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Right to Collective Bargaining and to Strike in Cambodia's Apparel Industry

A Legal Implication of the Labour Law
and Law on Union of Enterprises

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Contents

CHAPTER ONE: INTRODUCTION	1
1. Background	1
2. Research question and objective.....	3
3. Methodology and materials.....	4
4. Delimitations.....	5
5. Disposition	6
CHAPTER TWO: INTERNATIONAL STANDARDS ON THE RIGHT TO COLLECTIVE BARGAINING	9
1. Definition and Objective of the Right to Collective Bargaining	9
2. Right to Collective Bargaining in International Instruments	11
2.1. The ILO's instruments	11
2.2. The UN's instruments.....	12
2.3. The European's instruments.....	14
2.4. The ASEAN Declaration on Human Rights	15
3. General Principle of the Right to Collective Bargaining	15
3.1. Subject, parties and issues in the collective bargaining.....	15
3.2. Governing Principle in Collective Bargaining Process.....	18
4. Concluding remark	22
CHAPTER THREE: INTERNATIONAL STANDARDS ON THE RIGHT TO STRIKE.....	23
1. Definition and Objective of the Right to Strike.....	23
2. Rights to Strike in International Instruments	25
2.1. The ILO's instruments	25
2.2. The UN's instruments.....	27
2.3. European instruments	29
2.4. The ASEAN Declaration on Human Rights	30
3. General Principles of the Right to Strike	31
3.1. Types of worker who enjoy the right to strike	31
3.2. Condition for exercising the right to strike.....	33
3.3. Types of legal strike action.....	34
4. Concluding Remarks	34
CHAPTER FOUR: SCOPE OF THE RIGHTS AND STATE OBLIGATIONS CORRESPONDING TO THE RIGHT TO COLLECTIVE BARGAINING AND THE RIGHT TO STRIKE.....	36
1. General limitation of the rights to collective bargaining and to strike	36
1.1. Prescribed by law.....	36
1.2. Necessary in a democratic society.....	37
1.3. Legitimate aim pursued.....	38

2.	State obligations corresponding to the rights to collective bargaining and right to strike	38
2.1.	Obligation to respect.....	38
2.2.	Obligation to protect.....	39
2.3.	Obligation to fulfill.....	39
3.	Concluding remark.....	39
CHAPTER FIVE: THE ILO SUPERVISORY MECHANISM		41
1.	Regular system of supervision	41
1.1.	Committee of Experts on the Application of Conventions and Recommendations ..	41
1.2.	Tripartite Committee Conference on the Application of Conventions	43
2.	Special procedures	43
2.1.	Procedure for Representation on the Application of Ratified Conventions	44
2.2.	Procedure for Complaint over the Application of Ratified Conventions.....	44
2.3.	Special Procedure for Complaints regarding Freedom of Association	45
3.	Concluding remark.....	47
CHAPTER SIX: RIGHTS TO COLLECTIVE BARGAINING AND TO STRIKE IN CAMBODIA: AN ANALYSIS OF THE TWO LABOUR LAWS IN COMPARISON WITH INTERNATIONAL STANDARDS		48
1.	Cambodia’s Constitution.....	48
2.	The Labour Law	50
2.1.	The right to collective bargaining.....	50
2.2.	The right to strike	52
3.	Law on Unions of Enterprises.....	56
3.1.	The right to collective bargaining.....	56
3.2.	The right to strike	60
4.	Concluding remark.....	62
CHAPTER SEVEN: CHALLENGES SURROUNDING THE EXERCISE OF RIGHTS TO COLLECTIVE BARGAINING AND TO STRIKE IN CAMBODIA		63
1.	Judicial harassment	64
2.	Act of dismissal against trade unionists	66
3.	Short-term contract	68
4.	Intimidation and physical attack.....	69
5.	Politically dominated and incompetent judicial system	71
6.	Corruption.....	72
CHAPTER EIGHT: CONCLUSION.....		74
BIBLIOGRAPHY.....		77

Summary

This paper is designed to examine the implications of Cambodia's labour legislation, namely the Labour Law and the newly adopted Law on Union of Enterprises on the exercise of the rights to collective bargaining and to strike in Cambodia's apparel industry. Both laws are adopted by the Cambodian government in order to purportedly provide an effective and efficient safeguarding umbrella for workers in particular to exercise their fundamental labour rights, among others, including rights to form and join trade union, rights to function freely and bargain collectively, rights to stage a legal strike, and right to organise their activities without state's interference, in a manner that is in line with international human rights law and international labour standards.

The rights to collective bargaining and to strike are recognised in various international human rights instruments in which Cambodia is a State member, including the ILO's Convention concerning Freedom of Association and Protection of the Right to Organise (No. 87)¹, ILO's Convention concerning the Right to Organise and Collective Bargaining (No. 98)², UN's Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The rights as such are also embodied in Cambodia's supreme law, the Constitution, which fully pledges to guarantee all ranges of human rights safeguarded in international human rights instruments and renders unconstitutional and void any *lex specialis* which depart from the very essence of the Constitution itself.

Nevertheless, *de facto* enjoyment of the rights to collective bargaining and to strike in particular and rights to freedom of association in general by Cambodian workers is increasingly weakened by several issues. One of the main issues concerning the exercise of the rights *per se* is the legislative measure adopted by the Cambodia's government. The adoption of the highly contentious Law on Union of Enterprises (trade union law) as a complementary legislation and the implementation of the existing Labour Law are questionable. Ambiguities and insufficiencies in substantial provisions regarding the exercise of the rights to strike and collective bargaining is a major issue considering interpretation and application of the new legislation. Administrative requirements are also moving to the intrusive threshold which may be incompatible with the standards of the international labour rights instruments. Total discretion of power given to the administrative bodies are worryingly problematic in the case where the right and interests of numbers of trade unions in Cambodia are at stake.

More importantly, *de facto* exercise of workers' right to freedom of association in general and rights to collective bargaining and to strike in particular is not guaranteed due to numerous contextually surrounded challenges. The challenges faced by garment workers and their trade unions occur in various forms, including baseless criminalisation, arbitrary arrest and detention, the utilisation of short-term

¹ Cambodia has ratified the Freedom of Association and Protection of the Right to Organise Convention (No.87) on August 23, 1999, available on the International Labour Organisation's website via:

http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103055

² Cambodia has ratified the Right to Organise and Collective Bargaining Convention (No.98) on August 23, 1999

employment contract, attack on physical integrity, anti-union discrimination – workers dismissal, and endemic corruption.

Therefore, this thesis concludes that the adoption of the new law on trade union and the implementation of existing labour law is just a legislative arsenal through which the government is capitalising to suppress and silence the workers' and independent trade unions' voice in addition to the existing repressive tools, including the use of politically influenced judiciary and politically motivated criminalisation against independent trade unions, union activists and union leaders within the Cambodia's growing apparel industry.

Preface

First and foremost, I would sincerely like to thank my supervisor, Lee Swepston, for his continuous support, encouragement and supervision on my work since the preliminary stage. Without his invaluable guidance, this paper will not surely be successfully completed.

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Abbreviations:

AC	Arbitration Council
ACU	Anti-Corruption Unit
ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and People's Rights
ADHOC	Cambodia Human Rights and Development Association
AHRD	ASEAN Human Right Declaration
ASEAN	Association of Southeast Asian Nations
CBA	Collective Bargaining Agreement
CCHR	Cambodian Centre for Human Rights
CCPR	Committee on Civil and Political Rights/Human Rights Committee
C.CAWDU	Coalition of Cambodian Apparel Workers Democratic Unions
CESCR	Committee on Economic, Social and Cultural Rights
CFA	Committee on Freedom of Association
CLC	Cambodian Labour Confederation
CPP	Cambodian People's Party
CUMW	Collective Union of Movement of Workers
DCM	Direct Contact Mission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ESC	European Social Charter
FDCs	Fixed Duration Contracts
FTUWKC	Free Trade Union of Workers in the Kingdom of Cambodia
GMAC	Garment Manufacturers Association of Cambodia
HRC	Human Rights Council
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC	International Labour Conference
ILO	International Labour Organisation
ITUC	International Trade Union Confederation
LICADHO	Cambodian League for the Promotion and Defense of Human Rights
MLVT	Ministry of Labour and Vocational Training
MOI	Ministry of Interior

MOJ	Ministry of Justice
OHCHR	Office of High Commissioner on Human Rights
RGC	Royal Government of Cambodia
SRFAA	Special Rapporteur on Freedom of Association and Assembly
UDCs	Undetermined Duration Contract
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNTAC	United Nation Transitional Authority in Cambodia
WFUF	Workers Friendship Union Federation

CHAPTER ONE: INTRODUCTION

1. Background

Strike action has generally been regarded both as an essential mode and last resort for workers and their respective association in pursuit of their individual or collective demands, thereby promoting and defending their social and economic interests.³ It mostly occurs in the circumstance of failure to offer so-called decent working conditions by employers and/or state authority's legislation through collective bargaining.⁴ The right to strike is therefore internationally recognized as an intrinsic corollary of the fundamental right of freedom of association and collective bargaining.⁵ It is undeniably crucial for millions of people, to proclaim collectively their rights via protest action, from civil and political to socio-economic and cultural rights. This, moreover, can extend to the demands of people in relation to government social and economic policy. As Maina Kiai (2017) comments, it formulates part of the basic civil liberties to which respect is indispensable for the meaningful exercise of trade union rights.⁶

The existence of the right to strike, moreover, has given further sustenance to the internationally recognized right to collective bargaining. Whilst the right to strike is not to be restrained to the progression or defense of collective bargaining,⁷ the right to collective bargaining render, on the workers' side, no meaningful practical outcome in the absence of a right to strike. Without the latter right, a right to collective bargaining definitely amounts to a right to "collective begging."⁸ Given profound threats of removal and discrimination initiated by employer side, the collective voice confronting employers by workers' action in provisionally suspending their work through strike or stoppage will certainly be a corresponding measure employees can afford. It reinforces the collective bargaining process and enables workers to challenge companies and governments on a more equal footing, without which workers will be entrenched to poverty, inequality, limited democracy and human dignity. This interdependence has been universally recognised.

The rights to collective bargaining and to strike have long been enshrined in international law, in global and regional instruments, such as in the ILO Constitution, Freedom of Association and Protection of the Right to Organise Convention (Convention No. 87), Right to Organise and Collective Bargaining

³ Gernigon Bernard, Otero Alberto and Guido Horacio, 1998, *ILO Principles Concerning the Right to Strike*, International Labour Organization, page 11

⁴ International Labour Organization, *Labour Legislation Guidelines*, Chapter V, "Substantive provisions of labour legislation: The right to strike", available on <http://www.ilo.org/legacy/english/dialogue/ifpdial/1g/noframes/ch5.htm>

⁵ Ibid

⁶ Maina Kiai, 2017, *UN rights expert: "Fundamental right to strike must be preserved"*, United Nation Office of High Commissioner for Human Rights (UNOHCHR), available on <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21328&LangID=E>

⁷ KD Ewing and J Hendy, 2011, *Days of Action, The Legality of Protest Strikes against Government Cuts*, Institute of Employment Rights, Liverpool at p. 19.

⁸ International Trade Union Confederation (ITUC), March 2014, *The right to strike and the ILO: The legal foundations*, page 15, originally quoted from German Federal Labour Court (Bundesarbeitsgericht) Judgment 10 June 1980 (Case 1 AZR 822/79): "Against the background of this conflict of interests collective bargaining without the right to strike in general would be nothing more than collective begging (Blanpain)."

Convention (Convention No. 98), Collective Bargaining Convention (Convention No. 154), the UN's International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN's International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), and the American Convention on Human Rights (ACHR), ASEAN Human Right Declaration (AHRD), and African Charter on Human and People's Rights (ACHPR). The right to strike has in effect become customary international law.⁹

It is notable that no exact term of definition of strike action has been laid down in any provision of international instrument which would explicitly allow definitive conclusions to be drawn with regard to the legitimacy of the various ways in which the right to strike may be applied.¹⁰ Nevertheless, some forms of strike action, which do not fall into a category of typical work stoppages (including occupation of the workplace, go-slow or work-to rule strikes), have been acknowledged as legitimate by the Committee on Freedom of Association, given that they are carried out in a peaceful manner.¹¹

Like in the rest of the world, strike action has become a valuable mean for Cambodian workers to claim their legitimate benefits and rights safeguarded under both national and international law since the country has opened its door to the globalised market and foreign investment. Within the past two decades, Cambodia has seen a surprisingly rapid economic growth, following the introduction of free market ideas which has been brought at the same time with the ideology of westernised liberal multi-party democracy through which the country's first ever free and fair election was held in 1993 under the sponsorship of the United Nations Transitional Authority in Cambodia (UNTAC).

The main driving momentum of economic growth for these years is owed to the three main industries. The textile, footwear and garments is considered to be, and in the long-run will continue to be, one of the country's main economic growth pillars together with agriculture and service sector, gradually pushing the country to reach a new status of lower-middle income country.¹² The textile industry itself is primarily organized in "fractions and supply chains of contractors and sub-contractors"¹³ owned by multinational brands, including H&M, Levi's, Puma, Gap, Nike and Adidas, which manufacture goods that will eventually be sold to the US and EU markets. The sector totally employs more than 600 000 workers in 640 factories, and accounts for approximately 70% of the country's exports.¹⁴ In 2015, the value of the

⁹ Maina Kiai, 2017, *UN rights expert: "Fundamental right to strike must be preserved"*, United Nation Office of High Commissioner for Human Rights (UNOHCHR).

¹⁰ Gernigon, Bernard; Odero, Alberto; and Guido Horacio, 1998, *ILO Principle Concerning the Right to Strike*, International Labour Office, Geneva, page 12.

¹¹ Ibid.

¹² Asian Development Bank and ILO, *Cambodia Addressing the Skills gap*, 2015, page 29.

¹³ Inghammar & Pietrogiovanni, 2016, *The Role of Globalized Industrial Relations and Collective Agreements for the Promotion of Fundamental Labour Rights in Southeast Asian Garment Industry*, page 4.

¹⁴ Ibid. p. 4

industry stood at 11% of the Cambodian economy while the sector constituted 2% out of the country's 7% GDP growth.¹⁵

However, the garment factories in the country continue to be characterized by dire working condition and severe labour rights abuses, though some improvement has been recently attained.¹⁶ More significantly, workers' labour rights safeguarding system remains weak, particularly with regard to the right to freedom of association in general and the right to collective bargaining and to strike in particular. Cambodian workers have been systematically intimidated, judicially harassed and physically and mentally attacked when it comes to the exercise of their right to strike to assert their social and economic interest.¹⁷ Workers more often on one hand are exploited by powerful and unconstrained private employer, and on the other hand receive little protection from the government's employer-friendly policy and ambiguously provisioned state legislation.¹⁸

Cambodia, a member of the UN and ILO, has ratified a huge number of international instruments entailing human rights and labour rights, counting from UN's ICCPR and ICESCR to ILO's Convention No. 87 and Convention No. 98, within which freedom of association, the right to strike and collective bargaining have been obviously integrated. The right per se is also recognized in the Cambodia's Constitution and several adopted and drafted laws, particularly Cambodia's Labour Law and Law on Union of Enterprises, all of which will be examine in more detail below. These laws in principle aim to protect the right to freedom of association, right to strike and collective bargaining, facilitate the proper operation of trade unions and other unions' organization. However, the Law on Union of Enterprises, which has been recently introduced after numerous rounds of revision, has been severely criticized as a hostile infringement of fundamental human rights, including labour right to freedom of association, rights to collective bargaining and right to strike, marking another blow against freedom of association, right to strike and right to collective bargaining of Cambodian workers, as discussed in detail below.

This paper therefore aims to examine the impacts of the Labour Law and newly adopted Law on Trade Union of Enterprises on the enjoyment of the right to strike and collective bargaining underlying in the overall freedom of association in Cambodia's garment industry.

2. Research question and objective

The purpose of this paper is to examine and analyse the potential impacts of the Labour Law and newly adopted Law on Union of Enterprises on the exercise of the rights to collective bargaining and to strike,

¹⁵ Cambodian Garment and Footwear Sector Bulletin, Issue 5, January 2017, ILO, p. 1.

¹⁶ Yon Sineat and Baliga Ananth, January 25, 2018, Report shows little sign of improvement at factories, *The Phnom Penh Post*, available on <http://www.phnompenhpost.com/national/report-shows-little-sign-improvement-factories>

¹⁷ Kingdom of Cambodia Decent Work Country Programme (DWCP) 2016-2018, ILO, p. 22. Available on http://www.ilo.org/asia/publications/WCMS_533564/lang-en/index.htm

¹⁸ Maina Kiai, 2016, *Right to Freedom of Essembly and of Association*, General Assembly, A/71/385, para. 9 – para.17

underlying and being intrinsic corollary with the fundamental freedom of association and collective bargaining, in the Kingdom of Cambodia's apparel industry. Therefore, the paper will be tailored to answer the following research question:

What are the legal implications of the Labour Law and Law on Union of Enterprises on the Right to Collective Bargaining and to Strike in Cambodia's Apparel Industry?

In order to comprehensively answer the above research question, four sub-research questions have to be answered:

- 1) What are the rights to collective bargaining and to strike embodied in the International Human Rights regime?
- 2) How the rights to collective bargaining and to strike are safeguarded under the ILO supervisory mechanism?
- 3) How do the Labour Law and Law on Union Enterprises protect the rights to collective bargaining and to strike? And is this legitimately in line with international standards?
- 4) What are the challenges corresponding to the right to collective bargaining and to strike in Cambodia's garment industry?

3. Methodology and materials

In order to elucidate the subject matter of the above research question and sub-research questions, the presentation of this paper will be clustered into three main areas.

The first and second sub-research questions will be grouped into one main area of presentation regarding the international legal standards and international safeguarding system on the right to collective bargaining and right to strike in accordance with international human rights regime. A traditional legal method will be applied in order to explore and examine the legal norms and standards concerning rights to collective bargaining and right to strike. The use of this legal methodology in legal studies entails the study of the system and the interpretation of norms, simply put, studying all relevant sources of law and interpretation of law, such as legislation and case law. The legal norms of the right in this paper are established through a wide range of primary sources including international treaties and conventions following the secondary sources including their commentaries, reports, and documents from the United Nations human rights bodies and special rapporteurs, reports of international organizations – International Labour Organization (ILO) in particular, as well as academic books, journals and articles of scholars in the field. In addition, the protection system of the said rights will also be scrutinized, sourcing from the system of ILO supervisory bodies.

The third sub-research question will be placed into another main area of presentation regarding the rights as such in the context of Cambodia. In order to explore and analyse this matter critically, a legal comparative methodology will be employed. The comparative method has become more relevant than ever due to the fact that no country can successfully evade from the effects of international norm setting and the aftermath

of globalization.¹⁹ This method will be used in order to analyse to what extent the international standards is applied in each state member, more specifically in country's national legislation. Thus, Cambodia's national legislation regarding the right is examined to established national legal norms corresponding to the legal norms under international human rights law. In doing so, the main source includes various relevant national instruments such as national laws, royal decree, sub-decree, and government's notification (Prakas). The Cambodia's Labour Law and the newly adopted Law on Union of Enterprises are also thoroughly examined as a part of national legislation; they, however, will not be studied on article by article basis. The analysis focuses on some controversial articles which may potentially pose significant impacts on the right to strike and collective bargaining in order to establish an overall understanding of the implications of the new laws on the exercise of the right in Cambodia's apparel industry.²⁰

The last research question will be categorized into the last area of presentation regarding an analysis on challenges surrounding the exercise of right to strike and collective bargaining in Cambodia's garment industry and illustration of government's typically applied measures, administrative, legislative and judicial, against the exercise of the rights with regard to a so-called implementation of its internationally recognised obligations. To provide a general concrete overview of the challenges, a wide range of sources is going to be utilized; including documents of the UN human rights bodies (State reports and Concluding Observations); reports from ILO's supervisory bodies; reports, statements and briefing papers of national and international NGOs, news articles from independent local and international newspaper outlets and other reliable internet sources.

4. Delimitations

Several aspects of limitation imposed on this paper have made owing to the time and space constraints.

Primarily, the scope of this paper is bounded to the right to freedom of association. The Law on Union of Enterprise and Law on Labour, as a matter of fact, do not regulate solely right to freedom of association, they encompass several provisions concerning right to freedom of expression and peaceful assembly. These rights are nevertheless not examined in this research paper due to the reason that its purpose is to explore the law's possible implications on right to freedom of association in garment sector. More significantly, the new laws are deemed to have a higher association with the right to freedom of association. Therefore, this paper is going to provide an analysis of the legislations exclusively upon the right to freedom of association.

¹⁹ Blanpain, *Comparatism in Labour Law and Industrial Relations*, Comparative Labour Law and Industrial Relations in Industrialized Market Economies, 2014, p. 3-5.

²⁰ To date, despite being adopted since April 4, 2016, the Law on Unions of Enterprises are still merely available officially in Khmer, the official Cambodian language. Yet, the laws in Khmer version will be used as the main source along with the unofficial English translation of the law as a supplement for the analysis purpose in this paper. The unofficial English translation can be obtained from the human rights organization Cambodia Center for Human Rights (CCHR) via the link: http://www.sithi.org/temp.php?title=The-Law-on-Trade-Union&url=law_detail.php&lg=&id=278

More importantly, the right to freedom of association *per se* is commonly accredited as a broad and extensive one, entailing numerous rights and aspects, which are virtually impossible to render a comprehensive presentation of all aspects within the scope of this paper. This research, nonetheless, analyses two key elements of the right to freedom of association which are fundamentally relevant to Cambodia's apparel context, mainly rights to collective bargaining and to strike – rights considered to be an *intrinsic corollary* of right to freedom of association and collective bargaining. These two main elements are currently among the main concerns regarding to the application and exercise of the right to freedom of association in Cambodia's garment industry. Other elements of the rights, such as concept of voluntary association, operational autonomy principle, prohibition of involuntary dissolution, and the freedom of association of armed forces, police and civil servants, is not discussed in this paper.

Last but not least, this analysing paper studies exclusively the legal implications of the Labour Law and Law on Union of Enterprises regarding the right to collective bargaining and the right to strike on workers' unions in Cambodia's apparel industry. Other actors in this sector, including association of employer, workers in rural, armed forces, civil servant and police as well as non-governmental organisations are therefore excluded from the discussion in this paper. Moreover, the sectors other than garment and textile, such as agriculture and service industry, are consequently not covered in this paper. Furthermore, the ILO Convention No. 87 relative to Freedom of Association and Protection of the Right to Organise, Convention No. 98 on the Right to Organise and Collective Bargaining and Collective Bargaining Convention, (No. 154) are profoundly discussed due to its relevancy to the right to strike and collective bargaining. Yet, other ILO Conventions, including Convention No. 11 on 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, is consequently not covered in this paper.

5. Disposition

This paper is divided into seven separate chapters.

Chapter two and three examine the international and regional legal norms of the rights to collective bargaining and to strike according to international human right law, particularly under UN's Covenants: International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), ILO Constitution, Convention No. 87, Convention No. 98 and Convention No. 154, European Convention on Human Rights, European Social Charter, ASEAN Declaration on Human Rights and other regional instruments. In particular, various key aspects of the right are thoroughly elaborated and presented, including implicit existence of the right to strike and collective bargaining within a boundary of general principle of freedom of association, legitimate distinction of various types of strike, conditions for exercising the right to collective bargaining and to strike, principle

of the rights, mechanism to facilitate collective bargaining and specific limitation or restriction concerning right to collective bargaining and right to strike.

Chapter four explores the general limitations of exercising the rights to collective bargaining and to strike along with state obligations under the purview of UN legal instruments. UN's Covenants concerning the rights to strike and collective bargaining, UN's General Comment No. 31, UN Special Rapporteur, ECtHR's jurisprudence with reference to European Convention on Human Rights, and scholar's books and article concerning the rights as such, legitimate limitation and the state obligation with regard to both rights, is mainly employed in order to scrutinize the standard norms of genuine limitation whereby state can actually impose on its people's on the exercise of the rights, and in so far as and what kinds of obligation imposed on state that can be applied to secure the enjoyment of the right to strike and collective bargaining of the citizen.

Chapter five presents the International Labour Organisation's protection system concerning the implicit right to collective bargaining and to strike expressly established under ILO system of supervisory mechanism and state's obligations corresponding to the supervising system as such. Within this chapter, two main ILO protective mechanisms are discussed regarding protection of the right; namely a Regular System of Supervision: Committee of Experts and Tripartite Committee Conference on the Application of Conventions; and Special Procedures: Procedure for Representation on the Application of Ratified Conventions, Procedure for Complaint over the Application of Ratified Conventions and Special Procedure for Complaint regarding Freedom of Association.

Chapter six establishes the legal norms under Cambodian legal system regarding the right to collective bargaining and to strike corresponding those under international human rights law in general and ILO Conventions in particular addressed in chapter two. More importantly, this chapter also examines and offers a critical analysis upon several controversial provisions of the Law on Labour and newly adopted Law on Union of Enterprises concerning the aforementioned rights, especially those provisions which regulate either implicitly or explicitly right to collective bargaining and to strike of Trade Union and workers, whether both laws' provisions are in compliance with the international standards and international human rights law elucidated in the chapter two.

Chapter seven provides an overview of challenges surrounding the right to collective bargaining and to strike exercised by trade union and garment workers in Cambodia's textile and garment industry. Several main challenges, including judicial harassment and intimidation, physical and mental attack, manipulation of short-term contract and anti-union discrimination, encountered by union members and workers in relation to the exercise the above-mentioned rights are comprehensively articulated in order to gain deep insight of what has been occurred so far and the current situation in Cambodia's apparel industry on the labour right to collective bargaining and to strike.

Finally, chapter eight offer the author's conclusion and answer the main research question of the thesis, aiming to discern the underlying patterns of the finding that have been extensively illustrated in the previous chapters and delivering future predications on the issue of the right to collective bargaining and to strike in Cambodia's apparel industry after the adoption of the new laws.

CHAPTER TWO: INTERNATIONAL STANDARDS ON THE RIGHT TO COLLECTIVE BARGAINING

This chapter also aims to respond to the first sub-research question regarding the international standards and norms of the right to collective bargaining. This section, therefore, will examine the definition, objective, scope, content and limitation of the right to collective bargaining under international human right law. General principles and the underlying presence of the right to collective bargaining in international human right law are also highlighted in this chapter.

It should be critically reiterated that Cambodia has ratified virtually all the core international human rights instruments relative to the right to freedom of association and the right to strike.²¹ Unless otherwise specified, the provisions regarding the right to collective bargaining disclosed in this chapter are applicable in the case of Cambodia.

1. Definition and Objective of the Right to Collective Bargaining

The right to collective bargaining has constituted an essential element of the collective dimension of the rights to freedom of association. The application to the workplace of the right to freedom of association is a specialized application of the broader right to associate protected in the UDHR and other international human rights law. Collective bargaining is a voluntary process through which employers and workers are able to discuss and negotiate collectively their employment relations, especially terms and conditions of work.²² It is one of the indispensable components of trade union rights and freedom through which workers and their associations or unions may be able to promote and defend an array of their economic and social benefits, among others, decent minimum wage, working condition, social security protection, and other labour rights and benefits.

Thus, its definition is obviously stipulated in ILO Recommendation No. 91, paragraph 2, as:²³

“All agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers’ organisations, on the one hand, and one or more representative workers’ organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other.”

It also encompasses the right of employers or their respective representation to freely negotiate in good faith with workers’ trade unions or, in their absence, representatives of workers freely appointed by the workers. Trade unions or workers representative organisations have an inherent right, through collective bargaining procedure or other legitimate means of negotiation, to pursue the advancement of working

²¹ Cambodia’s constitution, art. 31

²² International Labour Organisation, *Right to collective bargaining*, retrieved on February 28, 2018, from http://www.ilo.org/empent/areas/business-helpdesk/WCMS_DOC_ENT_HLP_CB_EN/lang--en/index.htm

²³ *Compilation of international labour Conventions and Recommendations*, 2015, Geneva, page 43.

conditions and decent minimum wage of whom they represent,²⁴ on an equal footing with employers or employers' organisation. More significantly, the collective bargaining definition has been expressly reaffirmed under article 2 of ILO Convention No. 154 as:

“... all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for:

- a) determining working conditions and terms of employment; and/or
- b) regulating relations between employers and workers; and/or
- c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.”

As stated above, the right to collective bargaining is a fundamental mean *inter alia* to an end by promoting and defending workers' rights and interests as well as guaranteeing a workers' freedom of association as a whole, without which freedom of association will be in peril. Moreover, it is a process through which employers and workers are able to combine to form their organisations independent from public authorities and capable of decisively regulating wages and other working conditions by means of freely concluded collective agreements.²⁵ It also aims to be taken to “encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements”²⁶.

One should also be noted that collective agreements render a binding character on the signatories thereto and those on whose behalf the agreement is concluded and that stipulations in such contracts of employment which are divergent to a collective agreement consent should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement. Nevertheless, stipulations in contracts of employment which are more favourable to the workers than those prescribed by a collective agreement should not be viewed as contrary to the collective agreement.²⁷

It should significantly be highlighted that the right to collective bargaining has an intimately strong interdependence with the right to strike within the family of rights to freedom of association. Whilst the right to strike is not to be restrained to the progression or defence of collective bargaining,²⁸ the right to collective bargaining render, on the workers' side, no meaningful practical outcome in the absence of a

²⁴ Digest of Decisions, op cit., para. 881

²⁵ Ibid, para. 882; *Freedom of Association and Industrial Relations*, Report VII, International Labour Conference, 30th Session, Geneva, 1947, p. 52.

²⁶ Ibid, para. 880

²⁷ Gernigon, Bernard; Otero, Alberto; Guido, Horacio, 2000, ILO principles concerning collective bargaining, *International Labour Review*, vol. 139, No. 1, page. 34.

²⁸ KD Ewing and J Hendy, 2011, *Days of Action, The Legality of Protest Strikes against Government Cuts*, Institute of Employment Rights, Liverpool, page 19.

right to strike. Without the latter right, a right to collective bargaining undeniably amounts to a right to “collective begging.”²⁹

The right to collective bargaining has long-lastingly been recognised and guaranteed under international human right law regime on the one hand and under international labour law on the other hand. Owing to the nature of the right which stay in close connection with freedom of association as a whole, its essence is implicitly integrated within the meaning of freedom of association under various United Nations international instruments, and it is also explicitly provided for and guaranteed in all of the International Labour Organisation’s instruments, particularly including 1998 ILO Declaration of Fundamental Principles and Rights at Work, ILO Constitution, mainly Convention No. 98 concerning the Right to Organise and Collective Bargaining, Convention No. 154 concerning the Promotion of Collective Bargaining as well as other ILO’s reports and policies.

2. Right to Collective Bargaining in International Instruments

2.1. The ILO’s instruments

2.1.1. The ILO’s Constitution

The right to collective bargaining, which has an inseparable tie with the right to strike, has been rooted from the core principle of the ILO Constitution 1919 and integrated into and become essential part of the principle of freedom of association under the ILO Constitution. Under the preamble of 1919 Constitution of ILO, the right to collective bargaining has been read within the meaning and scope of rights to freedom of association,³⁰ mainly due to the fact that the right is derivative from the freedom of association. Subsequently, the right as such has also reaffirmed in the 1998 Declaration of Fundamental Principles and Rights at Work together with the principle of freedom of association as:

“2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organisation, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- a) Freedom of association and the effective recognition of the right to collective bargaining; ...”

2.1.2. The Right to Organise and Collective Bargaining Convention (No. 98)

Driven from the ILO Constitution, the right to collective bargaining is embodied and provisioned in an independent ILO convention, the ILO Convention No. 98 concerning the Right to Organise and Collective

²⁹ International Trade Union Confederation (ITUC), March 2014, *The right to strike and the ILO: The legal foundations*, page 15, originally quoted from German Federal Labour Court (Bundesarbeitsgericht) Judgment 10 June 1980 (Case 1 AZR 822/79):

“Against the background of this conflict of interests collective bargaining without the right to strike in general would be nothing more than collective begging (Blanpain).”

³⁰ International Labour Organization (ILO), Constitution, 1919, Preamble

Bargaining, which was adopted in 1949 and has seen a near-universal acceptance as of April 10, 2018.³¹ The convention is definitely viewed not as producing new rights, but rather echoing an existing principle that had already been accepted and guaranteed in the ILO Constitution, namely, stating that workers, and employers, in exercising their rights to freedom of association must be able, if they chose, “to form associations that are independent and capable of representing their interest for the purpose of collective bargaining”.³² More specifically, the right to collective bargaining is manifestly protected and promoted under article 4 of the Convention whereby requiring the State members to undertake all appropriate measures “where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements”.

2.1.3. Collective Bargaining Convention, 1981 (No. 154)

The right to collective bargaining is not merely be safeguarded, the right as such is also subject to be promoted to the fullest extent possible by the State authority. The obligation to promote the right to collective bargaining and its mechanism to ensure the best interests of workers and employers by the member States is formulated under the ILO's Collective Bargaining Convention, 1981, (Convention No. 154). An ILO member State who ratifies this Convention should undertake appropriate measures, adapted to national condition of each State party, to promote collective bargaining. Those measures undertaken should be subject to preceding consultation, and if possible agreement, between public authority, employers' organisations and workers' organisations.³³

2.2. The UN's instruments

In parallel, though not necessarily duplicate, with ILO's precedent instruments with regard to the right to collective bargaining in particular and freedom of association in general, the United Nation has historically and subsequently adopted the Universal Declaration of Human Rights, which was adopted a few months after the adoption of Convention No. 87 and a few months before the adoption of Convention No. 98, whereby the guarantee of the right to organise and collective bargaining is holistically provisioned, as in its article 23(4): “Everyone has the right to form and to join trade unions for the protection of his interests.” This was given greater articulation in the two Human Rights Covenants adopted in 1966, with the remarkable inclusion in both Covenants of a clause providing for respect of ILO Convention 87. It should

³¹ International Labour Organisation, list of ratification by Conventions, *Ratification of Right to Organise and Collective Bargaining Convention 1949*, available on

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312243:NO

³² Bellace Janice R., 2014, The ILO and the right to strike, *International Labour Review*, Vol 153, No. 1, page 43

³³ International Labour Organisation, 2015, *Promoting collective bargaining: Collective Bargaining Convention, 1981, and Collective Bargaining Recommendation, 1981*, page. 3, Geneva

be noted that this provision, similar to other UN standards, applies only to workers' organizations and not those of employers as well, as do the ILO instruments.

2.2.1. International Covenant on Economic, Social and Cultural Rights (ICESCR)

With a social and economic character and constituting one of essential element of rights to freedom of association, the right to collective bargaining is recognised under article 8 of the International Covenant on Economic, Social and Cultural Rights which provides an underlying meaning within the principle of freedom of association. Under the clause (a) of this article of the Convention, the State member shall ensure “The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests...” The right to participate in trade unions should be construed as encompassing the right to participate in collective bargaining process with employers' organisation, with the view to protect and promote social and economic interests of workers and workers' organisation. More importantly, it should also be noted that even though the right per se is not explicitly expressed under the present Covenant, in the framework of the supervision of the application of the ICESCR, ratifying States are required to provide information on the collective bargaining mechanisms in place and their impact on workers' rights.³⁴

2.2.2. International Covenant on Civil and Political Rights (ICCPR)

Similar to the right to strike which is considered as having a civil and political aspect as well as social and economic aspect, right to collective bargaining is also enshrined under article 22 of the International Covenant on Civil and Political Rights within the scope of the rights to freedom of association. It guarantees every person regardless of any kinds of difference “the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests”. It illustrates under this provision that the ICCPR is avoiding providing a detail descriptive definition and elements of the rights to freedom of association as a whole and the trade unions' rights to association in particular as to leave a space and authority to the ICESCR to focus on trade unions' rights to association in the socio-economic character,³⁵ instead stressing on the rights to freedom of association exercised by non-governmental organisations and political parties.³⁶

³⁴ Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey on the Fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalisation, 2008, Report III (Part 1B), International Labour Conference, 101st Session, 2012, p. 10, para. 23.

³⁵ Nowak, Manfred (2005). UN Covenant on Civil and Political Rights, *CCPR Commentary*. 2nd revised edition. Kehl: N. P. Engel. Page. 391

³⁶ International Trade Union Confederation (ITUC), March 2014, *The Right To Strike and the ILO: The Legal Foundations*, page 44 – 45

2.3. The European's instruments

2.3.1. The European Convention on Human Rights

A clear definitive description of the right to collective bargaining is not obviously indicated within the European Convention on Human Rights (ECHR) either. However, it is implicitly integrated into the definitive provision of the rights to freedom of association, under article 11, given its character as one of an essential parts of the rights to freedom of association, providing that: “everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests...” The right to form and join trade union, or right to union membership, encompassing several other fundamental labour rights including right to strike and right to collective bargaining. This assertion has been jurisprudentially affirmed by the European Court of Human Rights’ judgment, *Demir and Baykara v. Turkey*, delivered on November 12, 2008, by asserting that:

“...in this connection, the Court considers that the restrictions imposed on the three groups mentioned in Article 11 are to be construed strictly and should therefore be confined to the “exercise” of the rights in question. These restrictions must not impair the very essence of the right to organise...”

Restrictions imposed by the state thus have to be shown to be legitimate, and civil servants could not be treated as ‘members of the administration of the state’. The court went on to rule that the right to collectively bargain with an employer in principle had become one of the essential elements of the right to form and join trade unions, guaranteed under Article 11.³⁷

2.3.2. The European Social Charter

As complementary instrument to the European Convention on Human Rights, the European Social Charter (ESC – CETS No. 35) was adopted in 1961 and revised in 1996 as “Revised European Social Charter” (RESC – CETS No. 163).³⁸ The European Social Charter is a Council of Europe treaty which guarantees fundamental social and economic rights as a counterpart to the European Convention on Human Rights, which refers to civil and political rights. Both the original and revised treaties contain an explicit guarantee of the right to collective action, including to collective bargaining. Article 6(4) expressed states that: “with a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake ... and recognise: 4) the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into”.

³⁷ *Demir and Baykara v. Turkey*, judgment on November 12, 2008, application No. 34503/97, ECHR, para. 97

³⁸ Out of the 47 Council of Europe Member States only four have ratified neither the ESC nor the RESC (Liechtenstein, Monaco, San Marino and Switzerland)

2.4. The ASEAN Declaration on Human Rights³⁹

The Declaration is a non-binding legal instrument unanimously adopted by all ASEAN members in 2012 in Phnom Penh, Cambodia, during its 21st Summit, pledging to protect human rights in the region and following the creation of ASEAN Inter-Governmental Commission on Human Rights in 2009. Alike many other international and regional legal instruments, the declaration seeks no obvious definitive provision on the right to collective bargaining. It exclusively covers the broader rights to freedom of association. Under article 27(2), it is stated that: “every person has the right to form trade unions and join the trade union of his or her choice for the protection of his or her interests, in accordance with national laws and regulations”, without explicitly mentioning the right to collective bargaining and permissible limitation of state legislative measure against the right to freedom of association in general as such.

3. General Principle of the Right to Collective Bargaining

3.1. Subject, parties and issues in the collective bargaining

3.1.1. Type of representative in workers side in the collective agreement

Under ILO’s legal instruments, legitimate representatives from workers side can only be those who are regarded as representative of the workers’ organisations (trade union) or of the workers concerned if there are no workers’ organisations in the area in question.⁴⁰ While the collective agreement could be negotiated and concluded by representatives of workers, this possibility is not incentivised and put as a second choice to the situation of no workers’ organisation established or fully functioned. This was affirmed by the Committee on Freedom of Association, through its fourth revision of Digest of Decisions in 1996, to uphold in one case that “direct settlements signed between an employer and a group of non-unionized workers, even when a union exists in the undertaking, does not promote collective bargaining as set out in Article 4 of Convention No. 98”.⁴¹ The Committee went further reiterating that the possibility for staff delegates who is representing no more than 10 per cent of the total workers to conclude collective agreement with employers or employers’ organisation, while one or more workers’ organisations already exist, is not conducive to the development of collective bargaining in accordance with article 4 of the Convention No. 98.⁴²

3.1.2. The requirement of a certain level of representativeness

It’s also important to note that the right to negotiate is subject to a certain level of representativeness. In this regard, relying on the collective bargaining’s individual system, trade union organisations which take

³⁹ The Declaration is a non-binding legal instrument unanimously adopted by all ASEAN members in 2012 in Phnom Penh, Cambodia, during its 21st Summit, pledging to protect human rights in the region

⁴⁰ *Collective Agreements Recommendation (No. 91)*, 1951, para. 2(2); *The Collective Bargaining Convention (No. 154)*, 1981, article 3.

⁴¹ Digest of Decisions, 1996, Fourth (revised) edition, Geneva, para. 790.

⁴² *Ibid*, para. 788

part in collective bargaining may represent only their own members or, in some cases, all workers in the negotiating unit concerned. In this latter case where a trade union represents the majority of the workers or a high percentage established by law which does not imply such a majority, in the same undertaking, that union is able to enjoy the right to be the exclusive bargaining agent on behalf of all the workers.⁴³ Typically, some collective agreements apply only to the parties to the agreement and their members and not to all workers. However, if there is no union which could represent more than 50 percent of all the workers in the undertaking, while there are more than one union exist within the same undertaking, the right to collective bargaining, therefore, should be accorded to all unions exist in that undertaking.⁴⁴

3.1.3. Workers covered by collective bargaining

The Convention No. 98 obviously states the certain type of workers who can legitimately enjoy the right to collective bargaining and those who cannot or whose right is restricted within the purview of national legislation.⁴⁵ Under article 5(1) of the Convention, it provides that “the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations”, and article 6 states that “this Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way”. Under this Convention, only the armed forces, the police and the above category of public servants thus may be excluded from the right to collective bargaining.

The above claim has been reinforced by the latest Committee’s Digest of Decisions 2006, paragraph 886, 887 and 892, that:

“All public service workers other than those engaged in the administration of the State should enjoy collective bargaining rights, and priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of terms and conditions of employment in the public service”. A distinction must be drawn between, on the one hand, public servants who by their functions are directly engaged in the administration of the State (that is, civil servants employed in government ministries and other comparable bodies) as well as officials acting as supporting elements in these activities and, on the other hand, persons employed by the government, by public undertakings or by autonomous public institutions. Only the former category can be excluded from the scope of Convention No. 98. The mere fact that public servants are white-collar employees is not in itself conclusive of their qualification as employees engaged in the administration of the State; if this were not the case, Convention No. 98 would be deprived of much of its scope. To sum up, all public service workers, with the sole possible exception of the armed forces and the police and public servants directly engaged in the administration of the State, should enjoy collective bargaining rights.”⁴⁶

⁴³ ILO principles concerning collective bargaining, op cit., page 38.

⁴⁴ *Freedom of association and collective bargaining*. General Survey of the reports on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Report III (Part 4B), International Labour Conference, 81st Session, 1994. Geneva. Para. 240 – 241

⁴⁵ The Convention No. 98, article 4 – 6

⁴⁶ Digest of Decisions, 2006, op cit., para. 886, 887 and 892

3.1.4. Subjects covered by collective bargaining

A subject matter covered by collective bargaining occupies a wider range of issues; not just strictly covering regular occupational terms and condition, employment policy and regulation of the relation between employers and workers as well as between workers' organisation and employers or employers' organisation;⁴⁷ but also encompassing other certain matters which are typically included in conditions of employment, such as promotions, transfers, dismissal without notice, etc; and dispute resolution procedure to solve an occupational issues, such as staff reduction, changes in working hours; and other issues which go beyond the normal terms of employment.⁴⁸ This is reinforced by the subsequent paragraphs of the Committee of Expert's General Survey (2012) to prohibit unilateral intervention by the State authority, either by administrative or legislative measure, intending to limit the scope of negotiable issues within the collective bargaining process, having done so would amount to an infringement of rights of workers and/or workers' organisation to bargain freely laid down in several concerning ILO Conventions.⁴⁹

Nevertheless, despite being permitted to a numerous types of subject to be covered by collective bargaining, the scope of the subject is not absolute and need to be obviously related to conditions of work and employment, in other words, matters which are primarily or essentially questions relating to conditions of employment.⁵⁰ Moreover, the Committee of Expert allows the exclusion from the subjects covered by collective negotiation of matters which are for the employer to decide upon as part of the freedom to manage the enterprise, such as the assignment of duties and appointments.⁵¹ They also allow the prohibition of certain clauses, such as discriminatory clauses, clauses of trade union security, or clauses which are contrary to the minimum standards of protection set out in the law. More interestingly, the Committee on Freedom of Association also affirms that certain matters can also reasonably be regarded as outside the scope of negotiation, such as "matters which clearly appertain primarily or essentially to the management and operation of government business".⁵²

⁴⁷ Convention No. 98; Convention No. 151; Convention No. 154; and Recommendation No. 91

⁴⁸ Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey on the Fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalisation, 2008, Report III (Part 1B), International Labour Conference, 101st Session, 2012, p.88-89, para. 215; Digest of Decisions, 2006, op cit., para. 913.

⁴⁹ Ibid, para. 215

⁵⁰ Digest of decisions, 2006, op cit., para 920.

⁵¹ 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. Para. 259; General Survey on the Fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalisation, 2012, op cit., p. 89, para. 216.

⁵² Digest of Decisions, 2006, op cit., para 920; General Survey on the Fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalisation, 2012, op cit., p. 89, para. 216.

3.2. Governing Principle in Collective Bargaining Process

3.2.1. Principle of Free and Voluntary Negotiation

The voluntary nature of collective bargaining is explicitly provided for in article 4 of the Convention No. 98, as stating that “measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers’ organisation and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements”, and according to the Committee on Freedom of Association, is “a fundamental aspect of the principle of freedom of association”.⁵³ Thus, the obligation to promote collective bargaining excludes recourse to measures of compulsion.⁵⁴ The Committee goes on to affirm that “nothing in Article 4 of Convention No. 98 places a duty on the government to enforce collective bargaining by compulsory means with a given organization; such an intervention would clearly alter the nature of bargaining”⁵⁵, and “Article 4 of Convention No. 98 in no way places a duty on the government to enforce collective bargaining, nor would it be contrary to this provision to oblige social partners, within the framework of the encouragement and promotion of the full development and utilization of collective bargaining machinery, to enter into negotiations on terms and conditions of employment. The public authorities should however refrain from any undue interference in the negotiation process”⁵⁶.

Despite nothing in article 4 of the Convention 98 places a duty on the State authority to enforce collective bargaining process by compulsory means, this does not completely infer that the authority should refrain from any measure whatsoever aiming to establish a collective negotiation mechanism.⁵⁷ The measure imposed, more often by legislation, is frequently developed in the event of conduct which is contrary to good faith or which constitutes unfair practice in the course of collective bargaining, provided that they are not disproportionate,⁵⁸ and have admitted conciliation and mediation imposed by law within reasonable time limits.⁵⁹ It is, moreover, as reaffirmed by the Committee of Expert in the General Survey 2012, permissible to restrict an application of the principle of free and voluntary collective bargaining, allowing

⁵³ Ibid, 925

⁵⁴ Ibid, 926

⁵⁵ Ibid, 927

⁵⁶ Ibid, 928

⁵⁷ Ibid, 929

⁵⁸ For example, when examining the Panamanian legislation and noting that the employer was obliged to pay the workers for days when they had been on strike, in cases where the strike had occurred because the employer had not replied to the demands which had been made and because conciliation had been abandoned, the Committee on Freedom of Association considered that the sanctions were disproportionate (*318th Report of the Committee on Freedom of Association*. Document GB.276/1, Governing Body, 276th Session, November, Case No. 1931, para. 371).

⁵⁹ “307th Report of the Committee on Freedom of Association”, in *Official Bulletin* (Geneva), Vol. LXXX, Series B, No. 2, Case No. 1898 (Guatemala), para. 324; “304th Report of the Committee on Freedom of Association”, in *Official Bulletin* (Geneva), Vol. LXXIX, Series B, No. 2, Case No. 1822 (Venezuela), paras. 508-509; *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 2006, Fifth (revised) edition. Geneva. Para 930.

the state authorities (and particularly the administrative or budgetary authorities) to offer an approval prior to a collective bargaining process to be made merely when there is a procedural flaw during the collective agreement process or the agreement fail under the minimum standards laid down by international labour instruments.⁶⁰

3.2.2. Free choice of bargaining level

In this regard, Recommendation No. 163 concerning the Promotion of Collective Bargaining provides that “Measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels”.⁶¹ Likewise, the Committee of Experts, after recalling that the right to bargain collectively should also be granted to federations and confederations, and rejecting any prohibition of the exercise of this right, has stated that: “legislation which makes it compulsory for collective bargaining to take place at a higher level (sector, branch of activity, etc.) also raises problems of compatibility with the Convention [No. 98]. The choice should normally be made by the partners themselves, since they are in the best position to decide the most appropriate bargaining level, including, if they so wish, by adopting a mixed system of framework agreements supplemented by local or enterprise level agreements”.⁶²

The Committee on Freedom of Association has developed this point further as stating in its fifth Digest of Decisions: “According to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority. ...” Thus, the Committee does not consider the refusal by employers to bargain at a particular level as an infringement of freedom of association. Legislation should not constitute an obstacle to collective bargaining at the industry level. The best procedure for safeguarding the independence of the parties involved in collective bargaining is to allow them to decide by mutual agreement the level at which bargaining should take place. Nevertheless, it appears that, in many countries, this question is determined by a body that is independent of the parties themselves. The Committee considers that in such cases the body concerned should be truly independent”⁶³.

⁶⁰ Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey on the Fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalisation, 2008, Report III (Part 1B), International Labour Conference, 101st Session, 2012, p. 83, para. 201.

⁶¹ Collective Bargaining Recommendation, 1981 (No. 163), para. 4.

⁶² *Freedom of association and collective bargaining*, 1994, General Survey of the reports on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Report III (Part 4B), International Labour Conference, 81st Session, Geneva, para. 249.

⁶³ Digest of Decisions, 2006, op cit., para. 988 – 991.

3.2.3. The principle of good faith

In order to maintain a true social justice and peace, harmonious development of labour relation, the Committee on Freedom of Association via its Digest of Decisions 2006 recalls the indispensability which the collective bargaining process attaches to the obligation to negotiate in *good faith* by both parties.⁶⁴ Furthermore, the principle as such cannot be imposed by national law, it “could only be achieved as a result of the voluntary and persistent efforts of both parties”⁶⁵. The Committee further affirm that it is very crucial that both parties conduct a negotiation in good faith and make all the possible effort to reach an ultimate agreement; moreover, “genuine and constructive negotiation are a necessary component to establish and maintain a relationship of confidence” between employers and workers.⁶⁶ Additionally, it further stated that “satisfactory labour relations depend primarily on the attitudes of the parties towards each other and on their mutual confidence”; and “The principle that both employers and trade unions should negotiate in good faith and make efforts to reach an agreement means that any unjustified delay in the holding of negotiations should be avoided”.⁶⁷

The Committee, more importantly, stresses the importance of the principle of good faith in agreement that “while the question as to whether or not one party adopts an amenable or uncompromising attitude towards the other party is a matter for negotiation between the parties, both employers and trade unions should bargain in good faith making every effort to reach an agreement”⁶⁸; and once it is concluded, the agreement become binding on the parties, and parties should have a mutual respect for the commitment to undertake the agreement in order to establish labour relations on stable and firm ground.⁶⁹

3.2.4. Compulsory arbitration

Realistically and logically speaking, every norm or principle at least opens the door for an exceptional circumstance to be legally permitted, where the right as such is legally restricted, so does the right to collective bargaining. As described above, the legal norms in the ILO Convention as well as the Committee’s General Surveys prohibit the State’s intervention into the bargaining process between employers and workers’ organisations to preserve the core value of free and voluntary initiated by the parties. However, it should also be noted that those legal norms also permit a very narrowly legitimate space for authority to step in in the parties’ collective bargaining process, directly under the terms of the law or as a result of an administrative decision, to impose compulsory arbitration when the parties do not reach agreement in the context of essential services in the strict sense of term (i.e. services the interruption

⁶⁴ Ibid, para. 934

⁶⁵ *Record of Proceedings*. International Labour Conference, 67th Session, 1981. Geneva, page 22.

⁶⁶ *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 2006, Fifth (revised) edition. Geneva. Para. 935

⁶⁷ Ibid, para. 936 and 937

⁶⁸ Ibid, para. 938

⁶⁹ Ibid, para. 939 – 940

of which would endanger the life, personal safety or health of the whole or part of the population), or when a certain number of days of strike action have elapsed, or in the cases of disputes in the public service involving public servants exercising authority in the name of the State (who can actually be excluded from the right to collective bargaining under Convention No. 98).⁷⁰

The arbitration itself would not also be a prioritized choice to settle a disagreement in general, the Committee on Freedom of Association has expressed in its fifth revised Digest of Decisions that:

“The use of collective bargaining to settle problems of rationalization in undertakings and improve their efficiency may yield valuable results for both the workers and the undertakings. Nevertheless, if this type of collective bargaining has to follow a special pattern which imposes bargaining on the trade union organizations on those aspects determined by the labour authority and stipulates that the period of negotiation shall not exceed a specified time; and failing agreement between the parties, the points at issue shall be submitted to arbitration by the said authority, such a statutory system does not conform to the principle of voluntary negotiation which is the guiding principle of Article 4 of Convention No. 98.”⁷¹

Moreover, the arbitration as such must be truly independent, and the outcomes of the arbitration should not be predetermined by legislative criteria, in order to gain and retain the parties’ confidence.⁷² Evidently, compulsory arbitration is also acknowledged where it is provided for in the collective agreement as a mechanism for the settlement of disputes. It is also acceptable, as the Committee on Freedom of Association, following the Committee of Experts, has recently indicated in cases where, after protracted and fruitless negotiations, it is obvious that the deadlock in bargaining will not be broken without some initiative on the part of the authorities.⁷³ However, the Committee reiterated the principle of free and voluntary negotiation within the procedure of compulsory arbitration imposed by the State authorities, yielding an implication that the body appointed for the settlement of disputes between the parties should be independent and and recourse to these bodies should be on a voluntary basis, except where there is an acute national crisis.⁷⁴

⁷⁰ Ibid, para. 992 – 994

⁷¹ Ibid, para. 997

⁷² Ibid, para. 995

⁷³ “299th Report of the Committee on Freedom of Association”, in *Official Bulletin* (Geneva), Vol. LXXVIII, Series B, No. 2. Case No. 1768 (Iceland), para. 109; Digest of Decisions, 2006, op cit., para. 1003

⁷⁴ Digest of Decisions, 2006, op cit., para. 1004

4. Concluding remark

With reference to this chapter, it has been presented that the legal norms with regard to the right to collective bargaining are extensively founded under international human rights law regime in general sense and under international labour instruments in particular to industrial relation context. It on the one hand is an essential element within the collective right to freedom of association, and on the other hand has a close relationship with the right to strike, with the aim to promote and defend workers' economic and social interest, among others, including decent minimum wage, working condition, social security protection, and other labour rights and benefits. Without the latter right, a right to collective bargaining definitely amounts to a right to "collective begging." Collective bargaining has been defined as a voluntary process through which employers and workers or employees are able to discuss and negotiate collectively their employment relations, especially terms and conditions of work.

The right to collective bargaining has been definitively and textually specified in core international human rights instruments including ICCPR, ICESCR, and international labour instruments, such as the ILO Constitution, the Convention No. 98 and the Convention No. 154, as well as other regional instruments concerning labour rights and freedom of association, including European Convention on Human Rights and the Social Charter, and the non-binding ASEAN Declaration on Human Rights.

In order to host an acceptable collective negotiation between employers and workers' organisation under international legal norms, one should be noted that there needs to be a legitimate representative from both parties. However, the ILO Convention No. 154 and No. 87 stressed the importance of workers' representatives by offering two appropriate options, an individual person or organizational entity, as long as either option represents the majority of concerned workers in the undertaking. It should also be noted that this right is not generally granted to every type of person; it is limitedly accorded to public official engaged in administration of the State, armed force or police officer. Their rights, thus, is subject to national law of the country. Subject matters covered by collective bargaining occupy a wider range of issues, including occupational terms and condition, employment policy, dispute resolution procedure, and other issues which go beyond the normal terms of employment.

More importantly, the essential governing principles of the right to collective bargaining, which shall not be violated or impaired through State interference in any forms except in the event of a national emergency, are free and voluntary process of bargaining consented and negotiated in *good faith* by both parties. More notably, the ILO Conventions, however, provide an alternative space for authority to intervene in collective bargaining process, directly under the terms of the law or as a result of an administrative decision, to impose compulsory arbitration when no agreement has been reached in the context of essential services in the strict sense of term, or when a certain number of days of strike action have elapsed, or in the cases of disputes in the public service involving public servants exercising authority in the name of the State.

CHAPTER THREE: INTERNATIONAL STANDARDS ON THE RIGHT TO STRIKE

This chapter aims to respond to the first sub-research question with regards to the international standards and norms of the right to strike. This section, therefore, examine the definition, objective, scope, content and limitation of the right to strike under international human rights law. General principles and the underlying presence of the right to strike in international human rights law in general, freedom of association in particular are also highlighted in this chapter.

It should be noted that Cambodia has ratified virtually all the core international human rights instruments relating to the right to freedom of association and the right to strike.⁷⁵ Unless otherwise specified, the provisions regarding the right to strike disclosed in this chapter are applicable in the case of Cambodia.

1. Definition and Objective of the Right to Strike

The right to strike has been regarded by the Committee on Freedom of Association (CFA) as a primarily fundamental right of employees/workers and of their organizations in so far as it is employed as a legitimate mean for promoting and protecting their economic and social interests.⁷⁶ It is one of the essential vehicles through which workers and their association or union may be able to promote and defend an array of their economic and social benefits; among others, decent wage, working condition, social security protection, and other labour rights and benefits. The right to strike is also one of the crucial means for attaining the full enjoyment of other civil and political rights as well as economic, social and cultural rights to the extent that it is waged in a peaceful manner.

The right to strike and freedom of association have a longstanding interdependence: both rights address the concept of uniting as a collective voice to protect and promote socio-economic interests of workers. However, there has been a significantly divergent concepts between employers and employees groups, from 2012 to 2016, on the interpretive existence of the right to strike under the fundamental right to freedom of association provisioned under ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise. However, the right *per se* has long been globally recognized as an *intrinsic corollary* of the fundamental right of freedom of association⁷⁷ and right to organize⁷⁸ protected by Convention No. 87, despite it is not expressly provisioned within the Convention.

⁷⁵ Cambodia's constitution, art. 31

⁷⁶ *Freedom of Association: Digest of decisions and principles of the Freedom of Association committee of the Governing Body of the ILO*. Fifth (revised) edition, 2006, Geneva. Para. 520-521

⁷⁷ International Labour Organization, *Labour Legislation Guidelines*, Chapter V, "Substantive provisions of labour legislation: The right to strike", available on <http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch5.htm>

⁷⁸ Digest of Decisions, op cit., para. 523.

Unfortunately, there has never been any circumstances where the right to strike is either literally or politically defined into an exact term of right in ILO standards. However, the principle and the right are well established in international human rights law, either textually (UN et al.) or by interpretation (ILO). Although there has been some controversy around this issue in the ILO fora recent years, which seems to have been settled in 2015 after several informal tripartite meetings and discussions at Governing Body level have been made. Consequently, a joint statement was born which acknowledged that “[t]he right to take industrial action by workers and employers in support of their legitimate industrial interests is recognized by the constituents of the International Labour Organization.”⁷⁹

The purpose of strike is not solely confined to occupational and economic interests of workers which concern, among others, better working conditions, minimum wage or collective claims of an occupational nature, it, moreover, extends over to demands for solutions to economic and social policy in general, particularly employment policy, social protection scheme and standard of living, in so far as it has been directly affecting the workers.⁸⁰ The workers, furthermore, through the exercise of the right to strike, should be able to express their dissenting idea or criticize government policy relating to the broader economic and social context which affect their interests.⁸¹ In some cases, in so far as the matters indirectly disturb them, the workers can legitimately stage a sympathy strike given that the initial strike they are supporting is abide by law.⁸² Therefore, distinction of each purpose of demand pursued should ultimately be made based on whether or not it directly and immediately affects the workers who call for the strike. What is more, the strike action of a purely political nature and a strike decided systematically long period of time prior to negotiations taking place will not give rise to the legitimate protection under international law.⁸³ However, it’s challenging to differentiate between what is political character and what is social and economic character of the strike.⁸⁴

Therefore, it should no longer be denied the fact that the right to strike is implicitly expressed and affirmed in international human rights law, either United Nation’s covenants, International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR); or International Labour Organization’s conventions, Convention No. 87 and Convention No. 98.

⁷⁹ International Labour Organization, Tripartite Meeting on the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, TMFAPROC/2015/2, Appendix I: The ILO Standards Initiative – Joint Statement of Workers’ & Employers’ Groups (23.02.2015)

⁸⁰ Ibid, para. 526-527

⁸¹ Ibid, para. 531-532

⁸² Ibid, para. 534

⁸³ Ibid, para. 528-529

⁸⁴ Gernigon, Bernard; Otero, Alberto; and Guido Horacio, 1998, *ILO Principle Concerning the Right to Strike*, International Labour Office, Geneva, page 14

2. Rights to Strike in International Instruments

2.1. The ILO's instruments

2.1.1. The ILO Constitution

In spite of not having an obvious appearance in any provisions of the ILO Constitution, the right to strike has been enshrined, together with the right to freedom of association, under the Preamble of 1919 Constitution of International Labour Organisation (ILO).⁸⁵ The recognition of the right to freedom of association has been understood for many years to include the right to strike, and more importantly, the latter right is self-evidently a derivative right of the right to freedom of association and collective bargaining. The Constitution has vigorously been formulated as the source of the Committee of Freedom of Association (CFA) mandate to address issues relating to “freedom of association”, certainly resulting from the constitutional challenge to the competence of the CFA made by the then South African government in Case No. 102 (South Africa).⁸⁶ Subsequently, case after case, the Committee on Freedom of Association has found that the right to strike by workers and their organisations is not only a legitimate but also an essential means for defending occupational interests while reading this right into the Constitution, an *intrinsic corollary* to freedom of association.

2.1.2. Freedom of Association and Protection of the Right to Organize Convention (No. 87)

While the Convention No. 87 are broadly stated, mainly focusing on principles of freedom of association in general, it, specifically under article 3 and 8, implicitly encompasses the right to strike, one of the essential means in promoting and protecting the economic and social interests of workers. Article 3 of the Convention entitles workers and employers 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” and provisions state authority to “refrain from any interference which would restrict this right or impede the lawful exercise thereof”; and article 8 of the Convention reinforces the scope of enjoyment of the right and limits the state legislative intervention so far as not to “impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention”.

Though both articles holistically mention freedom of association, the right to strike is also derived from the very concept of freedom of association. This has been affirmed in the Committee of Experts' General

⁸⁵ International Labour Organization (ILO), Constitution, 1919, Preamble

⁸⁶ Case No. 102 (South Africa), 15th Report of the CFA (1955), para. 128

Survey⁸⁷ in 1994 on Freedom of Association and Collective Bargaining, and reiterated in subsequent General Surveys, most recently in its General Report⁸⁸ 2012, as stating:

118. With regard to the views put forward that the preparatory work would not support the inclusion of the right to strike, the Committee would first observe that the absence of a concrete provision is not dispositive, as the terms of the Convention [No.87] must be interpreted in the light of its object and purpose. While the Committee considers that the preparatory work is an important supplementary interpretative source when reviewing the application of a particular Convention in a given country, it may yield to the other interpretative factors, in particular, in this specific case, to the subsequent practice over a period of 52 years (see Articles 31 and 32 of the Vienna Convention on the Law of Treaties). In addition, and as seen below in response to comments made by both workers⁸⁸ and employers⁸⁸ organizations, the process of determining whether there is compliance with a general right to strike invariably involves consideration of the specific circumstances in which the Committee is called upon to determine the ambit and modalities of the right. The Committee has further borne in mind over the years the considerations set forth by the tripartite constituency and would recall in this respect that the right to strike was indeed first asserted as a basic principle of freedom of association by the tripartite Committee on Freedom of Association in 1952 and has been recognized and developed in scores of its decisions over more than a half century. Moreover, the 1959 General Survey, in which the Committee first raised its consideration in respect of the right to strike in relation to the Convention, was fully discussed by the Conference Committee on the Application of Standards without objection from any of the constituents.

119. The Committee reaffirms that the right to strike derives from the Convention. The Committee highlights that the right to strike is broadly referred to in the legislation of the great majority of countries and by a significant number of constitutions, as well as by several international and regional instruments, which justifies the Committee's interventions on the issue. Indeed, the principles developed by the supervisory bodies have the sole objective of ensuring that this right does not remain a theoretical instrument, but is duly recognized and respected in practice...

More importantly, in its fifth revised (2006) Digest Decisions concerning freedom of association, the Committee of Freedom of Association (CFA) has manifestly enunciated the right to strike as a fundamental part of freedom of association enjoyed by workers and employers to promote and defend their economic and social benefits. It is expressly stated in paragraph 135, 523, 555 and 669 of the Digest of Decisions as follows:⁸⁹

135. Protests are protected by the principles of freedom of association only when such activities are organized by trade union organizations or can be considered as legitimate trade union activities as covered by Article 3 of Convention No. 87.

523. The right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87.

555. With regard to the majority vote required by one law for the calling of a legal strike (two-thirds of the total number of members of the union or branch concerned), non-compliance with which might entail a penalty by the administrative authorities, including the dissolution of the union, the Committee recalled the conclusions of the Committee of Experts on the Application of Conventions and Recommendations that such legal

⁸⁷ Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey on Freedom of Association and Collective Bargaining, Report III (Part 4B), International Labour Conference, 81st Session, 1994 (*General Survey 1994*), p.66, para. 147-148.

⁸⁸ Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey on the Fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalisation, 2008, Report III (Part 1B), International Labour Conference, 101st Session, 2012, p. 48-49, para. 118-119

⁸⁹ Digest of Decisions, op cit., para. 135, 523, 555 and 669

provisions constitute an intervention by the public authorities in the activities of trade unions which is of such a nature as to restrict the rights of these organizations, contrary to Article 3 of the Convention.

669. The Committee considered that some of the temporary measures taken by the authorities as a result of a strike in an essential service (prohibition of the trade union's activities, cessation of the check-off of trade union dues, etc.) were contrary to the guarantees provided for in Article 3 of Convention No. 87.

2.1.3. The Right to Organise and Collective Bargaining Convention (No. 98)

As referenced to article 1 and 2 of the ILO's convention on the right to organise and collective bargaining (No. 98), the right to strike is also implicitly enshrined within the principle of freedom of association and collective bargaining. The convention particularly reinforces the safeguard of the right to strike entitled to workers and their organisations so as to the prohibition of acts of anti-union discrimination and acts of interference in their organisations' establishment, functioning or administration. Article 1 of the Convention guarantees the protection against acts of anti-union discrimination, including dismissal or any forms of employment prejudice, solely due to their "participation in union activities outside working hours or, with the consent of the employer, within working hours".⁹⁰ While article 2 grants the protection to workers and their organisations against acts of interference by employers' organisations in the course of their "establishment, functioning or administration".⁹¹

The act of union or workers' organisations to organise or function freely, generally considered one of the essences of collective rights to freedom of association, embraces an extensive array of union actions, including strike and collective bargaining actions. The convention is undeniably viewed not as yielding new rights, but rather enunciating a principle that had already been accepted; namely, that workers, and employers, in exercising their right to freedom of association must be able, if they chose, "to form associations that are independent and capable of representing their interest for the purpose of collective bargaining".⁹²

2.2. The UN's instruments

In parallel with, though not necessarily a duplication of ILO's instruments regarding right to strike in particular and freedom of association in general, the United Nations has historically and subsequently adopted the Universal Declaration of Human Rights, which was adopted a few months after the adoption of Convention No. 87 and a few months before the adoption of Convention No. 98, whereby the guarantee of the right to strike is explicitly protected, as in its article 23(4): "Everyone has the right to form and to join trade unions for the protection of his interests." This was given greater articulation in the two Human Rights treaties adopted in 1966, with the remarkable inclusion in both treaties of a clause providing for respect of ILO Convention 87.

⁹⁰ The Right to Organise and Collective Bargaining Convention (No. 98), article 1

⁹¹ Ibid, article 2

⁹² Bellace Janice R., 2014, The ILO and the right to strike, *International Labour Review*, Vol 153, No. 1, page 43

2.2.1. International Covenant on Economic, Social and Cultural Rights (ICESCR)

Within the clause (d) under the article 8 of the Convention, it exactly articulates the protection assured by the States Parties to the treaty of “the right to strike, provided that it is exercised in conformity with the laws of a particular country”; and it, moreover, stresses in paragraph 3 of the same Article, that “nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention”.

While it is largely in accordance with the ILO standards, there are a few divergences.⁹³ Firstly, employers are not entitled protection under the present Covenant.⁹⁴ Secondly, it explicitly safeguards the right to strike, though with the requirement that it should be applied in conformity with the national legislation of a corresponding country. This supplements the concern in article 8(1)(c) that States parties shall ensure “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.” These calls for respect for the national legal order are not accompanied by the countervailing provision found in article 8(2) of ILO Convention 87 that “The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention”, yet it undoubtedly provided the scope of authority’s measure, under article 8(3) of the same Convention with regard to the restriction on the right to strike to the extent not to render any “legislative measure which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in [Convention No. 87]”.

2.2.2. International Covenant on Civil and Political Rights (ICCPR)

Article 22 of the Covenant on Civil and Political Rights covers part of the same ground as the ICESCR, but is less extensive. In particular, it does not spell out the right to strike. It guarantees “the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests”. In contrast to article 8 of the ICESCR, which expressly provides the rights of trade unions (to function freely, to strike, to form international trade union organisations), this article is limited to the mere reference that trade unions may protect the interest of their members. This is due to the historical reason of the establishment of and relationship between both Covenants with regard to the same right; the ICCPR avoids specific rights regarding the functions of trade unions so as not to emphasise too strongly the socio-

⁹³ Keith Ewing, *Myth and Reality of the Right to Strike as a “Fundamental Labour Right”*, 29(2) *IJCLIR* 145, 146 (2013).

⁹⁴ The reasons for this omission were essentially that the USSR and its allies did not want the forces of capital to be covered. See the detailed analysis of this history in H. Dunning: *The origins of Convention No. 87 on Freedom of Association and the right to Organise*, *Int’l Labour Rev.* Vol. 137, No. 2, (Geneva, ILO, 1998), p. 160.

economic character of this right in a treaty limited to civil and political rights,⁹⁵ particularly stressing the right to strike exercised by non-governmental organisations and political parties and apparently preferring to leave this to the ICESCR.⁹⁶

It should also be critically noted that the Human Rights Committee which supervises the implementation of the Covenant originally did not consider that the ICCPR protected the right to strike.⁹⁷ However, since 1999, it has done so, and monitors states protection of this right.⁹⁸ The HRC has developed its own understanding that, even in the absence of a stated right to strike in this Covenant, the right nevertheless exists as an inherent part of the right to freedom of association, and that it is the Committee's obligation to examine not only the existence of that right but also the conditions under which it is exercised.

2.3. European instruments

2.3.1. The European Convention on Human Rights

The right to strike is not expressly guaranteed within the European Convention on Human Rights (ECHR) either.⁹⁹ However, ECHR, article 11 provides that: "everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests..." The right *per se* had long been unprotected and forgotten under European Court of Human Right jurisprudence.¹⁰⁰ In these cases, the Court communicated and repeated that Article 11 simply imposed a duty on States to have mechanisms in place to enable trade unions to represent their members, but did not guarantee any particular means by which this was to be done. As a result, the failure of a state to provide a precise mechanism for trade union organisations to be heard in order to protect their members' interest would not amount to violation under article 11(1) if other possible means were already allowed by which the union could be heard. Thus it is open to a State to refuse to consent the obligations relating to the right to organise, the right to bargain or the right to strike.

However, the position of the ECtHR has noticeably advanced over the years. In *UNISON v United Kingdom*,¹⁰¹ the court was beginning to move its position in favour of the right to strike. It should also be noted that it was nevertheless held the restrictions on the right to strike did not constitute a violation of ECHR, article 11. However, it was no longer affirmed by the court that the right to strike as such was

⁹⁵ Nowak, Manfred (2005). UN Covenant on Civil and Political Rights, *CCPR Commentary*. 2nd revised edition. Kehl: N. P. Engel. Page. 391

⁹⁶ International Trade Union Confederation (ITUC), March 2014, *The Right To Strike and the ILO: The Legal Foundations*, page 44 – 45

⁹⁷ *J.B. et al. v Canada*, 1986, CCPR/C/28/D/118/1982

⁹⁸ Concluding Comments on Chile, 1966; P Maclem, 2005, *The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right? in P Alston (ed), Labour Rights as Human Rights*, Oxford University Press, United Kingdom

⁹⁹ K D Ewing and J Hendy QC, *The Dramatic Implications of Demir and Baycara*, 39 ILJ 2 (2010).

¹⁰⁰ *National Union of Belgian Police v Belgium*, 1979, 1 EHRR 578; *Swedish Engine Drivers v Sweden*, 1979, 1 EHRR 617; *Schmidt and Dahlstrom v Sweden*, 1979, 1 EHRR 632.

¹⁰¹ *Unison v United Kingdom*, 2002, IRLR 497.

unprotected by ECHR, article 11(1), though the restrictions in this case were found to have been justified under ECHR, article 11(2).

More significantly, this development has reached a peak where there was a complete recognition of the right to strike as enshrined under ECHR, article 11, particularly in the case *Demir and Baycara v. Turkey*,¹⁰² by which the court judgment unanimously rendered that an annulment of a collective agreement in Turkey amounted to an infringement against article 11. The Grand Chamber expressly underscored that “the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights”.¹⁰³ In maintaining that the right to bargain collectively and right to strike were now becoming an essential element of the right to freedom of association, the Court took into account a wide range of international treaties, including ILO Convention 98, the European Social Charter, and the EU Charter of Fundamental Rights as well as the constitutional and labour law and practice of the Member States of the Council of Europe.¹⁰⁴

2.3.2. The European Social Charter

As complementary instrument to the European Convention on Human Rights, the European Social Charter (ESC – CETS No. 35) was adopted in 1961 and revised in 1996 as “Revised European Social Charter” (RESC – CETS No. 163).¹⁰⁵ The European Social Charter is a Council of Europe treaty which guarantees fundamental social and economic rights as a counterpart to the European Convention on Human Rights, which references to civil and political rights. Both the original and revised treaties contain an explicit guarantee of the right to collective action, including to strike. Article 6(4) states that: “with a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake ... and recognise: 4) the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into”.

2.4. The ASEAN Declaration on Human Rights¹⁰⁶

The Declaration is a non-binding legal instrument unanimously adopted by all ASEAN members in 2012 in Phnom Penh, Cambodia, during its 21st Summit, pledging to protect human rights in the region and following the creation of ASEAN Inter-Governmental Commission on Human Rights in 2009. Like many other international and regional legal instruments, the declaration seeks no obvious definitive provision on the right to strike. It exclusively covers partial elements of the freedom of association. Under article 27(2),

¹⁰² *Demir and Baykara v Turkey*, 2008, ECHR 1345.

¹⁰³ *Ibid*, para. 146

¹⁰⁴ *Ibid*, para. 147 – 154

¹⁰⁵ Out of the 47 Council of Europe Member States only four have ratified neither the ESC nor the RESC (Liechtenstein, Monaco, San Marino and Switzerland)

¹⁰⁶ The Declaration is a non-binding legal instrument unanimously adopted by all ASEAN members in 2012 in Phnom Penh, Cambodia, during its 21st Summit, pledging to protect human rights in the region

it is stated that: “every person has the right to form trade unions and join the trade union of his or her choice for the protection of his or her interests, in accordance with national laws and regulations”, without further mentioning the right to strike and permissible limitation of state legislative measure against the right to freedom of association in general as such.

3. General Principles of the Right to Strike

The general principle of the right consists of five crucial elements, including who will be entitled to exercise the right to strike, under which conditions, in what types of strike which can be regarded as legal, to what extent the right to strike can be legitimately exercised, and what the appropriate guarantee mechanism is when the right to strike is deprived.

3.1. Types of worker who enjoy the right to strike

It should be critically realised that not all types of workers enjoy the right to strike in occupational and trade union purpose equally. Workers in private sectors of economic, either they were categorized in formal or in informal form of economy, are guaranteed the full enjoyment of the right to strike, so long as they act in a peaceful manner and given that strike action is one of the fundamental means for rendering effective the right of workers’ organizations “to organize their ... activities” (Article 3 of Convention No. 87). However, the right as such maybe limited onto public employees and workers in essential services in the strict sense of the term or employees in the situation of acute national emergency, which will be discussed in the below sub sections. Though, it should be noted on the onset that Article 9 of Convention No. 87 allows a very restrictive limitation on the right to strike to armed force and police officers, as stating that “the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations”.

3.1.1. Public servants and employees in essential service

The certain sorts of employee in public service are entitled to the right to strike along with other aspects of freedom of association. It is recognised by both ILO supervisory bodies with a consensus agreement during the preparatory discussions leading to the adoption of Convention No. 87, as stating that “the recognition of the right of association of public servants in no way prejudices the question of the right of such officials to strike”¹⁰⁷. The right as such is not absolute, on the other hand, that it could be restricted in the event that an effective industrial dispute resolution mechanism is put in place to safeguard the workers’ occupational interest, or even obviously prohibited in so far as a strike triggers serious hardship to the national community.¹⁰⁸ It, moreover is stressed by the Committee on Freedom of Association and the Committee of Experts that “when public servants are deprived the right to strike, they should enjoy sufficient guarantees

¹⁰⁷ Gernigon, Bernard; Otero, Alberto; and Guido Horacio, 1998, *ILO Principle Concerning the Right to Strike*, International Labour Office, Geneva, page 17; *Freedom of association and industrial relations*, Report VII, International Labour Conference, 30th Session, 1947, Geneva, page 109

¹⁰⁸ Digest of Decisions, op cit., para. 573

to protect their interests, including appropriate, impartial and prompt conciliation and arbitration procedures to ensure that all parties may participate at all stages and in which arbitration decisions are binding on both parties and are fully and promptly applied”.¹⁰⁹

More significantly, the right to strike, under CFA’s Digest of Decisions, may be limited only for public servants “exercising authority in the name of the State”.¹¹⁰ It basically doesn’t grant a total authority to the state’s national law to determine what certain type of public servants could be restrictively limited their right to strike. Instead, it becomes a legal guideline for normatively identifying those public servants who may be excluded the right to strike, which emanates from a very nature of the functions that such public servants carry out. Thus, while the right to strike of officials in the employ of ministries and other comparable government bodies, that of customs officers as well as that of their assistants and of officials working in the administration of justice and of staff in the judiciary, may be subject to major restrictions or even prohibitions;¹¹¹ the same does not apply, for example, to persons employed by state enterprises, who do not exercise authority in the name of the State, such as public servants in state-owned commercial or industrial enterprises in oil, banking and metropolitan transport undertakings or those employed in the education sector and, more generally, those who work in state companies and enterprises.¹¹²

It should also be highlighted that aside from the category of public servants whose role is to exercise authority in the name of the State that their right to strike is permissively restricted or prohibited, among the group of public servant who do not exercise authority in the name of the State, those who carry out an “essential service in the strict sense of the term” may also be excluded from having recourse to strike action. The Digest of Decisions defines the essential service in the strict sense of the term referring to the services that is crucial for maintaining or protecting person’s life, health and safety of individual and the whole population.¹¹³ Within the Digest Decision, certain kinds of service are categorized in the essential service in the strict sense of the term, including hospital sector, electricity, water supply, telephone service, the police and armed forces, fire-fighting, public and private prison, the provision of food to pupils of school age and the cleaning of schools and air traffic control.¹¹⁴ Additionally, this concept is not absolute, and the list is not exhaustive. It can extend to a category of workers who are employed in the non-essential service, which can possibly restrict their right to strike given that “a strike lasts beyond a certain time or extends

¹⁰⁹ Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey on Freedom of Association and Collective Bargaining, Report III (Part 4B), International Labour Conference, 81st Session, 1994 (*General Survey 1994*), page 67, para. 153; Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey on the Fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalisation, 2008, Report III (Part 1B), International Labour Conference, 101st Session, 2012, p. 51 – 52, para. 127

¹¹⁰ Digest of Decisions, op cit., paras. 574 and 575

¹¹¹ Ibid, paras. 578 and 579

¹¹² Ibid, para. 577

¹¹³ Ibid, paras. 581 and 582

¹¹⁴ Ibid, paras. 585 and 586

beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population”¹¹⁵ or the character of their strike action evidently pose “a clear and imminent threat to the life, personal safety or health of the whole or part of the population”¹¹⁶.

3.1.2. Acute national emergency

In addition to the essential service in the strict sense of the term which gives rise to the possibility of a restriction on the right to strike of workers, the Committee of Freedom of Association, in its Digest of Decisions, went further to emphasize on another exceptional circumstance of acute national emergency where workers’ right to strike is also allowed to be restricted yet only within a short period of time.¹¹⁷ It noticeably applies only in exceptional circumstances, for instance, against the backdrop of an attempted coup d’État against the constitutionally elected government, which gave rise to a state of emergency; and only for a restricted period and only to “the extent necessary to meet the requirements of the situation”.¹¹⁸ The Committee also did not clearly articulate any permission to the government in defining the scope of the term acute national emergency in order to avoid inappropriate and discretionary restriction against right to strike and freedom of association. Instead it places the responsibility for temporarily suspending a strike action on the grounds of national security or public health to “an independent body which has the confidence of all parties concerned”.¹¹⁹

3.2. Condition for exercising the right to strike

Typically, the law of most nations provides for a series of prerequisites or requirements that must be met in order to render a strike lawful. The Committee on Freedom of Association, through its Digest of Decisions, has indicated that such conditions “should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations”¹²⁰. More importantly, the legal procedure for declaring a strike should not be made so complicated as to practically hamper the exercise of legal strike of workers. The committee thus lists several conditions in which the strike has to be made in order to be legal.

- 1) The obligation to give prior notice;¹²¹

¹¹⁵ Ibid, para 582

¹¹⁶ Ibid, para 581

¹¹⁷ Ibid, para 570; Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey on the Fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalisation, 2008, Report III (Part 1B), International Labour Conference, 101st Session, 2012, p.57, para. 140

¹¹⁸ Gernigon, Bernard; Odero, Alberto; and Guido Horacio, 1998, *ILO Principle Concerning the Right to Strike*, International Labour Office, Geneva, page 24

¹¹⁹ Digest of Decisions, op cit., para 571

¹²⁰ Ibid, para. 547

¹²¹ Ibid, paras. 552 - 554

- 2) The obligation to have recourse to conciliation, mediation and (voluntary) arbitration procedures in industrial disputes as a prior condition to declaring a strike, provided that the proceedings are adequate, impartial and speedy and that the parties concerned can take part at every stage;¹²²
- 3) The obligation to observe a certain quorum and to obtain the agreement of a specified majority;¹²³
- 4) The obligation to take strike decisions by secret ballot;¹²⁴
- 5) The adoption of measures to comply with safety requirements and for the prevention of accidents;¹²⁵
- 6) The establishment of a minimum service in particular cases;¹²⁶ and
- 7) The guarantee of the freedom to work for non-strikers.¹²⁷

Despite these prerequisites, over the years, the Committee on Freedom of Association and the Committee of Experts have adopted principles which confine their scope, including recourse to conciliation, mediation and arbitration; the necessary quorum and majority required to permit an assembly to declare a strike, and the establishment of a minimum service.¹²⁸

3.3. Types of legal strike action

With regard to the Committee's Digest of Decisions, paragraphs 545 and 546, and it was reaffirmed in the Committee of Expert's General Survey¹²⁹, a wide range of strike action is considered legitimate in so far as it is conducted in a peaceful manner. Both paragraphs indicate a number of strike actions, including wild-cat strikes (a sudden strike without giving prior warning by workers), tools-down, go-slow (a slowdown in work), working to rule (work rules are applied to the letter) and sit-down strikes as well as strike pickets and workplace occupation, aside from typically legal work stoppages, provided that they are conducted in a peaceful manner.¹³⁰ The Committee has also considered that the "occupation of plantations" by workers and by other persons, if it is not committed violently, should also be considered acceptable and safeguarded. However, if it is staged brutally, it should be subject to prohibition.¹³¹

4. Concluding Remarks

Under this chapter, it has been illustrated that the legal norms with regard to the right to strike are comprehensively founded under international human rights law regime in general and under

¹²² Ibid, paras. 549 - 551

¹²³ Ibid, paras. 555 - 562

¹²⁴ Ibid, para. 559

¹²⁵ Ibid, paras. 604 - 605

¹²⁶ Ibid, paras. 606 - 610

¹²⁷ Ibid, paras. 651

¹²⁸ Gernigon, Bernard; Odero, Alberto; and Guido Horacio, 1998, *ILO Principle Concerning the Right to Strike*, International Labour Office, Geneva, pages 25-26

¹²⁹ *Freedom of association and collective bargaining*, General Survey of the reports on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Report III (Part 4B), International Labour Conference, 81st Session, 1994. Geneva, paras. 173 and 174

¹³⁰ Digest of Decisions, op cit., para. 545

¹³¹ Ibid, para. 546

international labour instruments in particular. The right to strike has been widely recognized as *an intrinsic corollary* to freedom of association and rights to collective bargaining. Simply mean, the right to freedom of association is a collective rights, embracing an extensive array of right, among others, right to strike. It is moreover, the tool by which this right can be made effective if the bargaining process itself either is unsuccessful or is impeded. It has been provided for, both implicitly and explicitly, in core international human rights instruments including ICCPR, ICESCR, and international labour instruments, such as the ILO Constitution, the Convention No. 87 and the Convention No. 98, as well as other regional instruments concerning labour rights and freedom of association, including European Convention on Human Rights, European Social Charter and the non-binding ASEAN Declaration on Human Rights.

More importantly, the purpose the staging strike action by workers is not limited to purely occupational and economic interests. It extends to influence government policy on various sectors which directly and indirectly affect workers and their organisation, such as government's social protection scheme, employment policy, road safety and health care system, etc. It also undeniably covers other issues not considered purely political. However, it's profoundly difficult to segregate between what is political character and what is social and economic character of the strike.¹³² The distinction of each purpose of demand pursued should ultimately be made based on whether or not it directly and immediately affects the workers who call for the strike.

It is also far-reaching to be noted that the right to strike possesses five principles which give rise to the difference in enjoyment of the right from other normative rights, including types of workers who are entitled to exercise the right to strike, under which conditions, in what types of strike which can be regarded as legal, to what extend the right to strike can be legitimately exercised, and what the appropriate guarantee mechanism is when the right to strike is deprived. As clarified by the Committee of Freedom of Association in its Digest Decision regarding to the application of the principle of the right to freedom of association, workers and employees could fully employ their strike action as a mean to defend and promote their social and economic interests without any interference from State or third party or unjustified condition of limitation, except within the circumstance of acute national emergency or "endangering the life, personal safety or health of the whole or part of the population", or due to the nature of occupation of workers which is categorized in an essential services or public services in the name of State authority

¹³² Gernigon, Bernard; Otero, Alberto; and Guido Horacio, 1998, *ILO Principle Concerning the Right to Strike*, International Labour Office, Geneva, page 14.

CHAPTER FOUR: SCOPE OF THE RIGHTS AND STATE OBLIGATIONS CORRESPONDING TO THE RIGHT TO COLLECTIVE BARGAINING AND THE RIGHT TO STRIKE

1. General limitation of the rights to collective bargaining and to strike

The right to strike, which is mentioned in the above section as derivative form of the collective rights to freedom of association, and the fundamental rights to collective bargaining are not absolute and can be derogable in case of emergency situation,¹³³ as well as embraces the same general limitation as that of the rights to freedom of association. International human rights law permits certain permissible restriction on the right to collective bargaining and to strike in particular and freedom of association in general;¹³⁴ however, it articulates a provision of high threshold standard for that restriction on both rights in order to assure a maximum enjoyment of the rights *per se* by individual or groups in society as a whole and ensure the essence of the rights as such as the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, has avowed that, “freedom should be the rule and restrictions the exception” and “one of the key principles of freedom of association is the presumption that the activities of associations are lawful”.¹³⁵ Article 22(2) of the ICCPR, which provides the identical condition of limitation as article 8 of the ICESCR, offers the following threshold of permissible restriction on the right:

“No restriction may be placed on the exercise of this 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.”

Any limitation or restriction on the right to collective bargaining and to strike must also meet all the requirements under Article 22 (2) of ICCPR and article 8 of ICESCR, though, and in addition to, the certain restriction of the said rights is obviously affirmed within the International Labour instruments supervised by the ILO. The restriction must be: prescribed by law, necessary in a democratic society and in accordance with the purposes under paragraph (2).

1.1. Prescribed by law

First and foremost, the restriction shall be prescribed by law. The restriction must be legitimised by domestic law through the acts of elected parliamentary, decisions of the Court, other adjudicative bodies. Government decrees and administrative orders or notifications do not perceptibly satisfy the threshold of

¹³³ ICCPR, article 4(2); General Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey on Freedom of Association and Collective Bargaining, Report III (Part 4B), International Labour Conference, 81st Session, 1994 (*General Survey 1994*), page 67, para 152

¹³⁴ UDHR, Article 29(2); ICCPR, Article 22(2); ICESCR, Article 8(1)(a); DHRD, Article 17.

¹³⁵ Kiai, Miana, April 24, 2013, *Reports of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*. A/HRC/23/39, para. 18

‘prescribed by law’.¹³⁶ Such domestic law must also comply with the provisions and standards of international human rights law which guarantees the respect of universally recognized human rights and fundamental freedoms on a non-discriminatory basis. Failing to do so will definitely amount to a violation of the rights without further considering of the remaining criteria as presented below, such as legitimate aim pursued and proportionality principle.

1.2. Necessary in a democratic society

In addition to the above condition, the restriction imposed on the right must be ‘necessary in a democratic society’. There is a direct relation between freedom of association, pluralism, and democracy.¹³⁷ The right to freedom of association stimulates the existence and proper functioning of plurality of associations which is the essence of a democratic society, upholding the principle of pluralism, tolerance and broadmindedness. The Human Rights Committee (CCPR) requires States to demonstrate their necessity and proportionality to the pursuance of legitimate aims in order to ensure continuous and effective protection of the right under the Covenant.¹³⁸ With regard to any restriction, the State must provide a concrete proof that the imposed measure must be warranted and taken with ‘extreme care’ to evidently hamper real and precise risk, not subjective risk, in particular by establishing a direct and immediate connection between the expression and the threat, to the legitimate aim under paragraph (2) of article 22 of ICCPR.¹³⁹

The objective of the necessity test, affirmed by the ECtHR, is to consider whether the authorities have struck “a fair balance between the competing interests of the individual and of society as a whole”.¹⁴⁰ According to the ECtHR, two criteria must be met under the necessity requirement. The limitation must “respond to pressing social needs and be proportionate to the legitimate aim pursued”.¹⁴¹

The notion of proportionality is integrated into the necessity prerequisite.¹⁴² The proportionality test is a threshold to determine the ‘necessary in a democratic society’ standard. To determine the proportionality of the restriction on the right, the intensity of the measures with the specific reason for interference must be considered and further balanced with the legitimate aim.¹⁴³ The State must demonstrate that the interference is a ‘minimum level of interference’ to pursue the legitimate aims. More importantly, it is essential to assess

¹³⁶ Ibid, para. 19

¹³⁷ *Gorzelik and others v. Poland*, ECtHR, Judgement, February 14, 2004, application No. 44158/98, para. 88

¹³⁸ CCPR, 2004, *General comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 6

¹³⁹ HRC (2009). *Reports on Human Rights Defenders*, A/64/226, para. 28&35

¹⁴⁰ *Keegan v. Ireland*, ECtHR, May 26, 1994, 16/1993/411/490, para. 49

¹⁴¹ Golubovic, Dragan, 2013, Freedom of association in the case law of the European Court of Human Rights, *The International Journal of Human Rights*, 17:7-8, page 765.

¹⁴² Joseph, Sarah & Castan, Melissa, 2013, *The International Covenant on Civil and Political Rights: cases, materials, and commentary*, Oxford University Press, page 652.

¹⁴³ HRC (2009). *Reports on Human Rights Defenders*, A/64/226, para. 29; *Tebieti Múhafize Cemiyeti and Israfilov v. Azerbaijan*, ECtHR, October 8, 2009, no 37083/-3, para. 82; *Jehovah’s Witnesses of Moscow v. Russia*, ECtHR, June 10, 2010, no 302/02. Para. 154

whether other less intrusive measures are ineffective to attain the legitimate aim of the State. The measure taken “must be oriented along the basic democratic values of pluralism, tolerance, broadmindedness and people’s sovereignty.”¹⁴⁴

The ‘necessary in a democratic society’ requirement is the highest threshold for the permissible restriction of the right under the international human rights law in which States have often failed to demonstrate the necessity and proportionality of the measures taken to restrict the right.

1.3. Legitimate aim pursued

Last but not least, the restriction must be imposed to pursue legitimate aims or purposes stipulated in Article 22 (2). Paragraph (2) provides an exhaustive list of legitimate purposes for right restriction. The restriction, prescribed by law, must serve one of the purposes of “the protection of national security or public safety, the protection public order (*ordre public*), the protection of public health or morals, and the protection of the rights and freedom of others.” Any other grounds of restriction on the right may not be considered permissible under international human rights law.¹⁴⁵

2. State obligations corresponding to the rights to collective bargaining and right to strike

Under international human rights regime, two fundamental elements is constructed, ‘duty bearer’ and ‘right holder’. A duty bearer refers to a State authority whose government has ratified and become a signatory member of international human rights instruments; whereas, a rights holder refers to any single or collective individual as a person or as a citizen of any State with whom the State has an internationally binding obligation, both positive and negative in nature, to ensure the enjoyment of human rights and fundamental freedoms to the fullest extent without unfounded interference or any discrimination.

The notion of positive and negative obligation corresponds with the idea of tripartite typology of State obligation: obligation to respect, protect and fulfill.¹⁴⁶ This legal typology of State obligation is not merely delimited to economic, social and cultural rights. It is an integrated approach to human rights obligation in general. Therefore, the obligation to *respect, protect and fulfill* is applicable in the case of the right to strike and collective bargaining.

2.1. Obligation to respect

First and foremost, the duty to secure human rights is an obligation to *respect* the enjoyment of the right to strike and collective bargaining. Thus, State must perform a negative obligation by not taking any measures which shall impair the exercise of the right *per se* of any individual. The State must in no circumstances intentionally violate right to freedom of association, right to strike and collective bargaining either through

¹⁴⁴ Manfred, Nowak, 2005, *UN Covenant on Civil and Political Rights: CCPR Commentary*, Strasbourg, Germany, para. 40, p. 505

¹⁴⁵ Golubovic, Dragan, 2013, Freedom of association in the case law of the European Court of Human Rights, *The International Journal of Human Rights*, para. 99, page 765

¹⁴⁶ General comment No. 31, para 6

their public institutions or their state agents.¹⁴⁷ Commonly, this duty is construed as a cost-free and passive obligation which entails state to refrain from any kinds of interference, leaving as widened space as possible for individual to exercise his/her rights and freedoms. More specifically, this duty requires state to abstain from any kinds of intervention into person's freedom to express their opinion via strike action or right to freely and voluntarily form a collective bargaining process, unless the State's imposed measure satisfies the high threshold conditions described in the above section.

2.2. Obligation to protect

Aside from the negative obligation, which has been pervasively perceived as main obligation enshrined in the principle of freedom of association, right to strike and collective bargaining, in particular and among other rights and freedom under ICCPR in general, the rights *per se* also requires a State to carry out its positive obligation. The obligation to protect is categorized under the family of positive measure of state obligation as a 'duty bearer'. The obligation to *protect* mainly requires State and its agents to prevent any acts of violation of the rights and freedoms either by private individual or entity or State agents themselves that would noticeably impair the enjoyment of the rights under the Convention. The obligation to protect embodies executive measure and procedural protective measure in the event that the violation against the right occurs. These measures must be undertaken with 'due diligence' to prevent, investigate, adjudicate, punish and redress the damage caused by act of violation from private person or entities or state agents.¹⁴⁸ Failing to provide above-mentioned measures would clearly give rise to an infringement by State of right to freedom of association as stipulated by article 22 of ICCPR.

2.3. Obligation to fulfill

That is yet an end to undertake the above two obligations, the State is conditioned to take another further positive measure, aside from protecting individual from any violation of his/her rights and freedom, which is an obligation to *fulfill* the enjoyment of human rights. A positive obligation to fulfill involves an obligation to adopt necessary laws in order to fully comply with international undertaking, incorporating all fundamental rights and freedoms into its domestic legislations and constitution. Furthermore, under article 2 of ICCPR, State is required to adopt not only conformed domestic laws but also "judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations"¹⁴⁹.

3. Concluding remark

To sum up for this chapter, it is indicated that the right to collective bargaining and the right to strike, a derivative form of the right to freedom of association, are not absolute. Both rights are subjects to restriction or limitation in the event of the rise of emergency which, if such restrictions were delayed, would trigger

¹⁴⁷ Megret Frederic, "Nature of Obligation", edited by Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, 2014, *International Human Rights Law*, Oxford University Press, page 102

¹⁴⁸ General comment No. 31, para. 8

¹⁴⁹ General comment No. 31, para. 7

dire threats or pose a great danger to social security, endanger part or whole population's life, safety or health. Nonetheless, international human right law and labour law so far persistently maintain a high threshold standard for the restriction to be able to be imposed. Generally speaking, in order to sanction the limitation on both rights as such, the State authority has to offer a great assertion that the imposition of limitation on the said right is legitimate, necessary and proportionate in the democratic society. To claim that any State measure satisfy the legal requirement of necessity and proportionality, the State must prove there would definitely be a fair balance being struck between the interest of the whole population and that of individual person whose right has been deprived. More importantly, the measure taken "must be oriented along the basic democratic values of pluralism, tolerance, broadmindedness and people's sovereignty."¹⁵⁰ Aside from the restriction, under international human rights law, the principles of 'duty bearer' and 'right holder' is perceived as instrumental to ensure that every essence of human right and dignity are substantially respected and protected by the government. A duty bearer refers to a State authority whose government has ratified and become a signatory member of international human rights instruments; whereas, a rights holder refers to any single or collective individual as a person or as a citizen of any State with whom the State has an internationally binding obligation, both positive and negative in nature, to ensure the enjoyment of human rights and fundamental freedoms to the fullest extent without unfounded interference or any discrimination. The notion of positive and negative obligation corresponds with the idea of tripartite typology of State obligation: *obligation to respect, protect and fulfill*. State must *respect* the exercise of the above-mentioned rights by performing a negative obligation by not taking any measures which shall impair the exercise of the freedom of expression of any individual. The obligation to *protect* mainly requires State and its agents to prevent, either with executive measure or judicial measure, any acts of violation of the rights and freedoms either by private individual or entity or State agents which would noticeably impair the enjoyment of the rights under the Convention. A positive obligation to fulfill involves an obligation to adopt necessary laws in order to fully comply with international undertaking, incorporating all fundamental rights and freedoms into its domestic legislations and constitution. Furthermore, under article 2 of ICCPR, State is required to adopt not only conformed domestic laws but also "judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations"¹⁵¹.

¹⁵⁰ Manfred, Nowak, 2005, *UN Covenant on Civil and Political Rights: CCPR Commentary*, Strasbourg, Germany, para. 40, p. 505

¹⁵¹ General comment No. 31, para. 7

CHAPTER FIVE: THE ILO SUPERVISORY MECHANISM

The rights to collective bargaining and right to strike are also regarded as fundamental labour standards to which all ILO State members must be obliged to ensure for the full enjoyment without any kinds of discrimination. The fulfillment of the State members' obligation with regards to any ILO Conventions they have ratified is monitored and supervised by the ILO system that is unique at the international level.¹⁵² The ILO commonly examines the application of standards by member states and suggests areas where they could be better applied. If there are any problems within the application of standards, the ILO will offer an assistance to country members through social dialogue and technical support. The ILO has developed various means of supervising the application of Conventions and Recommendations in law and practice following their adoption by the International Labour Conference and their ratification by States. There are two kinds of supervisory mechanism: regular system of supervision and special procedures.

1. Regular system of supervision

The regular system of supervision is based on the examination by two ILO bodies of reports on the application in law and practice sent by member States and on observations in this regard sent by workers' organizations and employers' organizations.

1.1. Committee of Experts on the Application of Conventions and Recommendations

The Committee of Experts was initially established in 1926 with the purpose to examine the rapidly growing number of reports, submitted by government of member States, on the obligatory application of ratified Conventions. As of today, the Committee is composed of 20 eminent jurists from geographically, culturally and legally different background appointed by the ILO's Governing Body upon the proposal of the Director-General for renewable term of three years.¹⁵³ The Committee's role is to provide an independent and technical evaluation on the member States' application of international labour standards under ILO Conventions they have ratified, unratified Conventions and ILO Recommendation as provided for in articles 19, 22 and 35 of the ILO Constitution.¹⁵⁴ In principle, the government of member States must submit their reports illustrating measures they have undertaken in law and practice to apply any of the eight fundamental and four governance Conventions they may have ratified in every three years; for other ILO

¹⁵² International Labour Organisation, *ILO supervisory system/mechanism*, retrieved on March 23, 2018 from <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm>

¹⁵³ International Labour Organisation, *Committee of Expert on the Application of Conventions and Recommendations*, retrieved on March 23, 2018, from <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm>; International Labor Standards Department, *Handbook of the Procedures relating to International Labor Conventions and Recommendations*, International Labor Office, Geneva 2012, para. 58, page 34

¹⁵⁴ Ibid.

Conventions, the reports must be submitted in five years, except for the Conventions that are no longer supervised on a regular basis.¹⁵⁵

When examining the application of international labour standards, the Committee of Experts produces two types of comments: observations and direct requests. Observations contain comments on fundamental questions raised by the application of a particular Convention by a state and are generally used in more serious or long-standing cases of failure to fulfil obligations by each state member.¹⁵⁶ These observations, consequently, are published in the Committee's annual report. Direct requests are more technically related questions or requests for further information/clarification.¹⁵⁷ These requests are not publicly available in the report but are communicated directly to the governments concerned, and are made public some months later. The Committee's annual report consists of three parts. Part I contains a General Report, which includes comments about member States' respect for their Constitutional obligations; Part II contains the observations on the application of international labour standards, while Part III is a General Survey.¹⁵⁸ If the state concerned does not apply the recommendations mentioned in the comments, the Committee continues to follow the case until the state makes the necessary changes in law and in practice.

In 1964 the Committee of Experts embarked to list the cases where government of member States have made changes in law and in practice. These are called *cases of progress*. The Committee of Experts identifies such cases in its annual Report by noting "*with satisfaction*" where the government concerned has followed its previous comment. Since 2000 the Committee also started to apply another term - "*with interest*", which is used in relation to cases where some measures have been taken by the member States to improve the compliance to the conventions.¹⁵⁹ Where the Committee "*notes with concern*" or "*notes with regret*" that the government concerned has or has not taken particular action, it articulates that the problem of states non-compliance with its obligations is alarmingly severe.

The use of diplomatic language by the Committee of Experts is explained by the intention to avoid humiliating particular countries in order to maintain the dialogue and cooperation that may be required to improve a problematic situation.¹⁶⁰ The fact that the number of cases of progress has been increased during recent decades shows undoubtedly positive evolution in the implementation of the Committee of Experts' observations and proves the usefulness of diplomatic approach.¹⁶¹

¹⁵⁵ Ibid.

¹⁵⁶ Ibid, para. 59(k), page 36

¹⁵⁷ Ibid.

¹⁵⁸ Ibid, page 36-37.

¹⁵⁹ Gravel, Eric and Chloé Charbonneau-Jobin, *The Committee of Experts on the Application of Conventions and Recommendations: It's Dynamic and Impact*, ILO, Geneva 2003, page 23-24

¹⁶⁰ Rigby Crispin (ed), 2003, *Monitoring International Labor Standards: National Legal Frameworks*, Summary of a Workshop, National Academies Press, Washington, p. 32

¹⁶¹ Ibid, para. 59, page 23-24

1.2. Tripartite Committee Conference on the Application of Conventions

The annual report of the Committee of Experts; usually adopted in December, sent to the concerning government the following February and submitted to the International Labour Conference the following June, is examined by the Conference Committee on the Application of Standards.¹⁶² A standing committee of the Conference, the Conference Committee is made up of representatives of government, employer, and worker where it examines the report in a tripartite setting and selects from it a number of observations for discussion.¹⁶³

Following the independent, technical examination of documentation carried out by the Committee of Experts, the proceedings of the Conference Committee present an opportunity for representatives of governments, employers and workers to meet, review and comment on the manner in which States are discharging their obligations under and relating to Conventions and Recommendations.¹⁶⁴ It is also important to note that the Conference Committee selects the cases of utmost importance from the observations of the Committee of Experts Report. These selected observations are submitted to the Conference Committee to examine and adopted in plenary session.

The governments referred to in these comments are principally required to appear before the Conference Committee and to deliver information on the situation in question. This gives the Conference Committee members, including workers' and employers' delegates, possibility to publicly comment on a case and ask questions.¹⁶⁵ Such discussions heighten the public awareness of the situation and put more pressure on states to comply with their obligations. In many cases the Conference Committee draws up conclusions recommending that governments are highly encouraged to take specific steps to remedy a problem or to invite ILO missions or technical assistance. The discussions and conclusions of the situations examined by the Conference Committee are published in its report. Situations of special concern are highlighted in special paragraphs of its General Report.¹⁶⁶

2. Special procedures

Unlike the regular system of supervision, the three special procedures of ILO supervisory mechanism are carried out based on the submission of a representation or a complaint with regard to member state's obligatory application of ratified Conventions or of ILO fundamental principles:

¹⁶² International Labor Standards Department, *Handbook of the Procedures relating to International Labor Conventions and Recommendations*, International Labor Office, Geneva 2012, para. 60, page 37.

¹⁶³ Ibid.

¹⁶⁴ Ibid, para. 63, page 38.

¹⁶⁵ Ibid.

¹⁶⁶ International Labour Organisation, *Conference Committee on the Application of Standards*, retrieved on March 24, 2018 from <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/lang--en/index.htm>

2.1. Procedure for Representation on the Application of Ratified Conventions

The representation procedure is ruled by articles 24 and 25 of the ILO Constitution. It grants an industrial association of employers or of workers the right to present to the ILO Governing Body a representation against any member state which, in its view, "has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party"¹⁶⁷. The matter is initially communicated to the officers of the Governing Body following the institution's Standing Orders. The Governing Body then makes a decision whether the concerned case is receivable or not without discussing a substance of the matter.¹⁶⁸ The Governing Body will then set up a tripartite committee to examine the matter according to rules provided for in the Standing Orders, should the matter be receivable; or the Governing Body will refer the case to the Committee on Freedom of Association, should the matter be receivable and touch upon freedom of association or trade union rights.¹⁶⁹ The Committee, after receiving the case, reports to the Governing Body describing the steps taken to examine the representation and giving its conclusions and recommendations for decisions to be made by the Governing Body. The government concerned is also invited to be represented in the Governing Body. In case the representation is substantiated, the Governing Body may publish the representation and any government statement and notifies the association and government concerned.¹⁷⁰ The Governing Body also has competence to use the complaint procedure (see below) or to refer the issues, concerning any follow-up to the recommendations it has adopted, to the Committee of Expert.¹⁷¹

2.2. Procedure for Complaint over the Application of Ratified Conventions

The complaint procedure is governed by articles 26 to 34 of the ILO Constitution. Under these provisions, any member States can file a complaint against another member State for not complying with or satisfactorily implementing a ratified Convention which both of them have ratified. The complaint is then submitted to the Governing Body, which may alternatively use this procedure against any state on its own initiative or as a response to a complaint submitted by a delegate during the International Labor Conference.

Upon a receipt of a complaint, the Governing Body invites the state against which the allegations are lodged to respond on the subject matter. In case the state does not respond within a reasonable time, the Governing Body may form a Commission of Inquiry, consisting of three independent members, which is responsible for carrying out a full investigation of the complaint, ascertaining all the facts of the case and

¹⁶⁷ The ILO Constitution, article 24

¹⁶⁸ International Labor Standards Department, *Handbook of the Procedures relating to International Labor Conventions and Recommendations*, International Labor Office, Geneva 2012, para. 81(d), page. 49.

¹⁶⁹ Ibid, para. 81(e), page 49.

¹⁷⁰ Ibid, para. 81(f)-(h), page 49

¹⁷¹ International Labor Standards Department and International Training Centre of the ILO, *Guide to International Labor Standards*, Turin, 2008, page 265.

making recommendations on measures to be taken to address the problems raised by the complaint.¹⁷² A Commission of Inquiry is the ILO's supreme investigative procedure; it has an *ad-hoc* character and is generally established when a member state is accused of committing persistent and grave violations and has repeatedly denied to address them.¹⁷³ To date, 13 Commissions of Inquiry have been established, the latest one was established under article 26 of the ILO Constitution, following complaint filed against the Government of Venezuela in June 2015.¹⁷⁴

As a result of investigation and recommendation being made, the report is communicated to the concerned government. If the government concerned refuses to apply the recommendations of a Commission of Inquiry, the Governing Body can take action under article 33 of the ILO Constitution. This provision provides that "[i]n the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith." Article 33 was raised for the first time in ILO history in 2000, when the Governing Body asked the International Labour Conference to take measures to lead Myanmar to end the use of forced labour. An article 26 complaint had been filed against Myanmar in 1996 for violations of the Forced Labour Convention (No. 29), 1930, and the resulting Commission of Inquiry found "widespread and systematic use" of forced labour in the country.¹⁷⁵

2.3. Special Procedure for Complaints regarding Freedom of Association

After the Convention No. 87 and 98 relative to freedom of association and right to collective bargaining was adopted, the regular supervisory mechanism was soon not able to handle the overwhelming numbers of case with regard to the member States' application on the ILO Conventions, especially the compliance to the freedom of association related Conventions. In response to this, a separate procedure for the complaint regarding freedom of association was established which consists of two separate bodies, The Fact-Finding and Conciliation Commission on Freedom of Association and the Committee on Freedom of Association.

2.3.1. Fact-Finding and Conciliation Commission on Freedom of Association

The Commission is composed of nine independent persons appointed by the ILO's Governing Body, who typically work in panels of three.¹⁷⁶ This Commission examines complaints about the violation of the trade union rights referred to it by the Governing Body. The governments, workers' or employers' organisations

¹⁷² International Labour Organisation, *Complaints*, retrieved on March 26, 2018, from <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang--en/index.htm>

¹⁷³ Ibid.

¹⁷⁴ Commission of Inquiry, March 21, 2018, *ILO Governing Body decides to appoint Commission of Inquiry for Venezuela*, Press release, retrieved on May 7, 2018, from http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_622567/lang--en/index.htm

¹⁷⁵ Ibid.

¹⁷⁶ International Labor Standards Department, *Handbook of the Procedures relating to International Labor Conventions and Recommendations*, International Labor Office, Geneva 2012, para. 89, page. 52.

can also possibly lodge the complaint to the Commission. More significantly, it should be noted that the governments referred to above could potentially be (i) members which have ratified the Conventions on freedom of association; (ii) members which have not ratified the relevant Conventions and which consent to the referral; (iii) non-members of the ILO which are member States of the United Nations, where the Economic and Social Council of the UN has transmitted the matter to the ILO and the State has consented to the referral.¹⁷⁷

The past practices have demonstrated that the governments against whom the procedure was first invoked were not to give above-mentioned consent on the procedure to be initiated. For that reason, the work of the Commission was blocked for more than a decade, and this procedure is only used very rarely.

2.3.2. Committee on Freedom of Association

The Committee is a tripartite organ of the Governing Body, consist of nine persons as full members and other nine substitute members sitting in a personal capacity, plus an independent Chairperson.¹⁷⁸ Its sittings are private, working documents confidential and, in real practice, its decisions are made by consensus. The Committee examines complaint on the infringement of freedom of association and submit its conclusions and recommendations to the Governing Body. The complaints may also be taken into consideration even if the country concerned has not ratified any of the Conventions in the field of freedom of association.¹⁷⁹ Similar to the case handle by the Commission above, workers' or employers' organisation can lodge a complaint to the Committee; and the complaint itself must be in written form, signed and supported by proof of allegations relating to specific infringements of freedom of association.¹⁸⁰

More importantly, the Committee possess a full margin of appreciation to decide upon the admissibility of the complaints regarding the applicant. According to the special procedures for the examination of complaints alleging violations of freedom of association, the Committee has full power to decide whether an organization may be deemed to be an employers' or workers' organization within the meaning of the ILO Constitution, and it does not consider itself bound by any national definition of the term. The fact that the trade union has not deposited its by-laws or not been officially recognised by corresponding government – two examples of nationality-imposed definitions of legal trade unions – are not the criteria for consideration the admissibility of the complaint.¹⁸¹

More interestingly, the Committee also have a legitimate adjudicating or enforcing power to conduct an investigation on spot and/or take oral evidence or undertake other various mission (direct contacts, technical

¹⁷⁷ Ibid, para. 90, page 53-54

¹⁷⁸ International Labor Standards Department, *Handbook of the Procedures relating to International Labor Conventions and Recommendations*, International Labor Office, Geneva 2012, para. 85, page 50.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid, para. 86, page 51

¹⁸¹ Ibid, para. 87

assistance, etc.) with the government's consent. Once the Committee determines that there is sufficient information, it examines the case and drafts a report with recommendations and conclusions.¹⁸² Finally, the report of the Committee is submitted to the Governing Body for approval. The Governing Body communicates the report to all relevant parties and publishes it in the *Official Bulletin*. In the event that the country concerned has ratified relevant conventions on freedom of association, the case can further be referred to the Committee of Experts on the Application of Conventions and Recommendations.¹⁸³

3. Concluding remark

As mentioned above, the same as other ILO fundamental standards, ensuring the full enjoyment of the rights to strike and collective bargaining in the member States' national law and practice is undertaken with a cooperation and supervision from the ILO supervisory mechanisms through which technical assistance, social dialogue and other supports would be accorded to the concerned member States. Thus, two kinds of ILO supervisory mechanism – regular system of supervision and special procedures, has been made to accommodate the member States' application on the concerned Conventions.

The regular system of ILO supervisory mechanism could be considered as a soft supervisory international system to follow up on the observance of ILO's member states on a regular basis. The State's observance on international labour standards enshrined in various international labour Conventions is examined through the Committee of Expert or Tripartite Committee Conference on the Application of the Conventions. Either simple comments or *direct requests* produced by the Committee of Expert concerning the particular State in application on the particular Conventions are intending to provide all kinds of available assistance, from legal to technical field of supports, to the concerned State in order to encourage State to take positive steps to remedy problems.

In addition to the regular system on examination of State members' compliance to international labour standard on a regular basis, the ILO offers an additional complaint mechanism or special procedure where trade union or employers' organisation can lodge a complaint against the member States on various labour rights violation under the ILO's Conventions. Under this procedure, moreover, ILO member States is also given the right to file a complaint against another member State on infringement of particular ILO Conventions which the latter has ratified, which may considerably be regarded as special within the international law regime that allows a State to interfere another sovereign State's internal affair with regard to rights violation.

¹⁸² Ibid, para. 88(l), page. 52.

¹⁸³ Ibid, para. 88(g), page. 52.

CHAPTER SIX: RIGHTS TO COLLECTIVE BARGAINING AND TO STRIKE IN CAMBODIA: AN ANALYSIS OF THE TWO LABOUR LAWS IN COMPARISON WITH INTERNATIONAL STANDARDS

This chapter will be presented to tackle the third sub-research question with regard to the application and the guarantee of rights to collective bargaining and to strike in the context of Cambodia's legislative system, an analytical comparison of Cambodia's laws, namely the Constitution, Labour Law and Law on Trade Unions, with international standards under the purview of international human rights law and international labour law. The situation of Cambodia's application and observance of fundamental rights to freedom of association and collective bargaining and right to strike within its territory has been extensively examined by the ILO's supervisory bodies in comments as recent as this year. This analysis thus is obviously informed by the ILO's examination.

1. Cambodia's Constitution

The Constitution of the Kingdom of Cambodia was re-established by the new Constitutional Assembly on September 21, 1993, after a decades of civil war horrifically devastated the entire country. This version is the fifth constitution since the first modernised written constitution introduced by the French colony was adopted in 1947.¹⁸⁴ The Constitution is a normative constitution from its textual concept.¹⁸⁵ It is the supreme law of Cambodia.¹⁸⁶ Any laws or subsequent legal documents must under no circumstances diverge from the essence of the Constitution or otherwise they will be declared unconstitutional by the Constitutional Council—the supreme institution to safeguard the Constitution of Cambodia.¹⁸⁷

The Constitution with its fifth version is firmly based on the principle of democracy, fundamental rights, rule of law and separation of power, partly thanks to the influence of western's liberal ideas of democracy.¹⁸⁸ Therefore, fundamental rights lie at the heart of the Cambodia's Constitution, as expressly affirmed under constitutional chapter on the rights embarking with an embracement of the international human rights in article 31 (1):

¹⁸⁴ To date the Constitution was amended a number of times, but with the amendment of 1999, a new chapter (on the Senate) was included, which changed the numbers of articles from article 99 onward. Article numbers quoted here are according to the current "post-1999" version. For a useful collection of the historic constitutions of Cambodia see Raoul M. Jennar, *The Cambodian Constitutions (1953-1993)*, Bangkok 1995 (White Lotus Press). Jennar lists six constitutions altogether, treating the extensive amendments of the constitution of 1981 in 1989 effectively as the adoption of a new constitution. For a French language collection of the historic 20th century constitutions see Kim Y (ed.), *Collection Droit Khmer. Droit Constitutionnel, 1947-1993*, Phnom Penh 1997.

¹⁸⁵ Jorg Menzel, "Cambodia from civil war to a constitution to constitutionalism?", edited by Peng Hor, Phallack Kong and Jorg Menzel, 2016, *Cambodian Constitutional Law*, Konrad-Adenauer-Stiftung Cambodia, Cambodia, page 20.

¹⁸⁶ Constitution, art. 150

¹⁸⁷ Ibid, art. 136

¹⁸⁸ Menzel, op cit., p. 19

“The Kingdom of Cambodia recognises 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 and children’s rights.”

Despite not having obviously stated the international labour laws in the text of the Constitution, the principle of labour rights, provided for under international human rights law, is undeniably lie in several articles of the Constitution and subsequently together with other social, cultural, economic, civil and political rights is incorporated into the national legislation upon ratification of those instruments.

The right to strike is evidently safeguarded in the Cambodian legal system under article 37 of the Constitution, though there is an explicit provision of scope of application of the right *per se* merely within the scope of national law, which stipulate that: “The rights to strike and to organize peaceful demonstrations shall be implemented and exercised within the framework of law”. More significantly, the Constitution of Cambodia recognizes the right to strike as more than a derivative of the right to freedom of association¹⁸⁹, but an independent right guaranteed by the supreme law of Cambodia.

Unlike the right to strike, the right to collective bargaining, an element of the right to freedom of association, is not independently provisioned under a separate article in the Constitution. It is read within the meaning of the right to freedom of association under article 36 of the Constitution, which states that: “Khmer citizens of either sex shall have the right to form and to be member of trade unions. The organization and conduct of trade unions shall be determined by law”, leaving the scope of application to be specifically determined by national legislation.

While the Constitution is a supreme law which theoretically contains broad provisions, leaving national specific laws or *lex specialis* to further determine a definition and a scope of application of its provision, the exercise of the right to collective bargaining and to strike under the Constitution must be determined in accordance with specific laws. The current law concerning the rights to collective bargaining and to strike in Cambodia includes the Labour Law and Law on Unions of Enterprises. These laws are regarded as *lex specialis* whereas the Constitution is considered as *lex generalis* in the context of Cambodia. In case of implementation of the right, the provisions of *lex specialis* are applicable thereof.

The last section of Article 42 recognizes the right to take part in mass organisations. Mass organisations are permissible under the Constitution only if they are established for the purposes of ‘mutually protecting national achievements and social order’. Such delimitation of purposes of organization may contravene the principles of the right to freedom of association and collective bargaining in general and the right to strike which allows the pursuance of any common purposes considering it is lawful.¹⁹⁰

¹⁸⁹ Constitution, art. 36 and 42

¹⁹⁰ ICCPR, Article 22; Joseph, Sarah & Castan, Melissa, 2013, *The International Covenant on Civil and political Rights: Cases, Materials, and Commentary*, (third edition), New York: Oxford University Press, para. 37, page 652.

2. The Labour Law

The rights to strike and collective bargaining enshrined in the Constitution are further safeguarded under the *lex specialis* namely the Labour Law of the Kingdom of Cambodia. The Labour Law was passed by the Cambodia's National Assembly and went through the Royal Assent on March 13, 1997. It is obviously the first legislation in Cambodia to recognize the labour rights of freedom of association, including the rights to function of trade union, strike and collective bargaining.

2.1. The right to collective bargaining

Likewise, the right to collective bargaining is stipulated under an independent chapter within the Labour Law, embarking with the general provision which gave a detail definition and scope of application to the right as such. The right to collective bargaining¹⁹¹ is inferred under the Law as:

“[The purpose of the collective agreement is] to determine the working and employment conditions of workers and to regulate relations between employers and workers as well as their respective organisations. The collective agreement can also extend its legally recognised roles to trade union organisations and improve the guarantees protecting workers against social risks. ... The collective agreement is signed between:

- a) One part: an employer, a group of employers, or one or more organisations representative of employers; and
- b) The other part: one or more trade union organisations representative of workers. with derogation of the above principle, during the transitional period that there is no trade union organisation representative of workers in an enterprise or establishment, a collective agreement can be made between the employer and the shop stewards (workers delegates) who have been duly elected as per the conditions of Section 3, Chapter XI...¹⁹²

While the above definition provided for in the Law may be in line with that of international labour instruments, including ILO Recommendation No. 91 and the ILO Convention No. 154, that it has to be made in written form to regulate an employment relation between employers and workers representatives or trade unions, it, nevertheless, may have foregone an essential principle of “voluntary” process through which the agreement has to be made between the parties. This loophole might feasibly lead to an exploitation of the term in favour of public authority and powerful employers, given that there have been numerous allegations in Cambodia on workers' rights abuse perpetrated by employers, supported by the authorities, to force or coerce workers or workers' representatives to make an agreement where workers' rights and benefit may be imperilled.

More importantly, it would be conducive to the development of collective agreement; and rights and benefits of all workers in an undertaking would also be extensively secured, should there be a provision specifically express a certain level of representativeness of each trade unions or workers' representatives eligible in participating into the negotiating process. The absence of this description, which illustrates the

¹⁹¹ Within the Labour Law, the term “collective agreement” is used to refer to “collective bargaining”, the term used under international labour instruments

¹⁹² Labour Law, art. 96

certain level of representativeness of trade union organisations or workers' delegates eligible in take part in the process of collective bargaining within the above definition of term, means the provision might not fulfill the objective of maximizing the participation in collective bargaining to defend and promote the rights and benefit for all workers under the same undertaking.

More interestingly, the reference to the principle of *good faith* is absent in any provisions regarding the right to collective bargaining/agreement under the Law, which is explicitly not in compliance with the general principle of the right to collective bargaining under international labour instruments. In order to maintain a true social justice, peace and harmonious development of labour relation, the Committee on Freedom of Association via its Digest of Decisions recalls the indispensability which the collective bargaining process attaches to the obligation to negotiate in *good faith* by both parties.¹⁹³ Though, principle as such shouldn't be imposed by national law, and it "could only be achieved as a result of the voluntary and persistent efforts of both parties"¹⁹⁴, the principle should be mentioned in the provisions of the law to avoid employers' manipulation of the law against a workers' organisation to reach an unfair agreement.

Ultimately, the Law provides a wide scope and range of subject covered by collective agreement and a free choice of bargaining level, whether it is made in an establishment or an undertaking or a branch of activity. Under the last paragraph of article 96, it is expressly stated that "collective agreements shall specify their scope of application. This can be an enterprise, a group of enterprises, an industry or branch of industry, or one or several sectors of economic activities", and article 97 stipulates that "the provisions of a collective agreement shall apply to employers concerned and all categories of workers employed in the establishments as specified by the collective agreement". It is evidently in accordance with the ILO's Digest of Decisions 2006, paragraph 988, as affirming that "According to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority. ..."

Furthermore, the law grants a prevailing power to the parties' collective agreement over any national laws or regulations in the situation that that collective agreement provides more benefits to workers than those of laws and regulations in force as stating "the provisions of collective agreements can be more favourable toward workers than those of laws and regulations in effect..."¹⁹⁵

¹⁹³ Ibid, para. 934

¹⁹⁴ *Record of Proceedings*. International Labour Conference, 67th Session, 1981. Geneva, page 22.

¹⁹⁵ Labour Law, art. 98, para. 1

2.2. The right to strike

The right to strike is noticeably guaranteed and stipulated under an independent chapter of the Labour Law, embarking with the general provision which gave a detail definition and scope of application to the right to strike. Under article 318 of the Labour Law, the right *per se* 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”¹⁹⁶.

Under the Labour Law, the right to strike can be exercised in a number of circumstances.¹⁹⁷ The workers can legitimately exercise their right to strike: 1) when one of the parties to a dispute in the event of rejecting the arbitral decision; 2) when the Council of Arbitration has not rendered or informed of its arbitration decision within the period of fifteen days; 3) when the union representing the workers concerned deems that it has to exert this right to enforce compliance with a collective agreement or with the law; 4) in general situation to defend the economic and socio-occupational interests of workers; 5) and when all peaceful methods for settling the dispute with the employer have already been tried out.

However, it cannot be exercised when the collective dispute results from the interpretation of a judicial rule originating from the existing law, or the collective agreement, or the rule relating to an arbitral decision accepted by the concerned parties; and for the purpose of revising a collective agreement or reversing an arbitral decision accepted by the parties, when the agreement or the decision has not yet expired.¹⁹⁸

The above-mentioned scope of application of the right to strike under the Labour Law may be partly in line with objective of the right to strike as summarized in the ILO’s Digest of Decisions, yet it missed out a few conditions where strike can also be permitted under international labour law. It is in compliance with the purpose of strike action expressed under paragraph 526, 527 and 531 of the Digest of Decisions 2006 where workers can exercise their right to strike not only within the scope of their occupational demands, but they are also entitled to exercise the right to appeal for solutions to economic and social policy questions and problems of the government in general in so far as it has been directly affecting the workers and union members. However, the provision under the Labour Law does not accord the right to sympathy strike where workers can stage a strike protest to support the initial strike that is considered to be abide by national law. More importantly, there is no explicitly permissible provision under the Labour Law that provide for a general strike to be legitimately conducted in demanding justice, proper investigation and an end be brought to several murders of trade unions leaders and unionists during the past years, which is explicitly stated in paragraph 544 of the Digest of Decisions 2006.

¹⁹⁶ Labour Law of Cambodia, art. 318; The Labour Law in unofficial English version can be downloaded from the ILO website via <http://www.ilo.org/dyn/travail/docs/701/labour>

¹⁹⁷ Ibid, art. 319 and 320

¹⁹⁸ Ibid, art. 321

With regard to administrative procedure prior to declare strike, article 323 of the Labour Law, affirms that in order to render strikes lawful the union declaring the strike has to be abide by the legal procedure set out in its internal statutes and decisions must be made by “secret ballot”. The Law permits a prior notice period of not less than seven days, and the decision to declare strike must be communicated not only to enterprise concerned and employers’ association, if the strike affects an industry, but also to the Ministry in Charge of Labour.¹⁹⁹ The permissible provision of the Law relating to the decision making procedure to declare a strike action to be conducted by respective trade union would definitely be a guarantee of workers’ freedom to associate for strike action. While the requirement to communicate the decision to enterprise concerned or employers’ association prior to declare strike does not constitute an infringement against right to strike, the condition to further communicate the decision to the Ministry in Charge of Labour could trigger an unreasonable burden and could constitute a complicated and lengthy procedure for trade unions or workers’ organisations to fulfill. It is thus contrary to the decisions of the CFA as summarized in paragraphs 548 and 552 of the Digest of Decision 2006 that require the legitimate requirement to be not so complicated as to make it practically impossible to declare a legal strike and allow union of workers give prior notice merely to employer before calling a strike.

Under the Law, article 325 conditions the Minister in Charge of Labour to actively seek all means to conciliate between the parties to dispute, and obliges the workers’ organisations to “be present at the summon of the Minister in Charge of Labour” when the Minister call for conciliation between concerned workers’ organisation and employers’ organisation/representatives during the period of prior notice.²⁰⁰ This provision may evidently be divergent from the principle of voluntary conciliation and arbitration in industrial relation where workers are free and volunteer to participate in collective agreement or conciliation process with employers’ organisations in order to seek an agreed solution prior to stage a strike action, provided that the proceedings are adequate, impartial and speedy and that the parties concerned can take part at every stage.²⁰¹ Failing to respect this principle would trigger a serious violation to the right to strike and freedom of association of trade union and unionists.

The right to strike is also restricted under the Law whereby workers have to guarantee a minimum service within the enterprises. Article 326 stipulates that “during the period of notice, the parties to the dispute are required to attend the meeting in order to arrange the minimum service in the enterprise where the strike is taking place so that protection of the facility installations and equipment of the enterprise will be assured. If there is no agreement between the parties, the Ministry in Charge of Labour shall determine the minimum services in question.” This restriction may possibly be in line with the minimum service requirement

¹⁹⁹ Ibid, art. 324

²⁰⁰ Ibid, art. 325

²⁰¹ Digest of Decision, 2006, op cit., para 549 and 551

guaranteed under international labour standard where the strike action is taking place, its provision under the Labour Law, however, is expressed in a very broad scope of term and in diverge direction from the original purpose of the international standard, where the minimum services should only be maintained to ensure safety of machinery and equipment and the prevention of accidents;²⁰² in services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services in the strict sense of the term); services where the extent and duration of a strike might be such as to result in an acute national crisis; and in public services of fundamental importance.²⁰³

More importantly, in the situation of disagreement with the term and which type of workers should be restricted their right to strike, the Law accorded the adjudicating power to the executive bodies, Ministry in Charge of Labour to define the term and scope of restriction to the right to strike. This could possibly grant an unwarranted amount of discretion to an executive body that could result in a decision incompatible with international standards. Given that the Digest of Decisions 2006 guided the State member to refer the case to “arbitration tribunal” which is impartial, speedy and independent from legislative and executive body,²⁰⁴ there should be an establishment of labour specialized court or civil court to issue judgment on the term and types of workers whose right to strike could be limited following the criteria described under international labour instruments and guidelines.

What is positively significant under the Law with regard to the right to strike is the allowance of strike be taken place in essential services. Rather than be totally prohibited, the right to strike is merely restricted under articles 327 and 328 of the Law. It states that “if the strike affects an essential service, namely an interruption of such a service would endanger or be harmful to the life, or health of all or part of the population, the prior notice mentioned in article 324 shall be extended to a minimum of fifteen working days”; and “during the period of such prior notice, the Ministry in Charge of Labour shall determine the minimum essential service to be maintained so as not to endanger the life, health or safety of persons affected by the strike. The workers’ union that has declared the strike shall be asked to give its views as to which services to be maintained...” The list of essential services will be determined and be established by a Prakas (ministerial order) of the Ministry in Charge of Labour.²⁰⁵ To date, no determination on essential service during strike action has been made while hundreds of strike actions have already been occurred nationwide years after years.

More significantly, both the positive and negative right to strike are recognised under the Labour Law. Workers and its organisations on one hand have an inherent right to stage a strike action together with other

²⁰² Digest of Decision, 2006, op cit., para 605

²⁰³ Ibid, para. 606

²⁰⁴ Ibid, para. 605

²⁰⁵ Labour Law, art. 329

counterparts to demand and defend their respective socio-economic and occupational interest, and on the other hand have a right not to participate in any strike actions without fear of any kinds of coercion, threat and reprisal if s/he choose to do so. This guarantee is expressly affirmed under article 331 of the Labour Law as stating: “freedom of work for non-strikers shall be protected against all form of coercion or threat”²⁰⁶.

During the strike, the Law guarantees the right to be reinstated for workers who participate in strike after the strike end and the mandate of workers’ representatives during the strike.²⁰⁷ The Law also prohibits employers from imposing any sanction on workers because of their participation in a strike. Such sanction shall be nullified and the employer shall be punishable by a fine in the amount equal to sixty-one to ninety days of base daily wage or to imprisonment of six days to one month.²⁰⁸ More importantly, the employers, under the Law, are prohibited from recruiting new workers for a replacement for the strikers except to maintain minimum service if the workers who are required to provide such service do not appear for work. Any violation of this rule obligates the employers to pay the salaries of the striking workers for the duration of the strike.²⁰⁹ These provisions are no doubt in conformity with the principle set in the Digest of Decisions 2006 from paragraph 658 to 666 where striking employees/workers are fully protected from all kinds of discrimination imposed by their respective employers, and their rights and benefit must be safeguarded in accordance with the ILO’s Convention No. 98.

The criteria for determination of legality of the strike is clearly stipulated under the Law. Under article 336, a strike is declared illegal when the strike ceases to be peaceful or when striking workers do not comply with the procedures provided for in section 2 of chapter xiii of the Law, including procedure to give prior notice, minimum service and essential service. That the strike will be illegal solely in the event of failing to satisfy the criteria for prior notice is considered too onerous for union, workers’ representatives and workers, given that the procedure for communication of the notice requires it to be submitted to the Ministry in Charge of Labour, which becomes burdensome for workers, since they have to go through a lengthy and complicated bureaucratic procedure before being able to conduct a so-called legal strike. More interestingly, the extent to which strike action is illegal or legal will also be determined by the Labour Courts, or the common courts in the absence of the former.²¹⁰ It is a welcome provision in the first place for granting a judicial institution a jurisdiction to decide upon the legality and illegality of the strike. However, given the

²⁰⁶ Ibid, art. 331

²⁰⁷ Ibid, art. 332

²⁰⁸ Ibid, art. 333

²⁰⁹ Ibid, art. 334

²¹⁰ Ibid, art. 337

current situation of corrupted and politically bias judicial system in Cambodia, however, the right to conduct a legal strike will be surely in question, and if it is possible, it might not be widely enjoyed.²¹¹

3. Law on Unions of Enterprises

The Law on Union of Enterprises, aka Trade Union Law (TUL), was initially introduced in May 2010. The Law was subsequently revised a number of times from 2011 to 2014 in response to numerous comments from trade unions, employers association and international organisations, including ILO. Unfortunately, the development of the draft law by 2014 still contained provisions harmful towards rights and benefits of workers. As a result, the Law was ultimately adopted by the Cambodia's Council of Ministers on March 2016 without a significant improvement following the critics, and the Law was swiftly passed by the country's National Assembly in the midst of severe criticism by numerous independent trade unions, rights groups, international brands and international organisations, including ILO, and amid a violent crackdown on peaceful protestors on April 4.²¹² It was subsequently approved by the higher legislative house the following week.²¹³

The aim of the law is to provide rights and freedoms and to determine the organisation and functioning of professional organisations in Cambodia, including among others right to establish the trade union, right to formulate internal regulation of workers' unions, right to strike and right to collective bargaining. This law covers all enterprises, establishments and all persons under the provisions of the Labor Law.²¹⁴ Under the Trade Union Law, a 'professional organization' refers to "a voluntarily and jointly established team or group of workers or employers aiming to cooperate with one another to carry out activities or to develop their own procedural rules for achieving specific professional objectives or goals."²¹⁵ The professional organization of workers is called a 'union'.²¹⁶

3.1. The right to collective bargaining

Right to collective bargaining is recognised and regulated by both the Labour Law and the newly adopted and highly controversial Trade Union Law. The right as such is regarded as one of the essential elements of the fundamental trade unions' rights by the Cambodian legislators due to two obvious reasons. The first reason is that the right *per se* have been written clearly as one of the main objectives the state authorities

²¹¹ Alessandro Marazzi Sassoon and Mech Dara, April 11, 2016, Kingdom's judiciary perceived as most corrupt: UNDP, *The Phnom Penh Post*, available at <https://www.phnompenhpost.com/national/kingdoms-judiciary-perceived-most-corrupt-undp>

²¹² Baliga, Ananth & Pech, Sotheary, April 5, 2016, Trade union law passes, *The Phnom Penh Post*, available at <https://www.phnompenhpost.com/national/trade-union-law-passes>; LICADHO, April 4, 2016, *Protesting Union Members Beaten Next to Cambodia's National Assembly*, available at <https://www.licadho-cambodia.org/flashnews.php?perm=167>

²¹³ Sek, Odom, April 13, 2016, Senate Passes Union Law While Opposition Abstains, *The Cambodia Daily*, available at <https://www.cambodiadaily.com/news/senate-passes-union-law-while-opposition-abstains-111273/>

²¹⁴ Trade Union Law, art. 1, 2 and 3.

²¹⁵ For the purpose of this paper, the right of employers to establish and function professional organisations is excluded from the scope of this paper.

²¹⁶ Trade Union Law, art. 4.

aim to achieve in providing the maximum benefit to the workers. Article 2 of the Law states that “This law has an objective to: protect the legitimate rights and interests of all persons who fall within the provisions of the Labour Law and personnel serving in the air and maritime transportation; ensure the rights to collective bargaining between workers and employers; promote harmonious industrial relations; and contribute to the development of decent work, enhancement of productivity and investment”.

The second reason is that the right to collective bargaining has been separately formulated under one among several essential chapters of the law, embracing a number of articles mentioning of principles of the collective bargaining recognised under international standards.²¹⁷ It includes purpose of collective bargaining agreement, duration of the agreement, parties to the agreement, Bargaining Council, registration of collective bargaining agreements and clause on procedure for labour dispute settlement in collective bargaining agreements.

Interestingly, the Law, instead of providing a definition of the collective bargaining agreement in the first place, stipulates the purpose, scope of application and character of the agreement, and a certain number of agreements legally allowed under the Law under the first article of the concerned chapter. The article 69 of the Law states that:

“The purpose of a collective bargaining agreement (CBA) is to define the working and employment conditions and other conditions of workers, including personnel serving in the air and maritime transportation, and to regulate relationships between employers and workers or unions as well as between unions and employer associations.

Collective bargaining agreements (CBAs) should specify the scope of their application, which may be:

a. Geographical framework:

- At a workshop or site level
- At an enterprise or establishment level
- At a provincial or municipal level
- At a national level;

b. Occupational framework:

- A particular occupation
- A number of combined occupations or similar occupations
- An economic activity or a particular sector of economic activity
- Many economic activities or many sectors of economic activities.

c. Sectorial framework

d. Air and maritime transportation framework

The provisions of a CBA shall be more favorable towards workers, including personnel serving in the air and maritime transportation, than those of the laws and regulations in effect. However, they must not be contrary to the provisions of the public order and laws in effect. All demands by both employers and workers for rights, benefits, and working conditions which deviate from the laws and regulations and the internal rules of the enterprises or establishments shall be settled through an orderly collective bargaining process.

There shall be only one collective bargaining agreement for each of the geographical, occupational, sectoral and air and maritime transportation frameworks."

²¹⁷ Ibid, Chapter 13

It should be noted that, the definition of the term collective bargaining is formulated under the Labour Law while its purpose of the agreement is subsequently stipulated under the Trade Union Law, when both laws have been adopted years apart from one to another.²¹⁸

The scope of application of the collective bargaining agreement (CBA) has been widely set by the Law based on four frameworks, either geographical or occupational or sectorial or air and maritime transportation; which could be seen as in compliance with international standards of free choice of collective bargaining level. However, it would be more conducive should it also be mentioned within the article to give total discretion to the parties concerned of the collective bargaining agreement to decide at which framework/level they agree to conclude their agreement. Doing so would be in accordance with the principle of freedom of association or the right to collective bargaining under international standards.²¹⁹

More interestingly, the limitation of collective bargaining agreement for any enterprises, sectors or occupational settings would give rise to the question of compatibility of the Law concerned with the international standards of the collective bargaining system. The Committee on Freedom of Association, as indicated in its Digest of Decisions 2006, has established that “[s]ystems of collective bargaining... where it is possible for a number of collective agreements to be concluded by a number of trade unions within a company are both compatible with the principles of freedom of association.”²²⁰ This could include different occupations within the same enterprise to be covered by several collective bargaining agreements.

Under the Law, the collective bargaining agreement is established in two types: definite term of agreement and indefinite term of the agreement. The definite term of agreement is the agreement that is concluded and last for at least three years while the indefinite term of agreement is the agreement that is concluded and last for indefinite duration.²²¹ The indefinite agreement is subject to be repealed under the Law, and by whom the agreement could be repealed is not provided explicitly under the law. This provision give rise to the question of compatibility with the international standards’ principle of right to collective bargaining. To be compatible with the decision of the ILO’s CFA which are merely summarized in the Digest of Decisions 2006, to safeguard the right of unions to bargain freely with employers, this article should take into consideration that “[t]he duration of collective agreements is primarily a matter for the parties involved, but if government action is being considered any legislation should reflect tripartite agreement.”²²²

Furthermore, while the Law has given exclusive rights to the most representative trade unions to be a party to the collective bargaining process, it also evidently prohibited any acts of “interference, incitement and

²¹⁸ The Labour Law was promulgated on March 13, 1997 and amended on June 29, 2007 while the Trade Union Law was adopted April 4, 2016.

²¹⁹ Digest of Decisions, 2006, op cit., paras 988 – 991.

²²⁰ Ibid, para. 950

²²¹ Trade Union Law, art. 70

²²² Digest of Decision, 2006, op cit. para. 1047

interruption from any other person(s), who are not involved in collective bargaining agreement”²²³. This embargo might be partly seen as a legitimate ban against any interferences to the bargaining process which is compatible with the international standards. It, nonetheless, would give rise to an issue of ill-treating the right of minority unions to express their views or to contribute into the discussion which concerns their members’ rights and benefit.²²⁴ Acts by which minority unions demand to express their views should not be considered as “interference, incitement or interruptions.” Moreover, it would be more conducive to open for the possibility of unions receiving advice from other parties, such as labour experts, international organisations’ reports or UN’s special rapporteur on Freedom of Association’s reports, etc., during the negotiating process. This argument has been further affirmed by the Committee of Expert’s direct request, adopted in 2017 in 107th International Labour Conference session, to the Cambodia’s government that minority unions are not deprived of essential means to defend the occupational interest of their member and should be able to represent their members in grievances within the enterprise or in dispute settlement procedures, including before the Arbitration Council (AC).²²⁵

More interestingly, the law offers a procedural requirement for the most representative of trade union to fulfil in order to obtain a legal certification of the most representative status. The process has to be made ultimately through a request submitted to the Ministry in charge of labour, following the satisfaction of the criteria set out under article 54 of the Law.²²⁶ The prerequisite, on the one hand, is an onerous, lengthy and complicated burdensome stressed on the trade union due to the complicated bureaucracy within the government, hampering the full enjoyment of the right to form a trade union and right to bargain collectively with the employers’ association.

It’s provision, on the other hand, is contrary to the principle set forth under the Committee on Freedom of Association’s decision summarised under Digest of Decisions 2006 which established that a number of safeguards must be in place for the certification of the most representative union to be compatible with ILO Convention No. 98, including: “(a) certification to be made by an independent body; (b) the representative organizations to be chosen by a majority vote of the employees in the unit concerned; (c) the right of an organization which fails to secure a sufficiently large number of votes to ask for a new election after a stipulated period; (d) the right of an organization other than the certificated organizations to demand a new election after a fixed period, often 12 months, has elapsed since the previous election.”²²⁷

²²³ Trade Union Law, art. 71

²²⁴ Digest of Decision, 2006, op cit. para. 974

²²⁵ The Committee of Expert on the Application of Convention, 2017, *Direct Request on Freedom of Association and Protection of the Right to Organise Convention (No. 87), 107th ILC session (2018) for Cambodia*, International Labour Organisation, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3344061

²²⁶ Trade Union Law, art. 56

²²⁷ Digest of Decision, 2006, op cit. para. 969

Last but not least, the principle of good faith is significantly formulated within the Trade Union Law, which is a welcome provision that is provided for in line with the international standards. It is stipulated under article 51 and 53, respectively, for workers and employers to carry out their activities, including participating in a collective bargaining process, in good faith. Under paragraph 2 of the article 53, the duty of good faith of employers includes “a duty, in respect of the certified most representative status union, to meet and convene promptly and timely for the purpose of negotiating a collective bargaining agreement with regard to the terms and conditions of employment in accordance with the provisions of this law, as well as to consider proposals for dealing with any grievances or questions arising from such agreement. The duty goes beyond merely ordinary meeting and consultation and includes providing the most representative status union with facilities for carrying out negotiations, providing all information relevant to negotiations as requested by the union, implementing a contract or a written memorandum of understanding which incorporates such agreements, if requested by either party...”

3.2. The right to strike

Under this *lex specialis*, the right to strike is not spelled out by the drafter. The Law, under article 5, states that:

“All workers and employers have, without any distinction whatsoever, the rights to form a union or an employer association 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, of the persons covered by union or employer association statutes. Workers have the right to:

- Take part in the formation of a union;
- Be a member of a union and under its rules;
- Participate in the legitimate activities of the union of which he or she is a member;
- Seek and hold an office in any union of which he or she is a member and under its rules;
- Take part in the election of representatives at the workplace where there is a regulation stipulating such election;
- Be elected or appointed and serve as a workplace representative when there is a regulation stipulating for such election or appointment; and
- May exercise any other rights provided for in this law.”

It does lists a number of rights concerning the rights to freedom of association of workers’ organisations and additionally leaves open for unspecified “other rights”. It, however, on the one hand doesn’t explicitly mention the right to strike which has always been a crucial element of the right to freedom of association which the ICESCR, a standard which the national law should follow, stipulates under its article 8. It on the other hand provides a very imprecise and limited scope of those “any other rights” merely within the purview of this law. This lead to the question of to what extent this law be compatible with international human rights law in providing a sufficient guarantee of all fundamental rights entitled to workers in particular. Obviously, this law only mentions the right to strike in the definitive provision of illegal strike

action²²⁸, leaving a general principle, legitimate limitation, compensatory mechanism in case of restriction of the rights and other essential elements of the rights to strike unregulated.

More significantly, this provision may unduly restrict the freedom to choose and decide workers' organisations' own activities to function to only in narrowly given circumstances and categories, including for "study, research, training, promotion of interests, and protection of the rights and the moral and material interests, both collectively and individually, of the persons covered by union or employer association statutes". As indicated hereafter, it obviously tantamount to an unacceptable limitation under international human rights law and international labour law, particularly ILO's Convention No. 87, on many universal labour rights, including right to strike.

While the Law, under article 9, guarantees the rights to draw up their own workers' organisations' statutes and administrative regulations, their organisation and functioning, and their work program,²²⁹ the right to strike, nonetheless, is not expressly established and regulated in any sentences of this article, given that the right *per se* has been obviously and precisely recognised and established in international human rights law, either textually under UN's instruments or by interpretation made by various ILO's bodies.

Furthermore, the limitation on right to freedom of association with reference to laws and regulations in effect or public orders could irrationally restrict the rights of trade unions, including the right to strike, to a greater extent than is allowed by international standards, which limits restrictions merely to "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"²³⁰. This article could potentially allow for any public authority to issue orders that could impair the functioning of a union, employer association or the national council of unions, irrespective of the legality of the orders issued. In this regard, the UN's Special Rapporteur on Freedom of Association and Assembly (SRFAA) has stated that "[a]ny restrictions must, nevertheless, comply with States' international human rights obligations as blanket restrictions shall not be considered lawful."²³¹

More significantly, the Law, under article 65(g), provides that the strike action will be regarded as illegal if it is conducted to "cause a congestion or block an entrance and exit gate in the premises of the enterprise or establishment or to violently incite or threaten or prevent or coerce, through all means, non-striking workers not to work and close public streets"²³². This provision implicitly recognizes the right to strike, while limiting its application. It might not apparently be consistent with the international standards, particularly the Digest of Decisions' paragraph 545 and 546, which declare the strike illegal only in the

²²⁸ Trade Union Law, art 65(g)

²²⁹ Ibid, art. 9

²³⁰ ILO Convention No. 87, art. 8(2); ICESCR, art. 8; ICCPR, art. 22(2).

²³¹ A/HRC/20/27, para. 54.

²³² Trade Union Law, art. 65(g).

situation that the strike ceases to be peaceful. Moreover, this provision would render an unacceptable restriction on the right of worker to conduct a sympathy strike provided for under the international standard where workers, whose rights and benefit are not concerned, could freely join a strike action with other workers to collectively protect those workers' occupational and socio-economic rights and benefits.

4. Concluding remark

It has been explicit that the right to collective bargaining and the right to strike are recognized and guaranteed under Cambodian legal system. The Constitution—supreme law of Cambodia—guarantees both rights to be enjoyed by all the people of Cambodia, followed by various *lex specialis* legislation including the Labour Law of 1997 and the Law of Unions of Enterprises 2016. The constitutionalisation of the rights as such is a legal milestone for the promotion and protection of human rights in Cambodia in general and rights to freedom of association in particular.

However, the adoption of the a trade union law to complement the existing labour law regarding trade unions' rights to strike and collective bargaining is another side of the coin. Disregarding their stated purposes, the two new laws are believed to play a more controversial role in the promotion and protection of the rights *per se* in Cambodia, in particular, *vis-à-vis* trade unions which have been internationally and locally considered as being active and devoted in promoting and defending the rights and benefit of the workers as a whole. The main issue of the new laws is not that of too much details in regulating the exercise of the rights to strike and collective bargaining of trade unions, but the lack thereof.

Ambiguities and insufficiencies in substantial provisions regarding the exercise of the right to freedom of association is a major issue considering interpretation and application of the new legislation. Administrative requirements are also moving to the intrusive threshold which may be incompatible with the standards of the international human rights law. Total discretion of power given to the administrative bodies cannot be disregarded as well in the case where the right and interests of numbers of trade unions in Cambodia are at stake.

The Labour Law and the Law on Union of Enterprises are not merely another laws contributing a part of Cambodian legislation, but regarded as a significant legal phenomenon at this point of time where trade unions are increasingly playing major role in the promotion and protection of human rights and labour rights in emerging economy of Cambodia. The discussion and debates on these newly adopted law are therefore critical in the development of the rule of law and the protection of human rights. In addition, relevant *de facto* restriction of the rights to strike and collective bargaining of trade unions should also never be overlooked in the context of human rights discourse in Cambodia which will be discussed in the following chapter.

CHAPTER SEVEN: CHALLENGES SURROUNDING THE EXERCISE OF RIGHTS TO COLLECTIVE BARGAINING AND TO STRIKE IN CAMBODIA

This chapter seeks to answer the last sub-research question with regard to challenges surrounding the exercise of the rights to collective bargaining and strikes and in Cambodia's apparel industry. The challenges which will be presented in the below sections will be addressed to providing an understanding of the current situation of the rights to freedom of association in general in Cambodia, given the inseparable and intrinsic corollary relationship between both rights and the rights to freedom of association.

The rights to collective bargaining and to strike, together with the rights to freedom of association, is fully safeguarded under the Constitution of the Kingdom of Cambodia and many other national laws. Yet, in practice, a full genuine guarantee of the rights per se, and other fundamental rights and freedom, in the country has never been fully realised and secured, instead an enjoyment of the rights as such is increasingly facing numerous dire challenges, both individual and institutional levels, and terrifyingly falling into what some have called an environment where the protection of the rights is virtually non-existent.²³³

The gradually growing trend of suppressing and restricting trade unions, garment workers and their legitimate and respective representatives, those who are legitimately recognised as independent groups and distance themselves from pro-government unions, their rights to form and join trade union, rights to function freely without State's interference, rights to collectively bargain in equal footing with employers' organisation, rights to strike to protect and promote their basic labour rights and benefit, is worryingly reaching an alarming point in the past years.

De jure and *de facto* restriction by the Royal Government of Cambodia (RGC) on the exercise of rights to collective bargaining and to strike by garment workers and their respective independent trade unions are becoming more evident than ever. Such restrictions relentlessly interfere with their individual rights and freedoms and also with their works in the promotion and protection of workers' socio-economic interest in Cambodia's garment industry. The challenges faced by garment workers and their trade unions in exercising their fundamental rights to strike and collective bargaining occur in various forms, including baseless criminalisation, arbitrary arrest and detention, the utilisation of short-term employment contract, attack on physical integrity, anti-union discrimination – workers dismissal, and endemic corruption.

²³³ American Apparel and Footwear Association, March 19, 2018, *AAFA Urges Cambodia Government to Take Action on Labour Rights and Human Rights*, a Joint Letter, retrieved on April 21, 2018, from https://www.aafaglobal.org/AAFA/AAFA_News/2018_Letters_and_Comments/AAFA_Urges_Cambodia_Government_to_Take_Action_on_Labor_Rights_and_Human_Rights.aspx

1. Judicial harassment

The independent trade unionists and garment workers have been stifled through the use of the country's criminal justice system in the past decades when it comes to the exercise of their rights to collective bargaining and to strike to defend and promote their social and economic interest.

The country has seen numerous incidents nationwide where workers, unionist and trade union leaders have been slapped with arbitrary arrest and detention, prosecution without legitimate ground and a swift imprisonment by the government's profoundly influenced court system, more often amounting to an infringement of a due process and fair trial rights. The state authorities have persistently been manipulating and misusing Cambodia's Criminal Code to silence and suppress independent and vocal trade unionists, from intentionally misinterpreting legitimate trade union's activities outright as illegal actions, to perceiving as a "colour revolution" to topple the government, to judicially accusing, charging and incarcerating those unionists who dare to speak out or mobilise their members to defend workers' interest on grounds of criminal defamation or incitement or inciting to commit a crime/violence.²³⁴

For instance, four union leaders from the Workers Friendship Union Federation (WFUF) had been arbitrarily arrested, charged and imprisoned for allegedly "organising an illegal strike" in Cambodia's Kandal province on Monday, February 12, 2018.²³⁵ Two among the four, all of whom worked at Cosmos Textile Co, Ltd, on National Road 4, were summoned to the provincial court, after having led co-workers to go on strike in a protest against their member's unfounded dismissal last week, before the other two unionists were also summoned as witnesses and arrested later on the same day. They all were charged with "instigating workers to strike illegally, inciting damage of factory property, and affecting public order by blocking the national road and intentional violence for allegedly making panicked security guard faint".

Another troublesome incidents occurred when hundreds of garment workers from the Meng Da footwear factory went on strike on Veng Sreng Boulevard in early December 2017 over allegedly unpaid bonuses.²³⁶ At least one worker and potentially over a dozen more have been summoned by the Phnom Penh First Instance court on the charge of leading and staging illegal strike. This accusation has subsequently exemplified by the Cambodia's prime minister who seemed to reference the strike in a speech²³⁷ five days later, December 06, 2017, criticising the workers for blocking the streets and labelling their actions "illegal"

²³⁴ Cambodian League for the Promotion and Defense of Human Rights (LICADHO), July 2017, *The Dangers of Dissent: Attacks on Human Rights Defenders*, page. 8, available at [https://www.licadho-cambodia.org/reports/files/2232017_HRD_ENG\[finalWeb\].pdf](https://www.licadho-cambodia.org/reports/files/2232017_HRD_ENG[finalWeb].pdf); General Assembly, September 5, 2016, *Report of the Special Rapporteur on the situation of human rights in Cambodia*, para. 29, A/HRC/33/62

²³⁵ Sineat Yon, February 15, 2018, Union reps charged for 'organising illegal strike', *The Phnom Penh Post*, available at <https://www.phnompenhpost.com/national/union-reps-charged-organising-illegal-strike>

²³⁶ Chheng Niem, January 16, 2018, Phnom Penh court calls worker over Veng Sreng strike, *The Phnom Penh Post*, available at <https://www.phnompenhpost.com/national/phnom-penh-court-calls-worker-over-veng-sreng-strike>

²³⁷ Ben Sokhean and Daphne Chan, December 07, 2017, PM chides protesting workers, *The Phnom Penh Post*, available at <https://www.phnompenhpost.com/national/pm-chides-protesting-workers>

when he was addressing to more than 15,000 workers in Phnom Penh's Por Sen Chey district. This evidently systematic misuse of the criminal justice system and underlie consistency between judiciary and leader of executive body illustrate the close tie between Cambodia's supposed-to-be-independent state institutions and executive body, and the expanding use of such institutions as tools to intimidate and incapacitate independent trade union, unionists and union leaders.

More interestingly, one of the notorious incidents in February 2016, four prominent trade union leaders, including Cambodian Labour Confederation (CLC) President Ath Thorn, CLC General Secretary Kong Athit, Cambodian Informal Economy Workers Association President Sok Chhun Oeung, and Cambodian Transport Workers Federation Secretary Ean Kim Hong, were charged with intentional violence, obstructing public officials and blocking traffic in relation to the Capitol Bus protest which was attacked by thugs.²³⁸ Not only are the charges baseless, but three of the four were not even present when the violence took place. Nevertheless, the charges still hang over their heads. Under the Trade Union Law, enacted in May 2016, convictions could be used to prevent the four from holding any trade union office in future. As local rights groups have said, this continued a recent trend to use the criminal justice system to silence the labour movement by targeting and groundlessly charging its key leadership.²³⁹

More worryingly, the judicial interpretation of above-mentioned strike activities as illegal action have gone further to cover the strike action which had been made following all legal procedures required by national laws in force. The ILO's Committee of Experts, through its direct request to the Cambodian government in its report to the 107th International Labour Conference adopted in 2017, has noted via the direct contact mission (DCM) that "while a number of workers' organizations claimed that strikes, even when fully meeting legal requirements, were routinely subjected to injunctions and subsequent dismissals and criminalization if nevertheless conducted, the Government and the employers claimed that most, if not all, strikes failed to fully meet the legal requirements", and request the government to "hold a comprehensive tripartite dialogue on the issues raised concerning the legality of the exercise of industrial action, with a view to reviewing existing regulations and their application in practice, and undertaking any necessary measures to guarantee the lawful and peaceful exercise of the right to strike".²⁴⁰

The act of criminalisation against trade union, unionists and union leaders on the course of their strike action, moreover, has been appeared to be a noticeable concern with regard to the guarantee of the right to strike by the state authorities as highlighted by the ILO's Committee on Freedom of Association in its report

²³⁸ Odom Sek, February 10, 2016, Union leaders blast charges over capitol tours protest, *The Cambodia Daily*, available at <https://www.cambodiadaily.com/editors-choice/union-leaders-blast-charges-over-capitol-tours-protest-107981/>

²³⁹ Abid.

²⁴⁰ The ILO's Committee of Expert, 2017, *Direct Request on Freedom of Association and Protection of the Right to Organise Convention (No. 87), 107th ILC session (2018) for Cambodia*, International Labour Organisation, para. 4, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3344061

during the Governing Body 331st Session from October 26 to November 9, 2017. Consequently, the Committee provided an insightful recommendation to the government of that “the Government take the necessary measures to ensure that trade union members and leaders were not subjected to anti-union discrimination, or to false criminal charges based on their trade union membership or activities, and that any complaints of anti-union discrimination were examined by prompt and impartial procedures”²⁴¹.

2. Act of dismissal against trade unionists

The act of anti-union discrimination through which the workers, unionists or particularly union leaders have frequently experienced is the act of unjust dismissal after initiating a strike action or mobilizing union members to strike. It is largely due to the reasons that they form a trade union or join trade unions’ activities. The ILO’s Committee of Expert, through its observation on Cambodia’s labour rights situation in its report to the 106th International Labour Conference has raised a serious concern regarding the employers’ act of anti-union discrimination and dismissals against workers and unionists for joining unions or taking part in labour strike as well as a failure of Cambodian government to fulfil its positive obligation to secure the workers’ rights to freedom of association.²⁴² The committee further reiterated that according to the ITUC, at least 867 union leaders and workers have been dismissed from 38 companies since 2014 for joining a trade union or for taking part in labour protests.

Dismissing unionist has been used by employers in Cambodia’s garment factories as a mean of reprisal against trade unions and to threaten workers not to go on any strikes to enforce the collective bargaining power with the employer groups which could possibly hamper the factory’s benefit, according to one of the major international labour rights organisation Clean Clothes Campaign.²⁴³ This happened, for instance, when workers at the Hong Kong-owned Goldfame Enterprises International Knitters Limited factory, which employed nearly 7,000 workers and is one of the main suppliers for a global buyer H&M, went out on a massive, three-day, national strike for higher minimum wages in September 2010. After the government agreed to reopen negotiations and union organisers decided to return to their jobs, management retaliated by locking out 168 union members and activists. In response, workers went out again, this time on a two-day strike to demand their immediate reinstatement. This led to violent clashes with the riot police, leaving numerous workers injured. This climate of intimidation and harassment with the direct and indirect support from the state authorities who illegally benefit from the factory’s operation, together with state’s severe

²⁴¹ “383rd Report of the Committee on Freedom of Association”, November 2017, in *Official Bulletin* (Geneva), GB.331/INS/15, Case No. 3121 (Cambodia), para. 117, page 29, available at http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/WCMS_593083/lang-en/index.htm

²⁴² The ILO’s Committee of Expert, 2016, *Observation on application of Freedom of Association and Protection of the Right to Organise Convention (No. 87), 106th ILC session (2017) for Cambodia*, International Labour Organisation, para. 1, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3297202

²⁴³ Jeroen Merk, August 2012, *10 Years of the Better Factories Cambodia Project: A critical evaluation*, Clean Clothes Campaign and Cambodia’s Community Legal Education Centre, Amsterdam, Netherland, page 18, available at <https://cleanclothes.org/resources/publications/cc-clec-betterfactories-29-8.pdf/view>

failure to safeguard the workers' right to strike and freedom of association, has also been used to further undermine the labour rights movement. H&M so far has failed to address the issue of union dismissal after strike action. However, in words if not in practice, the company has consistently reiterated its commitment to labour rights, raised the holistic solution of promoting a culture of dialogue and good collaboration between government, union and employers' groups, and provided technical and financial support to building capacity for unions for a better collective agreement to improve the industrial relation and working condition in Cambodia.²⁴⁴

Likewise, on January 2 and 3, 2015, a Gap Inc. and Wal-Mart Stores Inc. supplier, Cambo Kotop garment factory, had fired more than 50 workers, including 15 unionists, after they walked off their job on December 15 in protest of management's termination of five Collective Union of Movement of Workers (CUMW) representatives. The company representative said the strike was illegal and potentially disrupted the company's operation. This incident had been internationally condemned by international and Cambodian unions, local unions and rights group as a serious violation against the right to freedom of association of workers, particularly right to strike of workers, triggering an appeal for state authority and the sourcing global brands, including Gap Inc. and Wal-Mart Stores Inc. together take immediate positive measures to ensure that rights and benefits of workers had immediately secured.²⁴⁵ Yet, no response or corresponding measure has reportedly been taken by Gap Inc. and Wal-Mart Store Inc. to address this alleged claim.

On June 09, 2017, another incident happened when a Southland garment factory in Phnom Penh refused to reinstate 10 workers, who are CUMW members, it suspended over a strike held to protest the company's refusal to allow workers additional day off to vote in the 2017 commune election.²⁴⁶ The employers' association the Garment Manufacturers Association of Cambodia (GMAC) accused the suspended workers of having "committed a serious mistake by turning off the electricity and instigating workers to stop working" and allegedly claimed that their trade union was not registered with the government and therefore their actions were illegal.

²⁴⁴ H&M Group, H&M CEO Karl-Johan Persson recently visited Cambodia to discuss annual wage reviews and industrial relations, *News article*, October 30, 2013, available at <http://about.hm.com/en/media/news/hm-ceo-karl-johan-persson-recently-visited-cambodia-to-discuss-annual-wage-reviews-and-industrial-relations.html>

²⁴⁵ International Trade Union Confederation (ITUC), January 16, 2015, *Cambodia: Ire raised over Kontop employee's dismissal*, available at <https://www.ituc-csi.org/cambodia-ire-raised-over-kotop-15527>

²⁴⁶ Reaksmeay Hul, June 09, 2017, *Factory Suspends Workers Over Election Strike*, *The Voice of America*, available at <https://www.voacambodia.com/a/factory-suspends-workers-over-election-strike/3893868.html>; Sony Ouch, June 12, 2017, *Garment Factory Suspensions Lifted; Strike Return to Work*, *The Cambodia Daily*, available at <https://www.cambodiadaily.com/news/garment-factory-suspensions-lifted-strikers-return-work-131245/>; Sineat Yon, June 09, 2017, *Garment Workers protest at Ministry*, *The Phnom Penh Post*, available at <https://www.phnompenhpost.com/national/garment-workers-protest-ministry>

3. Short-term contract

Cambodian labour law distinguishes between two main categories of employment contract: undetermined duration contracts (UDCs) and fixed duration contracts (FDCs).²⁴⁷ The first refers to a permanent contract, the latter refers to short-term contracts which can last until two years and be renewed one or more times upon the consent between the parties; each renewal shall not exceed two years.²⁴⁸ The latter has been predominantly used across the garment and footwear industry in Cambodia which by 2017 there are roughly 80 percent of Cambodia's garment labour force is estimated to be on contracts of two, three or six months.²⁴⁹ The growing application of fixed-duration (i.e., short-term) contracts by employers on the one hand leads to job insecurity and instability, and on the other hand can potentially be capitalised to discourage workers from joining unions and participating in any meaningful unions activities, including weakening collective bargaining process and demotivating strike action.²⁵⁰ It has been routinely observed and noted by the Clean Clothes Campaign organisation (2012) under its evaluation report on the Better Factory program²⁵¹ that it is sometimes difficult for workers under fixed-duration contracts to join independent unions like the Coalition of Cambodian Apparel Workers Democratic Unions (C.CAWDU) because their contracts are often not renewed.²⁵² One significant problem has been indicated by the report that the labour unions' lack of power and influence in defending workers' rights constituted one of the major labour problems derived from the establishment of short-term contracts between workers and employers; and even though the unionisation rate, including independent and pro-government trade unions, is relatively high, no union has yet succeeded in reaching a collective bargaining agreement to raise wages above the legal minimum. Collective bargaining agreements are all too often simply copies of existing labour law.²⁵³

In practical reality, moreover, employers are eager to extend the use of FDCs one after another leaving workers no space for exercising their fundamental labour rights. Taking into account on the Clean Clothes Campaigns organisation's report (2012), this renders a severe negative impact because: a) Workers fear that their contract may not be renewed if they participate in union activities or become union members; b) workers worry that their contract may not be renewed if they refuse overtime or take sick leave, or do

²⁴⁷ Labour Law, art. 66

²⁴⁸ Ibid, art. 67

²⁴⁹ Sineat Yon and Erin Handley, October 05, 2017, PM targets short contracts in latest bid to woo garment workers, *The Phnom Penh Post*, available at <https://www.phnompenhpost.com/national/pm-targets-short-contracts-latest-bid-woo-garment-workers>

²⁵⁰ Dennis Arnold and Toh Han Shih, (2010) "Fair Model of Globalisation? Labour and Global Production in Cambodia", *Journal of Contemporary Asia*, page 402.

²⁵¹ Better Factories Cambodia was created in 2001 as a unique partnership between the UN's International Labour Organization (ILO) and the International Finance Corporation (IFC), a member of the World Bank Group. The programme engages with workers, employers and governments to improve working conditions and boost competitiveness of the garment industry, ensuring the production is in compliance with the fundamental international labour standards and relevant ILO's Conventions. For more information, please visit <https://betterwork.org/where-we-work/cambodia/> or ILO's website: http://www.ilo.org/asia/projects/WCMS_099340/lang--en/index.htm

²⁵² Jeroen Merk, August 2012, *10 Years of the Better Factories Cambodia Project: A critical evaluation*, op. cit., page 16.

²⁵³ Ibid.

anything that will make their supervisors unhappy; c) workers hesitate to join struggles to demand for any rights or benefits because they worry that the employer may not renew their contracts.²⁵⁴ The non-renewal of fixed duration contracts of trade union leaders and activists is among the leading causes of disputes and strikes.²⁵⁵ Consequently, this has increasingly had a severe negative implication on the right to freedom of association. While the number of factories employing workers on FDCs increases, the percentage of factories in non-compliance with the fundamental right to freedom of association has shown a swift upsurge, according to 32nd and 33rd report, with an increase from 2.5 percent to 8 percent in 2015 and 2016, respectively.²⁵⁶

4. Intimidation and physical attack

To a more serious extent, trade unionists and union leaders particularly have been confronting with a deadly attack on their physical integrity. The existence as well as the works of independent trade unions in Cambodia are often critical towards the policies of the government of Cambodia. The government often – groundlessly – considers those groups of dissidents as anti-government or pro-Western agents aiming to hinder government’s development policy and peace. Consequently, unionists and trade union leaders are exposed to great danger of attack on their physical integrity. The Act of threats, intimidations, violence and even assassination of trade unionists and union leaders have pervasively occurred for years under the climate of impunity perpetuated by the state agencies with the aim to silent and suppress workers from rising against government’s policy and authorities’ benefit. Those cases have been thoroughly documented throughout the years.

One of the prominent cases is the murder of the former president of the Free Trade Union of Workers in the Kingdom of Cambodia (FTUWKC)—one of Cambodian oldest and most active labor union in 2004, which to date has never been successfully addressed by the government of Cambodia despite numerous reports, direct requests and observation made by the ILO’s conferences and committees with the note of extremely serious concern.²⁵⁷ Another recent prominent case is the lethal attack of excessive state armed

²⁵⁴ Jeroen Merk, August 2012, *10 Years of the Better Factories Cambodia Project: A critical evaluation*, op. cit., page 21.

²⁵⁵ International Trade Union Confederation, June 9, 2010, *2010 Annual Survey of Violations of Trade Union Rights - Cambodia*, retrieved on April 24, 2018, available at: <http://www.unhcr.org/refworld/docid/4c4fec89c.html>

²⁵⁶ Better Factories Cambodia, June 2015, *Better Factories Cambodia: Garment Industry 32nd Compliance Synthesis Report*, International Labour Organisation and International Finance Corporation, page 18, available at [file:///D:/Downloads/SR32-BFC-Final-after-PAC_Eng%20\(1\).pdf](file:///D:/Downloads/SR32-BFC-Final-after-PAC_Eng%20(1).pdf); Better Factories Cambodia, 2016, *2016 Garment Industry 33rd Compliance Synthesis Report: Cambodia*, International Labour Organisation and International Finance Corporation, page 23, available at file:///D:/Downloads/SR-33-BFC-FINAL_ENG.pdf; Sineat Yon and Ananth Baliga, January 25, 2018, Report shows little sign of improvement at factories, *The Phnom Penh Post*, available at <https://www.phnompenhpost.com/national/report-shows-little-sign-improvement-factories>

²⁵⁷ The ILO’s Committee of Expert, 2017, *Direct Request on Freedom of Association and Protection of the Right to Organise Convention (No. 87), 107th ILC session (2018) for Cambodia*, International Labour Organisation, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3344061; The ILO’s Committee of Expert, 2016, *Observation on application of Freedom of Association and Protection of the Right to Organise Convention (No. 87), 106th ILC session (2017) for Cambodia*, International Labour Organisation, para. 1, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3297202; “383rd Report of

forces against hundreds of striking garment workers on January 2-3, 2014. This use of excessive and deathly government's Military Police forces mixed with military personnel against striking garment workers has resulted in serious violence and assaults, injury of dozens of workers, death of five garment workers and arrests of 23 unionists and union leaders, and a procedural irregularities in the trial against the 23.²⁵⁸

More interestingly, in response to the above-mentioned deadly incidents, Cambodia's prime minister has restructured the existing Ministry of Labour's Committee to Solve Strike and Demonstrations of All Targets by appointing the chiefs of the national police, military police, and military to deal with all kinds of protest and strike throughout the country.²⁵⁹ The decision, which came the same day as senior government ministers met with global clothing brands H&M, Gap, and Puma over the lethal repression of a strike by garment workers last month, will bring the size of the committee to 49 members. The new form of Committee has been severely criticised by rights groups and national and international trade unions as another tool to further intimidate workers, unionists and union leaders, suppressing more severely than before the exercise their inherent rights to freedom of association, right to strike and right to collective bargaining.²⁶⁰

One year before the adoption of a controversial Law on Union of Enterprises, on May 8, 2015, more than 10 striking garment workers and union activists was stopped and allegedly detained by the police in Cambodia's Svay Rieng province after they went on strike to seek solution from national labour officials. Workers from the Japanese-owned Nissei Factory, accompanied by six representatives of the Collective Union of Movement of Workers (CUMW), were stopped by police at a checkpoint in Bavet town at 5:50am without any legitimate reason given by the authorities. However, later on the police chief said that they were stopped and temporarily detained due to the reason that they didn't possess driving license.²⁶¹

More recently a few months after the adoption of the Law on Union of Enterprises, on July 07, 2016, three unionists from Cambodian Federation Labor Union were arrested in Kampot province on Tuesday for attempting to mobilise workers at a garment factory to strike after their colleagues were fired for trying to unionize, police said on Wednesday. The arrests came amid weeks of turmoil at the Cambo T.D.G. garment factory in Kompong Trach district, where nearly half of the 700 employees have been on strike since 21 workers were fired on June 24 for trying to set up a union. Provincial police chief claimed that the unionists

the Committee on Freedom of Association", November 2017, in *Official Bulletin* (Geneva), GB.331/INS/15, Case No. 2318 (Cambodia), para. 22, page 85, available at http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/WCMS_593083/lang--en/index.htm

²⁵⁸ Ibid; LICADHO, January 2, 2014, Military Special Command Unit Deployed to Crackdown on Striking Workers, Joint Statement, available at <https://www.licadho-cambodia.org/pressrelease.php?perm=333>

²⁵⁹ Pheap Aun, February 21, 2014, Hun Sen Adds Armed Forces Chiefs to Strike Committee, *The Cambodia Daily*, available at <https://www.cambodiadaily.com/news/hun-sen-adds-armed-forces-chiefs-to-strike-committee-52873/>

²⁶⁰ Ibid.

²⁶¹ Vida Taing and Teehan Sean, May 08, 2015, Unionists 'detained' by authorities in Bavet, *The Phnom Penh Post*, available at <https://www.phnompenhpost.com/national/unionists-detained-authorities-bavet>

were arrested for blocking the entrance to the factory and attempting to incite workers to strike following a complaint from the factory bosses earlier in the day.²⁶²

5. Politically dominated and incompetent judicial system

According to article 51 new of the Cambodia's Constitution, the judiciary is an independent body which is separated from the legislative and executive. The judiciary in Cambodia consists of municipal and provincial courts, military courts, appellate court and Supreme Court and the Constitutional Council as the highest courts. The judicial system in Cambodia is also systematically and extremely flawed. The independence and impartiality of the judiciary is highly questionable.²⁶³ The independence of the judiciary in Cambodia is severely affected by its close affiliation with the government and its institutional incapacity. The government allegedly have strong influence on the judiciary. The vast majority of judges and prosecutors in Cambodia are widely known to be members of the ruling Cambodian People's Party (CPP). Judicial power has been abused in numerous cases where prominent union activists and union leaders were charged and convicted in politically motivated cases without observance of due process and fair trial rights as mentioned in cases above.

In addition to the lack of independence, the judiciary of Cambodia is said by a United Nations Special Rapporteur to also be affected by other challenging issues such as capacity shortage, lack of human, material and financial resources, corruption and lack of public trust in the ability of the judiciary to safeguard human rights in Cambodia.²⁶⁴ The government has subsequently adopted the Law on the Organisation of the Courts, the Law on the Status of Judges and Prosecutors and the Law on the Organisation and functioning of the Supreme Council of Magistracy in 2014 with the hope to endorse judicial reform in Cambodia, among other things, the establishment of labour court²⁶⁵ which would have a jurisdiction over labour dispute arising within the country and fill the gap of safeguarding the fundamental labour rights of workers in question. However, the adoption of the new laws as such fails to guarantee judicial independence and endorse reforms in the judicial system of Cambodia. The laws have been exploited by the Government to serve its political interests. The new laws are silent on provisions regarding permanent tenure of judges in Cambodia. The principle of permanent tenure guarantees independence of judges and prosecutors and protects them from any fear or influence. The absence of such provisions is considered as one of the loopholes of the laws. Other concerns of the laws include the remaining excessive power of the Supreme Council of Magistracy

²⁶² Narim Khuon, July 07, 2016, Unionists Arrested in Kampot for Inciting Strike, *The Cambodia Daily*, available at <https://www.cambodiadaily.com/news/unionists-arrested-kampot-inciting-strike-115106/>

²⁶³ Sopheap Chak, November 21, 2014, Political judiciary versus an independent judiciary in Cambodia, *The Phnom Penh Post*, available at <https://www.phnompenhpost.com/political-judiciary-versus-independent-judiciary-cambodia>

²⁶⁴ Subedi, Surya P., 2013, *Report of the Special Rapporteur on the situation of human rights in Cambodia*, A/HRC/24/36, para. 237, page. 16.

²⁶⁵ Law on the Organisation of the Courts, art. 14, 25, 26 and 27; The Law is constitutionally approved by the Constitutional Council of Cambodia on July 02, 2014, and promulgated by the King on July 16, 2014.

and the Ministry of Justice and the lack of check and balance system between the judiciary and the executive.²⁶⁶ More worryingly, the labour court under the new Law on the Organisation of the Courts would be put under the Labour Ministry's jurisdiction.²⁶⁷ This specialised courts were expected to be instituted by 2017, according to the Labour Ministry,²⁶⁸ but later have been vowed to be delayed or cancelled by the prime ministry on February 07, 2018 with the claim of implementation of existing labour dispute mechanism, including collective bargaining process and Arbitration Council.²⁶⁹

The main characteristic of the judiciary is the principle of independence and impartiality. The absence of appropriate check-and-balance system and of *de facto* separation of power gravely compromises effectiveness and authority of the judiciary in safeguarding the protection of fundamental human rights in Cambodia.

6. Corruption

Another major challenges for workers, union activists and union leaders in Cambodia's apparel industry in exercising their inherent rights to collective bargaining and to strike is the endemic and rampant corruption in all sectors in the country.²⁷⁰ According to the Transparency International, Cambodia ranks 161 out of 180 countries as one of the highly corrupted countries in the world.²⁷¹ Corruption pervasively affects every part of society, especially public and judicial sectors. It consequently undermines the effectiveness of the judiciary and administrative bodies in fulfilling its obligation to secure fundamental rights of the people of Cambodia which have been enshrined in international human rights laws. The judiciary remained the most corrupted institution in the country, according to Transparency International in its 2016 Global Corruption Barometer report.²⁷²

Cambodia is a member State to the United Nations Convention against Corruption since 2007. Under the Convention, Cambodia has obligation to take necessary measures to combat corruption effectively including establishing an independent preventive anti-corruption body to fight corruption at national level (Article 6). As part of the compliance with the Convention, the Anti-Corruption Unit (ACU) was restructured in 2006 from its predecessor in 1999. The ACU is to report to the Council of Ministers, the

²⁶⁶ Amnesty International, 2015, *Amnesty International Report 2014/15: The State of the World Human Rights*, para. 241, page 92.

²⁶⁷ David Sen and Ananth Baliga, July 06, 2016, Labour courts set to come into play by 2017, *The Phnom Penh Post*, available at <https://www.phnompenhpost.com/national/labour-courts-set-come-play-2017>

²⁶⁸ *Ibid.*

²⁶⁹ Sokhean Ben and Ananth Baliga, February 07, 2018, Hun Sen says no need for labour courts, proposes solution to mass fainting, *The Phnom Penh Post*, available at <https://www.phnompenhpost.com/national/hun-sen-says-no-need-labour-courts-proposes-solution-mass-faintings>

²⁷⁰ Human Rights Watch (HRW), 2016, *World Report: Events of 2015*, page 151 – 153, available at https://www.hrw.org/sites/default/files/world_report_download/wr2016_web.pdf

²⁷¹ Transparency International, 2018, *Corruption Perceptions Index 2017*, available at https://www.transparency.org/news/feature/corruption_perceptions_index_2017

²⁷² Mayuri Mei Lin and Rathavong Ven, March 01, 2017, TI says judiciary most corrupt, *The Khmer Times*, available at <https://www.khmertimeskh.com/news/35973/ti-says-judiciary-most-corrupt/>

executive body. The Anti-Corruption Law was correspondingly promulgated by the King in 2010. The creation of the Anti-Corruption Unit is generally believed to be just another flimsy institution which is strongly aligned with the government and the ruling CPP in which H.E. Om Yentieng—senior advisor of the Prime Minister and a high ranking member of CPP—is the President.

The close affiliation of this institution with the Government is not consistent with the principle of independence and impartiality required of an anti-corruption institution. Furthermore, it severely undermines effectiveness of the institution in fighting corruption without undue interference, specifically, in cases involving government officials. More importantly, rampant corruption and a weak judicial system are the causes of a culture of impunity in Cambodia. A high level of impunity is embedded in Cambodian society where selective justice and freedom are exclusively for the powerful and wealthy.²⁷³ No thorough, independent and prompt investigation has been made in the cases of killing of trade union leaders and union activists who were under attack by public authorities and private individuals up until now.²⁷⁴ Justice is yet a mirage for workers' rights defenders in a Cambodian society in general where the rule of law is seriously undermined by the political hegemons.

²⁷³ HRW, May 15, 2016, *Work Faster or Get Out*, page. 92, available at <https://www.hrw.org/report/2015/03/11/work-faster-or-get-out/labor-rights-abuses-cambodias-garment-industry> ; LICADHO, 2014, Report for the Human Rights Committee's Task Force for the adoption of the list of issues on Cambodia, page1, available at <http://www.licadho-cambodia.org/reports.php?perm=196>

²⁷⁴ The ILO's Committee of Expert, 2017, *Direct Request on Freedom of Association and Protection of the Right to Organise Convention (No. 87), 107th ILC session (2018) for Cambodia*, International Labour Organisation, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3344061; The ILO's Committee, 2016, *Observation on application of Freedom of Association and Protection of the Right to Organise Convention (No. 87), 106th ILC session (2017) for Cambodia*, International Labour Organisation, para. 1, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3297202; "383rd Report of the Committee on Freedom of Association", November 2017, in *Official Bulletin* (Geneva), GB.331/INS/15, Case No. 2318 (Cambodia), para. 22, page 85, available at http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/WCMS_593083/lang--en/index.htm

CHAPTER EIGHT: CONCLUSION

The main purpose of the thesis has been to thoroughly analyse the highly rights-contentious provisions of the Cambodia's laws, namely the Labour Law and the Law on Union of Enterprises, concerning the implied space of exercising the rights to collective bargaining and to strike within the sphere of Cambodia's increasingly growing apparel industry. The examination has also been explicitly made in relation to the Cambodia's highest law, the Constitution, and international laws.

Derived from the elaborate presentation of the above two main chapters, the adoption of the trade union law to further fill the gap within the provisions under the existing labour law renders more negative implication regarding trade unions' collective bargaining and the rights to strike than the positive one. Despite the adoption of the said law and the implementation of the existing labour law have been pledged by the Cambodia's government to be one of its positive obligations in response to the international laws, allegedly claiming to satisfy its internationally abided obligation to fulfil the protection of the rights to collective bargaining and to strike in specific and rights to freedom of association in general, there have seen a relentless number of cases illustrating the state's serious infringement on workers' rights to freedom of association, majority of which has been raised many times in its report to the International Labour Conference by both the Committee of Freedom of Association and the ILO's Committee of Expert, either subsequently through the Direct Request or the Observation.

One of the main issue of both labour laws is not that of too much details in regulating the exercise of the rights to collective bargaining and to strike of trade unions, but the lack thereof. Ambiguities and insufficiencies in substantial provisions which ostensibly protect and respect the exercise of the collection of rights to freedom of association and collective bargaining is becoming a major issue considering interpretation and application of the new legislation. This will potentially be exploited by the state authorities to suppress and silent voices of workers and independent trade unions, labour rights activists and union leaders, if their activities could politically be interpreted to affecting its broadly and ill-defined "social security" or "social order", a decent life and well-being of workers will indisputably at stake. The full application of those vague provisions, especially the penalty provisions, of both laws will further allow the state authorities, abetted by the state's abuse of the Criminal Code and use of severely corrupted judicial system, to judicially harass any groups of workers, union activists or prominent union leaders who dare to stand up against the state's social and economic policy or well-connected private garment and footwear factories.

Another troublesome issue is an unreasonable burdensome administrative requirements within the laws. Those are increasingly moving to the intrusive threshold which may be incompatible with the standards of the international human rights law. Total discretion of power given to the administrative bodies, mainly the Ministry of Labour, cannot be disregarded as well in the case where the right and interests of numbers of

trade unions in Cambodia are in peril. The executive body has been granted extensive authority with regard to the exercise of the rights to collective bargaining and to strike, from the decision to permit a legal strike action, to the decision to define the scope of restriction on strike action and to the decision to grant a legal certification of the most representative status to the most representative of trade union within the undertaking. This exercise of total discretion by the state authorities explicitly impair the existential enjoyment of the rights to strike and collective bargaining of workers in Cambodia's apparel industry.

Recommendations:

However, it should also be noted that it is never too late when it comes to promoting and safeguarding the rights as such for workers. Although the number of the Trade Union Law's provisions explicitly are incompatible with international law, the law still can be amended to be compatible with the international standards, particularly with input and recommendations given by international partners, with the good collaboration and technical support from International Labour Organisation (ILO) to ensure that rights to freedom of association and collective bargaining of workers are effectively safeguarded.

Although the recommendations and requests made by the ILO's supervisory bodies are not legally binding to member states, Cambodia is morally obligated to consider and should seriously take into consideration their views in good faith, suggesting that their rulings may have a certain impact on the law's implementation. The international supervisory bodies could willingly provide several constructive recommendations on the application of the Cambodia's labour laws, particularly a newly adopted Law on Union of Enterprises within the international fora and offer best practice examples to ensure that no workers should be left behind in enjoyment of the rights to collective bargaining and right to strike.

Moreover, the consumers should also pay more comprehensive attention to the source of their products. Consumers' awareness or consumers savvy regarding working conditions in the Cambodian garment factories should be maximised, rendering an active, strict and responsive observation of corporate social responsibility by international Brands and retailers, including GAP, Puma, H&M, Adidas, etc. with regard to the rights to freedom of association and other labour standards of their supply chain in Cambodia. The government of Cambodia should also work willingly and cooperatively with international brands to ensure the respect of fundamental labour rights and freedom of workers is fulfilled, and ensure that their customers are well informed of the working conditions of workers and their respective trade unions.

The collaboration between national and international non-governmental organisations, such as Clean Clothes Campaign, International Trade Union Confederation, and a local labour rights organisation such as the Centre for Alliance of Labour and Human Rights, etc., also possesses a great amount of power in affecting the law. Their voices will be taken into consideration by the International Labour Organisation in its reports to International Labour Conference when issuing any Direct Request or Observation to particular

country concerning a serious violation of rights to freedom of association. The close cooperation between these two driving forces in international lobbying will be a momentum for a positive change surrounding the space of exercising the collection of rights to freedom of association in Cambodia. This claim has been underpinned by Graver (2015) that “international pressure [on the basis of IHRL] may weaken dictatorships somewhat, but their continuation is mainly dependent on internal factors. International support and pressure can, on the other hand, be of great assistance when there is powerful internal resistance”²⁷⁵.

Therefore, considering the sector’s vital part in the Cambodian economy and society, the Cambodian government has a genuine interest to consider all surrounding recommendations made by international and national organisations and international and national trade unions as well as the responsive attitude and opinions of the multinational companies sourcing from thousands of suppliers in the country’s garment industry. What’s more importantly, international consumers in general and the development and establishment of “informed consumerism” and active and meaningful participation of the local workers in persistently and strategically protecting and promoting their labour rights in particular have a vital role in affecting the government’s attitude toward to full observation of the fundamental rights to collective bargaining and right to strike and the application of Cambodia’s labour laws to be compatible with international standards.

²⁷⁵ Graver, Hans Petter, 2015, *Judges against Justice: On judges when the rule of law is under the attack*, Springer Berlin Heidelberg, page. 281

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