

Mandates of the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Working Group on the issue of human rights and transnational corporations and other business enterprises

REFERENCE:
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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the rights to freedom of peaceful assembly and of association; and Working Group on the issue of human rights and transnational corporations and other business enterprises; pursuant to Human Rights Council resolutions 41/12 and 44/15.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning recurrent cases of anti-union dismissals of Cargill production workers at the Bursa-Orhangazi plant, in Turkey, and especially the dismissals effected in 2018.

Tekgıda-İs is a federation of nine unions founded on 13 April 1952, with the objective to contribute to the regulation and development of the working life, labour law and working conditions in Turkey. It gathers members from the tobacco, drink and food sectors. The union aims to protect the economic and social rights of its members, as well as their freedom of belief and speech in work relations. Tekgıda-İs is an affiliate union of the International Union of Food (IUF).

Cargill Inc is a Minnesota US-based company which employs 170,000 workers in 70 countries worldwide. Cargill has operations in several sectors such as meat and poultry, food and beverage ingredients or financial services. The company has been active in Turkey since 1960 and has currently more than six hundred employees located in seven different locations nationwide, with its head office in Istanbul.

IUF is an international federation of trade unions founded in 1920. Based in Switzerland, it aims to defend the rights and interests of workers in the food, agriculture, hotel, restaurant, catering, tobacco and other related sectors. IUF is composed of 425 trade unions affiliates in 127 countries. The federation represents over 10 million workers all over the world, including a vast majority of unionized Cargill workers.

According to the information received:

On 5 March 2018, members of the labour union Tekgıda-İs applied to the Turkish Labour Ministry for bargaining unit status at Cargill's Bursa-Orhangazi plant, in Turkey. In order to obtain the multi-unit bargaining certification of Cargill's food facilities, the union needed to reach the 40% memberships in the overall enterprise. As a result, unionists started to mobilize at their workplace in order to reach this percentage of membership.

It was reported that Cargill management of the Bursa-Orhangazi plant tried to challenge the union's application for bargaining unit certification. Indeed, the

firm caused the Tekgıda-İş's membership to fall under the 40% threshold by adding workers in the head office to the legal bargaining unit. On March 7, 2018, unionists were also warned that the company's working rules would change in an unfavorable way if the bargaining unit status was obtained. Fourteen workers involved in this attempt of unionization were then dismissed on 17 April 2018.

Cargill justified the dismissals as a consequence of the amendment of the "Sugar Law" announced by the Turkish government on 27 March 2018, which reduced the quotas of sugar to be produced. Due to this reduction, Cargill claimed that it had to downsize some company's staff and stated that no other positions were found for the workers. Economic constraint was therefore the reason indicated in all dismissal notices received by the fourteen workers.

As the fourteen dismissed workers were members of Tekgıda-İş, twelve of them decided to contest the decision in Court in 2018 for unfair dismissal on the basis of union activity. Two decided not to engage in any legal procedure. The complaints were lodged by Tekgıda-İş, on behalf of its twelve members.

Between 2018 and 2019, while the trials were ongoing, the IUF, to which Tekgıda-İş is affiliate, tried several times to engage in an open dialogue with Cargill Inc. on behalf of the dismissed union members but none of these attempts were successful. Indeed, a letter was sent to Cargill's CEO David MacLennan in May 2018 but received no answer. Between 2018 and 2019, thirty-four unions affiliated to IUF, which have members working for Cargill or who have collective bargaining relations with the firm, also sent open letters urging Cargill management to resolve the existing issues with the trade unionists and reinstate all dismissed workers. As Cargill is a USA-based corporation, IUF asked the United States National Contact Point (US NCP) for the OECD Guidelines for Multinational Enterprises for mediation in August 2018. The US NCP accepted the case but the proceeding did not lead to a settlement of the issue between Cargill and the dismissed workers.

On 10 July 2019, the Bursa-Orhangazi's local Court of First Instance (labour) concluded that all twelve production workers were unfairly dismissed for union activity. Cargill decided to appeal the decision. According to information received, during the second instance process, the cases of the fourteen workers were not considered all together, but rather divided between two legal departments and judgments were therefore not rendered at the same time. On 25 December 2019, the Bursa-Orhangazi's district court of appeals decisions rendered verdicts on four of the twelve workers. According to the Court, the economic justification provided by Cargill was not sufficient to justify those four dismissals. Indeed, the principle according to which enterprises must keep dismissals as a last resort was not respected. Anti-union dismissals were therefore not recognized for those four workers. However, on 20 February 2020, the Final Court confirmed the first instance court's decision for the other eight and recognized that they were dismissed on the basis of union activity. In its final and un-appealable decision, the Court ordered reinstatement in all twelve cases.

According to Law No. 4857 of 2003, Turkish enterprises are legally required to pay enhanced compensation in lieu of reinstatement, even in case of anti-

union dismissals. Normally if a Court concludes that no valid reason has been provided to justify the dismissal, the worker must be re-engaged by the employer within one month. However, if the worker is not reinstated, he or she has the right to compensation of his/her wages for a minimum of four months and a maximum of eight months (Art. 21 para. 1 Law No. 4857). If the dismissal is based on discrimination (sex, race, language, religion, political thought etc.), a compensation up to four months' wages is added (Art. 5 Law No. 4857). Finally, the National Law No. 6356 on Trade Unions and Collective Labour Agreements specifies that, if the discriminatory dismissal occurs because of union activity, compensation of up to one year is added (Art. 25).

Following the Court's decisions, the twelve workers applied to positions at Cargill in December 2019 and February 2020, in connection with the reinstatement orders. Cargill rejected their applications and provided compensations instead, while it seems that, between 2019 and the time of this communication, nine permanent positions were created, in the same department that the dismissed workers had previously worked in, and none of these positions were offered to them. Thus, in lieu of reinstatement, Cargill decided to pay the required compensation to the twelve workers.

It was also reported that similar cases had previously happened at Cargill Turkey. In 2012, 2014 and 2015, seven workers involved in union activities at Cargill Bursa-Orhangazi factory were reportedly dismissed for poor performance, according to Cargill. In 2015 and 2018 the Supreme Court confirmed that all seven were dismissed for union activity and ordered that they be reinstated. However, the company decided to provide compensation instead of reinstatement in each case.

We express our grave concern regarding the reported stigmatization and attempts of intimidation of labour-unionists at Cargill Turkey. If the above allegations are confirmed, these individuals appear to have been targeted solely for having exercised their right to freedom of association protected under the international covenant on civil and political rights. This is in contravention of international human and labour rights standards governing freedom of association. More generally, serious concern is expressed about the Law No. 4857, which allows companies to pay compensation instead of reinstating them. This threatens the rights of workers taking part in trade unions to be protected against retaliations in Turkey and can lead to situations whereby dismissals are used to keep unions from reaching the threshold necessary to achieve formal bargaining unit status.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.

2. Please explain the steps your Excellency's Government is planning to undertake in order to ensure that the Law No. 4857 is not used by companies to violate workers' rights to unionize and collective bargaining, including possible amendment of the law.
3. Please indicate the steps that your Excellency's Government has taken, or is considering to take, including policies, legislation, and regulations, to ensure the implementation of the United Nations Guiding Principles on Human Rights, such as (i) setting out clearly the expectations that all business enterprises under its jurisdiction and or territory respect human rights throughout their operations, including human rights due diligence to identify, prevent, mitigate and account for how they address their impacts on human rights throughout their operations and (ii) taking appropriate steps to ensure the effectiveness of domestic judicial mechanisms with respect to business-related human rights abuses.
4. Please highlight the steps that the Government has taken, or is considering to take, to ensure that Cargill and other companies do not dismiss employees for their union-activities.
5. Please explain what mechanisms the Government has put in place to mediate between employers and employees/workers in situation of disputes regarding union activities.
6. Please indicate the steps that the Government has taken or is considering to take to ensure that business enterprises operating in its territory establish effective operational-level grievance mechanisms, or cooperate with legitimate remedial processes, to address alleged human rights abuses against workers and adverse human rights impacts that they have caused or contributed to.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please be informed that a letter on the same subject has also been sent to the Government of the United States and to the company involved in the above-mentioned allegations.

Please accept, Excellency, the assurances of our highest consideration.

Clement Nyaletsossi Voule
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Dante Pesce
Chair-Rapporteur of the Working Group on the issue of human rights and
transnational corporations and other business enterprises

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, and while we do not wish to prejudge the accuracy of these allegations, we would like to refer your Excellency's Government to the international norms and standards applicable to the present case. We would like to refer your Excellency's Government to article 20 of the Universal Declaration of Human Rights (UDHR) and article 22 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the government of your Excellency's on September 23, 2003, which guarantee the right to freedom of association. According to the article, "nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention."

Regarding the right to freedom of association, we would like to refer to article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Turkey on September 23, 2003, in which the States Parties undertake to ensure the right to everyone to form trade unions and join the trade union of their choice, for the promotion and protection of their economic and social interests.

In this regard, we would like to refer to several further provisions of the ILO Conventions 87 on Freedom of Association and Protection of the Right to Organise and Convention 98 on the Right to Organise and Collective Bargaining, acceded to by Turkey respectively on July 12, 1993 and on January 23, 1952. In particular, we would like to refer to article 1 of the Convention 98, which provide the right for workers to be protected against any acts calculated to (a) "make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership"; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities." The article 1 of the ILO Convention No. 135 on Worker's Representatives also proclaims that "workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities."

Furthermore, resolution 24/5 of the Human Rights Council is relevant in this case. In this resolution, the Council "[r]emind[ed] States of their obligation to respect and fully protect the rights of all individuals to ... associate freely... including... trade unionists and others... and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of ... association are in accordance with their obligations under international human rights law" (OP2).

In relation with the above anti-unions dismissals, as recognized by the Courts, we would like to refer to the fundamental principles set forth in the decisions of the Committee on Freedom of Association published by ILO in 2018, which provides that measures should be taken in order to ensure the protection of workers and leaders of unions against any discrimination which might be exercised because of their union activities and they should be able to form trade unions without being exposed to anti-union discrimination. On the contrary, all workers should be entitled to become

members of a national trade union in the sector in which they are professionally acting, if they wish so. Indeed, “given that they conduct their activities in the sector, they may wish to join a trade union that represents the interests of workers in that sector at the national level”.

We would like to highlight the UN Guiding Principles on Business and Human Rights (A/HRC/17/31), which were unanimously endorsed by the Human Rights Council in June 2011, are relevant to the impact of business activities on human rights. These Guiding Principles are grounded in recognition of:

- a. “States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- b. The role of business enterprises as specialized organs or society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- c. The need for rights and obligations to be matched to appropriate and effective remedies when breached.”

According to the Guiding Principles, the obligation to protect, respect, and fulfil human rights, recognized under treaty and customary law entails a duty on the part of the State not only to refrain from violating human rights, but to exercise due diligence to prevent and protect individuals from abuse committed by non-State actors.

It is a recognized principle that States must protect against human rights abuse by business enterprises within their territory. As part of their duty to protect against business-related human rights abuse, States are required to take appropriate steps to “prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication” (Guiding Principle 1). This requires States to “state clearly that all companies domiciled within their territory and/or jurisdiction are expected to respect human rights in all their activities” (Guiding Principle 2). In addition, States should “enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights...” (Guiding Principle 3). The Guiding Principles also require States to ensure that victims have access to effective remedy in instances where adverse human rights impacts linked to business activities occur.

Moreover, Principle 26 stipulates that “States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”

In particular, Principle 18 underlines the essential role of civil society and human rights defenders in helping to identify potential adverse business-related human rights impacts. The Commentary to Principle 26 underlines how States, in order to ensure access to remedy, should make sure that the legitimate activities of human rights defenders are not obstructed. Moreover, Principle 26 stipulates that “States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”

States may be considered to have breached their international human law obligations where they fail to take appropriate steps to prevent, investigate and redress human rights violations committed by private actors. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures.