as it could potentially hinder the possibility to strike.[175]

Provisions concerning sanctions on strikes are also a common feature in the legislation of several countries, the CEACR has stated that sanctions for strike action "should be possible only where the prohibitions in question are in conformity with the principles of freedom of association."[176] The principles established by the supervisory bodies regarding the right to strike are only valid for strikes that are considered lawful, the determination whether a strike

[169] GS 1994, para 151.
[170] Ibid. para 165.
[171] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 151.
[172] Digest 2006, para 552 & 554.
[173] GS 1994, para 170 &171
[174] Digest 2006, para 557.
[175] Ibid. para 556 & 560.
[176] GS 1994, para 177.

is lawful or not is therefore essential, this should be assessed by an independent body, and not the government authorities.[177]

2.1.6 Prohibition to be dissolved or suspended by administrative authority

Administrative interferences resulting in the dissolution or suspension of trade unions are considered serious since they ultimately abolish the exercise of trade union activities.[178] Therefore, the CFA has stated that actions, such as dissolutions of trade unions, are to be seen as a last resort only after exhausting other possibilities, which might imply minor effects for the organisations.[179] The right is provided for in Article 4 of the Convention, which stipulates:

"Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority."

In this context it should be mentioned that Article 6 of Convention No. 87 extends the guarantee provided for in Article 4 to federations and confederations as well. As mentioned above, dissolution by the administrative authority is considered a clear violation of Article 4, however, the Article does not grant immunity concerning the ordinary law since trade unions are obligated to respect the law of the land according to Article 8 of the Convention, given that the law of the land shall not to be such as to impair, nor shall it be so applied as to impair, the rights provided for in the Convention. For instance, an organisation, which undertakes to destabilize the State's internal security, cannot invoke the rights laid down in Article 4 since it is considered an unlawful association.[180] The CFA has emphasized that it is the judicial authorities that should carry out any dissolution of organisations so that the rights of defence are fully guaranteed.[181] However, the dissolution of a judicial authority "entails consequences that are just as irremediable as a definitive dissolution by administrative authority since neither admits of appeal to independent bodies."[182] Hence, the legislation has to ensure that the given dissolution does not prevent the members from, for instance, maintaining their membership.

Moreover, specific measures that are not acknowledged as dissolution or suspension in the strict sense of the term may constitute difficulties since they might imply similar consequences for the trade unions. For instance, measures that might lead to a loss of certain advantages, which are vital for the activities of the trade union, or a condition which is decisive whether the union may exist or not, such as registration by an administrative authority, suspension of its legal personality, or depriving its financial resources, entails a serious risk of infringing the very existence of trade unions.[183] Another form of measure is the account of membership, the CFA has stated that a legal provision that requires the number of members to fall below 20 in order to be dissolved, is not in itself incompatible with the Convention.[184] The CFA has also emphasized that dissolution of trade unions based on a

[177] GS 2012, para 157.
[178] GS 1994, para 180.
[179] Digest 2006, para 678.
[180] GS 1994, para 181.
[181] Digest 2006, para 684 & 691.
[182] GS 1994, para 183. See references to: Report of the Commission of Inquiry – Poland, Chapter II, note 49, para 497.
[183] GS 1994, para 184 & 185.
[184] Digest 2006, para 680.

judgement that a leader or a member of the union has carried out illegal activities is in clear violation with the Convention No. 87. The notion of the Committee on the matter is that the leaders or members that have been carrying out illegal activities should be prosecuted in accordance with ordinary judicial procedure, it is therefore the persons responsible for the irregularities that should face legal action rather than suspending or dissolving the trade union.[185]

2.2 The UN Covenants ICESCR and ICPPR

It was originally the UN-organ, the Economic and Social Council (ECOSOC), which requested the ILO to devise a Convention regarding freedom of association. While this was processed, the Human Rights Commission (HRCO) was formulating a declaration of human rights, resulting in a constant exchange of opinions and views between the ILO and the involved UN agencies. The ILO Convention No.87 was subsequently adopted just a few months before the United Nations Universal Declaration of Human Rights, and was said to have formulated "key elements" of what was to become the Human Rights Declaration. According to Dunning, the influence of the ILO Convention No. 87 is mainly demonstrated through the wording and formation of the articles, for instance, Article 23 (4) of the Declaration states that, "Everyone has the right to form and to join trade unions for the protection of his interests". One could consequently argue that Article 23 of the Declaration derives directly from the ILO Convention No. 87.[186] Moreover, the importance and impact of the Declaration has been acknowledged by the ILO's Committee of Experts as "a point of reference for human rights throughout the world, and as the basis for most of the standard setting that has been carried out in the United Nations and in many other organizations since then."[187]

In 1966, the principles regulated in the Declaration were codified and stipulated into two separate covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In addition to provide protection concerning civil and economic rights, their aim was to maintain legislative conformity with the previously adopted ILO Convention No. 87. However, although they were codified and stipulated in the mid 1960s, they did not come into force until ten years later, as they received enough amounts of ratifications. Today, the UN covenants are considered to be "the most influential international human rights instruments of broad coverage."[188] Unlike the ILO Convention No. 87, the covenants exclusively regulate freedom of association in one article each, namely Article 22 of the ICCPR and Article 8 of the ICESCR.

[185] Ibid, para 692 & 693.
[186] Dunning, The origins of Convention no. 87 on freedom of association and the right to organize, 1998, p. 160-163.
[187] ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries, Report III (Part 1A, International Labour Conference, 86th Session, 1998, Geneva, pp. 17.17, paras, 56-58. See: Swepston Human rights law and freedom of association: Development through ILO supervision, 1998.
[188] Swepston Human rights law and freedom of association: Development through ILO supervision, 1998, p. 172.

Article 22 of the ICCPR provides:

1. 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.

2. No restrictions may be placed on the exercise of the right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), *the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Concern was raised during the draft process of Article 22, as its scope was considered too narrow compared to the ILO Convention, which could potentially diminish the protection of freedom of association. The biggest fear by adopting Article 22 was that states that had already adopted the ILO Convention No. 87 could refer to Article 22 of the ICCPR instead and thereby apply a more limited protection of freedom of association, which could potentially undermine the progress that had already been made by the ILO Convention.[189] Consequently, "there was a definite possibility of a discrepancy between the guarantees offered in the draft covenant and those extended by the convention and that it had therefore been necessary to ensure that the provisions of the former were not used to evade obligations assumed under the latter."[190] The article was therefore met with scepticism. However, in order to deal with the concerns that had been raised, article 5:2 of the ICCPR was adopted which stipulates that, "the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."[191] However, the Article was considered to be insufficient, and was therefore accompanied by Article 22 (3), which stipulates in a more distinct manner that, "nothing in this article shall authorize State Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association (…) to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention."[192]

Furthermore, Article 8 of the ICESCR provides:

1. The State Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join trade unions of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

[189] GAOR 10th Session A/2929, Chapter. VI, para. 152 and Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 222.
[190] Ibid, Chapter. VII, para. 182.
[191] Article 5:2 ICCPR.
[192] Article 22 (3) ICCPR.

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provide that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize State Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or apply the law in such manner as would prejudice, the guarantees provided for in that Convention.

During the draft process, it was discussed whether Article 8 of the ICESCR should entail a cross-reference regarding the limitations of trade union rights to Article 22 ICCPR in order to clarify the relationship between the UN covenants. This was nevertheless met with scepticism as it was considered undesirable to make a reference from a covenant to another one.[193] Furthermore, unlike Article 22 of the ICCPR, Article 8 of the ICESCR expressly defines the purpose of freedom of association in a much more restricted way by stipulating, "promotion and protection of his economic and social interests". In contrast to this, Article 22 ICCPR defines the purpose of the right in more general terms by stipulating, "the protection of his interests." This was a deliberate choice in order to emphasize that trade unions are not solely obligated to operate for social and economic purposes, but also for civic ones.[194] Consequently, since Article 22 of the ICCPR does not stipulate the possible purposes of an association, the protective scope is assumed to be broad.[195]

2.2.1 Obligations of the member states

In 1980, Cambodia acknowledged the UN covenants by signing the protocol that obligated the country to ratify the ICCPR and the ICESCR; however, it was not until 1992 Cambodia ratified the UN covenants. Since the ICESCR and the ICCPR are two separate Covenants, questions arise regarding the scope of the obligations Cambodia must observe. According to Article 2 of the ICESCR, states are obligated to "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."[196] On the contrary, according to Article 2 of the ICCPR the State "undertakes to respect and ensure" that all individuals, without distinction of any kind, are entitled the rights provided for in the Covenant. The State is also obligated to undertake "necessary steps, in accordance with its constitutional processes and with the provision of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[197] Hence, the obligations provided for in

[193] GAOR 10th Session A/2929, Chapter. VIII, p. 16.
[194] Ibid, Chapter. VI, p. 146-147.
[195] Nowak, UN Covenant on Civil and Political Rights: CCPR commentary, 2005, p. 500.
[196] Article 2 of the ICESCR.
[197] Article 2 of the ICCPR.

Article 2 ICESCR have been labelled positive since they entail demands on performance by the state, whereas the obligations laid down in Article 2 of the ICCPR have been labelled as negative since they stipulate that States should refrain from activities that might violate the rights of the individual.[198]

The obligations provided for in Article 2 ICESCR are therefore interpreted as costly and dependent on resources in order to be implemented in an adequate way whereas the obligations stated in Article 2 of the ICCPR, on the other hand, are considered as immediate actions, which makes them less dependent on resources in order to be implemented.[199] However, this dichotomy has been criticized since it does not acknowledge or interpret the obligations laid down in Article 2 of the ICCPR in an adequate way, and is therefore said to be in conflict with reality. As a matter of fact, the obligations provided for in article 2 ICCPR actually are in need of various resources and developments of essential structures of society in order to be implemented, and are thus also to be interpreted as positive obligations to some extent.[200]

The main difference between the two international instruments regarding the scope of obligation, is that the obligations provided for in the ICECSR are to be progressively realized whereas the obligations in the ICCPR are to be implemented immediately. "Progressive realization" in Article 2 of the ICESCR subsequently constitutes a central aspect of the obligations of the States concerning economic, social and cultural rights. The core of the expression refers to the obligation to take appropriate measures in order to fulfil the realization of economic, social and cultural rights of the maximum of the States' available resources. Consequently, the term "available resources" suggests that the implementation can be hindered due to lack of resources and may only be achieved under a specific period of time. This can be interpreted as States do not have to fulfil these obligations until they have sufficient resources, however, lack of resources do not justify inaction as every state is obligated to demonstrate that they are making every effort in order to fulfil their obligations as stated in the Article, "even when resources are scarce."[201] Consequently, this could potentially lead to a scenario where a State's allocation of resources could be subject to international inspection although this is not laid down in the Article.[202] However, in addition to the general obligation to implement the Article progressively, Article 2 of the ICESCR also obligates the states to "take steps", such as formulating strategies and plans and adopting necessary laws, which are considered to be immediate actions. Thus, there are actually certain areas where member states are obligated to take immediate action, such as, the elimination of discrimination and to provide a minimum core of every single right.[203]

In the case of freedom of association and Article 8 of the ICESCR, the Human Rights Commission stated during the preparatory work on the Covenant that the right to freedom of association should not be realized in a progressive way since "non-interference by States with trade unions was alone needed in order to grant the right."[204] Consequently, it is uncertain

[198] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 93.
[199] Ibid. p. 85.
[200] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 93.
[201] Human Rights Commissioner, Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No. 33, p. 14.
[202] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 94.
[203] Human Rights Commissioner, Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No. 33, p. 16-18.
[204] GAOR 10th Session 1955 A/2929, chapter VIII, p. 13.

whether Article 8 of the ICESCR is to be implemented progressively or not, however, both the doctrine and the UN seems to agree that the Article requires immediate action and is therefore not to be implemented in a progressive way.[205]

As been discussed above, state obligations in international human rights law entails both positive and negative obligations, this is not an exception in the case of freedom of association. In addition, these two forms of obligations constitute three core obligations on a more general level, namely, the obligations to respect, protect and fulfil, which every State is obligated to observe according to human rights law. However, the supervisory body of the ICCPR has not yet embraced this categorization on its articles, it has nevertheless, stated that the articles also entail positive obligations and not just only negative as was discussed above. Consequently, the categorization has been mainly applied and read together with the ICESCR. Yet, although questions remain concerning its applicability, the categorization provides a comprehensive notion of what ratification of international instruments entails in general.[206]

The obligation to *respect* is acknowledged as a negative obligation, as it requires the State and its various organs to refrain from any form of interference that might infringe the integrity of the individual or violate her freedom. The State is not allowed to deny the right of the individual and has to ensure that the individuals have equal access to the right, implying not to act in a discriminatory way.[207] However, the State may infringe the right, given that the interference is justified by the limitations clauses, which have to be provided by domestic law and be necessary for a specific purpose.[208] The second obligation is the obligation to *protect,* which is acknowledged as a positive obligation since it requires resources and an active State in order to be fulfilled in an adequate way. The core of the obligation requires the State to work proactively in order to prevent any infringements imposed by non-State actors, mainly through legislation, which has to be based on the special needs in the concerning State, or by other measures that ensure equal access to the right. Freedom of association also entails a negative right of individuals not to join a trade union, States are therefore obligated to protect individuals against these as well.[209] Lastly, the State is also obligated to *fulfil,* which is also considered a positive obligation since it is resource demanding. The obligation to fulfil may take different forms since the obligation is considered to entail requirements to facilitate, provide and promote the right, which makes it a relatively extensive one. The right, in this case freedom of association, has to be acknowledged in the judicial and political systems, and the state has to engage in activities with the purpose to facilitate the access of the right to individuals, which may be done through both legislative and administrative measures. The State is also obligated to provide for the right, which may be done by establishing an environment, where associations may operate freely, and where acts of violence and fear of threats are non-existent.[210]

[205] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 228.
[206] Ibid. p. 91.
[207] Ibid. p. 87.
[208] Nowak, Hofstätter, All Human Rights for All: Vienna Mannual on Human Rights, 2012, p. 383.
[209] Ibid. p. 385.
[210] A/HRC/20/27, para 63.

2.2.2 The supervisory bodies of the UN Covenants and their legal impact

Since the Covenants constitutes two separate human rights instruments, they have different monitoring structures and supervisory bodies, which in turn will be described below in order to present their work methods, legal impact and relationship.

It is the Human Rights Committee (HRC) that supervises and monitor the implementation of the articles regulated in the ICCPR by obligating States to impose periodic reports on the observance of the articles, which are thereafter commented on by the Committee.[211] The HRC examines each report together with a delegation of the concerning State party in a public dialogue that ultimately results in "concluding observations", which consists of both positive and negative comments of the State Party's implementation of the Covenant. In order to facilitate the work of the HRC, the Committee established the Special Rapporteur on Follow-up to Concluding Observations in 2001, whose mission is to assist the Committee by examining the follow-up information and provide recommendations to the HRC on steps that might be appropriate regarding the implementation of the Covenant.[212] Additionally, the HRC develops and adopts so-called general comments, which comprehensively analyses a specific topic or article of the Covenant in order to clarify the scope and meaning of its regulations. These comments have been described as "a general statement of law that expresses the Committee´s conceptual understanding of the content of a particular provision."[213] However, the Committee has never submitted a general comment on Article 22 of the ICCPR regarding freedom of association. Moreover, the State may also become a party to the Optional Protocol, which enables individuals who claim that their rights or freedoms under the Covenant have been infringed to call the State to "account for its actions." The HRC thereafter consider the complaint and forwards its views to the State concerned and the individual, however, these views are not binding to the member States.[214] In 2004, Cambodia signed the Optional Protocol and thereby enabled individuals to have the government supervised by the HRC, the protocol has nevertheless not yet been ratified by Cambodia.[215]

Consequently, regardless of whether the HRC adopts general comments or examines complaints by individuals, the Committee is considered the pre-eminent interpreter of the Articles regulated in the ICCPR. However, although the Articles set out in the covenant is legally binding, as was discussed above, the interpretations of the HRC are not. However, one could argue that they do have a certain legal impact, as member states are obligated to consider the views of the Committee in good faith.[216] This obligation appears to have had an impact as the ICCPR concludes, "the Committee's work has resulted in numerous changes of law, policy and practice, both at the general national level and in the context of individual cases".[217]

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[211] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 57.
[212] Civil and Political Rights: The Human Rights Committee, Fact Sheet No. 15, p. 19-20.
[213] Ibid. p. 24.
[214] Ibid. p. 25.
[215] Status of Ratification: Cambodia. http://indicators.ohchr.org/
[216] Sitaropoulos, States are Bound to Consider the UN Human Rights Committee's Views in Good Faith, Oxford Human Rights Hub, 2015, available at: http://ohrh.law.ox.ac.uk/states-are-bound-to-consider-the-un-human-rights-committees-views-in-good-faith/
[217] Civil and Political Rights: The Human Rights Committee, Fact Sheet No. 15, p. 30.

From the beginning it was ECOSOC that reviewed the reports submitted by the member states regarding the efforts and progress that had been made on the articles of the ICESCR.[218] However, the former supervisory mechanism was considered to be inefficient, mainly due to the Council's lack of time and resources.[219] As a result, the ECOSOC established the Committee on Economic, Social and Cultural Rights (CCESCR) which is the present supervisory body of the ICESCR whose main function is to review the submitted reports and thereby supervise the implementation of the articles of the ICESCR. Like the HRC, the CCESCR also conducts general comments concerning specific topics or certain articles of the ICESCR, which, according to Herzfeld Olsson, have the same legal impact as those general comments conducted by the HRC.[220] However, as in the case of HRC and Article 22 of the ICCPR, neither has the CCESCR conducted a general comment on Article 8 regarding freedom of association. Furthermore, like the HRC, the CCESCR is also able to handle individual complaints, however, Cambodia has neither signed nor ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural rights.

The relationship between the supervisory bodies of the UN covenants and the ILO has been debated throughout the years. During the draft process of the ICCPR, the function and power of the HRC was subject to considerable discussion. The view of the specialized agencies, including the ILO, was "that there should be no duplication of existing machinery or of functions (…) and that the committee should have the duty to protect human rights in general in all cases which were not covered by other provisions."[221] Hence, it was thought that the purpose of the HRC was to avoid overlapping since "the specialized agencies had long experience in the promotion of the rights falling within their competence, and their expert knowledge and special procedures could in most cases produce better results."[222] Furthermore, the special agencies, including the ILO, considered themselves to be the most appropriate actors in implementing economic, social and cultural rights since "the experience and procedures which they had evolved in connexion with those rights should not be disregarded."[223] Consequently, it becomes apparent that the ILO consider itself to be more competent than the supervisory bodies of the UN covenants concerning the implementation and follow-up of the fundamental rights stipulated in the international instruments.

This hierarchy shines through when comparing case law of the supervisory bodies of the ILO and the UN covenants regarding freedom of association. Hence, unlike the supervisory bodies of the ILO, the supervisory bodies of the UN Covenants have not had particularly prominent roles in developing freedom of association in international law. As a result, unlike the CEACR and the CFA, freedom of association has received little attention by the HRC and the CCESCR. One could subsequently argue that the bodies of the UN covenants have not been prone in establishing case law that facilitates the interpretation of the right. This notion is furthermore corroborated by the fact that none of the supervisory bodies have provided any general comment on the right. Taking this into consideration, it therefore seems as the bodies have assigned the responsibility in establishing adequate case law to the ILO and its supervisory bodies.[224] Moreover, Joseph and Castan argues that most of the cases the HRC has handled have mainly been straightforward violations, which has affected the Committee's

[218] Article 16 of the ICESCR.
[219] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 55.
[220] Ibid, p. 229.
[221] GAOR 10th Session 1955 A/2929, chapter VII, p. 149.
[222] Ibid. chapter VII, p. 149.
[223] Ibid. chapter IX, p. 40.
[224] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 226.

possibility to create a dynamic and comprehensive jurisprudence regarding freedom of association.[225] However, although the ILO appears to be the prominent actor in developing case law on freedom of association, the supervisory bodies of the UN covenants have dealt with freedom of association on numerous occasions. It is therefore of major importance to consider their interpretations as well in order to provide for a comprehensive presentation concerning the international protection of freedom of association. Additionally, the UN Special Rapporteur on the right to freedom of peaceful assembly and of association has also conducted reports, which might be helpful in clarifying the interpretation of freedom of association of the UN Covenants.

2.2.3 The right to establish organisations without distinction

Article 22 (1) of the ICCPR regulates 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 interest." Consequently, legislation that does not set any specific limitations on individuals is compatible with international standards, except armed forces and police who might have their right lawfully restricted.[226] The question regarding who may be denied the right to form and join a trade union has not received much attention by the HRC, the Committee has nevertheless stated on numerous occasions that public employees are not to be denied the right to freedom of association.[227] Article 8 of the ICESCR has a similar form of wording as it stipulates, "the right of everyone to form trade unions and join trade unions of his choice." Consequently, both of the Articles refer to "everyone" concerning who is entitled to form and join a trade union, which is in line the prohibition of discrimination.[228] Consequently, since the Articles are referring to "everyone", freedom of association is conceived as a right for every individual "to found an association with like-minded persons or to join an existing organization."[229] However, it also covers the collective right to perform activities in order to promote and defend the interests of their members.[230]

According to Nowak, the right to form and join unions also includes a prohibition to neither aggravate nor hinder the establishment of trade unions[231]; the HRC has therefore stated, like the CFA, that administrative routines, which hinder or makes it impossible to form trade unions, are incompatible with Article 22.[232] Consequently, the Committee has emphasized that one must consider the potential consequences of lengthy and highly technical registration procedures as they might lead to an aggravation of the right to be practiced. [233] This view is shared by the CCESCR, which has stated that requirements stipulated in the legislation concerning the formation of trade unions cannot be extensive since it may hinder the right to form a trade union. Furthermore, a minimum membership requirement in order to form a

[225] Joseph & Castan, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary, 2013, p. 664.
[226] A/HRC/20/27, para. 54.
[227] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 209.
[228] This prohibition is identically regulated in Article 2 (2) of the ICESCR and Article 2 (1) of the ICCPR, stipulating that the state undertakes to guarantee the right without discrimination of any kind such as, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
[229] Nowak, UN Covenant on Civil and Political Rights: CCPR commentary, 2005, p. 498.
[230] Ibid. p. 498.
[231] Ibid. 2005, p. 500.
[232] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 211.
[233] CCPR/C/112/D/2153/2012 para. 9.3

union is not allowed to be too high, and an approval from the Ministry of Labour is seen as a serious threat to the right to form a union.[234] The Special Rapporteur has stated that a, "notification procedure, rather than a prior authorization procedure that requests the approval of the authorities to establish an association as a legal entity, complies better with international human rights law and should be implemented by the States."[235] Moreover, the registration bodies must be obligated to act immediately, while the time limits provided for in the legislature to respond to submissions and applications have to be set short, a failure to provide a response from the registration bodies within the time frame should result in "a presumption that associations are operating legally."[236] If the registration body would reject the submission or application, the decision has to be clearly motivated and properly communicated to the applicant, who also should have the opportunity to challenge the decision before an independent court.[237]

Articles 22 of the ICCPR and Article 8 of the ICESCR also imply the freedom to choose the organisations to which one wishes to belong. The State is therefore prohibited to interfere in the choice making of the individual. Consequently, the State has to create an environment through both legislation and practice, in which the individual may choose to join an already existing union or form a new one, without any State interference. In addition, like the CFA and the CEACR, both the HRC and the CCESCR have stated that trade union diversity has to remain legally possible, although it might be disadvantageous to the trade union movement, obligating the state to create real opportunities regarding trade union diversity.[238]

2.2.4 Organisational autonomy

Like the CFA, the HRC has stated that trade unions should have the right to organize their administration as they wish.[239] Trade unions should be free to determine their "statutes, structure and activities and make decisions without State interference."[240] The State must therefore respect the privacy of the association, and thus not be entitled to condition the validity of trade union officers nor have free access to trade unions' premises without advance notice.[241] Moreover, the HRC has stated that a State should not regulate when a trade union meeting is to be held, and has also questioned whether restrictions concerning potential trade union officers are compatible with Article 22 of the ICCPR.[242] However, independent bodies may investigate the records of a trade union in order to ensure transparency and accountability, provided that the procedure respects the principle of non-discrimination and the right to privacy.[243] Since legislation and policies regarding trade union resources may have a substantial impact on unions' possibilities to conduct in activities, unions must be able to seek, secure and use resources. Hence, member states are prohibited to place restrictions

[234] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 236. See her reference to CO CESCR Algeria 30/11/2001. E/C.12/1/Add.71, p. 16.
[235] A/HRC/20/27, para 58.
[236] Ibid. para 60.
[237] Ibid. para 61.
[238] Nowak, UN Covenant on Civil and Political Rights: CCPR commentary, 2005, p. 500.
[239] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 215.
[240] A/HRC/20/27, para 64.
[241] Ibid. para 65.
[242] CO Nigeria 24/07/96. CCPR/C79/Add.65, p. 302. See also: Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 215.
[243] A/HRC/20/27, para 65.

which might impede the ability of unions to pursue their statutory activities, instead the State should undertake measures to facilitate access to funding etc.[244]

Like Article 3 of the ILO Convention No. 87, Article 8:1 (c) of the ICESCR and Article 25 of the ICCPR, imply that organisational autonomy entails the right to organize its external activities, including the right to invoke political activities.[245] However, the scope of the external activities protected by the ICESCR is unclear. According to Herzfeld Olsson, in order to define the scope of the external activities provided in Article 8:1 (c) ICESCR, one has to read it together with Article 8:1 (a) ICESCR. Since the latter stipulates, "for the promotion and protection of his economic and social interests", the Article implies that the activities of unions are not solely "passive" in the form of protecting but also active in the form of "promoting". Hence, trade unions may choose the best-suited method for safeguarding their interests in the best possible way. However, uncertainties remain whether activities with purposes other than promoting and protecting economic and social interests are protected by Article 8 of the ICESCR. Herzfeld Olsson refers to a case where the Committee expressed concern over a country's lack of legislative definition of the term "political activities", which she argues implies that the ICESCR does not provide a comprehensive protection regarding the trade unions right to invoke political activities.[246] Yet, as Nowak highlighted, due to the extensive scope of Article 22 of the ICCPR, any political activity invoked should subsequently be protected by either the ICESCR or the ICCPR, dependent on the purpose of the activity.

2.2.5 The right to strike

Unlike the ILO Convention No. 87 and Article 22 of the ICCPR, Article 8 (d) of the ICESCR expressly acknowledges the right to strike provided "that it is exercised in conformity with the laws of the particular country."[247] Concerns were nonetheless raised whether the exercise of the right would potentially be left to the discretion of the State. However, the CCESCR has developed and established a relatively comprehensive case law regarding the right to strike, declaring that a failure to provide for the right to strike is tantamount to a violation of the right.[248] Moreover, the CCESCR has stated that regulations on strike action have to be clear but not burdensome as they may hinder the right to be exercised. For instance, a requirement of two thirds of the members before a strike decision has been found incompatible with the Article.[249] In addition, according to the CCESCR, individuals working in essential services or public servants such as police and military personnel[250] may have their right to strike restricted, which is in line with the case law of the ILO supervisory bodies.

Since Article 22 of the ICCPR does not expressly acknowledge the right to strike, it has been debated over the years whether the Article protects the right to strike or not. Although case law of the HRC on freedom of association is scarce, the question was subject to a controversial decision by the Committee in the case JB et al v Canada (118/82). The Alberta

[244] A/HRC/23/29, para 8-14.
[245] These activities may however be restricted, see chapter 2.2.6.1.
[246] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 238. For further reading, see the case she refers to: CO CESCR Azerbaijan 22/12/97 E/C.12/1Add.20, p. 20.
[247] Article 8 (d) of the ICESCR.
[248] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 242.
[249] CO CESCR Egypt 23/05/2000. E/C.12/1/add.44, para 18 and 19. Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 243.
[250] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 242.

Union of Provincial Employees alleged that the general prohibition of strikes for public employees regulated in the Alberta Public Service Employee Relations Act of 1977 violated their freedom of association provided in Article 22 ICCPR. The HRC was thereby obligated to process whether the right to strike was covered by Article 22 of the ICCPR. Since Article 8:1 (d) ICESCR expressly acknowledges the right to strike, the Committee argued that it becomes "clear that the right to strike cannot be considered as implicit component of the right to form and join trade unions."[251] Additionally, it was highlighted that the right to strike was never mentioned in the original draft of the Covenant.[252] Hence, the majority of the Committee concluded that the right to strike was not to be interpreted within the scope of Article 22 ICCPR.[253] However, the decision was not unanimous as five Members came to a contrary conclusion, demanding the Committee to answer, "whether article 22 alone or in conjunction with other provisions of the Covenant necessarily excludes, in the relevant circumstances, an entitlement to strike."[254] They argued that the right to form and join an association was to be interpreted, as an exemplification of the general right to freedom of association, as they emphasized that "there is no mention of the right to strike in article 22, just as there is no mention of the various other activities, such as holding meetings, or collective bargaining."[255] Consequently, they argued that it was not possible to list, which activities were vital to the exercise of the right since they must be examined in "their social context in the light of the other paragraphs of this article."[256] Furthermore, the Members stated that although Article 8:1 (d) expressly acknowledges the right to strike, it does not necessarily exclude the right to strike in Article 22 ICCPR, since the structures of the articles varies. They emphasized that the question whether the right to strike was a necessary component in the protection of the authors' interests, was a question on the merits, namely, if the imposed restrictions were justifiable under Article 22 (2) ICCPR.[257]

Nowak shares the opinion of the Members, as he argues that the majority's decision to declare the communication inadmissible was incorrect.[258] Herzfeld Olsson agrees while emphasizing that the reasoning of the Members was the most rational one.[259] Joseph and Castan underline that the Members "exhibited a more coherent method of interpretation", and notes that the HRC majority seemed "overly concerned to separate the subject matters" of the ICCPR and the ICESCR, which ultimately hindered the majority from acknowledging the right to strike as a civil and political right.[260] Until today, the HRC has not processed an individual case concerning the right to strike, however, recent Concluding Observations implies that the Committee is approaching the opinion of the Members as it has expressed concern on the right to strike. For instance, the HRC expressed its concerns "about continuing restrictions on trade union rights in Chile", stating that the country "should remove all legislative and other obstacles to the full exercise of the rights established under article 22 of the Covenant."[261] Joseph and Castan argue that if the development of the HRC continues in this direction, it

[251] Communication no 118/1982, Decision on admissibility, p. 6:3.
[252] Ibid. p. 6:3.
[253] Ibid. p. 6:4.
[254] Communication no 118/1982. Individual opinion, p. 2.
[255] Ibid. p. 3.
[256] Ibid. p. 3.
[257] Ibid. p. 6-10.
[258] Nowak, UN Covenant on Civil and Political Rights: CCPR commentary, 2005, p. 504.
[259] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 218.
[260] Joseph & Castan, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary, 2013, p. 660-661.
[261] 2007, UN doc CCPR/C/CHL/CO/5.

may "herald a change of heart regarding the scope of article 22 protection for trade union members."[262]

2.2.6 Prohibition to be dissolved or suspended by administrative authority

Like the CFA, the UN Special Rapporteur emphasizes that suspension and involuntarily dissolution of a trade union are acknowledged as the most serious forms of restrictions on freedom of association. Hence, such measures should only be possible "when there is a clear and imminent danger resulting in flagrant violation of national law, in compliance with international human rights law."[263] Since the protection of a trade union applies for its entire life[264], a decision resulting in suspension or dissolution must be proportional to the legitimate aim pursued and applied only when other less interfering measures would be insufficient.[265] Thus, an involuntarily dissolution is therefore acknowledged as a measure of last resort.[266] Furthermore, the UN Special Rapporteur has emphasized that measures resulting in suspension or dissolution of a trade union have to be taken by an independent and impartial court while the ground for the decision have to be presented and communicated to the union concerned.[267]

Consequently, the views of the HRC, CCESCR and the ILO correspond regarding the prohibition to be dissolved or suspended by an administrative authority. However, although the views of the supervisory bodies are concurrent, they differ on how the right may be limited.

2.2.6.1 Limitations provided for in the ICCPR and the ICESCR

As was emphasized by the CFA and the CEACR, the right to freedom of association is not to be seen as an absolute right. However, unlike the ILO Convention No. 87, Article 22 (2) of the ICCPR and Article 8:1 (a) of the ICESCR expressly stipulate in detail the requirements for such limitations to be admissible. Article 22 (2) of the ICCPR provides:

2. No restrictions may be placed on the exercise of the right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

Article 8:1 (a) of the ICESCR, on the other hand, stipulates:

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[262] Joseph & Castan, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary, 2013, p. 661.
[263] A/HRC/20/27, para 75
[264] European Court of Human Rights, United Communist Party of Turkey and Others v. Turkey, No. 19392/92, para 33.
[265] A/HRC/20/27, para 75.
[266] A/HRC/26/29, para 51
[267] A/HRC/20/27, para 75. Failing to meet this requirement is considered tantamount to an administrative aggravation of the trade union, which could potentially be seen as an infringement of the right to freedom of association.

No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

Reading the wordings of the Articles, it becomes evident that Article 22 (2) of the ICCPR entails more limitation grounds than its counterpart. However, neither the CCESCR nor the HRC have developed or clarified the scope of the limitation grounds provided in the Articles, it has nevertheless been discussed in the doctrine. Herzfeld Olsson argues that the ICCPR was influenced by Article 11:2 of the European Convention on Human Rights (ECHR) during its drafting process, which might be a potential reason to why it contains more limitation grounds. It was never mentioned in the preparatory work on the ICESCR why the limitations grounds regulated in Article 22 (2) of the ICCPR were not to be included in Article 8:1 (a) of the ICESCR. However, according to Herzfeld Olsson, Article 8:1 (a) of the ICESCR was inspired by the ILO Conventions during its draft and therefore resulted in less limitation grounds.[268] Consequently, the limitation grounds provided in the Articles differ, however, although Article 22 of the ICCPR entails more limitation grounds, Article 8:1 (a) of the ICESCR is to be interpreted coherently. Hence, restrictions on the right to freedom of association, regardless of UN covenant, have to cumulatively meet the following conditions: (a) it must be provided by law; (b) it may only be enacted for one of the purposes set out in the articles; and (c) it must be necessary in a democratic society in order to achieve one of these purposes.[269]

Thus, restrictions on trade unions and their freedom of association have to be prescribed by law. The term implies that it must be "set down in a general-abstract parliamentary act or an equivalent unwritten norm of common law with sufficient definitiveness"[270]; restrictions, which are acknowledged by government decrees or other similar administrative orders, are therefore not permissible.[271] Moreover, the restrictions have to be "necessary in a democratic society" in order to achieve one of the purposes stipulated in the Articles, implying that they have to be proportional and be influenced by "basic democratic values of pluralism, tolerance, broadmindedness and peoples' sovereignty."[272] According to the HRC, the term "democratic society" refers to the "existence and functioning of a plurality of associations, including those which peacefully promote ideas not favourably received by the government or the majority of the population, is one of the foundations of a democratic society."[273]

Thus, in order to decide whether the restriction is proportionate or not, the intensity of a measure has to be balanced with the legitimate aim.[274] The HRC has therefore emphasized that the State party has to argue as to why the limitations would be necessary for the purposes stipulated in Article 22 (2) ICCPR.[275] For instance, the HRC stated in a case where an author was convicted of a crime due to his union membership that the restriction imposed has to be the least interfering restriction available for the protection of the objectives stipulated in

[268] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 232.
[269] A/64/226, para 26.
[270] Nowak, UN Covenant on Civil and Political Rights: CCPR commentary, 2005, p. 505.
[271] A/64/226, para 27.
[272] Nowak, UN Covenant on Civil and Political Rights: CCPR commentary, 2005, p. 505.
[273] Lee v Republic of Korea, 1119/02, para 7.2.
[274] Nowak, UN Covenant on Civil and Political Rights: CCPR commentary, 2005, p. 505.
[275] Zvozskov v Belarus 1039/01, para 7.4.

Article 22 (2) ICCPR.[276] The State party is therefore obligated to verify that the restriction imposed constitute a minimum level in order to attain the objectives stipulated in the Articles. The purposes for interference regulated in the Articles constitute: national security and public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

The term national security implies threats that poses an immediate threat to the very existence of a nation, in particular political and military activities, whereas restrictions regarding public order (ordre public) may be invoked when basic elements of a society's functioning is threatened. States are therefore authorized to "legislate ordinances to control the lawfulness of the formation and activities of associations and trade unions."[277] For instance, general strikes that might cripple the economic or public life of a society might be limited in the interest of public order. The HRC stated that a ban on the Italian fascist party was compatible with Article 22 (2) of the ICCPR, for reasons of public order and national security.[278] The ordre public has been subject to discussions over the years in both the preparatory works as well as in doctrine; according to Herzfeld Olsson, however, the term has not implied any problems in practice.[279] Furthermore, regarding trade unions and the objective "rights and freedoms of others", difficulties arise since trade union activities are to protect the interests' of their members and are therefore designed to restrict the freedoms of others, namely the employers. Consequently, restrictions invoked with the purpose to protect the interest of the employers are permissible provided that the activities of the trade union "violate methods generally acceptable in a democratic society."[280]

2.3 Concluding remarks

The international protection regarding freedom of association is comprehensive, as both ILO Conventions and UN covenants protect the right to be exercised. However, although the international instruments regulate the same right, they differ on a number of aspects. For instance, Article 8 of the ICESCR expressly acknowledges the right to strike whereas neither the ILO Convention No. 87 nor Article 22 of the ICCPR entails such acknowledgement. However, since the 1950s, the ILO supervisory bodies have recognized the right as an integral part of freedom of association. The HRC on the other hand, chose a different interpretation in the case JB et al v Canada (118/82), underlining that "each international treaty, including the International Covenant on Civil and Political rights, has a life of its own and must be interpreted in a fair and just manner."[281] However, although referring to the independency of the international treaties, the decision has been widely criticized while recent concluding observations indicate that the HRC is approaching the interpretation of the other international instruments concerning the right to strike.

The criticism of the HRC's decision exhibits the interest of the international community to maintain a uniform interpretation of freedom of association in international law. Furthermore, since the ILO supervisory bodies have been given a prominent role in the development of freedom of association at the expense of the HRC and the CCESCR, case law is not very

[276] Joseph & Castan, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary, 2013, p. 654.
[277] Nowak, UN Covenant on Civil and Political Rights: CCPR commentary, 2005, p. 506.
[278] MA v Italy (117/81).
[279] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2004, p. 207.
[280] Nowak, UN Covenant on Civil and Political Rights: CCPR commentary, 2005, p. 508.
[281] Communication no 118/1982, Decision on admissibility, p. 6:2.

dynamic or contradictory. Instead, due to low numbers of individual grievances and absence of general comments on the right, the bodies of the UN covenants have had insignificant roles in establishing freedom of association in international law. Apart from the case JB et al v Canada (118/82), the HRC and the CCESCR seem to interpret the right to freedom of association identical to the case law established by the ILO supervisory bodies. One could therefore argue that this is a conscious choice by the HRC and the CCESCR, implying that the interpretations made by the CFA and the CEACR may apply directly to the interpretation of Article 22 of the ICCPR and Article 8 of the ICESCR. Taking this into consideration, Article 22(3) of the ICCPR and Article 8 (3) of the ICESCR become of interest, as both of them entail an identical reference to ILO Convention No. 87, suggesting that they provide an identical protection as the ILO Convention No. 87. In addition, the CEACR has expressly stated that the "international labour standards and the provisions of related United Nations human rights treaties are complementary and mutually reinforcing."[282]

However, Herzfeld Olsson argues that the reference to the ILO Convention No. 87 does not imply that the UN covenants provide an identical protection as the ILO Convention No. 87. Consequently, if a state has ratified both the ILO Convention No. 87 and the UN covenants, it is primarily obligated to apply the ILO Convention No. 87 since it has the most extensive scope. Hence, since Cambodia ratified the UN covenants in 1992 and the ILO Convention No. 87 in 1999[283], it is obligated to apply all of them, and primarily the ILO Convention since it provides the most extensive protection. In case of restricting the right to freedom of association, it must meet a number of conditions stipulated in the ICCPR and the ICESCR while it has to argue as to why the limitations would be necessary for the purposes stipulated in the UN covenants. Cambodia is consequently obligated to verify that the restriction imposed constitute a minimum level in order to attain the objectives stipulated in the Articles. Furthermore, due to its membership, Cambodia is obligated to fulfil the general obligations to respect, protect and fulfil the provisions regarding freedom of association. However, since the country has not ratified the Optional Protocol to the ICCPR nor the ICESCR, it is uncertain whether the HRC and the CCESCR have authority to handle complaints from Cambodian individuals.

It is the Cambodian Government who has the ultimate responsibility to defend and promote freedom of association through legislation and practice, and to ensure that the principles are respected by all state authorities, including the judicial authorities. As will be discussed in detail in the next section, Article 31 of the Constitution of Cambodia expressly acknowledges these international instruments by stipulating "the Kingdom shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights (…)" Consequently, the obligations that follows the ratifications of the international instruments are directly acknowledged as Cambodian domestic law. According to Hall however, the extent of the legal implications of the Article remains unclear,[284] this conclusion will nonetheless be discussed in the next chapter.

[282] ILO, "Giving globalization a human face", International Labour Conference, 101st Session, 2012, para 45.
[283] Due to the Declaration of 1998, Cambodia was obligated from the very fact of ILO membership to respect and promote the right to freedom of association before it had ratified the ILO Convention No. 87.
[284] Hall, Human Rights and the Garment Industry in Contemporary Cambodia, 2000, p. 124.

3. The Cambodian context

3.1 A brief politico-historical overview of Cambodia

The modern history of Cambodia contains periods marked by harmony, stability and development, but also dark phases of chaos and human suffering beyond imagination. The country has endured numerous episodes of political transition, "changing from a monarchy to a capitalist republic, to a communist republic, to a socialist republic, and then back to the current constitutional monarchy with liberal and pluralistic parties under a market system."[285] This constant change of political regimes, which were often followed by violent transitions, hindered any effort to maintain the momentum of developing and establishing a stable country. However, Cambodia experienced growth and stability during almost 20 years after the ending of the French colonisation (1953) under the leadership of King Sihanouk. Yet, domestic unrest led to an increased resistance, which resulted in an opposition consisting of communist guerrillas, which would later be known as the Khmer Rogue. Consequently, while the opposition against him grew stronger, Sihanouk failed to remain in power, which eventually led to him being replaced by General Lon Nol in 1970. Cambodia under the leadership of Lon Nol was nevertheless characterized by unrest as the pressure increased from the Khmer Rogue and predominantly the rural areas as resentment started to emerge on his policies. Additionally, unlike his predecessor, Lon Nol took a pro-American stance in the Vietnam War, which eventually led to an increased resistance and anger as peoples' homes were demolished due to the intensification of American bombings. The Khmer Rogue captured the moment of fury and mobilised peasants to revolt and fight against the US-friendly regime, which resulted in the unconditional surrender of the Lon Nol government to the Khmer Rogue in April 1975.[286]

The Khmer Rogue renamed the country Democratic Kampuchea (DK), and reigned the country until it was driven from power following the Vietnamese invasion in late 1978. Until then, it had adopted "a fanatical and doctrinaire self-reliance policy"[287] with the intention to create a Marxist agrarian society that was free from "foreign corruption."[288] During its reign, one million out of seven million Cambodians were executed or died from catastrophic economic programs or exhaustion from forced labour. The legal system, as well as all existing government institutions were disassembled, while almost 80 % of the lawyers and legal experts who lived in Cambodia prior to 1975 were executed. After the Vietnamese invasion in late 1978, the majority of the surviving lawyers fled Cambodia. By the time the Salvation Front - a faction of dissatisfied Cambodian leftists backed by the Vietnamese government - overthrew the Khmer Rogue and renamed it Peoples' Republic of Kampuchea (PRK) in 1979, "only ten law graduates remained alive in the country."[289] The legal system was rebuilt during the reign of the PRK from 1979 to 1989, the judiciary was nevertheless functioning in an inadequate way as judges were appointed due to their political convictions rather than their competence, as their main function was to serve state interests rather than protecting individual rights.[290]

[285] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 9.
[286] Ibid. p. 10.
[287] Ibid. p. 10.
[288] Hall, Human Rights and the Garment Industry in Contemporary Cambodia, 2000, p. 119.
[289] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 11 and Hall, Human Rights and the Garment Industry in Contemporary Cambodia, 2000, p. 120.
[290] Hall, Human Rights and the Garment Industry in Contemporary Cambodia, 2000, p. 120.

The years 1989 and 1990 led to a geopolitical turning point with the fall of the Berlin wall and the ending of the Cold War, resulting in serious economic bankruptcy of the Soviet block, including Vietnam. Hence, the government realised that "their long-term interests were better served through trade, that is, through interdependent competition in a global market, rather than through violent elimination contests such as wars."[291] Until 1991, Cambodia endured a bloody civil war as guerrilla forces fought to overthrow the Vietnamese forces. As pressure from the international community grew concerning the continuing civil unrest, leaders of the contending regimes met and signed the Paris Peace Agreement, which led to the founding of the United Nations Transitional Authority in Cambodia (UNTAC). UNTAC was responsible for supervising the withdrawal of Vietnamese forces as well as developing and conducting national elections in the summer of 1993,[292] making it one of the largest peacekeeping operations and subsequently one of the most expensive ones in UN history. The UN-sponsored elections of 1993 were the first free elections in the history of Cambodia and had an electorate participating level of 90 %. The royalist party National United Front for an Independent, National, Peaceful and Cooperative Cambodia (FUNCINPEC) won a narrow victory, however, the leader of the Cambodian People's Party (CPP) Hun Sen, claimed that the polls had not been free and fair. This statement was followed by months of negotiations between the parties, which eventually resulted in a coalition government consisting of two Prime ministers, Rannaridh, the son of the deposed Prince Sihanouk, and Hun Sen.[293]

A couple of months after the election, a committee of the Assembly drafted the new Constitution which established Cambodia as a constitutional monarchy and renamed it the Kingdom of Cambodia. However, these years were unstable and marked by "the continuation of the Polpotists' guerrilla campaign that increasingly relied on terrorism."[294] Meanwhile, the relations between Rannaridh and Hun Sen worsened, resulting in a bloody coup carried out by military forces loyal to Hun Sen, which overthrew Rannaridh in July of 1997. In order to ease the growing international criticism, Hun Sen granted access for exiled leaders to return to Cambodia to campaign for the national elections that were to be held in July 1998. The CPP, the party of Hun Sen, won a plurality in the elections, the opposition claimed however, that the elections had not been conducted fairly as the government was said to have invoked fear amongst the voters (e.g.). Despite the criticism, the international observers claimed that the elections were conducted freely and fair, which was nevertheless followed by large demonstrations as people demanded "true democracy" in Cambodia. These demonstrations caused violent clashes with security forces, resulting in several deaths of monks and students participating in the demonstrations. The following months were marked by negotiations, which ultimately led to the founding of a new coalition government with Hun Sen as prime minister and Ranariddh as President of the National Assembly.[295]

With the death of Pol Pot and thus the final dissolution of the Khmer Rogue, the decade that followed 1998 was marked by a significant decline in crime and violence while the CPP established itself as the biggest party in Cambodia by receiving 58.1 % of the votes in the elections of 2008. The vote of the FUNCINPEC, on the other hand, declined to near extinction with only 5 %, which meant that the Sam Rainsy Party (SRP) developed to be the main opposition receiving 22 % in the elections in 2008. However, the elections that were

[291] Broadhurst, Bouhours & Bouhours, Violence and the Civilising Process in Cambodia, 2015, p. 246.
[292] Hall, Human Rights and the Garment Industry in Contemporary Cambodia, 2000, p. 120.
[293] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 12.
[294] Broadhurst, Bouhours & Bouhours, Violence and the Civilising Process in Cambodia, 2015, p. 247.
[295] Hall, Human Rights and the Garment Industry in Contemporary Cambodia, 2000, p. 120-121.

held five years later, in 2013, were marked by a low turnout as 68 % of the eligible voters participated. The CPP experienced a significant decline in its electoral ascendency by only receiving 48,8 % of the vote whereas the Cambodian National Rescue Party (CNRP)[296] obtained 44,5 % in the elections in 2013.[297] The most recent elections that were held in 2013, indicates that the influence and power of the CPP is diminishing, which may imply political instability and uncertainty that might consequently affect the general elections that will be held in 2018. The risk of violence will most likely increase as a new generation is demanding changes in a country were strong democratic institutions as well as an independent judiciary are absent, and is reigned by an ageing and authoritarian prime minister. Like its past, "recurring conflicts may arise and manifest as problems of governmental legitimacy, inviting yet another round of elimination contests."[298]

3.2 The industrial relations model of Cambodia – The case of the garment industry

3.2.1 A brief overview of the Cambodian garment industry

The Cambodian garment industry is dependent on the available workforce in the country, which in turn "provides a large pool of low cost, low skilled workers."[299] Almost 90% of the labour force in the garment sector consists of young women from rural areas. The industry itself is based upon low-skilled, labour intensive activities. Thus, the labour force in general "is characterised by low levels of education and skills" as only 23% of the workers has an education above primary school, whereas 29% lack any form of schooling at all.[300]

As of May 2015, there were over 550 exporting garment factories in Cambodia employing over 440 000 workers in all factories.[301] A Labour Market Profile report conducted in 2015, found that there were almost 2900 registered trade unions in Cambodia[302] whereas CAMFEBA argues that the number rather is 3100. Regardless of the correct estimation, over 90 % of these trade unions are active in the garment industry, constituting an average of 7 unions per exporting factory.[303] Today, the vast majority of organised workers are to be found in the garment factories where it is estimated that more than 60% of the workers are a member of a trade union, making it not just only the sector with the highest union membership in Cambodia, but also in Asia.[304] Concerning the industrial partners in the sector, there are "at least 63 garment trade union federations (…) of which only a handful are considered independent."[305] It is not possible to present all of these federations, however, some of them deserve to be mentioned such as the Cambodian Labour Union Federation (CLUF), which claims to have approximately 79 000 members. It is acknowledged as a pro-governmental federation, which consequently criticizes members who participate in strikes.

[296] This was a coalition of the former Sam Rainsy Party (SRP) and Human Rights parties.
[297] Broadhurst, Bouhours & Bouhours, Violence and the Civilising Process in Cambodia, 2015, p. 247-248.
[298] Ibid. p. 326.
[299] EuroCham, Market Study: The Textile Industry in Cambodia, 2014, p. 26.
[300] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 90.
[301] CAMFEBA, Cambodia's Trade Union Law: A necessity, 2015, p. 5-7.
[302] Ulandssekretariatet (LO/FTF Council, Labour Market Profile – Cambodia, 2015, p. 1.
[303] CAMFEBA, Cambodia's Trade Union Law: A necessity, 2015, p. 5-7.
[304] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 71.
[305] Human Rights Watch, Work Faster or Get Out, 2015, p. 35.

Another influential garment federation is the Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC), which is said to have 60 000 members in 135 local unions in the garment factories. Unlike the CLUF, the FTUWKC has a history of invoking strikes and demonstrations, mainly due to the fact that it is an affiliate of the opposition party, Sam Rainsy Party. (SRP)[306] The most prominent counterpart in the Cambodian garment industry is the Garment Manufacturers Association in Cambodia (GMAC), which is a powerful and well-organized employer association that "has more than 600 operational factory-members" [307], making it the primary representative of garment manufacturers in Cambodia. In 2012, together with non-governmental organisations, the parties signed a Memorandum of Understanding (MoU) on improving industrial relations, agreeing to treat arbitral awards as binding.[308] However, few federations were parties and obligated to respect the provisions laid down in the agreement. As a result, unions who had not signed the agreement still carried out strikes, as they did not think they were obligated to respect the MoU. Hence, the agreement was considered a failure in terms of sustainable social dialogue. The agreement expired in 2014 while a new agreement has not yet been signed.

The parties' incapability and unwillingness to make agreements is evident when studying the amount of collective bargaining agreements (CBA) in the sector. However, "(b)etween 2007 and 2008, there was a reported increase in the number of CBAs registered at an annual rate of 15 compared to the average of 11 CBAs per year between 2003 and 2006." [309] In 2009 alone, the number of CBAs increased to a total of 131 CBAs. However, the CBAs concerned, dealt with only a single issue "and on an ad hoc basis rather than through an orderly negotiation bargaining process." [310] As a result, the number of high quality CBAs was closer to 30 rather than 131 across all sectors in Cambodia. [311] However, as of 2015, the number of CBAs has increased and is today closer to 440, covering approximately 85 000 workers across all sectors.[312] Yet, there are very few CBAs in the garment sector alone, mainly due to the poor relationship between the employers and trade unions. This has in turn has hampered the trade unions ability to actually forge agreements, and when they actually manage to do so, the CBAs are "often merely reiterate what is already provided under the law."[313] However, the provisions provided for in a CBA may receive an erga omnes effect. At request of a trade union that is representative in the relevant scope of application, the Minister in Charge of Labour, together with the Labour Advisory Committee, "may extend all or some of the provisions of a collective agreement to all employers and all works included in the occupational area and scope" of the CBA.[314]

The parties' poor relationship is not only demonstrated by the lack of high quality CBAs, but also by the high number of strikes carried out in the garment sector. There was a total of 395 strikes in the garment sector from 2005 to 2009, with an increase of 30 % between 2005 and 2006, as well as an increase of 31 % between 2007 and 2008. There was nevertheless a noticeable decrease of 45 % in 2009 mainly due to the financial crisis of 2008, which affected

[306] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 77. See also Ulandssekretariatet (LO/FTF Council, Labour Market Profile – Cambodia, 2015, p. 20.
[307] Human Rights Watch, Work Faster or Get Out, 2015, p. 35.
[308] Ibid. p. 35-36.
[309] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 104.
[310] Ibid. p. 35.
[311] Ibid. p. 35.
[312] Ulandssekretariatet (LO/FTF Council, Labour Market Profile – Cambodia, 2015, p. 1.
[313] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 104.
[314] Labour Law, Article 99. Peng, Phallack,& Menzel, Introduction to Cambodian Law, 2012, p. 299.

the Cambodian garment industry.[315] However, the number of strikes has increased annually since the financial crisis. During the first three months of 2015, the number of strikes increased by 74 % compared to the same period the year before. In total, the number of strikes increased by 9.26 % from 2014 to 2015[316], while 70 % of them was invoked by unregistered trade unions in the factories.[317] According to the vice president of the Coalition of Cambodian Apparel Workers Democratic Union (CCAWDU), the main reason to the increasing degree of strike action is the poor communication between the employers and workers. [318]

3.2.2 The development of the Cambodian garment industry and its industrial relations

Due to decades of war, devastation and instability, the labour relations of Cambodia have been characterized by the state's structural inability to implement labour standards[319], the industrial relations of Cambodia have however developed rapidly over the past 20 years, particularly in the garment sector, starting from more or less nothing in the early 1990s.

Before 1997, there were no independent trade unions in Cambodia that could represent the interests of the members in an adequate way, the situation changed however as unions started to emerge due to the adoption of the Cambodian Labour Law in 1997. Additionally, a dispute resolution system was founded involving conciliation and arbitration mechanisms, which in turn facilitated the management of labour disputes on the labour market. The adoption of the Labour Law in 1997 also encouraged foreign investment as Cambodia was conceded as Most Favoured Nation (MFN) by the US, European Union (EU) and several developed countries, which consequently entitled Cambodia to tariff and quota free access which stimulated foreign investment in general and investment in the garment sector in particular.[320] In 1998, the government eased the procedures for trade union registration, which resulted in an increase in officially acknowledged trade unions. One year later, in 1999, the tripartite Labour Advisory Council (LAC) was established with the purpose to "reviewing and approving labour regulation including minimum wage review" [321], in addition to this, the Ministry of Commerce and the Ministry of Labour and Vocational Training (MoLVT) created an "inter-ministerial committee responsible for reviewing labour-related complaints from various sources and recommending penalties for violation" in 2002.[322]

However, although having adopted the Labour Law, which provided for several worker protections as well as implementing various measures for labour resolution, the actual working conditions in the garment factories were substandard and poor. Both Kevin Kolben and John Hall[323] conducted studies on Cambodian garment factories in the late 1990's and identified several violations of both Cambodian labour law and international law, such as

[315] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 31.
[316] Better Factories Cambodia, 2016 Garment Industry 33rd Compliance Synthesis Report: Cambodia, 2016, p. 9.
[317] Teehan and Channyda, GMAC sees surge in strikes, Phnom Penh Post, 2015, available at: http://www.phnompenhpost.com/national/gmac-sees-surge-strikes
[318] Ibid.
[319] Arnold, Workers' agency and re-working power relations in Cambodia's garment industry, 2013, p. 5.
[320] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 18.
[321] Ibid. p. 16-18.
[322] Ibid. p. 16-18.
[323] See for instance Hall, Human Rights and the Garment Industry in Contemporary Cambodia, 2000.

forced overtime without overtime pay, wage violations and poor health and safety standards. Moreover, the right to freedom of association and the right to form and join a trade union were routinely violated as workers lost their jobs or were harassed or transferred to inferior jobs if they tried to form a union or "speak out against abuses." During labour disputes in the factories, both workers and union representatives were subject to threats and physical abuse by the police and the factory managers, and workers who wanted to form independent unions that were not aligned with the ruling party were often subject to administrative obstacles whereas unions that were politically connected were given advantages.[324] Kolben argues that one of the main reasons that these violations occurred despite having adopted the Labour Law was "the inadequacy of the labor inspectorate." In general, state workers did not only lack technical knowledge regarding the regulations but were also paid well below a living wage, enforcing them to accept bribes for under-reporting violations in order to make a living. The connection between the state and the industry was also acknowledged as one significant factor, as the garment industry served as a tool to accomplish the political and financial interests of the party in power, the state therefore had a political and financial interest in not "enforcing the Labor Code too stringently."[325]

In response to this, American labour and textile manufacturer groups requested the American government to review the alleged violations of workers' labour rights in Cambodian factories, resulting in the three-year US-Cambodia Textile and Apparel Trade Agreement in 1999. This agreement linked quotas for textile exports to Cambodian factories' compliance with Cambodian and international law, if the factories were able to guarantee substantial compliance with national and international law, the quotas were increased annually. Hence, the agreement facilitated and bolstered the factories' ambition to improve labour conditions in order to obtain potential quota bonus.[326] In order to monitor the factories' compliance with national and international law, the Cambodian and American governments requested the ILO for technical assistance, after extensive negotiations the ILO Garment Sector Project was established in 2001. The project is managed by the ILO with support from the Cambodian government, the Garment Manufacturers Association in Cambodia (GMAC) and unions, and is today known as Better Factories Cambodia (BFC).[327]

The main purpose of the project was to ensure that working conditions in the Cambodian garment factories were not in violation with internationally acknowledged labour standards, including the eight core conventions, or the Cambodian Labour Law of 1997. The aim was to do this "by monitoring and reporting on working conditions in Cambodian garment factories according to national and international standards, by helping factories to improve working conditions and productivity, and by working with the Government and international buyers to ensure a rigorous and transparent cycle of improvement."[328] The monitors of the BFC conduct unannounced visits to the exporting garment factories once every twelve months, while the inspection process itself contains "on-site inspection, meetings with human resource

[324] Kolben, Trade, Monitoring, and the ILO: Working To Improve Conditions in Cambodia's Garment Factories, 2004, p. 82-84.
[325] Ibid. p. 85.
[326] Lawyers Committee for Human Rights, Background to the US-Cambodia Agreement, 2001, p. 1.
[327] Hall, The ILO's Better Factories Cambodia Program: A Viable Blueprint for Promoting International Labor Rights?, 2010, p. 440-443.
[328] For further reading regarding the work of the BFC, see:
http://www.ilo.org/asia/whatwedo/projects/WCMS_099340/lang--en/index.htm

managers, union leaders and shop stewards as well as interviews with workers."[329] The monitors verify the factories' status of compliance and thereby conduct a monitoring report, which is to be retrieved by authorized buyers.[330] However, the scope has expanded beyond solely monitoring factories, as the BFC today offer trainings, advisory services and various resources regarding cooperation at the workplace and dispute resolution.[331] Another objective of the BFC has been to establish a tripartite system derived from Western models "in a country with no such history".[332] Consequently, in cooperation with the Ministry of Labour, employers and trade unions, the ILO established the tripartite Arbitration Council (AC), which is a quasi-judicial authority with mandate to handle collective labour complaints.[333] The AC "asks parties for meditation before arbitration" as they are allowed time to improve their relationship and therefore given a chance to resolve their dispute in a peaceful way before conducting industrial actions.[334] The AC is acknowledged as the "principal dispute resolution mechanism utilized by garment factories and unions" since it offers free service and fills the function of an, to date, absent Labour Court.[335]

However, the BFC is not a guarantee for factories to act in complete compliance with labour standards as the ILO programme is focusing on continuous improvement. The BFC program has also been criticized for its naivety as the garment factories have "learned the tricks of hiding violations and passing audits without fundamentally altering their behaviour."[336] The BFC has also been criticized for not conducting interviews with workers off-site, and although the monitors conduct unannounced visits to the factories, they may be kept waiting at the factory gates for up to 45 minutes, which in turn gives the factory owners time to rectify various violations in the factories.[337] Yet, Hall concludes that the synthesis reports of the programme indicate that genuine progress have been made in key areas such as, child labour and timely payment of salary.[338] A study on the implications of the programme concludes that the advisory services of the programme have been fundamental in creating an open environment, which has improved the communication between the workers and the management and thus the working conditions and workers' wellbeing.[339] International buyers have also been aware of the work of the BFC programme, which has maintained the interest of Cambodia and its garment industry as these buyers use it as a showcase for their ethical awareness.[340]

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[329] Oka, Improving Working Conditions in Garment Supply Chains: The role of Unions in Cambodia, 2016, p. 654.
[330] Ibid. p. 654.
[331] See more at http://betterfactories.org/?page_id=246
[332] Arnold, Workers' agency and re-working power relations in Cambodia's garment industry, 2013, p. 6.
[333] Rossi & Robertson, Better Factories Cambodia: An Instrument for Improving Industrial Relations in a Transnational Context, 2011, p. 17-18.
[334] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 42.
[335] Cambodian Center for Human Rights, Workers' Rights are Human Rights. Policy Brief: The Garment Industry in Cambodia, 2014, p. 7.
[336] Oka, Improving Working Conditions in Garment Supply Chains: The role of Unions in Cambodia, 2016, p. 655.
[337] Ibid. p. 655.
[338] Hall, The ILO's Better Factories Cambodia Program: A Viable Blueprint for Promoting International Labor Rights?, 2010, p. 446.
[339] Rossi & Robertson, Better Factories Cambodia: An Instrument for Improving Industrial Relations in a Transnational Context, 2011, See "Conclusions".
[340] Hall, The ILO's Better Factories Cambodia Program: A Viable Blueprint for Promoting International Labor Rights?, 2010, p. 446.

Despite the significant improvements that have been made in the industrial relations of Cambodia, the industrial relations environment still remains complex and challenging. For instance, although the AC is considered to be a rigorous and transparent dispute resolution mechanism, which has contributed to the improvement of the industrial relations in Cambodia, the decisions of the court are non-binding while the AC itself lacks monitoring and enforcement abilities. The decisions of the body may only be binding if the parties give their consent, there is therefore no real means of guaranteeing that the decisions of the AC will be acknowledged and they may therefore be ignored by the factory owners or the workers.[341]

Moreover, as will be described below, the Cambodian labour legislation entitles workers a numerous of rights as it is much more comprehensive and modern as one would imagine. However, the reality of the garment sector suggests that these rights are often violated or ignored. This is partly due to the lack of monitoring and enforcement of the Labour Law, as it relies heavily on the BFC program. It is therefore possible for employers to either violate or ignore the provisions of the Labour Law, which in turn creates an environment where systematic violations of workers' labour rights is a common feature. Unlike other sectors in Cambodia, the garment sector is acknowledged to comply with the Labour Law in general. However, a general disregard to the rule of law remains to be a major problem in the country, including the garment sector.[342] Inghammar and Pietrogiovanni argue that the political influence on the Cambodian labour market represents "a major clash with collective laissez-faire" and a "deviation from modern industrial relations."[343] The judicial system is therefore lacking independence, as corruption remains a major problem in the country, which is considered to be a major threshold for the development of mature industrial relations in Cambodia. For instance, although the BFC programme monitor numerous factories, labour inspection in general constitutes a big problem in the development of mature and constructive industrial relations in the country. As a result, enforcement of labour standards is poor since "there are few skilled inspectors who have the capacity to do it effectively", [344] as corruption still constitutes a common feature. For example, out of thousands of inspections conducted by labour inspectors between January 2009 and December 2013, only ten fines were imposed on factories violating labour regulations.[345] However, Ministry of Labour officials have provided service in some factories and the BFC "monitors conditions, gives advice, and provides training to management and unions on workplace cooperation." [346] This is nevertheless limited to factories that produce goods for export, leaving many factories unmonitored and consequently open for labour rights violations.[347]

Additionally, the garment workers lack adequate knowledge and understanding of the law, including which rights they are entitled to as well as what protections the Labour Law provides for. As a result, workers' number of individual grievances, which may contain little

[341] Cambodian Center for Human Rights, Workers' Rights are Human Rights. Policy Brief: The Garment Industry in Cambodia, 2014, p. 7.
[342] Ibid. p. 14.
[343] Inghammar & Pietrogiovanni, The Role of Globalized Industrial Relations and Collective Agreements for the Promotion of Fundamental Labour Rights in Southeast Asian Garment Industry, 2016, p. 16.
[344] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 46.
[345] Human Rights Watch, Work Faster or Get Out, 2015, p. 16.
[346] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 46.
[347] Ibid, p. 46.

if any legal merit, escalates in a way, which reduces the efficiency of the dispute resolution mechanisms. Many workers are therefore accepting abusive and discriminatory conditions, and when negotiations fail they prefer to take strike action, rather than resolve the dispute with the help of the dispute resolutions mechanisms.[348] From 2000 to 2010 the garment sector itself experienced over 800 incidences of strikes, involving more than 640 000 workers resulting in 12 535 855 working days lost.[349] Moreover, although industrial action is provided for in Cambodian law, both strikers and union organizers are often subject to illegal disciplinary action and violence as the Cambodian police occasionally serve as "heavies" for the employers. For instance, during a strike in January 2004, the police force fired bullets in the air and beat strikers with baton, injuring more than 100 striking workers, and in October the same year, the police used water hoses in order to break up 1700 striking workers outside a factory.[350] After the Government announced the 2014 minimum wage in early January 2014, tensions between workers and public authorities reached its breaking point with police forces beating monks, factory workers and journalists while arresting 15 people outside a factory. The situation degenerated the following day, as police forces opened fire on protestors outside a factory in Phnom Penh, killing four people and injured more than twenty. The civil unrest has also been demonstrated by the killings of high-profile trade unionists such as the president of one of the largest unions in Cambodia, the Free Trade Union of the Workers of the Kingdom of Cambodia (FTUWKC), Chea Vichea in 2004. As pressure from the international community started to emerge, the police arrested two men accusing them for the murder of Vichea. They were thereafter convicted to twenty years in prison each, although lacking convincing evidence. The men were nevertheless released by the Supreme Court in September 2013, having spent more than four years for a crime they did not commit. Many observers argue that the judicial proceedings against the convicted men had no intention to find the actual murderers as suspicions still remain against Governmental involvement in his murder.[351]

3.2.3 The rise of the Cambodian trade union movement

The trade union movement of Cambodia has endured various transitions over the years, beginning with state-controlled unions during the centrally-planned politico-economic system between 1979 and 1990. Yet, unions existed in some factories as early as during the Khmer monarchy regime from 1954 to 1975 as well as during the Khmer Rogue regime from 1975 to 1979. However, the knowledge of how they operated back then is to date still unknown.

Following the fall of the Khmer regime in 1979, the "syndicates" (the unions) constituted one of the four main pillars through which the new government, the PRK, applied its politics. During this period, unions were considered "not only as core groups for conveying messages from the members to the state and vice versa, but as mass organisations representing voice of the people." [352] They were however used as instruments to serve the interests of the governments by spreading propaganda and promoting communist ideologies rather than serving the interests of the members. However, the unions were also acknowledged by the workers as a "necessary agency to convey (…) their messages" as they had frequent contacts

[348] Cambodian Center for Human Rights, Workers' Rights are Human Rights. Policy Brief: The Garment Industry in Cambodia, 2014, p. 14.
[349] Peng, Phallack, Menzel, Cambodian Constitutional Law, 2016, p. 520.
[350] Hall, The ILO's Better Factories Cambodia Program: A Viable Blueprint for Promoting International Labor Rights?, 2010, p. 450.
[351] Ibid. p. 453.
[352] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 20.

with the government and the companies in order to organise and facilitate the workforce supply. The unions also distributed farming products to the members and established childcare centres in the workplaces. They were nevertheless established under state control and their staff were thereby paid by the state, while eminent unionists held high positions in the government and were given various benefits such as education abroad, especially in communist countries. At this time, workers were not able to choose whether they wanted to join a union or not since it was mandatory and considered to be useful in order to receive various forms of support. In addition, workers were neither entitled fundamental rights such as the right to strike nor able to negotiate with the employers. Moreover, due to the fact that Cambodia by this time was a centralised planned economy, all industrial and service workers were state employees and consequently all the unions as well.[353]

During the period from 1991 to 1993, the state union network was rebuilt in order to adapt to the upcoming free market economy. Hence, the new government and its political and economic policies encouraged "the birth of free and democratic unionism in Cambodia" as Cambodia underwent a rapid transition from a central planned economy to a free market economy. Consequently, the Cambodian government was strongly influenced by international actors as its markets policies were outlined together with the World Bank, the International Monetary Fund and international organisations. The unions that once had been state-controlled were demobilised, and the Union Federation of Kampuchea (UFK), which had been the only union during the former regime, was now transformed into a mass organisation. Former leaders of the UFK were given key positions in state institutions, while some of them volunteered to obtain leader positions within the newly reformed organisation as they started to organise workers in factories and enterprises. In response to this, the leader of the Khmer National Party (KNP) Sam Rainsy, began to organise local unions in the factories in order to counteract unions loyal to the government. Rainsy, in collaboration with Chea Vichea, founded the Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC) in 1996 in order to support and encourage the campaign of the opposition.[354]

In the late 1990's, a number of important events took place that would affect the expansion of independent unions in Cambodia. Firstly, the adoption of the Constitution of Cambodia in 1993 and of the Cambodian Labour Law in 1997 played an important role in the growth of free and independent unions in Cambodia as unions were provided a legal framework, which entitled them to several rights, such as, the right to strike, freedom of association and collective bargaining. Secondly, the US-Cambodia bilateral trade agreement that was signed in 1999 was also an important factor in the growth of unions in the country as working conditions were more efficiently monitored due to the agreement, putting the garment industry "in the national and global spotlight as they (the agreements) brought interaction between all stakeholders of the industry."[355] Thirdly, in the same year, as Cambodia's garment industry became more acknowledged within the international community, Cambodia ratified the ILO Conventions 87 and 98 which made the government "more accountable to ensure independence and freedom of unions" since it had to relate to the observance of the international community as well.[356] In 2004, the young movement was left in shock with the murder of Chea Vichea, whom by then was the president of the FTUWKC. Following his murder, he came to be acknowledged as a worker hero, while his death affected the notion and attitude towards trade unions as they were seen as protectors of workers' labour rights. In

[353] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 19-23.
[354] Ibid. p. 23-24.
[355] Ibid. p. 61.
[356] Ibid. p. 29.

the years that followed the assassination of Chea Vichea, the enthusiasm in forming and organising unions was increasing, which led to a remarkable growth of trade unions in Cambodia, especially in the garment industry.[357]

3.2.3.1 The trade union movement today and its existing challenges

One of the biggest challenges facing Cambodian trade unions today is the fact that the legacy of the past is still present as the majority of trade union leaders who were in charge of the state controlled unions during the 1980s, "still figure prominently in union leadership today." As a result, previous concepts and practices are still nurtured and practiced amongst many unions, as old leaders grasp every opportunity they get in order maintain their power and influence within the unions.[358] Furthermore, communication between leaders and members within the unions are poor as unions rarely take the time to make members understand the legal framework, nor address them of the activities and plans they are conducting, which in turn creates a culture where power is concentrated in fewer hands, namely the union leaders. For instance, BFC and Tuft University carried out an impact survey among 1500 workers in 73 factories and found that almost a third of both male and female respondents were either "somewhat uncomfortable" or "very uncomfortable" of asking for help from the trade union.[359] Additionally, many union leaders lack vision and commitment, and do not have knowledge in strategic planning and human resource management, which weakens the very structures of the unions. As a result, members do not feel ownership of the unions and are therefore lacking a mutual sincerity since they do not believe in them, which in turn make them unwilling to conduct various union activities with enthusiasm and interest.[360]

Corruption also constitutes a major threshold for the development and activities of Cambodian unions since they depend on the respect for the rule of law and the public services in order to resolve disputes or advocating their demands. The implementation and enforcement of the Labour Law is nevertheless poor since "authorities and the courts are often ineffective and rarely seen as neutral." Many union leaders are consequently working in the interest of themselves rather than the ones they claim to represent as they accept bribes from employers in exchange for industrial peace. As a consequence, collective demands and actions are therefore actively opposed by union leaders.[361] The political parties' strong influence over the unions constitute a big challenge since many unions have been, and still are, controlled and used in order to support the agenda of the party.[362] Consequently, some union leaders have high positions in the government as they are enjoying protection and support from the authorities. Pro-government unions are therefore never attending mass demonstrations and collective actions with other social actors demanding improved labour rights and social justice since they often act in line with the interests of the government, which "normally favour employers even if this is contrary to union members' desire to push for higher wages."[363]

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[357] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 27.
[358] Ibid. p. 65-66.
[359] Better Factories Cambodia, Baseline Survey, 2015, p. 1.
[360] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 100-105.
[361] Ibid. p. 94-96.
[362] Inghammar & Pietrogiovanni, The Role of Globalized Industrial Relations and Collective Agreements for the Promotion of Fundamental Labour Rights in Southeast Asian Garment Industry, 2016, p. 15.
[363] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 103.

The Cambodian trade union movement is also very young, as it started to grow as late as the mid 1990's; the knowledge and acceptance of independent unionism are therefore limited in the country. Workers often find unions less useful since they "do not understand the principles or the practice of unions in their sector." The strength and impact of a trade union is predominantly determined by its members, since those who understand the importance and benefits of a trade union and who are working actively in union related work, constitute strong members. Cambodian workers in general however, are joining trade unions solely "for immediate needs without understanding the long term benefits of a democratic union." However, this is not surprising since the majority of Cambodian trade unions are dependent on financial support from international and national organisations in order to provide training programs for their members. Although the unionisation level in the garment industry is relatively high, the wages of the workers are so low that even if the dues are collected, they are forced to seek financial support elsewhere. Consequently, unions cannot afford to educate their members. Hence, since the majority of Cambodian trade unions lack financial resources, they are forced to fund their activities from sources other than their members, making them vulnerable to external actors.[364] As a result, a vast majority of Cambodian trade unions lack independence as trade union officers are forced to accept support from political parties and even employers.

Since independent unions are considered as a relatively new phenomenon to employers and authorities, there is a strong cultural suspicion towards independent unions, primarily amongst managers in the Cambodian garment factories.[365] This widespread resistance against unions is predominantly displayed by the employers' unwillingness to negotiate, which in turn has been pointed out as the main reason to the small amount of collective agreements in the Cambodian garment industry.[366] The negotiations between the parties are also hindered by the vast amount (3000) of trade unions in the sector, which also tend to have a very low union density. Although being formally registered, many unions are small in numbers or inactive, which "projects an image of fragmentation and divisiveness",[367] making them incapable of forming "a significantly unit or even a balanced picture"[368] For instance, in extreme cases, there can be up to more than 10 trade unions in one factory, hampering the unions' willingness and capability to agree on various difficulties and strategies. As a result, the employers' attitude towards trade unions aggravates, as they are perceived as unserious and therefore not worth negotiating with.[369]

Due to the multiplicity of Cambodian trade unions, competition and rivalry between them have intensified as unions are competing for acknowledgment, members and support from political parties. When a problem arises, workers may go from one union to another in order to find the most suitable one for their particular problem. Due to their moving patterns, in order to prevent the loss of members or losing reputation, trade unions' tactics have become

[364] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 100-102.
[365] Hall, The ILO's Better Factories Cambodia Program: A Viable Blueprint for Promoting International Labor Rights?, 2010, p. 448.
[366] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 97.
[367] Ibid. p. 100 & 107.
[368] Inghammar & Pietrogiovanni, The Role of Globalized Industrial Relations and Collective Agreements for the Promotion of Fundamental Labour Rights in Southeast Asian Garment Industry, 2016, p. 15.
[369] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 100 & 107.

more aggressive, as they are more willing to take strike action against factory owners.[370] Concerns also arise regarding union multiplicity as it allows factory managers to dictate the unions' roles by playing one union against another, which has resulted in a large crack between pro-government unions and pro-opposition/independent unions. Hence, union solidarity has been a major problem over the years, which has hampered the unions desire and ability to organise and push for collective interests.[371]

3.3 Freedom of association in Cambodia

As been pointed out above, trade unionists are operating in a complex and highly confrontational industrial relations environment, where violence between unions and authorities and rivalry within unions are common features. Despite the progress that has been made by the ILO BFC programme, violations of workers' right to freedom of association occur on a daily basis. However, as been discussed briefly, the Cambodian legislation is relatively modern and comprehensive and contains numerous regulations regarding freedom of association. These will be described in this chapter in order to provide an understanding for the legal framework concerning the right.

3.3.1 The legal system of Cambodia

Scholars have divided the legal development of Cambodia into two separate periods, ancient law and modern law, where the former constitutes unwritten customary law and stretches from the Funan Period to the Angkor period whereas the latter "refers to the codification of Cambodian laws from 1336 to the present."[372] Hence, the legal system of Cambodia "is a heritage of diverse historic legal and ideological concepts and multiple interventions."[373] For centuries, Buddhist and Khmer traditions and rituals influenced Cambodian law as it was governed by customary rules based on consensus,[374] this system was nevertheless changed due to the French colonization. As a consequence, the legal and judicial system of Cambodia was influenced by the French Civil Law System from 1863 to its independence in 1953. However, due to the strong impact of the French Civil Law System on the legal system in general and on the Cambodian lawyers, judges and bureaucrats in particular, the impact of the French Civil Law System lasted until 1975. Since its independence, the legal history of Cambodia has undergone many transitions over the years, including the reign of the Khmer Regime from April 1975 to December 1978 as the most fearful one. During its reign, the regime "implemented a dictatorial legal system which exercised absolute power"[375] and which consequently eradicated the entire legal system including existing laws, the judiciary and government institutions. Even Cambodian intellectuals, such as, lawyers, judges and other legal professionals were executed in large numbers. In retrospect, the aftermath of the Khmer Regime has been described as a "legal vacuum."[376] Following the Vietnamese intervention in 1979, Cambodia had to rebuild its legal system from scratch. However, due to the Vietnamese occupation; the system that emerged was strongly influenced by the Vietnamese model.

[370] Oka, Improving Working Conditions in Garment Supply Chains: The role of Unions in Cambodia, 2016, p. 664.
[371] Ibid. p. 665.
[372] Peng, Phallack,& Menzel, Introduction to Cambodian Law, 2012, p. 7.
[373] Ibid. p. 1.
[374] Ibid. p. 7.
[375] Ibid. p. 1.
[376] Ibid. p. 7.

The period from 1991 to 1993 constitutes an important phase in the legal history of Cambodia, involving the signing of the Paris Peace Agreement as well as the supervisory control conducted by the UNTAC, which ultimately resulted in the promulgation of the new Constitution in 1993. Over the years, Cambodia has had six written modern Constitutions. Since the country has endured many political transitions, the Constitutions have introduced different forms of political systems and aims, beginning with the Constitution of 1947, which introduced "a political process with a constitutional monarchical system of a parliamentary democracy". Other Constitutions that have preceded the present one have, for instance, introduced "a liberal democracy with a republic system of a presidential democracy" (1970-1975), "a pseudo-democracy with a communist system" (1975-1979) and "a democracy with a socialist system of parliamentary government." (1979-1989)[377] Consequently, the contents and aims of the previous Constitutions have differed markedly while foreign scholars have argued that the constitutional democracy of these former regimes has been unsuccessful. In response to this, strong political reaction arose concerning the constitutional problems and human rights violations of the former regimes by "including measures to ensure that the policies and practices of the past shall never be allowed to return." [378] The aim of the sixth and present Constitution has therefore been to bring Cambodia into a modern constitutionalism by re-introducing a liberal multi-party democracy, and to acknowledge universal principles of fundamental freedoms of citizens "by enforcing the principle of constitutional restriction on the state power." [379] Due to the involvement of the UN and the international community during its draft, the constitutional characteristics of the new Constitution of 1993 are consequently relatively universal and modern, involving democracy, human rights and the rule of law.[380] There is nevertheless an inevitably gap between the constitutional text and reality, however, the new Constitution indicates an effort to reduce this gap.[381]

The present legal system of Cambodia has been acknowledged as a hybrid since it entails influences from the French based legal system, Cambodian customs and the common law system due to the "foreign aid assistance to legal and judicial reform in Cambodia."[382] The Constitution is considered to be the supreme law of the country, all laws and decisions made by state institutions must therefore be in strict conformity with the Constitution. [383] Concerning the right to freedom of association, both the Constitution and the Labour Law of 1997 contain regulations regarding the right.

3.3.2 The legal framework on freedom of association

3.3.2.1 The Constitution of 1993

The Cambodian Constitution provides the legal basis for labour rights in the country. Freedom of association is regulated in two separate articles in the Constitution of 1993, beginning with Article 36, which stipulates, "Khmer citizens of either sex shall have the right to form and to be members of trade unions. The organization and conduct of trade unions shall be determined by law." Additionally, the right to strike is expressly protected by the

[377] Peng, Phallack,& Menzel, Introduction to Cambodian Law, 2012, p. 25.
[378] Ibid. p. 26.
[379] Ibid. p. 26.
[380] Ibid. p. 39.
[381] Ibid. p. 65.
[382] Ibid. p. 8.
[383] Constitution, Article 150.

Cambodian Constitution and its Article 37, stipulating "the right to strike and to non-violent demonstration shall be implemented in the framework of a law." Furthermore, Article 31 of the Constitution is of major importance regarding the protection of freedom of association in Cambodia, as it stipulates "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights." In 2000, Hall concluded that the extent of the legal implications of the Article remained unclear[384] since the Constitutional Council had not announced its position concerning the matter. However, according to a decision of the Constitutional Council in 2007[385], international law such as covenants and conventions are considered to be a source of Cambodian law and have to "be directly taken into account when applying and interpreting national Cambodian law."[386] Consequently, international regulations regarding freedom of association such as ILO Convention no. 87, Article 22 of the ICPPR and Article 8 of the ICESCR are considered to be Cambodian law. The international standards are therefore automatically incorporated in the Cambodian legislature due to wording of Article 31 of the Constitution. Moreover, the right to form and join trade unions and the right to strike are acknowledged in the Cambodian Constitution. However, the regulations are referring to more specific laws as the conduct and organisation of trade unions must be "determined by law"[387] while the right to strike has to be "in the framework of a law."[388] This is mainly due to the fact that the Constitution is a supreme law with much broader provisions. Both the Labour Law and the Trade Union Law constitute more specific law concerning the right to freedom of association and their provisions are therefore presented below.

3.3.2.2 The Labour Law of 1997

The Labour Law of 1997 is based on the Constitution of 1993, and is considered the main source of Cambodian labour and employment law, since it regulates the labour relationship between employer and employee as well as the social-legal rights and obligations stemming from the labour relationship.[389] The aim of the law is to protect the workers; they are therefore entitled to at least the minimum benefits provided for in the Labour Law and its implementing regulations. As a result, any employment contract, CBA or internal regulations, which is less beneficial, are therefore considered to be incompatible with the Labour Law.[390] The law applies to everyone except "(a) Judges of the Judiciary, (b) persons appointed to a permanent post in the public service, (c) personnel of the Police, the Army, the Military Police, who are governed by a separate statue, (d) personnel serving in the air and maritime transportation, who are governed by a special legislation, (e) domestics or household servants, unless otherwise expressly specified under this law."[391] According to Article 12, employers are prohibited to discriminate workers in relation to race, colour, sex and religion, but also in relation to political opinion, social origin and membership of workers' union or the exercise of union activities.

[384] Hall, Human Rights and the Garment Industry in Contemporary Cambodia, 2000, p. 124.
[385] The Constitutional Council, Case No. 131/003/2007 of June 26, 2007, Decision No. 092/003/2007 CC.D of July 10, 2007.
[386] Peng, Phallack,& Menzel, Introduction to Cambodian Law, 2012, p. 489.
[387] Constitution, Article 36.
[388] Ibid. Article 37.
[389] Peng, Phallack,& Menzel, Introduction to Cambodian Law, 2012, p. 288.
[390] Labour Law, Articles 13 and 25.
[391] Ibid. Article 1.

The right to form a trade union is provided for in Article 266 of the Labour Law, which stipulates:

"*Workers and employers have, without distinction whatsoever and prior authorization, the right to form professional organizations of their own choice for the exclusive purpose of studying, promoting the interest, and protecting the rights, as well as the moral and material interests, both collectively and individually, of the persons covered by the organization's statutes."*

Cambodian workers are also entitled the right to join trade unions of their own choosing,[392] they are nevertheless also entitled the freedom of not joining a workers' union as well as the right to withdraw from the organisations at any time.[393] Moreover, the Cambodian trade unions are entitled the right to draw up their own statutes and administrative regulations as long as they do not violate laws in effect and public order, they are also entitled to freely elect their representatives and formulate their own work program.[394] In order for trade unions to enjoy the provisions of the law, the founders have to "file their statutes and list of names of those responsible for management and administration, with the Ministry in Charge of Labour for registration."[395] In addition to the registration procedure, members that are responsible for the administrations and management of the trade union have to "(1) be at least 25 years of age, (2) be able to read and write Khmer, (3) not have been convicted of any crime, (4) have engaged in the profession or the job for at least one year."[396]

Concerning the representativeness of a trade union it is "recognized in the framework of geography or profession or, if necessary, by the type for which the union was registered to operate." In order to be acknowledged as the most representative union it has to be "(a) legally registered as provided for in Article 268, (b) (…) number of members is over 51 per cent of the total number of workers, (c) receive dues from at least 33 per cent of its members, (d) have programs and activities indicating that the union is capable of providing professional, cultural and educational services to its members, as provided for in Article 266."[397] Moreover, employers are forbidden to interfere in the activities of a trade unions, instead they are obligated to collaborate with trade unions and to create an enabling environment in order to find solutions with their counterpart.[398] They are also prohibited to consider union affiliation or participation in union activities "when making decisions concerning recruitment, management and assignment of work, promotion, remuneration and granting of benefits, disciplinary measures and dismissal."[399]

The right to strike is provided for in the Labour Law and is defined as a "concerted work stoppage by a group of workers that takes place within an enterprise or establishment for the purpose of obtaining the satisfaction for their demand from the employer as a condition of their return to work."[400] The right to strike is guaranteed provided that specific preliminary dispute resolution mechanisms have been attempted, workers are therefore required to first try

[392] Labour Law, Article 271.
[393] Ibid. Article 273.
[394] Ibid. Article 267.
[395] Ibid. Article 268.
[396] Ibid. Article 269.
[397] Ibid. Article 277.
[398] Ibid. Articles 12 and 280.
[399] Ibid. Article 279.
[400] Ibid. Article 318.

negotiation, conciliation and arbitration before going on strike.[401] Moreover, before going on strike, it has to be declared according to the procedures provided for in the union's statutes, which has to include requirement for a secret ballot of the union members on the decision to strike.[402] A strike has to be preceded by prior notice to the employer and the Ministry in charge of labour of at least seven working days.[403] Strikes that do not comply with these requirements are considered to be illegal.[404] A strike therefore has to be peaceful since committing violent acts during a strike is acknowledged as a serious violation, which could result in punishment such as work suspension or disciplinary layoff.[405] It is only the courts that have the mandate to determine whether a strike is legal or illegal.[406] Thus, "this is not a determination that can be made unilaterally by the employer of the Ministry of Labor."[407] To solely participate in an illegal strike is not considered to justify termination or punishment,[408] instead, the employer has to prove that the workers participating in the strike have committed serious misconduct. Yet, if a worker is not returning to work within 48 hours of a court order without a valid reason it is considered to be serious misconduct.[409] Hall concludes, "although a strike may be deemed illegal by a court, so long as the strikers return to work within forty-eight hours of a court order they cannot be punished by their employer."[410]

3.3.3 The Trade Union Law of 2016

3.3.3.1 The draft process

In 2007, business owners requested a trade union law through the Private Sector Working Group (PSWG) due to the on-going problems caused by union multiplicity, unrepresentativeness and infighting within unions. In response to this request, the Prime Minister of Cambodia agreed on developing a law that would not only govern trade unions, but employer associations as well. The first draft of the Trade Union Law was consequently written in 2008 and was thereafter discussed at numerous Consultative Tripartite Meetings from 2009 to 2011.[411] Yet, the drafting of the law was abandoned in 2011. However, due to the growing unrest in the garment sector caused by the poor conditions in the factories, which triggered more industrial action, the project of a new Cambodian Trade Union Law was reinitiated in 2014. Consultations were thereafter held with trade unions, employers and the ILO in May 2014, resulting in a draft that was publicly released in October 2014.[412] The draft of the bill was thereafter analysed by various NGOs such as Human Rights Watch, which in turn expressed its concerns as it found that many provisions of the bill were violating

[401] Labour Law, Article 320. See for instance 258/15-Bloomsfield (Cambodia) Knitters Ltd.
[402] Ibid. Article 323.
[403] Ibid. Article 324.
[404] Ibid. Article 336.
[405] Ibid. Article 330.
[406] Ibid. Article 337.
[407] Hall, The ILO's Better Factories Cambodia Program: A Viable Blueprint for Promoting International Labor Rights?, 2010, p. 449.
[408] Labour Law, Articles 332 and 333.
[409] Ibid. Article 337.
[410] Hall, The ILO's Better Factories Cambodia Program: A Viable Blueprint for Promoting International Labor Rights?, 2010, p. 450.
[411] CAMFEBA, Cambodia's Trade Union Law: A necessity, 2015, p. 3.
[412] IndustriALL, Alarm grows over trade union law in Cambodia, 2015, available at: http://www.industriall-union.org/alarm-grows-over-trade-union-law-in-cambodia

international standards.[413] However, after the consultation held in May 2014, Cambodian authorities did not arrange any public consultations on subsequent drafts of the bill, government officials made nonetheless periodic announcements to the media that indicated that the law would be enacted in 2015.[414] Hence, an updated draft of the Trade Union Law was not publicly announced and made available until very late in the legislative process, "with only limited statements from the Ministry of Labor in September 2015 providing information on further proposed revisions."[415] Consequently, according to Non-Governmental Organisations (NGOs) and international and Cambodian trade unions, the period that followed until the next draft in November 2015, was characterized by a significant lack of transparency and a total absence of consultation with stakeholders[416] as trade unions "had no input and little reliable information on amendments until the draft was released."[417] According to Fa Saly, president of the National Trade Union Confederation (NTUC), the Labour Ministry and the National Assembly denied unions to have a last look at the draft before being implemented.[418] The Trade Union Law was consequently pushed through, despite the objections made by the trade unions, the ILO and several global garment brands.[419] However, the draft process of the law has been interpreted differently from different stakeholders as Cambodian Federation of Employers and Business Associations (CAMFEBA) has maintained its position that the process involved significant consultation and tripartite meetings.[420]

Consequently, although there are conflicting opinions regarding the draft process, an updated draft of the law was made available to the public in November 2015, which was thereafter followed by an arrangement of a bipartisan committee of the National Assembly in January 2016 and a public forum, in March 2016.[421] Yet, these procedures resulted in "very few amendments to the draft law, with those made including some changes strongly opposed by unions, demonstrating a lack of genuine engagement with and openness to civil society's concerns."[422] The Council of Ministers adopted the law in March 2016 while the National Assembly passed the law on April 4, 2016. Following the adoption of the law, unionists and activists protested outside the National Assembly in order to show their grievances about the law. The demonstration was however met with violence, resulting in the injuries of a unionist and a labour leader.[423] Shortly after the "Constitutional Council reviewed and endorsed on the

[413] Robertson, Cambodia: HRW Letter to Prime Minister Hun Sen on the Proposed Trade Union Law, Human Rights Watch, 2015, available at: https://www.hrw.org/news/2015/06/07/cambodia-hrw-letter-prime-minister-hun-sen-proposed-trade-union-law
[414] Ibid.
[415] CCHR, Fact sheet: Trade Union Law, 2016, p. 1.
[416] Ibid. p. 1.
[417] O'Grady, Cambodian trade union law,TUC, 2015, available at: https://www.tuc.org.uk/international-issues/countries/labour-standards/union-rights/cambodian-trade-union-law
[418] Kunthear, Union Law Kicks in a Month Late, Khmer Times, 2016, available at: http://www.khmertimeskh.com/news/26694/union-law-kicks-in-a-month-late/
[419] Peng, Phallack, Menzel, Cambodian Constitutional Law, 2016, p. 523.
[420] CAMFEBA, EuroCham Luncheon – Trade Union draft law, 2015, p. 27.
[421] CCHR, Fact sheet: Trade Union Law, 2016, p. 1.
[422] Ibid. p. 2. See also: Asian Correspondent, Cambodia's new Trade Union Law violates workers' rights, activists say, 2016, available at: https://asiancorrespondent.com/2016/04/cambodia-trade-union-law/#86mw7IJADAPOg1lf.97
[423] Naren and Narim, Violence as Assembly Passes Trade Union Law, The Cambodia Daily, 2016, available at: https://www.cambodiadaily.com/featured/violence-as-assembly-passes-trade-union-law-110857/

constitutionality of the Trade Union Law early May 2016, the King officially promulgated the Trade Union Law on May 17."[424] After the promulgation of the law, the Labour Ministry issued a Prakas on 27 June 2016 which, delegated the functions of the MOLVT concerning registration to the appointed Labour Governor, Labour Inspector or Officer who had been delegated "the authority to take administrative actions outlined in Chapter 15" of the Trade Union Law.[425]

3.3.3.2 The right to establish and join a trade union

The purpose of the law is to "provide rights and freedoms of enterprises or establishments, and all persons who fall within the provisions of the labor law (…) and determine the organization and functioning of the professional organizations of workers and employers in the Kingdom of Cambodia."[426] Moreover, the objectives of the law constitute to protect the legitimate rights and interests of all persons who fall within the scope of the law, ensure collective bargaining, promote harmonious industrial relations as well as contribute to the development of decent work.[427] The scope of the law covers "enterprises or establishments and all persons who fall within the provisions of the labor law",[428] the scope of the law is consequently identical to the Labour Law of 1997. According to the law, a local union "refers to a professional organization that is established by workers jointly and voluntarily in the locality of that enterprise or establishment."[429]

According to Article 5 of the Trade Union Law, all workers, without any distinction whatsoever, are entitled the right to form a union "of their own choice for the exclusive purpose of study, research, training, promotion of interests and protection of the rights and the moral and material interests, both collectively and individually (…)" Workers are nevertheless also entitled the freedom not to join a trade union and to withdraw from one at any time.[430] Moreover, the law prohibits discrimination in membership due to race, colour, sex, creed, religion, political opinion, nationality, and social origin or health status.[431] Workers are furthermore entitled, for instance, to take part in the formation of a union, be a member of a trade union, take part in the legitimate activities of the union of which he or she is a member, and to take part in the election of representatives at the workplace.[432] The law entails provisions regarding representation by most representative union, stipulating that the most representative union has the exclusive right to negotiate. In order to obtain this status, the union have to "(a) being legally registered, (b) having programs and activities indicating that the union is capable of providing professional (…) services to its members," and have more than 30 per cent of the total workers.[433] Consequently, by meeting these requirements, the most representative union "has the exclusive right to represent all workers in negotiating a collective bargaining agreement or to resolve collective labor disputes."[434] The minority

[424] Peng, Phallack & Menzel, Cambodian Constitutional Law, 2016, p. 523. See Constitutional Council: Announcement #24/2016, Phnom Penh: Constitutinoal Council (2016, May 02).
[425] Ibid. p. 523.
[426] Trade Union Law, Article 1.
[427] Ibid. Article 2.
[428] Ibid. Article 3.
[429] Ibid. Article 4.
[430] Ibid. Article 7.
[431] Ibid. Article 6.
[432] Ibid. Article 5.
[433] Ibid. Article 54.
[434] Ibid. Article 55.

unions on the other hand, "are prohibited from demanding collective bargaining rights, and from demanding rights or benefits beyond those provided for in laws, prakas, regulations, collective agreements in force, or internal work rules."[435]

In order to form a local trade union, it has to be established by at least 10 workers of a given enterprise or establishment[436], while its founders have to register the trade union with the Ministry in charge of Labour, which in turn is a requirement for unions to "enjoy the rights and benefits as provided for in this law."[437] Thus, unions that are registered in an adequate way are considered to achieve a legal person status and legality, whereas unions that are not registered or continue to operate although having their registration application revoked or deferred are considered to be illegal.[438] In order for a trade union to be registered, it has to provide for (a) an original copy of the unions' statutes, including a statement of its intents, "(b) an original copy of its administrative regulations which govern leadership and administration, (c) a name list of leaders, managers, and those responsible for the administration of the union (…) "(d) an address where financial books and records are to be kept, (e) an affidavit guaranteeing that its bank account details will be provided within 45 days following receipt of registration, (f) an attachment of original copy of the official minutes of elections for establishment of a professional organization, (g) a local union shall have a name list of all workers as its members made up of at least 10 workers at a given enterprise or establishment."[439] However, the law does not only regulate the requirements for trade unions to be registered, as it also contains regulations concerning the maintenance of registration. Consequently, in order to maintain the approved registration, trade unions have to (a) "submit their annual financial statements and annual activity reports based on the financial books and records they keep", which involves the obligation to show the total income, "shown by amounts from all of the sources of income", and also their activities and number of members. They are moreover obligated to (b) "provide details of its bank accounts within 45 days following receipt of registration," as well as (c) "update the information required by this law and whenever changes are made thereto, with exception of any change in the membership, within 15 working days."[440] Consequently, the registration procedures that are provided for in the Trade Union Law are extensive and relatively burdensome.

3.3.3.3 Organisational autonomy and the right to strike

Regarding organisational autonomy, trade unions have the right to determine their own statutes and administrative regulations, and "their organization and functioning, and their work program as long as they are not contrary to the laws and regulations in effect or public order," they are also entitled the right to freely elect their representatives.[441] However, the Trade Union Law provides several requirements potential leaders have to meet, namely, "(a) be at least 18 (eighteen) years of age, (b) make their own declaration of a specific residential address, (c) make their own declaration that they have an educational level, with the minimal ability to read and write Khmer, and (d) make their own declaration that they have never been convicted of any criminal offense." [442] Foreign nationals on the other hand, must also been

[435] Trade Union Law, Article 59.
[436] Ibid. Article 10.
[437] Ibid. Article 11.
[438] Ibid. Article 14.
[439] Ibid. Article 12.
[440] Ibid. Article 17.
[441] Ibid. Article 9.
[442] Ibid. Article 20.

working in the country for a minimum of 2 years and have the right to reside and have a permanent residence in accordance with the Immigration Law of Cambodia.[443] In addition, the Ministry in Charge of Labor may ask for more information if necessary." Moreover, although the Trade Union Law stipulates that trade unions have the right to determine their own statutes and administrative regulations, they are required to meet numerous requirements provided for in the law. For instance, the statutes have to include whether the specific union "has the intent to represent all workers in an enterprise or establishment or to represent only one or more than one category of workers as defined by the statutes" and "the determination of safekeeping of ordinary financial records and publication of annual financial reports of the union."[444]

As mentioned above, the right to organisational autonomy also involves the right for unions to organize their activities in full freedom, which entails for instance, the right to strike. Considering strike action, it is forbidden for an employer to provoke violence against workers, participating or intend to participate in a strike,[445] as well as obstructing workers by any means "in order not to allow the workers to participate in a lawful strike or by exerting threat against workers who have participated in a lawful strike."[446] An illegal strike is defined as a strike that is continued by the strikers despite being acknowledged as unlawful by the Labour Court.[447] It is also considered illegal for a trade union to lead a strike or demonstration, which contravenes the legal procedures.[448] The statutes of the trade unions are furthermore required to stipulate that a majority of its members must be assembled to allow strike action, while at least 50 % of the present members have to vote for industrial action to be executed.[449] Additionally, the Trade Union Law also stipulates numerous practices that are considered to be unlawful for unions or its representatives to conduct; one of these is "to agitate for purely political purposes".[450]

3.3.3.4 Dissolution or suspension by administrative authority

A trade union may be dissolved "in accordance with its respective statutes", or "in the event of a complete closure of the enterprise or establishment", as well as being "dissolved by the Labour Court."[451] The Labour Court may dissolve a trade union if its activities contravene legislation or the objectives as stated in its statutes, or if it is unable to restore its independence, or if "leaders, managers and those responsible for the administration were found of committing serious misconduct or an offense in the capacity of the union (…)."[452] Following a decision of the Labour Court, leaders, managers and those responsible for the union's administration are not allowed to lead or be responsible of the union's administration for five years. Concerning the assets of a dissolved trade union, the assets "are allotted according to the rules defined by the General Assembly." If no decision has been given from

[443] Trade Union Law, Article 20.
[444] Ibid. Article 13.
[445] Ibid. Article 63.
[446] Ibid. Article 87.
[447] Ibid. Article 92.
[448] Ibid. Article 65.
[449] Ibid. Article 13.
[450] Ibid. Article 65.
[451] Ibid. Article 28.
[452] Ibid. Article 29.

the General Assembly the Labour Court may transfer the assets to "similar, legally constituted union or association" in the forms of donations.[453]

3.4 Summary

The right to freedom of association is widely acknowledged in the Cambodian legal system, as the supreme law of Cambodia – the Constitution – guarantees the right to form and join unions and to strike. Considering the Constitution's aim to acknowledge democracy, human rights and respect for the rule of law, freedom of association subsequently constitutes a fundamental right in the Cambodian society. Moreover, both the Labour Law of 1997 and the Trade Union Law entail numerous, sometimes identical, regulations regarding different aspects of the right. As a result, the legal framework of the right has been acknowledged as relatively comprehensive and modern. However, while the draft process of the Trade Union Law has been said to lack democratic governance and transparency, the content of the law has been said to violate a number of international standards concerning freedom of association. Considering Article 31 of the Constitution which stipulates that international covenants and conventions are to be acknowledged as Cambodian law, the Trade Union Law's provisions concerning freedom of association may not only be incompatible with international standards, but also with the supreme law of Cambodia.[454]

Furthermore, the biggest threshold concerning Cambodian workers' right to freedom of association is the poor enforcement of legislature and the modest establishment of efficient judicial mechanisms. One of the main reasons is corruption, which constitutes a major problem in Cambodia as authorities and judicial bodies are often ineffective and seldom acknowledged as neutral. Moreover, due to the complex and violent history of Cambodia, the state and society were left "uniquely eviscerated and without a clear centre of political gravity or an autonomous development agenda throughout much of the 1990s"[455], which is a key factor in "understanding why Cambodia entered the global economy from a position of abject weakness."[456] The country was consequently open for foreign intervention, resulting in trade agreements and monitor programmes such as Better Factories Cambodia, which in turn helped the garment industry to develop into one of Cambodia's most important sectors.

However, although the sector itself often serves as a successful example in Cambodian development, the Cambodian garment industry is considered to be a paradox, since "it is characterized by a highly confrontational industrial relations environment" while it "is promoted as a showcase for ethical production."[457] Furthermore, as the industry grew, trade unions started to emerge in large numbers, which in turn put pressure on factory managers, as they had to deal with a new phenomenon on the Cambodian labour market, namely independent trade unions. As a result, many employers in the garment industry have a hostile attitude towards trade unions, which in turn hamper the establishment of constructive industrial relations. Additionally, these relations are hampered by the trade unions themselves as multiplicity, rivalry and incompetence constitute major problems for trade unions to form a united force and push for collective demands. Moreover, a widespread disregard for the rule

[453] Trade Union Law, Articles 30 and 31.
[454] This will be further discussed in the following chapter.
[455] Arnold and Shih, A Fair Model of Globalisation? Labour and Global Production in Cambodia, 2010, p. 405.
[456] Ibid. p. 405.
[457] Arnold, Workers' agency and re-working power relations in Cambodia's garment industry, 2013, p. 19.

of law in general and freedom of association in particular has led to a dangerous environment for unionists to operate in as strikes and demonstrations are frequently met with violence from the public authorities, while union leaders are murdered due to their union activities.

4. The content of the Trade Union Law

4.1 The Trade Union Law and its relation to international law regarding freedom of association

Considering the scope of the Trade Union Law and its relation to international law, it is of importance to highlight the wording of the international instruments concerning who is entitled the right to freedom of association. ILO Convention No. 87 stipulates that "workers and employers, without distinction whatsoever"[458] are entitled the right, whereas both Article 22 of the ICCPR and Article 8 of the ICESCR refer to "everyone". Unlike the supervisory bodies of the UN covenants, the CFA has emphasized that the right of freedom of association should apply to all workers, indiscriminately, including occupational discrimination.[459] While the question has not received extensive attention by the HRC, the Committee has stated on numerous occasions that public employees are not to be denied the right to freedom of association.[460] Consequently, according to the international instruments, everyone (except police and military personnel) is entitled the right to freedom of association. However, the Trade Union Law does not entitle judges; persons with a permanent position in public service; police, army or military police personnel; personnel serving in the air and maritime transportations or domestic or household servants[461] freedom of association. The law's scope is therefore not in conformity with international human rights law, since it excludes individuals such as civil servants and teachers the rights and protections that are provided for in the Trade Union Law. In addition, in 2014 the CEACR called on the Cambodian government to ensure that these groups were ensured right to freedom of association; this request seems to have been ignored.[462]

4.1.1 The right to form and join a trade union

An important aspect of the right to form and join a trade union is the right to do so without prior authorization. The CFA has stated "such authorization could concern the formation of the trade union organization itself, the need to obtain discretionary approval of the constitution or rules of the organization, or, again, authorization for taking steps prior to the establishment of the organization."[463] This notion is shared by the HRC, which has stated that administrative routines that hinder or inhibit forming trade unions are incompatible with Article 22.[464] In addition, the CCESCR has stated that requirements stipulated in the legislation concerning the formation of trade unions cannot be extensive, since it may hinder the right to form a trade union. However, already in the preparatory work on the ILO Convention No.87, the right to provide legislative formalities was acknowledged and accepted, given that they did not hamper the functioning of the organisations.[465] Article 12 of

[458] ILO Convention No. 87, Article 2.
[459] Digest 2006, para 216. See also its reference to: 326th Report, Case No. 2113, para. 372.
[460] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 209.
[461] Labour Law, Article 1.
[462] Observation (CEACR) – Adopted 2014, published 104th ILC session, 2015.
[463] Digest 2006, para 272.
[464] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 211.
[465] International Labour Conference, Record of Proceedings, 31st Session, 1948, First Report of the Committee on Freedom of Association and Industrial Relations, p. 477.

the Trade Union Law provides the requirements an application for registration has to meet in order to be approved. The OHCHR has expressed concerns over the phrase "shall be approved" as it "allows for the possibility of the registration procedure becoming an authorization procedure,"[466] which would be contrary to international law. Additionally, the UN Special Rapporteur has stated that a "notification procedure, rather than a prior authorization procedure that requests the approval of the authorities to establish an association as a legal entity, complies better with international human rights law and should be implemented by States."[467]

The CFA has therefore "drawn attention to the desirability of defining clearly in the legislation the precise conditions which trade unions must fulfil in order to be entitled to registration."[468] Vague provisions regarding the registration procedure are considered tantamount to requiring previous authorization and are therefore incompatible with international law.[469] Considering the fact that the requirements of the registration application stipulated in Article 12 of the Trade Union Law are concrete and detailed, they fulfil the desire of the CFA. However, as mentioned above, all of the international instruments emphasize that one has to consider the potential consequences of lengthy and highly technical registration procedures since they may hinder the workers' ability to form a trade union. For instance, according to Article 12 of the Trade Union Law, the registration application has to provide an "address where financial books and records are to be kept" as well as "an original copy of its administrative regulations which govern leadership and administration". Considering the level of complexity, the requirements may hinder workers' abilities to form and join trade unions, as they might be too hard to meet. As a consequence, the Article may be incompatible with international law.

Furthermore, "in contrast to the considerable detail with which the requirements on unions for registration are set out, precise information on the process or criteria for the granting of approval has been omitted."[470] According to international law, when a regulatory body rejects a submission or application, the decision has to be clearly motivated and properly communicated to the applicant, who also should have the opportunity to challenge the decision before an independent court.[471] Consequently, the CFA has emphasized that the legislation has to clearly define the precise conditions "on the basis of which the registrar may refuse or cancel registration, and of prescribing specific statutory criteria for the purpose of deciding whether such conditions are fulfilled or not."[472] However, Article 12 of the Trade Union Law appears to lack detailed information on how the registration process is evaluated and the criteria that are of importance when granting an approval. Instead, this task is left to the Ministry of Labour to set out in a Prakas. Due to this omission in the law, the Government is granted a high degree of discretion in granting and rejecting trade unions' applications of registration. In addition to this, the difficulty complying with the requirements set out in Article 12 of the Trade Union Law is aggravated by the fact that the Ministry of Labour may change the requirements at any time. This in turn grants more power to the Government

[466] High Commissioner for Human Rights in Cambodia, A Human Rights Analysis of the Draft Law on Trade Unions, 2016, p. 12
[467] A/HRC/20/27, para. 58.
[468] Digest 2006, para 302.
[469] GS 1994, para. 73.
[470] High Commissioner for Human Rights in Cambodia, A Human Rights Analysis of the Draft Law on Trade Unions, 2016, p. 12
[471] A/HRC/20/27, para 60-61.
[472] Digest 2006, para 302.

concerning the registration process, [473] and could subsequently be incompatible with international law.

Moreover, the Trade Union Law provides a minimum membership requirement of ten individuals in order to form a trade union. While a minimum membership requirement is not in itself incompatible with international law, the CFA has emphasized that it must "be fixed in a reasonable manner so that the establishment of organizations is not hindered."[474] This view is shared by the HRC and the CCESCR, which have stated that a minimum membership requirement cannot be too high.[475] The UN Special Rapporteur has emphasized "the law must be accessible and its provisions must be formulated with sufficient precision."[476] What is considered a reasonable number is dependent on the particular conditions in which a minimum number is determined. However, the CFA has stated that a minimum requirement of 20 members was not excessive, whereas a requirement of 30 % of the workers in the branch or a minimum of 50 persons has been labelled too excessive. [477] Taking this into consideration, the number provided for in the Trade Union Law is compatible with international standards. However, the Special Rapporteur considers legislation that requires "no more than two persons to establish an association", best practice. They continue, "(a) high number may be required to establish a union or a political party, but this number should not be set at a level that would discourage people from engaging in associations."[478] In conclusion, although the minimum membership requirement of ten individuals does not violate international standards, it is not in line with best practice.

Furthermore, as been described above, trade unions have to comply with a variety of lengthy requirements in order to maintain their registration and continue operating lawfully. For instance, trade unions have to provide an annual provision of financial statements and activity reports based on the financial records of the trade union as well as "detailing all income and its sources, expenditure activities, and number of members; and the updating of any of the information required for registration (with the exception of changes in membership) within 15 days of any change."[479] These requirements may nevertheless violate the permissible grounds for restrictions on the right to freedom of association stipulated in Article 22 (2) ICCPR and Article 8 ICESCR, which provides the right to form and join trade unions for the protection of the interests of the individual with no restrictions[480] "other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others." In order to be accepted, the requirements have to be proportional and influenced by pluralism, tolerance, broadmindedness and individuals' sovereignty. In deciding whether a restriction is proportionate or not, the intensity of a measure has to be balanced with its legitimate aim.[481] It is nevertheless hard to make such an assessment since the State party has to argue as to why the limitations would be necessary for the purposes stipulated in Article 22 (2) ICCPR and

[473] Trade Union Law, Article 15.
[474] GS 1994, para 84.
[475] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 236.
[476] A/HRC/20/27, para. 16.
[477] Digest 2006, para 283-292.
[478] A/HRC/20/27, para 54.
[479] CCHR, Fact sheet: Trade Union Law, 2016, p. 3.
[480] High Commissioner for Human Rights in Cambodia, A Human Rights Analysis of the Draft Law on Trade Unions, 2016, p. 15.
[481] Nowak, UN Covenant on Civil and Political Rights: CCPR commentary, 2005, p. 505.

Article 8 ICESCR.[482] However, taking the components into consideration, the Article may well violate international law regarding restrictions on the right to freedom of association.

Moreover, according to Article 14 of the Trade Union Law, "any unions or employer associations that have not registered or have their registration deferred or revoked that continue to operate are considered to be illegal."[483] Hence, the registration process is considered mandatory in order to obtain legal capacity. Trade unions who have their registration application granted will accordingly enjoy different legal rights than the ones who have theirs denied, as they are prohibited to conduct any activities until they have their registration application granted by the authorities. Additionally, if they would act regardless of registration, they risk a five millions riel fine.[484] The UN Special Rapporteur has emphasized that "the right to freedom of association equally protects associations that are not registered" while individuals "involved in unregistered associations should indeed be free to carry out any activities (…)"[485] Taking this into consideration, trade unions should therefore "be presumed to be operating lawfully and registration should be voluntary" while "it should not be a perquisite for the ability to function lawfully."[486] Moreover, neither does Article 14 of the Trade Union Law stipulate the consequences for a trade union that is considered to be illegal nor any right of appeal for trade unions that "have either had their registration applications denied or their registration removed."[487] The UN Special Rapporteur has emphasized that trade unions that have their application rejected must "have the opportunity to challenge the decision before an independent court,"[488] suggesting that the Article is incompatible with international law.

Considering the Trade Union Law's provisions regarding most representative status, some of them may as well be in violation to international law. For instance, Article 59 stipulates that minority unions are "prohibited from demanding collective bargaining rights, and from demanding rights or benefits beyond those provided for in laws, prakas, regulations, collective bargaining agreements in force, or internal work rules." The CEACR has emphasized that regulations concerning most representative status are not necessarily incompatible with international law. However, the effect of such legislation must not hinder the functioning of the minority unions.[489] Consequently, the most representative trade unions are not allowed to be entitled rights through legislation, which enables unions to be the only ones to operate in an effective manner and therefore influence the workers' choice of trade union in an unreasonable way.[490] For example, by prohibiting minority unions from bargaining regarding internal "work rules", most representative unions may be granted privileges extending beyond the preferential rights they actually are granted according to international law. As a result, the provisions may jeopardize the workers' freedom of choice as minority unions risk being acknowledged as disadvantageous, as their space of action is significantly reduced. The CFA has emphasized that the minority union must, at least, have

[482] Zvozskov v Belarus 1039/01, para 7.4.
[483] Trade Union Law, Article 14.
[484] Ibid., Article 80.
[485] A/HRC/20/27, para 56.
[486] CCHR, Fact sheet: Trade Union Law, 2016, p. 3.
[487] ICNL, Analysis on Draft Trade Union Law, 2015, p. 4.
[488] A/HRC/20/27, para 60-61.
[489] GS 1994, para 97-98.
[490] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 144.

the opportunity to speak on behalf of its members in order to represent them in an adequate way.[491] Minority unions may lose this right due to this provision.

4.1.2 Organisational autonomy

Article 13 of the Trade Union Law outlines a number of requirements, which statutes of trade unions have to include, such as "a description of the occupational or sectorial scope of the union" and "the determination of safekeeping of ordinary financial records and regular publication of annual financial reports". According to the CFA, a list of different components that have to be included in the constitution of a union is not in itself incompatible with the Convention. However, the UN Special Rapporteur has stated that trade unions should be free to determine their "statutes, structure and activities and make decisions without State interference", implying that the State must respect the privacy of the trade union.[492] Yet, restrictions are considered acceptable if they are not too detailed and their intention is to protect the interest of the members and to ensure that the organisation operates according to democratic principles.[493] Regarding the requirements stipulated in Article 13 of the Trade Union Law, some of the requirements are very detailed such as "the determination of safekeeping of ordinary financial records and regular publication of annual financial reports." On the other hand, the purposes of some of the requirements appear to ensure that trade unions operate according to democratic principles such as requiring "a procedure for electing leadership through secret ballot." Thus, it is hard to make an assessment whether these requirements are incompatible with international standards or not. However, one must be aware of the fact that the requirements have to serve the interests of the members, implying that some of the requirements do not serve this purpose, as they are too detailed or irrelevant to the members. In addition, by demanding "publication of financial reports" authorities are granted too much power and influence over the union's financial administration. The CEACR has emphasized that legislation, which enables public authorities to carry out inspections and request information at any given time[494], to investigate books and other documents, or require that specific financial operations have to be approved, entails a danger of interference and are therefore considered incompatible with the Convention.[495] Taking this into consideration, the financial requirements for the statutes are also incompatible with international law.

Another aspect of trade unions' organisational autonomy is the right to elect their representatives in full freedom. Article 20 of the Trade Union Law stipulates that no one is permitted to be elected trade union officer unless he/she is "at least eighteen (18) years of age", and may "make their own declaration of a specific residential address, and "have the minimal ability to read and write Khmer" and have "never been convicted of any criminal offense." The CFA has emphasized "the right of workers' organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. (…) it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining the conditions of eligibility of leaders or in the conduct of the elections themselves."[496] This notion is shared by the UN Special Rapporteur whom has stated that States should not be entitled to condition the validity of trade union officers nor

[491] Digest 2006, para 974.
[492] A/HRC/20/27, para 64-65.
[493] Digest 2006, para 369.
[494] Ibid. para 490
[495] GS 1994, para 126.
[496] Ibid. para 391.

have free access to trade unions' premises without advance notice, as trade unions should be free to make decisions without State interference.[497] During the draft process of the law, the CEACR proclaimed its concerns regarding the requirements stipulated in Article 20 since they were considered to be incompatible with the ILO Convention No.87. The CEACR trusted the Cambodian Government to "bear in mind these principles when finalizing the draft law."[498] This requirement was nonetheless also ignored.[499]

The age requirement stipulated in Article 20 of the Trade Union Law is incompatible with international law, as it restricts the ability of minors to obtain a position as leaders, managers and those responsible for the administration of a trade union. The requirement is in clear violation with Article 15 of the UN Convention on the Rights of a Child (CRC) under which Cambodia, as a State member, is obligated to "recognize the rights of the child to freedom of association and to freedom of peaceful assembly". Since the CRC may only be restricted by "those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safest, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others", the age requirement provided for in Article 20, may restrict the right to freedom of association in an inadequate way. Additionally, the CCESCR has emphasized its concerns regarding severe legislative restrictions on the right to freedom of association, such as minimum age requirements[500] while the UN Special Rapporteur has stated that "everyone has the right to freedom of association. (…) legislation that does not set any specific limitation on individuals, including children (…) complies with international standards."[501]

Moreover, by requiring that the person shall never have "been convicted of any criminal offense" is in clear violation to international law. The CEACR has stated that if the crime is not such as to be prejudicial to the mission as a trade union officer, the regulation does not constitute ground for disqualification. Hence, if the legislation is excessively broad, by an open-ended definition or a long list, which do not contain any form of correlation between the crime and the qualities required for the exercise of the mission, the legislation is incompatible with international law.[502] Reading the requirement as stipulated in Article 20 of the Trade Union Law, the provision is very broad and indefinite, giving the Cambodian Government unrestrained power to decide whether the criminal offense may be prejudicial to the exercise as a trade union officer or not. Taking this into consideration, it is obvious that the requirement is incompatible with international law. Moreover, it is noteworthy that the minimum requirement regarding education and language is only imposed on individuals who lead, manage or administer trade unions, "but not on those who perform equivalent functions in employer associations."[503] These literacy and language requirements could furthermore be considered as "distinctions in treatment",[504] which are forbidden under Article 3 of the ILO Convention No. 87. They could also be contrary to both Article 2 of the ICCPR and Article 2 of the ICESCR, which stipulate that all individuals are entitled the rights provided for in the

[497] A/HRC/20/27, para 64-65.
[498] Direct Request (CEACR) – adopted 2015, published 105th ILC Session (2016).
[499] High Commissioner for Human Rights in Cambodia, A Human Rights Analysis of the Draft Law on Trade Unions, 2016, p. 17.
[500] E/C.12/MEX/CO/4, paras. 16 & 34.
[501] A/HRC/20/27, para 54.
[502] GS 1994, para 120.
[503] High Commissioner for Human Rights in Cambodia, A Human Rights Analysis of the Draft Law on Trade Unions, 2016, p. 17.
[504] Ibid. p. 17.

Covenants "without distinction of any kind, such as (…) language (…)."[505] Regarding foreign nationals that are seeking office as trade union officer, it is of importance to highlight that the vast majority of requirements that for instance, requires citizenship or requirements in general alluding to nationality, are incompatible with international law. It is forbidden to discriminate workers that are legally residing in the territory of a given state, which implies that it is permitted to obstruct foreigners' labour rights through legislation.[506] Hence, all of the requirements stipulated in Article 20 of the Trade Union Law are more or less incompatible with international law.

4.1.3 The right to strike

According to international law, the right to strike may be restricted. However, the legislation has to be reasonable and not lead to a total ban or an excessive limitation of the right to be practiced or restricted in an unauthorized way.[507] In general, as long as legal measures are conceived as an additional step in the process and aims to encourage the parties to engage in negotiations, they may be considered in line with international law.[508] Requirements stipulating that a trade union need an approval by a certain percentage of the workers before taking action are not contrary to international law. The quorum and percentage required should nevertheless be reasonable and not make the right to strike very difficult or even impossible.[509] The judgement depends on several factors, such as the type of industry and geographical isolation, which in turn requires an examination on a case-by-case basis. Article 13 of the Trade Union Law requires the statutes to stipulate that a majority of its members must be assembled to allow strike action, while at least 50 % of the present members have to vote for industrial action to be executed. Considering the percentage level of the quorum, the CFA has stated that an absolute majority may be difficult to achieve, especially in unions with a large number of members, and is therefore seriously limiting the right to strike.[510] A provision requiring two-thirds of the members has also been considered difficult to reach and thereby too high, a requirement of over half of the members has also been declared excessive as it could potentially hinder the possibility to strike.[511] Taking this into consideration, the quorum requirement stipulated in Article 13 of the Trade Union Law is in clear violation to international standards, as it may hinder trade unions to invoke strike action.

Moreover, the wording of Article 65 (f) may as well be in violation to international law since it stipulates that it is considered unlawful for a trade union or its representatives to "agitate for purely political purposes." In general, political strikes are not considered to fall within the scope of the ILO Convention No.87. However, general prohibitions for trade unions to engage in political activities might ultimately lead to difficulties to act at all since "the interpretation given to the relevant provisions may, in practice, change at any moment."[512] The CEACR has therefore stated that trade unions have to be able to strike on political decisions that directly affect the members' economic and social conditions, such as employment and social protection.[513] The CEACR has also emphasized that trade unions must be able to express their

[505] Articles 2 of the ICCPR and the ICESCR.
[506] Herzfeld Olsson, Facklig föreningsfrihet som mänsklig rättighet, 2003, p. 136.
[507] Ibid. p. 151.
[508] Digest 2006, para 552 & 554.
[509] GS 1994, para 170 &171
[510] Digest 2006, para 557.
[511] Ibid. para 556 & 560.
[512] Ibid. para 501
[513] GS 1994, para 165.

opinions on political issues, on broad policies in general and on a government's economic and social policy in particular, in order to develop the trade unions and establish their role as a social partner.[514] Additionally, the UN Special Rapporteur has emphasized that "the right to freedom of association necessarily entails the freedom of association to decide and engage in activities of their own choosing and this extends to those wishing to engage in election-related activities."[515] Trade unions should accordingly not be denied registration or lose their legal status due to carrying out activities which are considered to be "political" by the authorities since this might infringe the principles of freedom of association provided for in the international instruments.

4.1.4 Dissolution and suspension of trade unions

As been described above, suspension and involuntarily dissolution of an association are acknowledged as the most serious forms of restrictions on freedom of association. As a result, the CFA has stated "it would be preferable, in the interest of labour relations, if such action were to be taken only as the last resort, and after exhausting other possibilities with less serious effects for the organization as a whole." [516] Moreover, the protection of an association stretches from its founding to its dissolution since the right to freedom of association applies for the entire life of the association.[517] Consequently, a decision of suspension or dissolution must be proportional to the legitimate aim pursued.[518] According to Article 28 of the Trade Union Law, a trade union may be dissolved "in accordance with its respective statutes", or "in the event of a complete closure of the enterprise or establishment", as well as being "dissolved by the Labour Court."[519] Article 29 lists reasons for dissolving a trade union, which covers, if its activities contravene legislation or the objectives as stated in its statutes, or if it is unable to restore its independence, or if "leaders, managers and those responsible for the administration were found of committing serious misconduct or an offense in the capacity of the union (…)."[520] Following a decision of the Labour Court, leaders, managers and those responsible for the union's administration are not allowed to lead or be responsible of the union's administration for five years.

The OHCHR argues that "(e)xternal interference in the internal operations of a professional organization might be warranted in cases of truly extraordinary circumstances when the ordinary democratic functioning of a membership organization would be unable to address the situation." Considering this, the reasons listed in Article 29 "falls short of the threshold for extraordinary circumstances and the approach does not reflect dissolution being used as a last resort." [521] Instead, the reasons for interference by the authorities provided for in Article 29 are relatively general which allows for dissolution of trade unions. Furthermore, the CFA has emphasized that dissolution of trade unions based on a judgement that a leader or a member of the union has carried out illegal activities is in clear violation with the principles of freedom of association. According to international law, it is the leader who has been carrying

[514] GS 1994, para 131.
[515] A/68/299, para. 43.
[516] Digest 2006, para 678.
[517] European Court of Human Rights, United Communist Party of Turkey and Others v. Turkey, No. 19392/92, para 33.
[518] A/HRC/20/27, para 75.
[519] Trade Union Law, Article 28.
[520] Ibid. Article 29.
[521] High Commissioner for Human Rights in Cambodia, A Human Rights Analysis of the Draft Law on Trade Unions, 2016, p. 20.

out illegal activities that is to be prosecuted in accordance with ordinary judicial procedure rather than dissolving the trade union. Hence, it is the persons responsible for the irregularities that should face legal action rather than suspending or dissolving the trade union.[522] These regulations are subsequently also incompatible with international law.

Consequently, the majority of the Trade Union Law's provisions concerning freedom of association are incompatible with international standards as they either are too detailed in a way which infringes the principles of freedom of association or too ambiguous which grants unrestrained power to the authorities. Considering this, it is of importance to once again mention Article 31 of the Constitution, which explicitly and unambiguously acknowledges that Cambodia "recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights, women's rights and children's rights." Taking this into consideration, it becomes obvious that many of the provisions of the Trade Union Law do not only contravene international law but also the Constitution of Cambodia. However, although the majority of the Trade Union Law's provisions violate international law, neither the ILO nor the UN covenants may affect the content of the Trade Union Law by applying material sanctions. However, the wordings of ILO conventions and ILO standards may obligate member states to pursue a certain policy in national court rulings. Yet, it is solely the ICJ that is entitled a formal authorization to provide binding interpretations of the ILO Constitution and its Conventions. The CFA and the CEACR have not been formally accredited this authority although the CEACR argues that its interpretations are binding to member states. On the other hand, although the interpretations of the supervisory bodies of the international instruments are not legally binding, they may have a certain effect on the Cambodian government, as it is obligated to consider the views of the international instruments in good faith. Hence, by publically criticize the Trade Union Law within the international community; the supervisory bodies of the ILO and the UN covenants may actually affect the implementation of the law. However, it is uncertain what actual effect this will have on the Cambodian government.

4.2 The differences and similarities between the Trade Union Law and already existing Cambodian legislature concerning freedom of association

4.2.1 A close bond between the Labour Law and the Trade Union Law

Article 36 of the Constitution provides that "Khmer citizens of either sex shall have the right to form and to be members of trade unions," implying that everyone has the right to form and join trade unions. However, the Labour Law and the Trade Union Law have an identical scope since the Trade Union Law expressly refers to the Labour Law by stipulating that it "covers enterprises/establishments as well as workers, employers and other persons, who fall within the provisions of the Labor Law."[523] Consequently, unlike the Constitution, neither the Labour Law nor the Trade Union Law apply to judges, persons with a permanent post in the public service, police, army or military police, personnel serving in the air and maritime

[522] Digest 2006, para 692 & 693.
[523] Trade Union Law, Article 3.

transportations and domestic or household servants.[524] Moreover, the definition of a trade union according to the Labour Law is solely a "professional organization of workers"[525] whereas the Trade Union Law defines one as a "professional organization that is established by workers jointly and voluntarily at a particular enterprise/establishment."[526] The definition stipulated in the Trade Union Law may therefore be regarded as an extension to the one provided for in the Labour Law, suggesting that the provisions complement each other. This notion is reinforced by the fact that the Labour Law provides for a definition of a worker[527] whereas the Trade Union Law lacks a definition, implying that they are to be read together. Furthermore, although the discrimination grounds of the two laws and the Constitution do not differ in any extensive way, the two laws vary as the Trade Union Law only regulates non-discrimination in relation to union membership[528] whereas the Labour Law and the Constitution[529] provides for non-discrimination in general.[530] However, since the focus of the thesis is on garment workers, it becomes apparent that the laws provide identical protection concerning non-discrimination for garment workers.

The right to form and join a trade union is provided for in the Constitution, the Labour Law as well as the Trade Union Law. However, unlike the Constitution, the Labour Law and the Trade Union Law also acknowledge the right not to join a trade union and the right to withdraw at any time from the organisations that they join.[531] Considering the Constitution's role as a supreme law, the right to form and join a trade union is provided for in much broader terms comparing to the Labour Law and the Trade Union Law as it stipulates "Khmer citizens of either sex shall have the rights to form and to be members of trade unions."[532] The Labour Law and Trade Union Law on the other hand, have not just a more detailed provision concerning the right to form and join a trade union, but also an almost identical one. However, although Article 5 of the Trade Union Law is almost identical to Article 266 of the Labour Law, it does not entail the wording "without (…) prior authorization." Furthermore, both the laws also acknowledges organisational autonomy in an almost identical way as Article 9 of the Trade Union Law and Article 267 of the Labour Law entitle trade unions to "draw up their own statutes and administrative regulations, as long as they are not contrary to laws in effect and public order, to freely elect their representatives and to formulate their work program."[533]

4.2.2 A more comprehensive legislation

Although the Trade Union Law has numerous similarities to the already existing Cambodian legislature on freedom of association in general and the Labour Law in particular, a relatively clear pattern appears when comparing the new Trade Union Law to the already existing legislature concerning freedom of association in Cambodia. By comparing the provisions with each other, it appears as the provisions on freedom of association set out in the Trade Union

[524] Labour Law, Article 1.
[525] Ibid. Article 266.
[526] Trade Union Law, Article 4.
[527] Labour Law, Article 3.
[528] Trade Union Law, Article 6.
[529] Constitution, Article 31.
[530] Labour Law, Article 12.
[531] Labour Law, Article, 273 and Trade Union Law, Article, 7.
[532] Constitution, Article 36.
[533] Labor Law, Article, 266 and Trade Union Law, Article, 9.

Law regulate more aspects of the right and thereby provide a more comprehensive protection than the ones stipulated in the Labour Law.

For instance, the Trade Union Law does not only entail provisions concerning the registration itself, but also numerous provisions on the maintenance of registration[534] as well as stipulating the effect of registration.[535] The Labour Law, on the other hand, lacks similar provisions, leaving a large part of the registration process unregulated compared to the Trade Union Law. Thus, the provisions of the Trade Union Law offer a legal framework, which covers a much larger part of the registration process than the Labour Law. This pattern is also evident when comparing the provisions of the laws regarding the dissolution of trade unions, as the provisions of the Labour Law on the matter are more or less non-existent. The only regulation regarding the dissolution of trade unions in the Labour Law is that it "must be pronounced by the Labour Court in the event of those organizations committing wrongdoing (…) or in case of serious, repeated violation of the laws and regulations, particularly in the area of industrial relations."[536] The Trade Union Law, on the other hand, provides much more detailed and comprehensive provisions, stipulating grounds for dissolution[537], how a trade union is dissolved[538] as well as the effect of the dissolution.[539] This pattern can also be seen when comparing the laws' provisions concerning most representative status. Although the provisions resemble each other to a certain extent, the Trade Union Law regulates more aspects of the right. For instance, unlike the Labour Law, the Trade Union Law entails provisions concerning duration and loss of most representative status,[540] rights and roles of minority unions,[541] and rights and duties of the most representative status unions.[542] Hence, the Trade Union Law contains provisions on aspects that are unregulated in the Labour Law, leaving fewer aspects unregulated and open for interpretation for the industrial partners.

However, the right to strike constitutes an exception from this pattern, as the Labour Law appears to have more comprehensive provisions regarding the right than the Trade Union Law. The Constitution, the Labour Law and the Trade Union Law acknowledge the right to strike, however, the Labour Law is the only one of the three that expressly defines strike action[543], whereas the Trade Union Law only defines illegal strike action.[544] Furthermore, the procedures prior to the strike are more comprehensive in the Labour Law as the right to strike is guaranteed provided that specific preliminary dispute resolution mechanisms have been attempted, workers are therefore required to first try negotiation, conciliation and arbitration before going on strike.[545] Additionally, before going on strike, it has to be declared according to the procedures provided for in the union's statutes, which has to include requirement for a secret ballot of the union members on the decision to strike.[546] The strike must also be preceded by prior notice to the employer and the Ministry in charge of labour of at least seven

[534] Trade Union Law, Article, 17.
[535] Ibid. Article, 14.
[536] Labour Law, Article, 378.
[537] Trade Union Law, Article 29.
[538] Ibid. Article 28.
[539] Ibid. Article 30.
[540] Ibid. Article 60.
[541] Ibid. Article 59.
[542] Ibid. Article 58.
[543] Labour Law, Article, 318.
[544] Trade Union Law, Article 92.
[545] Labour Law, Article 320.
[546] Ibid. Article 323.

working days.[547] In contrast, the Trade Union Law "only" requires that the secret ballot is to be cast by at least (50%+1) of the members, overlooking, for instance, the Labour Law's regulations on using the dispute resolution mechanisms before invoking strike action. Moreover, The Labour Law also entails provisions on the effects of a strike[548] and illegal strikes.[549] The Trade Union Law, on the other hand, contains provisions on, for instance, illegal strike[550] and illegal obstruction of strike[551], however, it has far less provisions on strike action in general and the effects of a strike in particular, leaving a vast amount of aspects of the right unregulated.

However, although strike action constitutes an exception from the general pattern when comparing the Trade Union Law and the Labour law, it becomes clear that the provisions of the Trade Union Law covers more aspects of freedom of association in general and thereby provides a much more comprehensive legislation on the right. This is in line with the business owners' request to the Cambodian Government in 2007, as they required a more comprehensive trade union law in order to deal with the on-going problems in the Cambodian garment factories. Furthermore, reading the provisions and what they regulate it also appears as if the majority of the laws' provisions do not overlap each other, implying that they might be read together whenever the laws lack provisions in a certain matter.

4.2.3…and a higher degree of technicality

Another general difference between the Trade Union Law and already existing legislation on freedom of association in Cambodia is the fact that the provisions of the Trade Union Law are more detailed and technical than the provisions provided for in the Labour Law and the Constitution, making them more burdensome to fulfil.

For instance, although both of the laws require the founders of the union to file the trade union's statutes and list of names of those responsible for management and administration to the Ministry in Charge of Labour[552], the requirements regarding the registration procedure differ in complexity level between the Labour Law and the Trade Union Law. For instance, unlike the Labour Law, the Trade Union Law requires the application for registration to be accompanied by "an address where financial books and records required by this law are kept" and "an attachment of original copy of the official minutes of elections for establishment."[553] In addition, the Trade Union Law also requires at least ten workers of a given enterprise or establishment in order to form a trade union.[554] When comparing the laws' registration provisions, it becomes evident that they differ significantly in complexity level.

Additionally, as was discussed above, the Trade Unions Law's registration provisions do not only cover the founding of a trade union but also regulations in order to maintain the registration approved by the Ministry in Charge of Labour, and reasons for refusing a registration application.[555] Like the requirements to form a trade union, the requirements for a

[547] Labour Law, Article 324.
[548] See for example Labour Law, Article 330.
[549] For instance, see Labour Law Article 336.
[550] Trade Union Law, Article 92.
[551] Ibid. Article 87.
[552] Labor Law, Article 268 and Trade Union Law, Article 11.
[553] Trade Union Law, Article 12.
[554] Ibid. Article 10.
[555] Ibid. Article 16 and 17.

trade union to maintain its status as registered are as burdensome. For instance, in order to maintain the list of registrations approved by the Ministry in Charge of Labour, trade unions "must submit an annual report of accounts based on the financial books and records they keep, showing (a) total income during the covered period, shown by amounts in categories of sources", as well as updating information "whenever changes are made thereto, including any change of address, as well as the number of members."[556] The Labour Law, on the other hand, lacks any form of similar provisions. Hence, as was discussed above, the provisions concerning the registration procedure according to the Trade Union Law, covers the entire registration process while the regulations are lengthier and subsequently more technical than the ones provided for in the Labour Law. These provisions may therefore hinder the workers' abilities to form trade unions considering the fact that they have to fulfil these lengthy, technical requirements in order to gain legal status and not to be perceived as illegal.

This pattern is also evident when comparing the laws' provisions concerning the statutes of trade unions. The Labour Law lacks any form of requirement regarding the statutes of trade unions; it nevertheless refers to the statutes of trade unions, but never requires certain requirements to be fulfilled. The Trade Union Law, on the other hand, lists a number of requirements the statutes have to meet in order to be approved. For instance, the statutes must include an identified amount of dues that each member shall pay, and the mode of monthly payment for union contribution shall be determined by a general assembly or an assembly of the union" as well as "the determination of safekeeping of ordinary financial records and regular publication of annual financial reports of the union."[557] Concerning the procedures prior to a strike, the Labour Law stipulates that the statutes are required to stipulate that the decision to invoke industrial action is adopted by a secret ballot, implying that this number is up to the members to decide.[558] The Trade Union Law, on the other hand, requires the statutes to stipulate that a majority of its members must be assembled to allow strike action, while at least 50 % of the present members have to vote for industrial action to be executed.[559] Hence, the Trade Union Law expressly provides a specific percentage of the members whereas the Labour Law solely requires a "secret" ballot. The requirement is subsequently not more detailed than the one stipulated in the Labour Law, it is nonetheless more express and might be hard to meet. Since the Trade Union Law expressly provides a specific percentage level on whether strike action is accepted or not amongst the members, the assessment becomes less dynamic and incapable of consider external factors such as number of members in the individual case. For instance, the requirement to gain more than 50 % of the members' votes may be easier for a small trade union to meet than one with hundreds or maybe thousands of members.

Consequently, the tendency regarding freedom of association in Cambodian legislature considering the adoption of the Trade Union Law, points in a direction where legislation is much more extensive, as the majority of the provisions of the Trade Union Law cover more aspects of freedom of association than the Labour Law and the Constitution together. This in turn creates a legal framework that covers aspects of the right that used to lack legal provisions for both employers and workers to lean on, which may be preferable to a lack of provisions. Hence, when analysing the provisions of the Trade Union Law, it becomes obvious that the Cambodian Government had the intention to provide legislation on aspects that used to be unregulated. This intention may stem from the business owners' request for a

[556] Trade Union Law, Article 17.
[557] Ibid. Article 13.
[558] Labour Law, Article, 323.
[559] Trade Union Law, Article 13.

new trade union law as the employers considered the trade unions in the factories to be unconstructive. Intrusive legislation was consequently regarded as the solution to the on-going problems in the garment industry rather than trusting the industrial partners to solve their problems on their own through negotiations.[560] For instance, the legislation could have been less interfering, and thereby granting the industrial partners more influence over the industrial relations. However, the legal issue still remains whether an increase of legislation on freedom of association automatically implies better protection for the workers. From a worker's point of view, the downside of the Trade Union Laws' provisions is their character as highly technical and detailed. Considering their design, workers' ability to exercise their freedom of association such as invoking strike action or forming trade unions may be reduced, it is nonetheless also a question of how these provisions will be applied in reality. On the other hand, some provisions of the Trade Union Law seem to have been customized to the garment sector. For instance, the Trade Union Law has set the age requirement concerning members responsible for the administration and management of a trade union to 18 years[561] whereas the Labour Law requires these members to be at least 25.[562] Considering the work force of Cambodian garment workers, which in general consist of young people, this provision might actually improve the trade unions, as a larger amount of the work force may be elected trade union officer.

After having analysed the Trade Union Law and its provisions in relation to international and domestic law, the question still remains in what way the law may affect trade unions operating in the Cambodian garment industry. Hence, the next chapter of the thesis will present the potential implications of the law.

[560] See for instance: Kunthear, "No One in Union Law Firing Line, Says Vannak", Khmer Times, 2016, available at: http://www.khmertimeskh.com/news/33337/no-one-in-union-law-firing-line--says-vannak/
[561] Trade Union Law, Article 20.
[562] Labour Law, Article 269.

5. The implications of the Trade Union Law

5.1 …on trade unions' right to freedom of association in the Cambodian garment industry

In the previous chapter I subjected the provisions of the Trade Union Law to a legal analysis where the provisions on the freedom of association were compared to and discussed in relation to domestic and international law. This was done in order to examine the relation between already existing domestic legislation and the Trade Union Law concerning freedom of association, and whether the provisions were compatible with international law. This chapter has a different analysis approach, as it discusses the possible implications of the Trade Union Law for unions in the Cambodian garment sector. However, one must be aware of the difficulties to make an adequate assessment on how legislation affects reality. How the provisions of the Trade Union Law will affect the Cambodian garment industry is dependent on numerous actors and coincidences, which in turn is a complex process that will go on for years, making it almost impossible to present an adequate assessment of the law's implications. Taking this into consideration, one must be aware of the fact that this chapter presents possible implications and not real implications. The chapter therefore emphasizes possibility rather than reality.

5.1.1 Corrupt authorities are granted unilateral power over the registration process

While the detailed requirements may be discouraging workers from forming trade unions and thereby weakening their right to freedom of association, the omission of precise information on the process or criteria for granting approval may strengthen the employers, as public authorities are granted more unrestrained power in deciding the faith of trade unions applying for legal personality. Hence, due to the absence of provisions concerning the application process, public authorities have complete power to unilaterally and without consultation, determine and establish the application process. Taking this into account, it is important to be aware of the widespread corruption in the country, since "perceptions of public sector corruption in Cambodia are high."[563] According to the annual monitoring report conducted by Transparency International in 2016, Cambodia is considered one of the most corrupt countries in the world, ranked 156 out of 176 countries,[564] as well as being acknowledged as the most corrupt country among the top exporters of clothing.[565] Consequently, corruption is not only evident in the private sector and the garment factories, but also in the public sector influencing the authorities, and thereby affecting the legal enforcement and the workers' possibility to equal treatment. Considering the fact that trade unions in general and independent trade unions in the garment industry in particular, depend on respect for the rule of law and public services in order to resolve disputes and advocate for their demands, the consequences of these vague provisions may be devastating for trade unions in the Cambodian garment industry. Consequently, since trade unions are dependent on the approval

[563] Human Rights Watch, Work Faster or Get Out, 2015, p. 111.
[564] Transparency International, Corruption Perceptions Index 2016, available at: http://www.transparency.org/news/feature/corruption_perceptions_index_2016#table
[565] Transparency International Bangladesh, Call on Clothing Companies to Tackle Corruption, Factory Safety, 2013, available at: http://www.transparency.org/news/pressrelease/clothing_companies_to_tackle_corruption

of the Ministry in Charge of Labour in order to operate lawfully, the power-balance between pro-government unions and independent unions will most likely become even more unbalanced as authorities might be more willing to grant approval to trade unions which are said to support the agenda of the party in power. This is nonetheless an already existing problem in the garment industry as union leaders often hold high positions in the government and enjoy protection and support from the authorities. However, the problem could be more comprehensive and widespread throughout the garment industry as a result of the omission in the law in combination with the extensive corruption. Moreover, due to the lack of regulations concerning granting registration, public authorities also have the power to control the activities and operations of trade unions, as they are prohibited from conducting any activities until the public authorities have granted their registration application. Hence, authorities may arbitrarily and indefinitely prolong or cancel the registration process in order to intimidate or discourage workers waiting for their registration application to be approved. In addition, the right to impose a fine of up to five million riels if a trade union is operating without the approval of the authorities enforces the power of the public authorities, as the level of the fine may dissolve the union.[566] Moreover, by controlling the registration process, public authorities are also granted the power of governing unions' most representative status since one of the requirements to have this status approved is to be legally registered.[567] Thus, unions that are corrupted or used in order to support the agenda of the party may achieve status as most representative to a greater extent, as their registration application is more likely to be approved. Since most representative unions are granted the exclusive right to collective bargaining, the public authorities may subsequently affect the whole garment industry, as all workers are obligated to observe the agreements, which the most representative union has forged together with the employer or employer organisation.

Thus, as a result of the omission of provisions concerning the application process, the public authorities possess the power to unilaterally grant pro-governmental trade unions legal capacity and most representative status over independent trade unions with the stated objective of protecting garment workers' human rights. The public authorities thereby create an unbalanced trade union environment where trade unions operating in the interest of the government are most likely to have their registration application granted at the expense of independent unions. They may also control the activities of unions waiting for their registration application to be granted, as they are prohibited to act until the public authorities have granted their registration. As a result, for instance, unions that are pronounced anti-governmental may be subjected to threats and long waiting times, which may affect the willingness to form independent trade unions. This in turn may threaten the very concept of independent trade unions in the Cambodian garment industry as they may decline in numbers. Another factor that has to be taken into account is that garment workers in general do not understand the principles or the practice of unions in their sector. The strength and impact of a trade union is predominantly determined by its members; those who understand the importance and concept of a trade union constitute strong members. The members of the trade unions in the Cambodian garment industry are considered weak since they are more likely to join a trade union for immediate needs without understanding the long-term benefits of a democratic union. As a result, they may accept the potential difficulties in forming independent trade unions. The potential diminution of independent trade unions in the garment sector may therefore pass relatively unnoticed.

[566] Trade Union Law, Article 80.
[567] Ibid. Article 54.

In order to understand this, one has to be aware of the fact that the independent trade union movement is young, as it started growing as late as the mid-1990s; the acceptance and knowledge of independent trade unions amongst the population is therefore limited in the country. However, by increasing the knowledge and acceptance amongst the population by emphasizing the advantages of independent unions and their role in developing the society in general, workers might be more willing to stand up against this potential decline of independent unions in the sector. Although garment workers in general lack understanding of the long-term benefits of independent unions, they are most likely aware of the fact that independent unions have played a vital part in advocating for their right to freedom of association, which has improved the working conditions, as the they have gained a collective voice. However, one must understand that the labour force consists of young women from rural areas whose primary aim is to provide for their families. Since the garment industry is based upon low-skilled, labour intensive activities while the country "provides a large pool of low cost, low skilled workers,"[568] every worker is exchangeable. Hence, garment workers constitute an exposed labour force, as every individual is exchangeable, making them unwilling to advocate for their rights or defending the right to form independent trade unions as they may lose their only source of income. Additionally, due to the long history of state-controlled unions, which distributed farming products and established childcare centres in the workplaces, the attitude towards state-controlled unions may not be as hostile as one could imagine. Consequently, the notion of state-controlled unions as a supporting, caring actor is historically rooted, suggesting that the willingness to advocate for independent trade unions may not be as strong amongst the workforce in the garment industry.

Moreover, considering that fact that there is a strong cultural suspicion towards independent trade unions amongst managers in the garment factories and amongst authorities in general, there is a high risk that the ambiguous registration provisions may be applied in favour of the employers in order to hinder the establishment of independent trade unions in the sector. Hampering the garment workers' ability to form and join trade unions has serious consequences for their labour rights and work situation, considering the fact that since the sector's surge of trade unions, working conditions have improved.[569] Furthermore, the establishment of independent trade unions might also be affected by the sanctions stipulated in the Trade Union Law, as the employer sanctions may be too low in order to be acknowledged as dissuasive. Almost all violations have a maximum fine of 5 million riels[570] regardless of whether it is an employer association or a trade union. Taking this into consideration, it becomes clear that the fine level might be too low and therefore acknowledged by the employers simply as a cost of doing business. For instance, the maximum fine for obstructing the forming of a trade union is a mere 1 million riels[571], which one could argue is too low in order to secure the right to freely form and join trade unions. Hence, employers in the garment industry may therefore hamper the establishment of trade unions in the sector relatively cheap and thereby affect the development of independent trade unions in the garment industry. However, it is not clear whether the fines "will be calculated by the illegal act or by number of affected"[572] while admonishments appear to be required

[568] EuroCham, Market Study: The Textile Industry in Cambodia, 2014, p. 26.
[569] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 110.
[570] Approximately $ 1,250.
[571] Trade Union Law, Article 79.
[572] O'Grady, Cambodian trade union law" TUC, 2015, available at: https://www.tuc.org.uk/international-issues/countries/labour-standards/union-rights/cambodian-trade-union-law, see attached file "Top 10 concerns with the 2015 Draft of the Cambodian TUL."

before issuing a fine. Furthermore, although the fine will be insignificant to the majority of the employers it may be devastating for a small and newly formed trade union.

Additionally, it is also of importance to highlight the wording of Article 65 (f) of the Trade Union Law, as it stipulates that it is considered unlawful for a trade union or its representatives to "agitate for purely political purposes." Considering the widespread corruption in Cambodia, this ambiguous wording may hamper trade unions' ability to invoke strikes even more, as authorities may use this provision to weaken and hinder trade unions to act. For instance, if the government would adopt a policy that would affect the garment workers, directly or indirectly, the garment workers would not be able to strike on the political decision although it would affect their work situation economically or socially. Hence, due to this Article, unions might become unable to raise their voice regarding policies of the Government, enabling the public authorities to enact policies without having to worry about an increase in strike activity in the garment factories. Public authorities are therefore not only granted the power to unilaterally control the registration procedure of the trade unions but also their activities and operations, weakening them even more as power shifts from the unions to the authorities.

5.1.2 An increase of state interference in unions' organisational autonomy

Considering the characteristics of the work force in the garment industry, the requirements for being elected a trade union officer also constitute a major threat to the trade unions in the Cambodian garment sector. Compared to the age requirement (25 years of age) stipulated in the Labour Law, the age requirement in the Trade Union Law (18 years of age) appears to be a step in the right direction. If the law had followed the example of the Labour Law, a vast majority of the work force would have been excluded from being elected trade union officer. Yet, in relation to the garment workers' young middle age, the requirement still might exclude a large number of workers wanting to become trade union officers. As a consequence, the possibility to select a trade union officer that is representative to the workforce may be hampered. This might affect the workers' belief in unions and commitment in conducting trade union activities, as they are more likely to be represented by an individual that is unrepresentative to the labour force. Furthermore, the majority of the garment workers come from poor rural areas with the primary purpose to earn more money than they could in their home villages. Due to their socio-economic background, they lack any form of education. For example, almost a third of the garment workers lack any form of schooling whereas a forth has an education above primary school. Taking this into account, by requiring trade union officers to be able to read and write Khmer may consequently have a disproportionate impact on garment workers. It is moreover of importance to highlight that this requirement is only applicable to trade union officers, and not leaders of employer associations, which in turn "reinforces the belief that this restriction is arbitrary and the motivation behind it is to limit the ability of employees from choosing a Leader of their choosing."[573]

The requirement, which stipulates that a trade union leader must "never been convicted of any criminal offense", may also have a disproportionate effect on garment workers since the Cambodian garment industry is complex and constitutes a highly confrontational industrial relations environment. For instance, in early January 2014, garment workers were demonstrating, as they were demanding a $ 160 minimum wage. However, violent clashes

[573] ICNL, Analysis on Draft Trade Union Law, 2015, p. 5-6.

broke out as hundreds of policemen and gendarmes were deployed to clear the protesting garment workers. Apart from the killings of 6 people, 23 human rights defenders and garment workers were arrested and charged with the responsibility for the clashes and were consequently sentenced to prison as a result of the demonstrations although lacking sufficient evidence. In contrast, no gendarmes were prosecuted due to the clashes. The aftermath of the clashes consisted of suspension of union registrations[574] while the government "announced that it was initiating a criminal investigation against six independent union leaders and summoned them to appear before a court" in September 2014.[575] Consequently, numerous trade union officers and garment workers are currently under investigation for alleged criminal activity, which several human rights observers claim to be politically influenced.[576] Taking these types of events into consideration, preventing anyone who has ever been convicted of a crime of any nature under Cambodian law may imply serious consequences for garment workers since it "provides employers and authorities with an incentive to levy charges on active or prospective Leaders in order to prevent them from holding or seeking leadership positions."[577]

Another aspect of the requirements stipulated in Article 20 of the Trade Union Law is the one involving foreign nationals in the garment industry. The law requires foreign nationals to have a legal and permanent residence in Cambodia while they must have worked in the country for at least two years in order to be elected a trade union officer. However, migrant workers, for instance, who are not necessarily seeking permanent residence, will most likely have difficulties meeting these requirements and thereby lose their right to be elected trade union officer. The consequence of the requirement may ultimately develop into a leadership problem within the trade union movement, as the general composition of trade union leaders in the garment industry might become too homogenous. As a result, diversity within unions and new and different thought patterns regarding trade unionism risk being forfeited in favour of empowering old practices and notions, which might hamper the development of progressive trade unions in the Cambodian garment industry. Taking this into consideration, it appears, as the requirements regarding foreigners constitute a Governmental tool in order to control and regulate foreign influence in Cambodian trade unions. From the government's point of view, foreign workers coming from nations with a different legal history and industrial relations history, may constitute a threat to the Government as they may provide different thought patterns and a critical approach of the structures Cambodian trade unions are operating in. As a consequence, it could possibly broaden the garment workers' knowledge and understanding of the concept of independent trade unions, which could potentially change the very structures and perceptions of the importance of democratic trade unions within the garment industry and ultimately the whole country.

Taking all of the requirements stipulated in Article 20 of the Trade Union Law into consideration, it becomes obvious that these constitute major threats to trade unions' organisational autonomy as they grant public authorities power to control and infer in the election of potential trade union leaders. This is nevertheless not surprising since the legacy of the past is still present, as the majority of trade union leaders who were in charge of state controlled unions during the 1980s, still figure prominently in union leadership today. Consequently, old concepts and practices are still nurtured and practiced amongst the majority

[574] Human Rights Watch, Cambodia: Stop Stalling Union Registrations, 2014, available at: https://www.hrw.org/news/2014/04/29/cambodia-stop-stalling-union-registrations
[575] Human Rights Watch, Work Faster or Get Out, 2015, p. 41.
[576] ICNL, Analysis on Draft Trade Union Law, 2015, p. 5.
[577] Ibid. p. 5.

of the trade unions, including the suspicious and hostile attitude towards independent unions. The Government is therefore keen on maintaining these structures, as they are more beneficial to maintain power in the country as well as undermining the development of independent unions. For instance, in exchange for holding high positions in the government and enjoy protection and support from the authorities, trade union leaders are operating in the interests of the Government rather than the members by actively opposing collective actions carried out by trade unions in the garment sector. As a result, independent trade unions in the garment industry loses recognition and capacity to raise their voice and make an impact since pro-government trade unions do not attend mass demonstrations or collective actions demanding improved labour rights and social justice since these activities are not in line with the interests of the government.

Consequently, the Cambodian Government is not willing to lose influence over elections of trade union officers in the garment sector, and therefore grants authorities tools in order to uphold old structures, which are empowering the Government and weakening independent unions. However, although public authorities may misuse all of these requirements, the wording of Article 20, which stipulates, "the Ministry in Charge of Labor may ask for more information if necessary,"[578] is the most troublesome. Consequently, despite meeting all requirements discussed above, authorities may ask for additional information. Due to this open-ended wording, authorities are granted more or less unrestrained power to infer in the election of trade union officers. In addition, due to its vagueness, the provision could be misused, as authorities may adjust the prerequisite required dependent on the traits of the individual wanting to be elected trade union officer. From a trade union perspective, it is of major importance that the choice of leader is adequate and democratic considering the present lack of communication between leaders and members within trade unions in the garment industry. Due to this, the power and influence of a vast majority of trade unions in the sector are concentrated to the trade union leaders whom are supported by the public authorities in order ensure that the trade unions continue to operate in the interest of the Government. As a result of this unbalanced disposition of power, many union members lack enthusiasm and interest regarding trade union matters, hampering the very functions of trade unions in the sector. Moreover, the assassination of the high-profiled trade unionist Chea Vichea in 2004 and the substandard judicial procedure following his murder, serves as an example of the dangerous environment trade union officers in the garment industry are operating in. As a reminder, suspicions still remain against Governmental involvement in his murder,[579] implying that authorities are more than willing to infer in the election of trade union officers in the Cambodian garment sector.

Article 29 of the Trade Union Law, which lists reasons for dissolving a trade union, including if "leaders, managers and those responsible for the administration were found of committing serious misconduct or an offense in the capacity of the union (…),"[580] also opens up for state interference. The potential implication of this provision is identical to Article 20 of the Trade Union Law, which stipulates that a trade union leader must never have "been convicted of any criminal offense". As was discussed above, due to the widespread corruption amongst factory managers and public authorities in Cambodia, many trade union officers and garment workers are being convicted or being under investigation although lacking sufficient evidence as these legal measures appears to be politically influenced. Taking the high number of strikes and

[578] Trade Union Law, Article 20.
[579] Hall, The ILO's Better Factories Cambodia Program: A Viable Blueprint for Promoting International Labor Rights?, 2010, p. 453.
[580] Trade Union Law, Article 29.

demonstrations in the garment sector into consideration, it becomes obvious that Article 29 opens up for misuse by public authorities as they are more or less entitled the power to dissolve a trade union by randomly levy charges on trade union officers. As a result, trade unions might be dissolved for being acknowledged as too progressive as these may be considered threatening to the Government. Authorities may also use the Article to promote pro-government trade unions by simply erasing their competition in the factories by dissolving independent unions. Hence, authorities are once again granted unrestrained power to decide the faith of trade unions in the industry, giving them control from the birth of a trade union (registration requirements) to its death (dissolution). Hence, public authorities might control trade unions throughout their entire lifetime; independency within trade unions in the garment sector will therefore be hard to come by as trade unions may become vulnerable to external actors, forcing them to accept bribes or deals in order to avoid dissolution or having their registration application rejected.

5.1.3 Burdensome provisions may hinder trade unions to establish themselves as a counterpart to be reckoned with

As mentioned above, it is mandatory for trade unions to register in order to obtain a legal personality. However, the requirements for the approval of the registration application are lengthy and burdensome. For instance, the application shall be accompanied by "an attachment of original copy of the official minutes of elections for establishment of a professional organisation" and an "affidavit guaranteeing that its bank account details will be provided within 45 days following receipt of registration."[581] These requirements are just examples, as there are many more that have to be fulfilled in order for trade unions to provide an adequate registration application. Additionally, these types of technical requirements must also be fulfilled in order to maintain a legal personality. For instance, unions have to "submit their annual financial statements and annual activity reports", which include, for example, "expenditure of the union" and activities of the union. They must also "provide details of its bank account within 45 days following receipt of registration" as well as "update the information as required by this law whenever changes are made thereto (…) within 15 working days."[582] By reading all these requirements, which trade unions have to fulfil in order to provide an adequate registration application and to maintain a legal personality, it is obvious that they are hard to meet, as they are technical and required to be fulfilled within different time frames, some of them within as less as two weeks. A factor, which has to be considered when studying these provisions, is the garment workers' lack of knowledge regarding labour law provisions. In general, the workforce in the garment factories has little knowledge of labour law legislation and trade unionism, implying that these technical provisions will have a disproportionate effect on workers' chances to meet these burdensome requirements. In addition to risking their registration application or legal personality, unions are also subjected to economic sanctions if they would fail to, for instance, undertake the obligations required regarding "maintenance of financial records."[583] As a result, the number of trade unions in the Cambodian garment industry may decline as bureaucracy increases, discouraging workers and their willingness to form trade unions.

Another example of burdensome provisions is the one provided for in Article 13 of the Trade Union Law. This Article requires trade unions' statutes to stipulate that a majority of its

[581] Trade Union Law, Article 12.
[582] Ibid. Article 17.
[583] Ibid. Article 78.

members must be assembled to allow strike action, while at least 50 % of the present members have to vote for industrial action to be executed. However, in order to make an assessment of this provision, one must take the complex reality of the garment industry into consideration. As been stated by the CFA, the judgement whether the quorum is set at an acceptable level is dependent on numerous factors, such as type of industry and the geographical isolation. The garment sector is complex and highly confrontational, which is due to a number of different factors. One of these factors is the garment workers' lack of adequate knowledge and understanding of labour law. Due to this, workers' number of individual grievances, which may contain little if any legal merit, escalates in a way that reduces the efficiency of the dispute resolution mechanisms. As a result, garment workers prefer to invoke strike action rather than resolve the dispute with the help of the dispute resolutions mechanisms, resulting in an unstable and confrontational industrial relations environment. Another factor, which affects the number of strikes in the sector, is the multiplicity of trade unions in the garment factories. Since garment workers tend to go from one union to another in order to find the most suitable one for their particular problem, trade unions within the same factory tend to get competitive in order to prevent losses of members or reputation. Hence, trade unions within the factories are required to give the impression of being strong and fearless, resulting in an increased willingness to invoke strike action against the factory managers. As a result, the industrial relations environment becomes highly confrontational. As a reminder of the complexity of the environment, from 2000 to 2010 the garment sector itself experienced over 800 incidences of strikes, involving more than 640 000 workers resulting in 12 535 855 working days lost.[584] Ever since the financial crisis in 2008, the number of strikes has increased annually in the garment sector, for instance, during the first three months of 2015, the number of strikes increased by 74 % compared to the same period the year before while it increased by 9.26 % in total from 2014 to 2015.

However, due to the high (50% +1) quorum stipulated in Article 13 of the Trade Union Law, trade unions' ability to invoke strike action will most likely be significantly reduced. This may in turn have serious consequences for trade unions in advocating for the rights and interests of their members. According to Hall and Kolben, serious violations of domestic and international labour law such as forced overtime without overtime pay, wage violations and poor health and safety standards were common features in the Cambodian garment factories. Furthermore, Kolben found that the right to freedom of association and the right to form and join a trade union were routinely violated as workers lost their jobs or were harassed or transferred to inferior jobs if they tried to form a union or speak out against abuses. In order for garment workers to gain a collective voice and oppose the poor conditions and labour rights violations occurring in the factories, it is vital that trade unions are able to act, and if the circumstances require it, to strike. Yet, the quorum (50 %+1) provided for in Article 13 of the Trade Union Law, constitutes a major threat for trade unions to act at all and establish themselves as a counterpart to be reckoned with. Instead, they will most likely lose respect and decisiveness as their most powerful weapon is significantly weakened. Moreover, this provision will most likely affect larger unions to a greater extent than small ones, as it will be harder for unions with 1000 members to gain majority than those with 10 members. Hence, the garment sector's largest trade unions, which are actually the ones who are able to speak up and make an impact due to their high membership numbers, will be more or less disarmed as a result of the quorum. The garment manufacturers will most likely benefit from this high quorum, as their counterpart is significantly weakened, resulting in a sector with an unbalanced disposition of power.

[584] Peng, Phallack, Menzel, Cambodian Constitutional Law, 2016, p. 520.

5.2 In what way may the Trade Union Law's provisions regarding freedom of association improve the industrial relations in the garment industry?

Although having identified a number of threats to trade unions in the Cambodian garment industry, deriving from the provisions of the Trade Union Law, it is of major importance to scrutinize possible implications of the law that may have a positive effect on the sector as well. Thus, in order to conduct a comprehensive study of the law and its provisions, one must be able to analyse the provisions from an employer perspective as well. Hence, the following chapter will shed light on the positive aspect of the Trade Union Law, which aims to analyse in what way the provisions may improve the industrial relations environment and thereby the garment sector.

One of the most characteristic traits of the Cambodian garment industry is the lack of CBAs, which is primarily due to the poor relationship between the parties in the sector. A CBA is considered an important industrial tool in order to regulate the labour market, including rights of workers and employers. It is therefore acknowledged as a cornerstone in creating a more constructive and mature industrial relations environment. However, the significance and positive effects of CBAs are yet to be realised in the Cambodian garment industry. Today, there are very few CBAs that would be considered qualitative since their content are generally weak and often simply a repetition of the law, one could therefore argue that they reflect the parties' incapability to negotiate in an adequate way. However, by re-establishing and reinforcing the relationship between employers and trade unions, the parties' willingness and creativity in finding solutions that are beneficial to both of them might prosper. As a result, this may motivate them to respect and enforce the collective agreements they are forging. Consequently, in order to address the problem in an adequate way, one must be aware of the factors influencing the relationship between trade unions and employers in the garment industry. This question is nevertheless complex and requires an interdisciplinary approach, which is more or less impossible to address in this thesis due to space and time constraints. However, it is possible to distinguish some factors that are affecting the relationship between the industrial partners in the garment sector, which hampers their willingness to forge CBAs.

5.2.1 A "clean up" that may lead to a unified trade union movement

As was highlighted in the previous chapter, there is a strong cultural suspicion and hostility towards independent trade unions amongst factory managers in the Cambodian garment industry, affecting the parties' willingness and capability to forge collective agreements in the sector. This attitude derives from a historical context where independent trade unions were non-existent since all unions were state-controlled, making the notion culturally and historically rooted in the Cambodian soul and consequently too complex and profound to change over night. Today, the general notion regarding independent trade unions amongst employers in the garment industry is that they are unserious and therefore not worth negotiating with, which in turn hampers the development of CBAs. This notion derives from the fact that there are over 3000 trade unions operating in the sector today and although being formally registered, many of them are either small in numbers or inactive. Due to this, there can be up to 10 trade unions in one garment factory, affecting the unions' motivation and ability to agree on various difficulties and strategies. As a result, they are unable to form a

unit or even exhibit a balanced picture to the employers, instead they project "an image of fragmentation and divisiveness"[585], making it hard for employers to basically outline which trade union they must negotiate with. As a result, employers' attitude towards trade unions in general aggravates, hampering the negotiation process and consequently decreases the chances to regain trust and respect between the parties.

Taking this into consideration, the Trade Union Law's registration provisions may therefore be justified to a certain degree considering the present problem with inactivity within the trade unions and the fact that they are too many in numbers. As been discussed above, these types of requirements are excessive and burdensome, however, these types of regulations appear to be necessary in order to provide an opportunity to "clean up" in the sector, and subsequently ensure that the trade unions within the factories are active and thereby facilitate the negotiation process between employers and trade unions in the garment industry. By requiring trade unions to remain active and thereby alert, trade unions in the sector might become more professional and consequently more structured and well organized. As a result, this may simplify the process of the trade union movement to establish a unified trade union voice that is representing and negotiating in the interests of the workers in an adequate way. Consequently, although the majority of the registration provisions are burdensome and incompatible with international law, this type of provisions might actually constitute a tool in order to establish a more constructive approach between the industrial partners within the sector and thereby facilitate the trade union movement in regaining the trust and reputation from the employers.

Another provision that might be of importance concerning the matter is Article 12 of the Trade Union Law, which requires a minimum of 10 workers in order to form a trade union. As been noted above, according to international standards, the figure is not too excessive although it is not in line with best practice according to the UN Special Rapporteur, it may nevertheless favour the reconstruction of more mature industrial relations in the sector. Considering the fact that many trade unions in the garment industry are not only inactive but also have few members, the minimum requirement of 10 workers may imply a positive effect for the trade union movement since the high number of minority unions might decrease. As a result, the trade union movement is given an opportunity to concentrate workers in fewer unions rather than having them scattered in many, resulting in fewer trade unions but with higher membership. This may ultimately bolster the trade union movement's ability and motivation to unify and agree on various difficulties and strategies since there will be fewer trade unions to agree with while they are representing more workers. Due to this, the process of creating a more unified and well-organized trade union movement might be facilitated. In addition, by stipulating a minimum requirement, workers' tendency of going from one union to another in order to find the most suitable one for their personal problem, may decline since the supply of different trade unions might ultimately decrease.

Hence, by obligating trade unions to be active and meet a number of requirements and to fulfil the minimum requirement of 10 workers in order to form a trade union, they may re-establish the trust and respect of the employers in the sector as they are forced to act and operate in a more professional way. This may additionally facilitate their process of forming a unified trade union movement and thereby a strong united force. Union solidarity has been a major problem for trade unions in the garment sector over the years, primarily due to union

[585] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 100 & 107.

multiplicity in the factories. Employers have taken advantage of this by playing one union against another in the factories, resulting in a large crack between trade unions in the sector. As a result, trade unions' desire and ability to organise and push for collective interests have been hampered. However, the registration requirements provided for in the Trade Union Law may be a step in the right direction as they may ultimately result in a more unified and structured trade union movement. As trade unions become more structured and less divided, employers' willingness to negotiate might subsequently also increase, which may ultimately result in an increase of CBAs in the sector.

5.2.2 Establishing strike action as the last resort rather than the only one

Another problematic consequence of union multiplicity in the garment factories is the rivalry between them as they are competing for acknowledgment, members and support from political parties. Since workers tend to go from one union to another in order to find the most suitable one for their particular problem, unions are forced to act in a way that many would consider deconstructive to the establishment of mature industrial relations in the garment industry. Consequently, due to the diverseness and multiplicity of trade unions in combination with the moving patterns of the workers, trade unions' tactics have become more aggressive in order to prevent potential losses of members or reputation. They are therefore more willing to invoke strike action in order to "flex their muscles" and demonstrate determination rather than trying to resolve issues by negotiating. As a result, the employers' willingness to negotiate with them aggravates, as they are acknowledged as radical and unreasonable. Moreover, as was discussed above, by studying the statistics regarding number of strikes in the sector during the past decade, it becomes evident that the number does not seem to decrease, as it rather appears to increase annually, reflecting a highly confrontational industrial relations environment where constructive relations between employers and workers are absent. An interesting fact regarding strike action in the sector is that 70 % of the strikes were invoked by unregistered trade unions in the factories, implying a chaotic and unconstructive environment where the need for numerous registration provisions appear to be necessary. One must nevertheless be aware of the trade unions' difficulty to have their strike actions deemed legal by the governments as employers often refuse to negotiate with them while authorities may linger their attempts to strike legally, indicating that the number must be read with caution.

Taking the industrial relations context into consideration, although the quorum (50% +1) provided for in Article 13 of the Trade Union Law is too high according to international standards, the intention of regulating industrial action by stipulating a specific quorum may constitute a potential solution to the problematic industrial relations environment in the garment sector. Today, the social environment is considered unpredictable as strike action is acknowledged as the only resort rather than the last one, contributing to a confrontational and unstable industrial environment where strike action is considered to be the standard measure when negotiations fail or demands are either ignored or not fulfilled. By requiring a minimum quorum before invoking strike action might therefore break this trend as strike action becomes more conditional, which might make trade unions more prone to use it as a last resort and thereby trying to solve the conflict by using other less radical measures. Consequently, the main function of the quorum is therefore to encourage trade unions to rather exhaust other avenues such as negotiating, and thereby encourage their counterparts to become more pro-active and understanding, before invoking strike action. Moreover, by requiring a certain percentage of the members' approval before invoking strike action, the

decision making on whether it is to be considered as an adequate measure or not will most likely be preceded by discussions, highlighting both advantages and disadvantages and thereby decreasing the risk of invoking strike action impulsively.

5.2.3 Most representative status may offer a different approach in negotiations

Another problematic consequence of union multiplicity in the garment factories is the vast amount of minority unions, which are disrupting and interfering the negotiations between the parties, reflecting the present disorganisation and lack of structure within the Cambodian trade union movement today. Due to this, the negotiation processes between the parties are hampered. Additionally, the CBAs are often disrespected by the minority unions, tarnishing the unions that have negotiated the CBA to set an example for more progressive and constructive industrial relations in the sector. In addition, union bodies such as federations and confederations are not able to control these minority unions whose actions are damaging the whole trade union movement and thereby its chances to re-establish its relation to the employers. According to CAMFEBA, due to the absence of clear guidelines regarding representativeness in the Labour Law of 1997, many individuals have grasped the opportunity to exploit the law and its ambiguities for personal interests. As a result, the establishment of trade unions regardless of representativeness has surged in the sector, resulting in quantity of unions rather than qualitative ones.[586] Taking this into consideration, it becomes evident that the sector is in need of a transformation from a quantitative to a qualitative representation in order to establish and enforce a constructive and sustainable industrial relations environment. Moreover, it is also problematic that individuals, who are genuinely working in the interests of the workers, lose at the expense of those who are taking advantage of the Labour Law for protectionist purposes such as, economic opportunities and solving personal vendettas.

Therefore, the Trade Union Law's provisions regarding most representative status might be of importance in order to deal with the present problem concerning minority unions in the garment factories. By obligating trade unions to be legally registered and having programs and activities that indicates that they are capable of providing professional services to its members, employers are provided a counterpart that is required to operate in the interests of the members. Moreover, by requiring at least 30 % per cent of the total workers in a given enterprise, and thereby ensuring representativeness, might affect the negotiation procedures to be more constructive and cohesive since employers are granted a counterpart that will most likely be more organized and unified. Furthermore, this may ultimately improve the industrial relations in the garment sector, as all unions are obligated to respect and enforce the result of the negotiations between the parties. However, these provisions risk affecting the workers' choice of union in an inadequate way. In addition, in order for this to work, minority unions have to respect and believe that the most representative union is operating in the interests of the members and not in the interests of the employers or the government. Considering the widespread corruption, this requirement might be hard to fulfil. Today, as was discussed above, rivalry and distrust between trade unions are common features, which are affecting the unions' willingness to trust and support one another, contributing to a fragmented trade union movement. However, the provisions concerning most representative status might constitute a solution to the complex industrial relations environment. Yet, one must be aware of that it will predominantly require a regaining of trust within the trade union movement due to the history of corruption amongst trade union leaders.

[586] CAMFEBA, Cambodia's Trade Union Law: A necessity, 2015, p. 6.

Hence, it might be possible for trade unions to influence the attitude of the employers towards trade unions in the sector by unify and giving an appearance of balance and reason, since employers in the sector consider them to be fragmented and unreasonable. Additionally, one must be aware that most of the employers are used to trade unions that are operating in the interest of the government, which also predominantly happens to benefit the employers. The majority of them are therefore not accustomed to a counterpart that has conflicting interests or are willing to take industrial action in order to have their demands observed and implemented. On the other hand, one could argue that this is a factor that should not hinder or affect the way trade unions should operate as they are entitled the right to take industrial action regardless of the attitude of the employers. This is a valid argument indeed; it is nevertheless beyond doubt that by invoking more strikes in the sector will make the industrial relations more constructive and sustainable. Instead, if the trade union movement is able to project an image of balance and reason by unifying trade unions and thereby create a united and well-organized force that are operating for collective interests rather than trying to outmanoeuvre each other, the trade union movement in the sector will most likely be more respected and considered as a counterpart to be reckoned with. As was discussed above, the provisions provided for in the Trade Union Law may be a step in the right direction due to the requirements trade unions are obligated to fulfil in order to operate legally. As a result, the image of the trade unions in the sector may go from a fragmented and confrontational counterpart to a united and reasonable one, increasing the chances of more successful negotiations between the parties and thereby the possibility of an increase of CBAs in the sector. This would most likely benefit both parties and the sector as a whole, as an increase of CBAs in the garment industry will most likely provide security and stability, contributing to the re-establishment of the industrial relations in the sector. However, as was described above, the employers' hostile attitude towards trade unions is culturally rooted and therefore too profound to change over night. In addition, the major threshold for developing constructive industrial relation is the widespread corruption in Cambodia, affecting all authorities and subsequently the chances to rebuild and reinforce the industrial relations. Thus, in order to drive the development in the right direction, one must be aware of the fact that is an on going process that will take time and patience to change, as there are no simple solutions to complex problems.

6. The Trade Union Law in relation to Kahn Freund's theory on the role of law in industrial relations

After having analysed the Trade Union Law's provisions in relation to domestic and international law and its potential positive and negative implications on trade unions in the Cambodian garment industry, the following chapter aims to elaborate the law in relation to Kahn Freund's theory concerning the role of law in industrial relations.

According to Kahn Freund, law may be applied in three different ways in order to address these requirements concerning collective labour law. The first one is acknowledged as "auxiliary" legislation, which is not used for direct intervention as it rather "seeks to promote collective bargaining, to ensure the observance of collective agreements, to define and delineate the freedom of organisation and the freedom to strike."[587] This form of legislation

[587] Davies and Freedland, Kahn Freund's Labour and the Law, 1983, p. 60.

subsequently aims to define and establish various standards of behaviour in the interaction between the industrial partners, including rules for their settlement. As a result, "rules of the game" are established.[588] For instance, the law may be applied in order to support the organisation and formation of unions and their recognition or spread trade unionism. The second way to apply legislation is termed "regulatory law", which implies that the law is used as an instrument to set standards and thereby create rights and obligations directly. Consequently, rules of employment are established, which both employers and workers are obligated to observe individually, implying that the law has a more interfering role compared to "auxiliary" legislation. The third and final way to apply law on collective labour law is termed "abstentionist" or non-interventionist", which in turn stems from the "collective laissez-faire" principle, which Kahn Freund described as "the retreat of law from industrial relations and of industrial relation from the law."[589] Consequently, this application of law implies a minimum of legislative intervention in the collective labour relations "and an insistence on the autonomy of industrial forces and on their freedom to regulate industrial society without interference from the state."[590]

After having elaborated the provisions of the Trade Union Law regarding freedom of association, it is obvious that the Trade Union Law is the opposite of non-interventionist law, as it predominantly entails provisions, which directly intervene in the workers' freedom of association by stipulating standards and obligations workers are obligated to observe in order to exercise their right. For instance, Article 13 of the Trade Union Law requires trade unions' statutes to stipulate that a majority of its members must be assembled to allow strike action, while at least 50 % of the present members have to vote for industrial action to be executed. Hence, the legislation intervenes directly, as it sets an expressed standard that has to be met in order for unions to invoke strike action, making the right conditional. Furthermore, the Article also stipulates numerous requirements that unions' statutes have to comply with in order to be regarded as legal. Kahn Freund argued that it was inadvisable to use the law with the intention to lay down minimum rules of "democracy." He emphasized the importance of union autonomy, as he did not believe that "union democracy is so clearly desirable that it should to any extent be imposed by the State."[591] Hence, he stated regarding the dilemma "between imposing standards of democracy and protecting union autonomy the law must come down on the side of autonomy."[592] This interfering function of law is also evident when studying the provisions regarding the right to form and join trade unions. For example, in order for the registration application to be adequate, it has to fulfil numerous requirements such as provide "an attachment of original copy of the official minutes of elections for establishment of a professional organisation" and an "affidavit guaranteeing that its bank account details will be provided within 45 days following receipt of registration."[593] These forms of legislative interventions are furthermore also present in trade unions' desire to maintain a legal personality. Hence, compared to "auxiliary" legislation, these provisions are not supportive since they leave no room for the parties to establish and develop a common interpretation of the provisions. The legislation is subsequently designed to intervene in the collective labour law by stating various requirements directly rather than promote the right to freedom of association. This notion is corroborated by Inghammar and Pietrogiovanni, whom elucidate

[588] Davies and Freedland, Kahn Freund's Labour and the Law, 1983, p. 60.
[589] Kahn-Freund, Labour and the Law, 1977, p. 9.
[590] Dukes, Constitutionalizing Employment Relation: Sinzheimer, Kahn-Freund, And the Role of Labour Law, 2008, p. 356.
[591] Kahn-Freund, Labour and the Law, 1977, p. 212.
[592] Ibid. p. 213.
[593] Trade Union Law, Article 12.

that the Trade Union Law "specifies in a rather detailed fashion a number of features which, from a comparative perspective, are usually developed through years of case law, tradition or collective bargaining."[594]

In general, legislation that is considered "regulatory law" is predominantly "used quite obviously to restrict the power of management."[595] Hence, regulatory law primarily aims to ensure a minimum level of a certain right in order to strengthen the workers, such as minimum wage. However, this appears to not be the case concerning the Trade Union Law, as it appears to restrict the power of trade unions and their ability to exercise freedom of association rather than guarantee certain rights. Hence, the Cambodian Government's stated purpose to improve the industrial environment in the Cambodian garment sector by adopting the Trade Union Law appears to have the opposite effect, as trade unions are significantly weakened by the legislative interventions in their exercise of freedom of association. The situation resembles the one Kahn Freund acknowledged when he studied British labour law. He argued that unions in the United Kingdom could not be ensured independence since they "could not rely on state support in the form of labour laws."[596] As a result, he argued that legal intervention in collective labour law was neither necessary nor desirable, emphasizing the importance of law as non-interventionist. However, taking the confrontational industrial relations environment of Cambodia into consideration, a non-interventionist law would perhaps not be the solution either considering the unbalanced disposition of power between the industrial partners. Yet, Kahn Freund emphasizes "that which can be achieved for the workers through legislation is very frequently far below that which they can get through collective bargaining", implying that a less interfering law would result in more rights for the workers.[597]

Considering how and what the provisions of the Trade Union Law regulate regarding freedom of association, it is obvious that almost every aspect of the right are regulated, and sometimes extremely detailed. It is therefore relatively easy to categorize these provisions as regulatory law. However, the Trade Union Law also entail provisions concerning freedom of association, which are ambiguous such as Article 65 (f), which stipulates that it is considered unlawful for a trade union or its representatives to "agitate for purely political purposes." Due to the vagueness of these types of provisions, it is harder to categorize them in accordance with the theory of Kahn Freund since they are not as detailed as, for instance, the registration provisions, and subsequently more open for interpretation. Does this mean that they are supportive in the sense of auxiliary law or restrictive as regulatory law?

The purpose of "auxiliary" legislation is to promote and delineate freedom of association and thereby establish rules of the game by establishing standards of behaviour in the interaction between the industrial partners. Although these types of provisions open up for the industrial partners to establish a common interpretation due to their vagueness, the main purpose of them do not seem to be promoting or simplifying the industrial partners' abilities to exercise their right to freedom of association and spread trade unionism. Instead, due to their intrusive nature, they appear to be regulatory law. For instance, Article 65 (f) stipulates that it is

[594] Inghammar & Pietrogiovanni, The Role of Globalized Industrial Relations and Collective Agreements for the Promotion of Fundamental Labour Rights in Southeast Asian Garment Industry, 2016, p. 7.
[595] Davies and Freedland, Kahn Freund's Labour and the Law, 1983, p. 37.
[596] Dukes, Constitutionalizing Employment Relation: Sinzheimer, Kahn-Freund, And the Role of Labour Law, 2008, p. 343.
[597] Davies and Freedland, Kahn Freund's Labour and the Law, 1983, p. 57.

considered unlawful for a trade union or its representatives to "agitate for purely political purposes." This provision is vague and opens up for misuse by the public authorities, granting them more unilateral power over the unions' ability to exercise freedom of association. Additionally, it also creates obligations directly for trade unions to not agitate for purely political purposes, implying that the provision itself is regulatory law.

7. Conclusion

The main purpose of the thesis has been to elaborately analyse the provisions of the Trade Union Law concerning freedom of association and their possible implications for trade unions' ability to exercise the right in the Cambodian garment sector. The law has also been analysed in relation to domestic and international law.

Cambodia ratified the ICCPR and the ICESCR in 1992, whereas the ILO Convention No. 87 was ratified in 1999. Due to its ratifications, the country is obligated to respect, protect and fulfil the Articles of these international instruments regarding freedom of association. However, the interrelation between these international sources is uncertain. The ILO argued already in the preparatory work on the ICCPR that it "could in most cases produce better results"[598] while it considered itself to be the most appropriate actor in implementing economic, social and cultural rights.[599] Taking this into consideration, it appears as ILO acknowledges itself as the most adequate actor regarding the implementation and follow-up of workers' right to freedom of association. This pattern is also evident when analysing international case law concerning the right. For instance, unlike the CFA and CEACR, freedom of association has not gained as much attention by the supervisory bodies of the UN covenants, implying that they have handed over the responsibility to establish an international case law to the ILO. This notion is furthermore corroborated by the UN bodies' unwillingness to provide a general comment on the right. Consequently, although international law regarding freedom of association is comprehensive, the protection is unilateral, as the ILO supervisory bodies have had a prominent role in establishing the right at the expense of the HRC and CCESCR. In addition, both Article 22 of the ICCPR and Article 8 of the ICESCR entail an identical reference to the ILO Convention No. 87, implying that they provide an identical protection as the ILO Convention. However, the ILO Convention No. 87 is considered to provide the most extensive scope of protection, suggesting that Cambodia is primarily obligated to apply the ILO Convention No. 87. According to the CEACR however, the "international labour standards and the provisions of related United Nations human rights treaties are complementary and mutually reinforcing."[600] Hence, the international instruments complements each other, suggesting that Cambodia is obligated to observe all of them, regardless of their vague interrelationship. Additionally, the Cambodian Constitution expressly stipulates, "the Kingdom shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights (…)." This obligation was furthermore reinforced through a decision of the Constitutional Council in 2007,[601] emphasizing that international instruments are to be considered domestic law and must "be directly taken into account when applying and interpreting national Cambodian law."[602]

Thus, taking the international protection into consideration, it becomes obvious that the Trade Union Law is in clear violation to international law and consequently the Cambodian Constitution. In relation to international standards, the majority of the provisions are either

[598] GAOR 10th Session 1995 A/2929, chapter VII, p. 149.
[599] Ibid. chapter IX, p. 40.
[600] ILO, "Giving globalization a human face", International Labour Conference, 101st Session, 2012, para 45.
[601] The Constitutional Council, Case No. 131/003/2007 of June 26, 2007, Decision No. 092/003/2007 CC.D of July 10, 2007.
[602] Peng, Phallack,& Menzel, Introduction to Cambodian Law, 2012, p. 489.

too detailed, which infringes the principles of freedom of association or too ambiguous, granting unrestrained power to the authorities. Additionally, the requirements required in order to exercise the right are either too high or not in accordance with best practice, aggravating trade unions' abilities to exercise their right to freedom of association. Hence, the adoption of the Trade Union Law implies that Cambodia violates its obligations deriving from the ratifications of the ILO Convention No. 87 and the UN covenants to respect, protect and fulfil the Articles stipulated in the international instruments.

However, although the majority of the Trade Union Law's provisions violate international law, the international instruments are not capable of affecting the content of the law by applying material sanctions. Yet, although the interpretations of the international supervisory bodies are not legally binding to member states, Cambodia is obligated to consider their views in good faith, suggesting that their rulings may have a certain impact on the law's implementation. In addition, the international supervisory bodies may also publically criticize the Trade Union Law within the international community, placing Cambodia and the Trade Union Law under international spotlight. By turning the international attention to Cambodia, consumers' awareness regarding working conditions in the Cambodian garment factories may increase. NGOs such as Clean Clothes Campaign and consumers therefore possess a great amount of power in affecting the law, as international pressure may increase. In addition, they may demand companies operating in the country to require and assure that the Trade Union Law is compatible with international law. Considering the sector's vital part in the Cambodian economy and society, the Cambodian government has a genuine interest to consider the attitude and opinions of the multinational companies operating in the country's garment industry. Hence, consumers in general and the development and establishment of "informed consumerism" in particular, have a vital role in affecting the Trade Union Law by demanding that the law meets international standards.

In relation to already existing Cambodian law, the law provides a more comprehensive protection than the Labour Law and Constitution together, as it covers more aspects of the right to freedom of association. The provisions are furthermore much more detailed, specifying features, which "are usually developed through years of case law, tradition or collective bargaining."[603] As a result, the industrial partners are not granted mandate and trust in establishing and developing common interpretations of the right to be exercised. Moreover, the law sets higher standards than the Labour Law and Constitution for trade unions to meet in order to exercise their right to freedom of association. Taking these characteristics into consideration, it is obvious that the Cambodian Government considers an increase of legislation as solution to a more constructive industrial relations environment in the garment industry. In relation to Kahn Freund's theory on the role of law in collective labour law, the Trade Union Law may consequently be termed "regulatory" law, considering the intrusive nature of the provisions and their level of detail. However, although the law covers areas that used to be unregulated, it also contains provisions that are ambiguous. One could therefore argue that these provisions grant power to the industrial partners in developing and establishing freedom of association, suggesting terming the law "auxiliary" rather than "regulatory." Yet, the design of these provisions appear to grant more power to state authorities rather than supporting the industrial partners in establishing a common

[603] Inghammar & Pietrogiovanni, The Role of Globalized Industrial Relations and Collective Agreements for the Promotion of Fundamental Labour Rights in Southeast Asian Garment Industry, 2016, p. 7.

interpretation of the right, implying that its function appears to be interfering rather than supportive.

What practical consequences the Trade Union Law will imply for trade unions' right to freedom of association in the Cambodian garment industry is a complex question, depending on numerous coincidences and actors. Hence, the answer will not disclose itself until years from now. However, by analysing its provisions in relation to a specific context, it is possible to make an assessment of its potential implications. Considering the design of the law's provisions in relation to the Cambodian garment industry, one might argue that the Trade Union Law constitutes a major threat to Cambodian trade unions and their right to freedom of association. Ambiguous provisions may grant public authorities excessive discretionary control over trade unions' entire lifetime, resulting in a significant decrease of organisational autonomy, making unions more vulnerable to external actors. As a result, state interference in trade union matters is enabled, threatening the very concept of independent trade unions in the Cambodian garment industry. This may in turn hamper the development of strong, progressive trade unions. Furthermore, by decreasing independency within unions, the prospects of establishing a genuine dialogue between the parties are significantly reduced, decreasing the chances of establishing and developing a constructive and sustainable industrial relations environment. Additionally, unions may be significantly weakened due to burdensome provisions, as requirements are either too complex to meet or too hard to fulfil. As a consequence, workers, which in general lack adequate labour law knowledge, are discouraged from forming unions whereas unions themselves might lose strength and decisiveness, affecting the unions' possibilities to establish themselves as a counterpart to be reckoned with. However, the discussion regarding the Cambodian garment sector is far more complex. Although violations of garment workers' labour rights are frequently reported; trade unions also have a responsibility in establishing and developing constructive industrial relations. Due to rivalry, multiplicity and unrepresentativeness amongst unions in the garment sector, the movement "projects an image of fragmentation and divisiveness,"[604] making it incapable of forming "a significantly unit or even a balanced picture."[605] As a result, employers' willingness and unions' ability to establish sustainable and constructive industrial relations are negatively affected, hampering the chances of forging qualitative CBAs in the garment sector. Taking this aspect into consideration, the Trade Union Law may subsequently offer a solution to unify unions in order to push for collective demands.

Consequently, the Trade Union Law entails provisions, which may hamper and eventually disable trade unions to exercise their right to freedom of association while independent unions might decrease in numbers. On the other hand, it may simplify the process of creating a united and well-organized force that are operating for collective interests rather than trying to outmanoeuvre each other. Hence, although the majority of the provisions are incompatible with international law, the intention to regulate unions to some extent, may offer an alternative solution. However, after having analysed its possible positive and negative implications, it is obvious that the law in general might do more harm than good for trade unions in the Cambodian garment sector. The criticism of NGOs and unions following the adoption of the law may therefore be considered justified. Yet, although the general notion regarding the content of the law is negative, the enforcement of the law is directly decisive

[604] Nuon & Serrano, Building Unions in Cambodia: History, Challenges, Strategies, 2010, p. 100 & 107.
[605] Inghammar & Pietrogiovanni, The Role of Globalized Industrial Relations and Collective Agreements for the Promotion of Fundamental Labour Rights in Southeast Asian Garment Industry, 2016, p. 15.

whether the law will have positive or negative implications for unions in the sector. This is in line with the notion of the ILO, which emphasized that it is "essential for the government, together with union and employers, to turn its attention to implementing in a fair and impartial manner."[606] However, according to Hall, "(t)he single greatest barrier to guaranteeing the rights of workers in Cambodia is the culture of impunity and corruption."[607] Hence, considering the widespread corruption amongst public authorities in general and labour inspectors in particular[608], the prospects for implementing the law in a fair manner are fairly small, implying that the vague provisions will be misused while the burdensome provisions will be strictly followed.

In order to understand this potential scenario, one must scrutinize the country's corruption, which is historically rooted and is therefore affecting all public instances in Cambodia. During the 1980s, the few unions that operated were state-controlled with the intention to serve the interests of the governments by spreading propaganda and promoting communist ideologies rather than serving the interests of the members. However, as independent unions started to develop during mid-1990s, the union movement developed into "a more complex structure of enterprise-level unions, union federations, and union alliances with different affiliations."[609] Independent unions consequently started to emerge in large numbers in the sector[610], redefining the meaning of unionism while questioning the functions of trade unions in general. Due to this development, garment workers began to unionize and consequently gain a collective voice, as they started to advocate for labour rights. This development was, and is to this day, acknowledged as threatening to the CPP, as workers' awareness and knowledge of unionism is steadily increasing. Taking this into consideration, the CPP indeed has incitement to control and weaken independent trade unions, as they may ultimately undermine the party's chances to remain in power, as workers' motivation in advocating for improved working conditions is increasing.

The intention of the Government to weaken independent trade unions by hampering the enforcement of labour legislature has been demonstrated before in Cambodian history. Kolben argues, following the adoption of the Labour Law in 1997, the Government was keen on not enforce the law too "stringently"[611], as it used the garment industry as a tool to accomplish its political and financial interests. In order to thwart the enforcement of the Labour Law, labour inspectors were bought, resulting in numerous violations of workers' labour rights although having adopted a comprehensive Labour Law. Another factor, which reinforces the belief that the enforcement of the Trade Union Law will be conducted in an inadequate way, is that union leaders still enjoy protection from the authorities as they hold high positions in the government in exchange for their loyalty. As a result, influential trade union leaders oppose collective demands and actions, as they work in the interests of the Government rather than the members, fragmenting the trade union movement and its chances to unify and create a united force. In addition, suspicions still remain against Governmental

[606] ILO's statement on Trade Union Law in Cambodia, 2016, available at: http://www.ilo.org/asia/info/public/pr/WCMS_466553/lang--en/index.htm
[607] Hall, Human Rights and the Garment Industry in Contemporary Cambodia, 2000, p. 169.
[608] See for instance: Roberston, In Flawed Union Law, Hope Remains for Greater Transparency, Human Rights Watch, published in The Cambodia Daily, 2016, available at: https://www.hrw.org/news/2016/05/02/flawed-union-law-hope-remains-greater-transparency
[609] Peng, Phallack & Menzel, Cambodian Constitutional Law, 2016, 513.
[610] From about 100 unions in 2001 to 3000 in 2015.
[611] Kolben, Trade, Monitoring, and the ILO: Working To Improve Conditions in Cambodia's Garment Factories, 2004, p. 85.

involvement in the murder of Chea Vichea,[612] suggesting that the Cambodian Government is willing to take extreme measures to control and affect unions in the garment sector. Consequently, considering the widespread corruption and its underlying motives, the enforcement of the Trade Union Law will most likely be conducted in an unfair manner, affecting the potential implications of the law.

Finally, an essential factor that has to be taken into consideration regarding the possible implications of the Trade Union Law is the political context of Cambodia. The recent elections held in 2013, suggests that the power of the reigning party, CPP, is diminishing whereas the support of the opposition, CNRP, is increasing. As a result, the risk of violence may increase, which in turn may affect the general elections that will be held in 2018. Taking the previous political transitions into consideration, this potential transition may as well be a violent one. In addition, the aftermath of the general elections of 2013 has been chaotic as the CNRP accused the CPP of poll fraud while the leader of the CNRP, Sam Rainsy, left Cambodia in 2016 after being charged with defamation and incitement.[613] After having his royal pardon rejected by the leader of the CPP, Hun Sen[614], he resigned as President of the CNRP in February 2017 while he is still banned from political activity in Cambodia.[615] Consequently, the context where the Trade Union Law is being implemented is underpinned by political instability and uncertainty, which may affect the implementation of the Trade Union Law and subsequently its implications for unions in the garment sector. However, how this potential scenario will unfold and affect the Trade Union Law is yet to be seen.

[612] Hall, The ILO's Better Factories Cambodia Program: A Viable Blueprint for Promoting International Labor Rights?, 2010, p. 453.
[613] Odom, Sam Rainsy a No-Show in Kem Ley Defamation Case, The Cambodia Daily, 2016, available at: https://www.cambodiadaily.com/brief/sam-rainsy-no-show-kem-ley-defamation-case-116948/
[614] Sokhean, Hun Sen Rejects CNRP Request for Pardons, The Cambodia Daily, 2016, available at: https://www.cambodiadaily.com/news/hun-sen-rejects-cnrp-request-pardons-119278/
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