LEGAL ANALYSIS: SEPTEMBER GARMENT SECTOR STRIKES
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A Report by the Cambodian Center for Human Rights
11 November 2010
Cambodian Center for Human Rights ("CCHR")

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<table>
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<tr>
<th>Date</th>
<th>Event</th>
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<tbody>
<tr>
<td>24 June 2010</td>
<td>Prior to negotiations on the minimum wage, the major Cambodian unions agree a common position, seeking an increase to US$93.¹</td>
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<td>25 June 2010</td>
<td>Joint press statement from two government departments released highlighting a personal recommendation from Prime Minister Hun Sen that the current wage be increased by only US$5.²</td>
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<td>8 July 2010</td>
<td>The Labour Advisory Committee votes to increase the minimum wage to US$61 a month – effectively a US$5 a month increase for garment workers.³</td>
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<td>25 July 2010</td>
<td>In spite of an official ban and a heavy police cordon preventing access to the site, an estimated 3,500 to 5,000 garment workers converged on Phnom Penh for a Cambodian Labour Confederation (“CLC”) and Coalition of National Construction Federation (“CNC”) public forum regarding the minimum wage.⁴</td>
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<td>3 August 2010</td>
<td>CNC and CLC unions write to the Ministry of Labour and the Garment Manufacturers Association of Cambodia (“GMAC”), threatening strikes unless talks are scheduled by August 15 to negotiate minimum wage.⁵</td>
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<td>10 September 2010</td>
<td>GMAC receive a second letter from unions reiterating the original strike threat and explaining that this will go ahead unless negotiations recommence immediately.</td>
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<td>13 September 2010</td>
<td>Strike begins. Unions claim nearly 70,000 workers participate. Two union representatives are briefly detained by police but later released without charge.⁶</td>
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<td>14 September 2010</td>
<td>Unions claim that 144,520 workers from 88 factories participate in the strike. GMAC disputes the unions’ estimate and claims only 30,000 workers were absent.⁷</td>
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<td>15 September 2010</td>
<td>Factories call for authorities to step in to halt the strike. Unions claim that 159,850 workers stayed away from 96 factories and that over 200,000 participated in the strike, although both figures are disputed by GMAC.⁸</td>
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<td>16 September 2010</td>
<td>Strikes come to an end after the government called both sides to the negotiating table on 27 September 2010. Ministry of Interior states it will cooperate with GMAC in filing legal complaints against strike leaders.⁹</td>
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<tr>
<td>17 September 2010</td>
<td>Workers return to work while 10 factories file lawsuits against union leaders preventing them from returning to work. Unions threaten further strikes in response.¹⁰ Phnom Penh’s Municipal Court orders workers to return to work by Monday.¹¹</td>
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⁵ The Phnom Penh Post, “Union group threatens to strike”, 4 August 2010.
⁶ The Cambodia Daily, “Union claims 70,000 strikers on day one”, 14 September 2010.
⁷ The Cambodia Daily, “Strike Number Doubles, Union Leaders Claim”, 15 September 2010; and The Phnom Penh Post, “Nationwide garment strike hits day two”, 15 September 2010.
<table>
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<tr>
<td>18 September 2010</td>
<td>In Kandal Province, more than 1,000 workers briefly clashed with provincial military police while protesting against the suspension of 24 union representatives. Unions claim a total of 200 Union representatives were prevented from going back to work.</td>
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<tr>
<td>20 September 2010</td>
<td>GMAC threatens that workers will be dismissed pursuant to the injunction issued by the Phnom Penh Municipal Court on 17 September if they continue to protest, but thousands of workers are still on strike in Kandal Province. Kong Athit says the workers are acting independently of the union.</td>
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<td>23 September 2010</td>
<td>Kandal Provincial Court refers all questions on the legality of the strikes to the Labour Ministry while the Ministry refers all questions to the Courts. Phnom Penh Municipal Court President Chiv Keng states that despite earlier ordering striking workers back to work, the Court has not ruled on the legality of the strikes as a whole.</td>
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<tr>
<td>25 September 2010</td>
<td>Workers who had been taking unauthorised strike action over the suspension of union representatives attempt to return to work. Unions claim that over 3,300 were dismissed for participating in the strike.</td>
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<tr>
<td>28 September 2010</td>
<td>Labour unions sign an agreement with industry representatives to prevent strikes by simplifying the resolution of labour disputes to come into force in January.</td>
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<td>29 September 2010</td>
<td>Hun Sen calls for the Court to drop the accusations against the workers as well as the union leaders and asks all factories to accept back the workers. He also warns unions to respect the Labour Law and try to settle disputes through arbitration.</td>
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<tr>
<td>4 October 2010</td>
<td>GMAC Secretary General Ken Loo indicates his intention to continue legal claims against striking workers in a column in <em>The Phnom Penh Post</em>. Unions claim that 800 workers have still not been allowed to return to work.</td>
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<tr>
<td>12 October 2010</td>
<td>Comment piece by Ken Loo which earlier appeared in <em>The Phnom Penh Post</em> is reprinted as an advertisement in <em>The Cambodia Daily</em>.</td>
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<tr>
<td>18 October 2010</td>
<td>Ken Loo is reported as claiming that he will not negotiate with unions unless they apologise for the strike.</td>
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BACKGROUND

1. Two prominent unions representing Cambodian garment workers (the Coalition of Cambodian Apparel Workers' Democratic Union or “C.CAWDU” and the National Independent Federation Textile Union of Cambodia or “NIFTUC”) together with their respective confederations (the Cambodian Labour Confederation or “CLC” and Coalition of National Construction Federation or “CNC”) led their members on a nationwide strike from 13-16 September 2010. The strike came following the July decision of the Labour Advisory Committee to increase the minimum wage received by apparel sector employees by just US$5 a month to US$61. The unions had been seeking an increase to between US$75 and US$93 a month, as well as other demands such as increased seniority pay and overtime meals allowance.

2. Estimates of the number of workers taking part in the strike varied. Unions claimed that at its peak nearly 160,000 workers stayed away from 96 factories across the country, while representatives from the Garment Manufacturers Association of Cambodia (“GMAC”) claimed the number was more like 30,000 and only affected 23 or 24 factories. In addition to legal threats and actions against strike organisers, the unions claim that as of 13 October 2010, 106 union representatives remained suspended from 14 factories and 677 workers who protested over the suspensions had been dismissed. GMAC estimated that the strike cost its members in excess of US$15 million in lost or delayed orders, lost production, extra transport costs and discounts to buyers. The timeline at pages 1-2 sets out the key events relating to the strike.

3. In the lead up to the strike and since its conclusion, a raft of accusations have been made by both unions and garment manufacturers regarding the other side’s compliance with legal requirements. Claims and counterclaims abound. Unions have been quick to accuse employers of violating labour rights and have rallied international and NGO support to condemn the employers’ response to the strike. Meanwhile, employers claim that unions failed to follow the required procedures and have commenced legal action against individual union activists on the basis that the strike was unlawful. The treatment of the legal issues by the courts has been equally unclear. Despite earlier ordering workers to return to work during the strike, Phnom Penh Municipal Court President Chiv Keng recently claimed that the court yet to rule on the legality of the strikes as a whole.

4. Most recently, in a column in The Phnom Penh Post on 4 October 2010, GMAC Secretary General Ken Loo reaffirmed the intention of his members to seek a determinative ruling from the courts that the entire strike was unlawful. A number of cases are pending in courts in Kandal Province and Phnom Penh where this issue needs to be determined. To reiterate this point, GMAC took the unusual step of purchasing a full page advertisement in The Cambodia Daily on 12 October 2010 to re-publish the same Ken Loo column from The Phnom Penh Post on 4 October 2010.

5. GMAC’s persistence in arguing that the strikes are illegal is noteworthy as it comes after Prime Minister Hun Sen specifically recommended that both parties return to the negotiating table.

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20 The previous minimum wage of US$50 was also changed to formally include a separate cost of living allowance of US$6 which garment workers were already receiving.
22 The Cambodia Daily, “Strike Number Doubles, Union Leaders Claim”, 15 September 2010; and The Phnom Penh Post, “Nationwide garment strike hits day two”, 15 September 2010.
23 The Phnom Penh Post, “22 union reps back at work”, 13 October 2010.
and that employees be reinstated.\textsuperscript{26} Indeed, comments from Ken Loo reported on 18 October 2010, indicate that GMAC may refuse to participate in new talks until union leaders apologise: “Until we get the apology letter, negotiations will not move forward”.\textsuperscript{27}

6. Amid the escalating rhetoric on each side there has been little substantive examination of the legal position. This legal analysis considers the strike with reference to international human rights law, the Cambodian Constitution and domestic labour legislation concerning the right to strike and freedom of association. It considers the competing claims of unions and employers and makes recommendations for the resolution of the dispute.

A RIGHT TO STRIKE?

7. The right of individuals to join and form trade unions and for those unions to operate freely is firmly established as a component of the right to freedom of association under international human rights law.\textsuperscript{28} The right to strike sits alongside these rights\textsuperscript{29} and has been described by the International Labour Organization (“ILO”) as “an intrinsic corollary to the right to organize”.\textsuperscript{30}

8. Despite their subsequent inclusion within the International Bill of Rights,\textsuperscript{31} the primary international expression of trade union rights is under the ILO Freedom of Association and Protection of the Right to Organize Convention 1948 (“Freedom of Association Convention”).\textsuperscript{32} This was ratified by Cambodia along with the Right to Organize and Collective Bargaining Convention 1949 (“the Right to Organize Convention”) in 1999 (together “the ILO Conventions”).\textsuperscript{33}

9. Both the ILO Conventions confirm the fundamental right of individuals to join and form trade unions for the protection of their interests and go on to set out a number of subsidiary rights necessary to give practical effect to that right. In the Freedom of Association Convention this includes defining unions as organizations with the aim of “furthering and defending the interests of workers”\textsuperscript{34} and providing an express right for unions to “organise their administration and activities and to formulate their programmes”.\textsuperscript{35}

10. While there is no explicit mention of “the right to strike” in the ILO Conventions, it has been recognized in two resolutions of the International Labour Conference\textsuperscript{36} – which provide

\textsuperscript{26} The Phnom Penh Post, “Hun Sen’s double whammy”, 30 September 2010.

\textsuperscript{27} The Cambodia Daily, “Row Over Apology Could Delay New Garment Pact”, 18 October 2010.

\textsuperscript{28} These rights are set out in article 23(4) of the Universal Declaration of Human Rights (“UDHR”); Article 22 of International Covenant on Civil and Political Rights (“ICCPR”); and Article 8 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). Cambodia ratified the ICCPR and the ICESCR in May 1992 while the UDHR is generally viewed as customary international law.

\textsuperscript{29} See Article 8(1)(d) of the International Covenant on Economic, Cultural and Social Rights.


\textsuperscript{31} That is, the UDHR, ICCPR, and ICESCR.

\textsuperscript{32} The rights as set out in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights expressly preserve and defer to the Freedom of Association Convention at articles 22(3) and Article 8(3) respectively.

\textsuperscript{33} For details see: http://www.ilo.org/ilolex/english/convdisp1.htm

\textsuperscript{34} ILO Convention 87: Freedom of Association and Protection of the Right to Organize Convention 1948, Article 10.

\textsuperscript{35} ILO Convention 87: Freedom of Association and Protection of the Right to Organize Convention 1948, Article 3.

\textsuperscript{36} Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation 1957; and Resolution concerning Trade Union Rights and Their Relation to Civil Liberties 1970.
guidelines for ILO policy. In any event, the ILO Committee on Freedom of Association and the ILO Committee of Experts on the Application of Conventions and Recommendations have specifically recognized the right to strike as arising from Articles 3 and 10 of the Freedom of Association Convention, as quoted above. Both bodies have frequently stated that the right to strike is a fundamental right of workers and of their organizations and have defined the limits within which it may be exercised by laying down a body of principles developed through quite substantial “case law”. For example, the ILO has recognised that, “[t]he right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests.”

11. The wide acceptance of the right to strike as a component of the freedom of association is reflected in its inclusion in the restatement of this right in Article 8 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”): “The States Parties to the present Covenant undertake to ensure...The right to strike, provided that it is exercised in conformity with the laws of the particular country.”

12. The Cambodian Constitution also provides trade union rights and the right to strike. It incorporates the international human rights instruments referred to above, but also goes on to restate a number of these rights. The Constitution thus provides for example that, “Khmer citizens of either sex shall have the right to form and to be members of trade unions,” “the organization and conduct of trade unions shall be determined by law” and that “the right to strike and to non-violent demonstration shall be implemented in the framework of a law”.

13. In a decision made by the Cambodian Constitutional Council dated 10 July 2007, it was confirmed that Cambodian courts are required to take account of the international human rights instruments incorporated into the Constitution when interpreting domestic legislation. The decision clarified that no domestic law should be applied by the courts in a way that violates the Constitution or the international human rights instruments it incorporates. In this context then, the Labour Law 1997 must be interpreted consistently with the trade union rights provided in the ILO Conventions referred to above.

**Limitations on the right to strike**

14. It is important to emphasize that neither the right of trade unions to function freely, nor the more specific right to strike, are absolute. The right to strike set out in the ICESCR only subsists provided it is exercised in accordance with national law. The right of unions to function freely in ICESCR is “subject to no limitations other than those prescribed by law and which are necessary

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40 Article 31 of the Constitution of the Kingdom of Cambodia states: ‘The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights’.
41 Constitution of the Kingdom of Cambodia, Article 36.
42 Constitution of the Kingdom of Cambodia, Article 36.
43 Constitution of the Kingdom of Cambodia, Article 37.
44 The Constitutional Court of Cambodia, decision no. 092/003/2007.
in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others". 46

15. This qualification also appears in the expression of trade union rights in the Freedom of Association Convention, which requires that unions exercising the right to organize their activities and formulate their programs “shall respect the law of the land”. 47 The limitations on the right to strike have also been recognized by the ILO in the principles developed under the right of freedom of association:

Consequently, the principles of the supervisory bodies cover only legal strikes, that is, strikes which are carried out in compliance with national legislation where this does not undermine the basic guarantees of the right to strike as have been described in the preceding sections on the principles of freedom of association in connection with strikes. 48

16. The expression of these rights in the Constitution is subject to similar qualifications. The organization of trade unions is to “be determined by law”49 and the right to strike “shall be implemented in the framework of a law.”50

17. This reflects an important point which GMAC has been keen to make at every opportunity51 – employers as well as employees have rights in relation to strikes. The procedural rules for declaring a strike and requirements in respect of the conduct of a strike established by Cambodian law (set out in more detail below) are designed to protect the legitimate interests of garment manufacturers. On the face of it most of these provisions appear to be broadly compatible with principles developed by the ILO in relation to national law limitations on the right to strike.

18. The applicable law in the context of a Cambodian strike is the Labour Law 1997. Article 319 guarantees the right to strike, and articles 323-329 specify a number of “Procedures prior to the strike” which unions must follow, including making the declaration to strike in accordance with the union’s statutes (which must require a secret ballot), providing a minimum of 7 days notice and clearly identifying the union’s demands. Articles 330-335 then set out a number of requirements with regard to the carrying out of the strike itself, for example requiring that the strike be non-violent and that the freedom of non-strikers shall be protected from threats and coercion. Strikes which do not comply with the procedural rules or the conduct rules are deemed to be illegal. 52

19. The central legal questions to a consideration of the Cambodian garment worker strike are thus (i) whether the unions complied with the statutory requirements in declaring and conducting the strike; and (ii) whether the reaction of employers was lawful and justified.

46 International Covenant on Economic, Social and Cultural Rights, Article 8(1)(c).
49 Constitution of the Kingdom of Cambodia, Article 36.
50 Constitution of the Kingdom of Cambodia, Article 37.
UNIONS’ COMPLIANCE

20. On the face of it, unions appear to have complied with most requirements of the Labour Law 1997. Written notice was provided to GMAC and the Labour Ministry, the strike was declared with the approval of 60,000 members and was for the most part conducted peacefully and without violence. However, GMAC has highlighted several particular areas where it believes that the unions have failed to comply. These are considered in more detail below.

Provision of sufficient notice

21. Article 324 of the Labour Law 1997 states:

A strike must be preceded by prior notice of at least seven working days and be filed with the enterprise or establishment. If the strike affects an industry or a sector of activity, the prior notice must be filed with the corresponding employer’s association, if any. The prior notice must precisely specify the demands which constitute the reasons for the strike.

22. GMAC acknowledges that it received written correspondence from unions on 19 August 2010 threatening a strike from 13 to 18 September 2010.\(^{53}\) This letter was actually the second letter which GMAC had received from the unions in respect of the proposed strike, but contained more specific details about strike dates. The notification in this second letter provided GMAC with 24 days’ notice of the strike – well in excess of the required 7 days. That letter listed 4 specific demands and its delivery to GMAC (as the employer’s association representing the garment industry) appears to have complied with Article 324 in all other respects.

23. However, GMAC claim that a third letter received from the unions on 10 September 2010, “amended their demands from minimum wage to living wage”.\(^{54}\) GMAC’s argument appears to be that this third letter (with the slightly amended demand) re-started the notice period, and that as another seven days did not elapse before the strike commenced, the minimum notice was not provided.

24. This letter stated that its purpose was “to give you notice that workers in the footwear and garment industry want to have a meeting on new proposals about an increase of living wage and other benefits for employees.”\(^{55}\) It reviewed the lack of negotiation from the employers in response to previous letters and demands from the unions’, and concluded that “to avoid any inconveniences to the employers, and to avoid protests to the decision made by the Labour Advisory Committee we decided not to discuss on minimum wage anymore.”\(^{56}\) The letter went on to propose talks between the unions and GMAC on a “living wage” rather than an amended “minimum wage”.\(^{57}\) At the end of the letter the same four specific demands specified in the earlier strike notice were repeated, with the only change being that instead of demanding a US$93 “minimum wage”, the unions clarified that they were now seeking a US$93 “living wage”.\(^{58}\)

25. GMAC’s argument that this third letter re-started the notice period pursuant to Article 324 is not persuasive. The letter does not amend or revoke either the earlier letter or the strike plans

\(^{53}\) Loo, K., “Employers Have Rights Too”, The Phnom Penh Post, 4 October 2010.

\(^{54}\) Ibid.

\(^{55}\) Ibid.

\(^{56}\) Ibid.

\(^{57}\) Ibid.

\(^{58}\) Ibid.
and there is no evidence to suggest that that earlier notice was invalid. At the date of the strike then, an Article 324 compliant notice had been given to GMAC more than 7 working days prior to the strike. The change of language from “minimum wage” to “living wage” does not appear to be a significant departure from the earlier strike notification. This was merely terminology used to describe the nature of the demand; in both letters the actual wage being sought (i.e. US$93) was specified quite clearly and did not change. Nor did the dates or nature of strike action being threatened.

26. The difference in the way the demand was couched probably reveals a genuine attempt by the unions to bring about a last minute negotiated solution to the wage dispute without the need for a strike. One possible benefit to changing the demand from being described as a “minimum wage” is that resolving the dispute would no longer require government intervention. It could be resolved in talks with just GMAC, for example. It might also allow the union to claim that it was no longer directly disputing a personal recommendation from Hun Sen about the minimum wage, which might more readily enable compromise to be made. The third letter thus appears to have been a genuine attempt to try and find a negotiated solution which allowed both parties to save face.

27. It should be borne in mind that one of the purposes of the notification procedure is to allow disputes to be resolved prior to mutually damaging strike action. This is emphasized by Article 325, which requires, “during the notice period”, the Ministry of Labour to “actively seek all means to conciliate between the parties to the dispute”. It would be strange indeed (and contrary to the interests of all involved) if the intention of Article 324 was to prevent unions from suggesting settlement proposals in the final days leading up to a planned strike. In other words, GMAC’s argument could lead to a situation where a decision to strike precludes any further negotiations until after the strikes have been carried out.

28. Interpreting these provisions so as to allow the parties to negotiate a settlement right up to the date of the planned strike also accords with the principles of freedom of association expressed by the ILO:

> In the Committee’s opinion, it would be highly advisable that the parties be given every opportunity to bargain collectively, during a sufficient period, with the help of independent facilitators (mediator, conciliator, etc.) and machinery and procedures designed with the foremost objective of facilitating collective bargaining.  

**Secret ballot**

29. Another pre-condition on the right to strike under the Labour Law 1997 concerns the procedure pursuant to which a decision to strike is made. Article 323 requires: “A strike shall be declared according to the procedures set out in the union’s statutes, which must state that the decision to strike is adopted by secret ballot.” CLC and CNC declared the strike following the collection of thumb prints and signatures from a majority of their members voting in favour of the strike. While this appears to have been a genuinely democratic vote reflecting the views of the unions’ members, it is not clear that it amounted to a “secret ballot”.

30. The requirement for a secret ballot to conduct a strike is not a unique pre-condition of national law in this context (an equivalent requirement exists in, for example, the Philippines) and has previously been considered by the ILO to be compatible with the freedom of association: “The

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obligation to observe a certain quorum and to take strike decisions by secret ballot may be considered acceptable. 60

31. However, there are two points worth noting about this finding of compatibility: firstly, it only states that the requirement for a secret ballot may be considered acceptable, not that it will be in every case, or should be as a general principle; and secondly the word used is “acceptable” – secrecy is not a necessary pre-condition, but may simply amount to a permissible interference with the right to strike.

32. While there are other international examples of national law requiring a secret ballot, there are equally many countries where unions are permitted to declare a strike using other means, for example: France, 61 Sweden, 62 and New Zealand. 63 In those countries, a signed petition by a majority of union members could well be used as a valid method of declaring a strike.

33. The principle that secret ballots “may be considered acceptable” must also be read in conjunction with the other principle developed by the ILO that, “[t]he conditions that have to be fulfilled under the law in order to render a strike lawful 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”. 64 When these two principles are read together, a more complete statement of the position would seem to be that while generally the pre-condition of a secret ballot may be acceptable, if in a particular case it placed a substantial limitation on the means of unions to conduct a strike it would not.

34. This appears to be the union’s response to this question. They have claimed that, “given the scale of this strike action, reflecting the genuine discontent of workers, it was impossible to organize a secret ballot vote for the entire industry.” 65 It is important to note that “substantial limitation” is a reasonably high standard for unions to establish in this context, given that secret ballots have been deemed acceptable in other cases. But nevertheless the major administrative burden of carrying out a nationwide secret ballot in a country such as Cambodia should not be underestimated. The unions would no doubt point to the sheer number of workers to be balloted (unions claim between 60,000 and 80,000), the geographical area over which their members are located, and time required to travel these distances in Cambodia. The administrative costs of carrying out a secret ballot in these circumstances would include, for example: conducting meetings for workers in every location across the country, printing, mailing and then counting potentially over 80,000 voting forms, and communicating the results to every member. These are far from insignificant costs for a union funded by workers with some of the industry’s lowest wages in the world. The difficulties workers claim they face in merely surviving on these wages was after all the cause of the strike.

35. In assessing the scale of difficulties faced by unions, it is also relevant to note that never before in Cambodia has a trade union successfully conducted a nationwide secret ballot. Previous strikes in Cambodia have generally only been small scale, for example, in a single factory.  

36. In addition to prohibitive costs, unions faced substantive difficulties from the authorities in organising large scale meetings with members where balloting could have taken place. For example, CLC and CNC attempted to organise a public forum on 25 July to discuss the unions’ response to the minimum wage decision and gather the views of their members. However, local authorities denied them permission to hold the forum and a large police cordon was set up on the outskirts of Phnom Penh and near the planned forum site to prevent workers from attending.  

37. The combination of the prohibitive cost and the restrictions placed on the unions’ activities make it certainly possible that unions could establish that the secrecy requirement was a substantial limitation on the ability of unions to conduct the strike. In the context of a garment industry strike of this magnitude in Cambodia, the secrecy requirement might then be said to “undermine the basic guarantees of the right to strike” and on that basis not constitute a valid limitation of national law. 

38. Given that the rights under the Freedom of Association Convention (and by extension their interpretation by the ILO) are directly incorporated into the Cambodian Constitution, Cambodian courts are obliged to interpret the Labour Law 1997 consistently with those rights. In this case that may require interpreting Article 323 so as not to require absolute secrecy in a ballot of this nature, or alternatively that the lack of secrecy here did not render the strike as a whole unlawful. Ultimately a democratic ballot was carried out and an overwhelming majority of over 60,000 workers voted in favour of strike action. The complaint here is thus not that members did not vote in favour of the strike, but merely that that ballot was not sufficiently secret. It was not the case that the ballot was entirely public – no one other than union officials had access to the thumbprints of voting members. Nor have there been any substantive suggestions of undue coercion or pressure on union members in respect of the ballot (presumably the justification for the requirement of secrecy) which might make the lack of full secrecy more significant.  

39. In view of the fact that in most other respects the strike was compliant, a conclusion that the strike as a whole was lawful, in spite of the admitted deficiencies in the ballot procedure, would be a reasonable finding. It would also reflect the pragmatic approach which has been taken to similar issues by courts in other parts of the world, where it has been acknowledged that ruling a strike to be unlawful in the courts on the basis of a minor failure to comply with technical provisions is likely to inflame rather than resolve an industrial dispute. For example, in the UK earlier this year the Court of Appeal overturned a lower court’s decision to rule a strike unlawful due to a minor failure in the reporting of the results of a strike ballot by a union.  

Labour Advisory Committee

66 See for example, Arbitral Award re case 01/06-Goldtex Hing Shing dated 23 January 2006.  
67 See the full description of the public forum in CCHR and Community Legal Education Center, A tightening noose: briefing note on the restrictions on unions campaigning for an increased minimum wage in Cambodia 1 September 2010, p. 4.  
68 Ibid.  
70 British Airways Plc v Unite the Union [2010] EWCA Civ 669.
40. GMAC has raised the fact that both unions participated in the Labour Advisory Committee’s determination of the new minimum wage as a further argument that the strikes are unlawful. A significant portion of Ken Loo’s The Phnom Penh Post column (subsequently repeated as an advertisement in The Cambodia Daily) was then devoted to the decision making process of the Labour Advisory Committee, for example:

Only Mr Ath Thorn and Ms Morm Hhim (sic) refused to accept the decision of the [Labour Advisory Committee], even though they were full voting members of the committee and the decision passed by an overwhelming majority of 25 out of 27 votes... In any democratic society, it has always been that the minority has to comply with the wishes of the majority, but we have a case where the minority is creating trouble through inappropriate behavior and objections to the decision of the majority.71

41. Whatever moral or persuasive validity such points might have, they have no basis in law. The determination of the garment sector minimum wage by the Labour Advisory Committee in no way precludes union’s ability to strike. Pursuant to Article 107 of the Labour Law 1997, a minimum wage must be set by Prakas (Ministerial Regulation) from the Ministry of Labour. However, no Prakas has ever been issued under this provision, and in practice the level of garment sector minimum wage (no minimum wage exists for other sectors) has been announced by an informal Notification from the Ministry of Labour following the agreement of the Labour Advisory Committee. While these Notifications are not an official legal instrument, in practice the level set by the committee is generally adhered to by garment factories.

42. The Labour Advisory Committee is a tri-partite institution made up of 7 representatives from federations of trade unions representing garment workers, 7 representatives from GMAC representing employers and 14 representatives from the Royal Government of Cambodia (“RGC”). Of the 7 union representatives, 5 are from unions generally thought to have links with the ruling Cambodian People’s Party (“CPP”). Other prominent unions such as those headed by Chea Mony and Rung Chhun are not represented at all.

43. There are no legal restrictions on unions represented on the Labour Advisory Committee continuing to advocate for an increased minimum wage or to organize strike action. The body is not a statutory mechanism and its process does not result in a minimum wage under the Labour Law 1997. In reality it is more akin to a mediated collective bargaining mechanism or a government consultation forum.

44. The criticisms from Ken Loo are thus best viewed as complaints about the reasonableness of the unions’ negotiating position and not relevant to a consideration of the legality of the strike action. It is worth noting though, that as a collective bargaining mechanism it is far from democratic, with government representatives holding a vast majority of the votes, more than sufficient to easily out-vote either all the unions or all the employers. The Labour Advisory Committee vote in this context was made in relation to a specific proposal developed in a meeting with Prime Minister Hun Sen several days earlier.72 With that in mind it was probably unsurprising that very few government representatives were prepared to vote against the proposal and publicly oppose the Prime Minister.

Conciliation procedures

45. Another claim by GMAC has been that unions failed to follow the required conciliation and arbitration procedures prior to commencement of the strike. For example, at the conclusion of the strike, Ken Loo was quoted as saying; “[t]he strike was another example of unions holding

illegal strikes without going through the proper channels, such as meeting at the Labour Arbitration Council.\(^{73}\)

46. The Labour Law 1997 does indeed provide for conciliation and arbitration to take place prior to a strike. However, the only obligations in this regard are placed on the Ministry of Labour rather than the unions. Article 325 of the Labour Law 1997 provides that:

> During the period of prior notice, the Minister in Charge of Labour shall actively seek all means to conciliate between the parties to dispute, including soliciting the collaboration of other relevant ministries. The parties are required to be present at the summons of the Minister in Charge of Labour.

47. Articles 304-306 spell out more detail about the process of conciliation of a collective dispute, including that the Ministry of Labour will assign a conciliator within 48 hours of being notified of the dispute and that conciliation will be carried out with 15 days of the notification.

48. The unions claim to have filed written notification of the strike with the Ministry of Labour at the same time as they notified GMAC on 18 August 2010.\(^{74}\) This has not been disputed by the Ministry of Labour. Having complied with this requirement, that was the extent of unions’ obligations under the Labour Law 1997 until the Ministry of Labour appointed a conciliator or summoned the parties for the purposes of conciliation. The fact that no conciliation took place was thus not a result of any failure by the unions and cannot be used as an argument that the strike was illegal.

**Conduct of the strike**

49. In addition to setting a number of procedural requirements for unions in declaring a strike, the Labour Law 1997 also places requirements on unions in the carrying out of the strike. In particular, strikes must be peaceful and non-violent\(^{75}\) and strikers must not threaten or coerce other workers into joining the strike.\(^{76}\) That these requirements are legitimate limitations on the right to strike and thus consistent with the development of trade union rights under international law is not disputed by either party to the dispute.

50. While there may have been some isolated incidents giving cause for concern,\(^{77}\) for the most part the unions appear to have conducted the strike in accordance with these requirements. The strike was peaceful and little property was destroyed or damaged. The main allegation from GMAC seems to have been that striking workers tried to prevent other workers from attending work and forced them to join the strikes in breach of Article 331. There is always a fine line between the informal social pressure applied by striking workers against those who continue to work (which is permitted) and substantive coercion or threat (which is not).

51. Ken Loo has alleged coercion on the part of the unions a number of times in publicised comments disputing the number of workers taking part in the strike. For example, on 16 September 2010 he is reported to have said; “[t]he workers are afraid...[the unions] know where the workers stay.”\(^{78}\) GMAC has, however, produced little substantive evidence to support

\(^{73}\) The Cambodia Daily, “Garment Strike Ends; Factories File Lawsuits”, 18-19 September 2010.
\(^{75}\) Labour Law 1997, Article 330.
\(^{76}\) Labour Law 1997, Article 331.
\(^{77}\) See, for example, allegations of stone throwing in The Cambodia Daily, “Strike Numbers Double, Union leaders Claim”, 15 September 2010.
\(^{78}\) The Cambodia Daily, “Employers Call for Crackdown on Strikers”, 16 September 2010. See also comments from Ken Loo in The Cambodia Daily, “Strike Number Doubles, Union Leaders Claim”, 15 September 2010.
these allegations, which unions have been quick to deny. 79 Nor have there been any reports of substantive violence towards non-striking workers to lend credence to claims of coercion. Indeed some of the published comments by workers who elected to continue working tend to suggest nothing but sympathy for the strikers, for example, one worker explained; “I want to join the strikes too but I am afraid of losing my income ahead of the Pchum Ben festival”. 80 In the absence of any compelling evidence being produced by GMAC, there seems to be little foundation for a claim that unions’ were engaged in threats or coercion.

EMPLOYERS’ REACTION

52. The strike itself was relatively peaceful and non-violent with only a few minor incidents reported. 81 However, the response from garment manufacturers has been sharply criticised by unions and NGOs. 82 It included refusing to allow striking workers to return to work, the arrest of union activists and the pursuit of legal claims against union representatives in the courts. 83 Unions and NGOs also reported a small number of violent incidents toward union activists during and following the strike action. 84

53. Intrinsic to the right to strike is the right not to be discriminated against for taking part in legitimate strike action. Adverse treatment of workers for taking part in a strike will thus amount to a violation of the right to strike itself. This has been specifically acknowledged by the ILO:

Workers, and especially their leaders in undertakings, should however be protected against any discrimination which might be exercised because of a strike and they should be able to form trade unions without being exposed to anti-union discrimination. 85

54. The Labour Law 1997 also specifically prohibits acts of anti-union discrimination, including in relation to strike action. For example, Article 332 requires that, “the worker shall be reinstated in his job at the end of the strike”, and Article 333, provides that; “[t]he employer is prohibited from imposing any sanction on a worker because of his participation in a strike.” Physical violence, arrest or imprisonment of union activists associated with a lawful strike would clearly breach these requirements, as would the dismissal or suspension of such employees.

55. However, the right to strike is not absolute and applies subject to unions complying with national law. Employers’ actions must be considered in the light of these limitations as well as the right to strike itself. While GMAC has openly admitted to many of the claims of suspension /dismissal of workers and legal proceedings against strike organisers, it claims that these actions are justified because the strike itself was unlawful.

56. One important point to emphasise here is that even if unions have failed to satisfy every precondition for a strike, employers are not then given carte blanche to take whatever steps they please to punish the striking workers. There are limits on what constitutes a justified and lawful

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80 The Cambodia Daily, “Union Claims 70,000 Strikers on Day One”, 14 September 2010.
82 American Center for International Labor Solidarity (ACILS), Cambodian Center for Human Rights (CCHR), Cambodian Center for Independent Media (CCIM), Cambodian Human Rights Action Committee (CHRAC), Community Legal Education Center (CLEC), Housing Rights Task Force (HRTF) and Cambodian League for the Promotion and Defense of Human Rights (LICADHO), Joint Media Statement, “Intimidation and Legal Threats Against Union Workers and Leaders Must Cease”, 21 September 2010.
83 Ibid.
84 Ibid.
response, even in respect of a clearly unlawful strike. For example, under no circumstances would the violent beating of workers be justified.

57. The explanation of this principle by the ILO provides that a response to a strike must be proportional, even in the event of breaches by the union:

Penal sanctions should only be imposed as regards strikes where there are violations of strike prohibitions which are themselves in conformity with the principles of freedom of association. All penalties in respect of illegitimate actions linked to strikes should be proportionate to the offence or fault committed and the authorities should not have recourse to measures of imprisonment for the mere fact of organizing or participating in a peaceful strike.  

58. The final part of the second sentence deserves particular emphasis. It establishes the principle that imprisonment should not be available as a remedy in relation to a peaceful strike, even if that strike was unlawful for some other procedural failure.

Responses to official strike

59. A group of local NGOs have documented a small number of instances of violence towards union members in apparent retribution for participation in the strike. Irrespective of the unions’ compliance with the procedural rules for holding a strike, this violence (if indeed linked to participation in strike action) would constitute a disproportionate response and a grave violation of those individuals’ right to strike, in addition to any criminal liability which might arise. However, the number of violent incidents was relatively few when compared to the number of workers striking and there has not been any suggestion that GMAC or its members deliberately coordinated a systematic campaign of violence.

60. However, GMAC and its members have publicly advocated a policy of taking legal action in the courts against strike organisers in a personal capacity. During the strike itself, several factories obtained injunctions requiring workers to return to work. Since the conclusion of the strikes, a range of garment factories filed lawsuits against union representatives preventing them from returning to work. Several days after the conclusion of the strike, NGOs claimed to have copies of court documents suspending 92 workers from 5 different factories while the unions alleged that 200 representatives had been suspended. GMAC has also stated publicly its intention to sue strike leaders for damage suffered during the strike and to pursue criminal charges against strike leaders.

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87 American Center for International Labor Solidarity (ACILS), Cambodian Center for Human Rights (CCHR), Cambodian Center for Independent Media (CCIM), Cambodian Human Rights Action Committee (CHRAC), Community Legal Education Center (CLEC), Housing Rights Task Force (HRTF) and Cambodian League for the Promotion and Defense of Human Rights (LICADHO), Joint Media Statement, “Intimidation and Legal Threats Against Union Workers and Leaders Must Cease”, 21 September 2010.
90 American Center for International Labor Solidarity (ACILS), Cambodian Center for Human Rights (CCHR), Cambodian Center for Independent Media (CCIM), Cambodian Human Rights Action Committee (CHRAC), Community Legal Education Center (CLEC), Housing Rights Task Force (HRTF) and Cambodian League for the Promotion and Defense of Human Rights (LICADHO), Joint Media Statement, “Intimidation and Legal Threats Against Union Workers and Leaders Must Cease”, 21 September 2010.
92 See comments from Ken Loo reported in The Phnom Penh Post, “Strikers face legal hurdle”, 16 September 2010.
61. GMAC claims that its members are justified in taking legal action against the union representatives and the striking workers on the basis that the strike was unlawful. For example, on the second day of the strike, Ken Loo claimed that, “We will be seeking legal action very soon... I don’t know if they know how many laws they have broken.” However, as set out above, the unions largely complied with the procedural requirements of the Labour Law 1997. While the unions could perhaps be questioned in relation to the level of secrecy of the ballot, it is by no means clear that this rendered the strike unlawful.

62. In any event, significant doubts can be raised about whether GMAC’s reaction was proportional, even if its claims that the strike was unlawful were correct. Pursuing criminal charges against union officials or striking workers seems highly unlikely to be a proportional response to a failure in balloting requirements. Even if there were failures to comply by the union, the strike was conducted peacefully and cannot sensibly be categorised as criminal. Imprisonment of workers for participation is disproportionate response to a peaceful strike and directly breaches the ILO principle that imprisonment should not be available for participation in a peaceful strike. To respond to a minor non-compliance with prison sentences for union activists would represent a serious curtailment of the right to strike in Cambodia.

63. The pursuit of civil actions against local union representatives in a personal capacity can be viewed in a similar light. One way to assess proportionality in the human rights context is to consider whether an alternative course of action was available which would not have interfered with the rights of the individuals to strike. In this case, manufacturers could, for example, have pursued their legal arguments against the unions as entities in their own right. Article 274 of the Labour Law 1997 specifically establishes the legal personality of registered trade unions, meaning that if manufacturers had concerns about the legal compliance of the strike they could have resolved these with the union directly. This is how legitimate disputes over the legality of strike action are resolved elsewhere in the world, not in proceedings against individual union members. In contrast, to target individual union representatives in actions threatening significant financial damages or suspension from their employment as a result of participation in a peaceful strike which for the most part complied with all legal requirements appears to be personal retribution designed to intimidate workers from exercising their rights.

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95 See for example, British Airways Plc v Unite the Union [2010] EWCA Civ 669.
Unauthorized Strikes

64. A second phase of the strikes unfolded after a number of union representatives were prevented from returning to work after the strike was over. The justification given by one factory owner for refusing to allow union representatives to return to work was that, “[t]hese people are troublemakers. I do not know how to control my workers now”. The union representatives were told they were suspended pending legal action being taken against them for their role in the strike. As we have seen above, the suspension or dismissal of workers for participation in a lawful strike is a blatant breach of the right to strike and Article 333 of the Labour Law 1997. While GMAC claims that the original strike was unlawful, this analysis has concluded that for the most part the original strike was conducted in accordance with the legal requirements. In any event the fact that these workers were suspended “pending legal action”, indicates that the suspensions were made before any determination of the lawfulness of the original strike could be made. This, along with the comments from the factory owner quoted above, tend to suggest that these suspensions were made with the primary motive of retaliating against striking workers, rather than any genuine belief that the original strike was unlawful.

65. In any event, in some factories the suspension of union activists provoked a strong reaction from the workers. After employers refused to let strike organizers return to work, several thousand workers decided to continue to strike, demanding that the union representatives be allowed to return. These secondary strikes were not declared pursuant to the CLC’s or CNC’s governing statutes, were undertaken without any notice being given to employers or the Ministry of Labour (it took place outside the original strike period notified by the unions in their letter of 18 August 2010) and apparently without any ballot of members. In contrast to the official strike action of the week before, it seems clear that few if any of national law requirements for declaring a strike were followed. If the union wanted to object lawfully to the treatment of its representatives it could have balloted its members and given notice of another strike at least 7 days later. This is also perhaps reflected in the public acknowledgement from CLC Secretary General Kong Athit that the strikers were acting independently of the union’s decision making process.

66. It should be borne in mind, however, that the unauthorised strikes took place in retaliation to what appears to have been unlawful treatment of the union representatives. In other words, both parties were at fault and the incident (which eventually led to violent confrontations between workers and police) demonstrates how quickly an industrial dispute can escalate to damage both parties through retaliatory exchanges. In relation to the unauthorised strikes, GMAC’s claim that it is entitled to take legal action due to the failure to comply with the strike requirements could perhaps have some foundation (although pursuing such strikers in a personal capacity or for criminal offenses would remain disproportionate). However, Article 333 of the Labour Law 1997 could equally be used by the workers to nullify the suspension of union workers and enforce a fine of sixty-one to ninety days of base daily wage or to imprisonment of six days to one month against the employer.

67. Even if a trusted and independent judiciary were available, enforcing the breaches committed by both sides would only be counterproductive in a case like this. The procedures are expensive, take a great deal of time and effort and given the chronic state of the administration of justice in Cambodia could make the situation far worse. A far more preferable solution would be for each to admit their mistakes and accept a pragmatic compromise solution in respect of the

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unauthorised strikes whereby workers agree to return to work and employers allow the union representatives to return.

RESOLUTION AND RECOMMENDATIONS

68. The right to strike is an invaluable democratic measure of last resort. It is an integral element of both international human rights law and the domestic Cambodian regime. However, GMAC is right to point out that this right is not absolute – it is subject to unions complying with the requirements of national law, provided those requirements are consistent with and do not undermine the right to strike itself.

69. While unions generally complied with these requirements and ensured the strike remained peaceful, they could have made greater efforts to clearly and unambiguously demonstrate compliance with all the procedures for declaring a strike. If unions wish their claims of union rights violations to continue to be taken seriously they need to ensure they fully comply with the procedural requirements of the Labour Law 1997 for any future strikes. Responding to overreactions by employers with additional unauthorized strikes with little attempt to follow procedural rules is only likely to inflame the dispute further and make a resolution which benefits their members more difficult to achieve.

70. While certain questions about the unions’ compliance with procedural rules can be validly raised, many of GMAC’s justifications for its claim that the strike was “illegal” ought to be dismissed as not relevant or unpersuasive. Those areas of compliance which are open to question are unlikely to justify the scale of the reaction to the striking workers by employers. In this context, the coordinated crackdown on union officials through suspension, dismissal, civil proceedings in a personal capacity and the threat of criminal charges is an excessive and disproportionate reaction to what was a largely peaceful strike. If GMAC continues to press these claims through the courts rather than constructively attempting to resolve the dispute, its actions are likely to constitute a violation of the rights guaranteed to workers and trade unionists by international human rights law, the Cambodian Constitution and the Labour Law 1997. It will also be counter-productive – litigation is seldom a satisfactory method for resolving industrial disputes, even where parties have faith in the independence and transparency of the judicial system.

71. CCHR therefore recommends that both unions and employers adopt a pragmatic approach and focus on resolving the underlying dispute via good faith negotiations, rather than pursuing claims in the courts. To this end, CCHR recommends that:

- employers allow all suspended or dismissed workers to return to work without delay;
- employers withdraw all current legal proceedings against union officials and employees involved in the strikes;
- employers agree to participate in talks to resolve the dispute without pre-condition;
- unions cease making threats of further strike action until the outcome of renewed negotiations is clear;
- unions take steps to educate their members about the legal requirements for strike action to prevent future unauthorised retaliatory strikes; and
unions take procedural steps without delay so that they will be able to ensure with greater certainty that any future strikes comply with the legal requirements.

72. CCHR praises the recent constructive intervention of the Royal Government of Cambodia (“RGC”) in attempting to bring the parties together in new negotiations and developing a new bipartite committee to resolve the underlying dispute. If the RGC continues to respect the rights of both sides while pressing towards a constructive solution, there is a real prospect of tangible progress. However, CCHR nevertheless recommend that the RGC:

- ensures that the police and government agencies are not involved in any violence towards striking workers or union representatives or used to bring criminal proceedings against them;

- continues to put pressure on GMAC to participate in good faith negotiations to resolve the dispute without pre-condition and to withdraw all outstanding legal claims against striking workers and union representatives; and

- carries out a detailed review as to whether the blanket requirement for a secret ballot in the Labour Law 1997 is practical for a nationwide dispute in the garment sector and considers whether an amendment to permit a non-secret ballot in certain circumstances would be more equitable.