

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

REFERENCE:
AL USA 1/2021

27 January 2021

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-İs'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 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-İs, 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-İs, on behalf of its twelve members.

Between 2018 and 2019, while the trials were ongoing, the IUF, to which Tekgıda-İs 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 shortly after the Court's decision 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 where 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 highlight the steps that your Excellency's Government, as Cargill's transnational cooperation home state, has taken or is considering to take, to ensure that Cargill and other companies do not dismiss employees for their union-activities.
3. Please indicate what measures your Excellency's Government has taken, or is considering to take, to ensure that US companies operating abroad are not causing or contributing to abuses of international human rights norms and standards that the government of the United States has undertaken to uphold.
4. Please indicate the actions taken, or being planned, by your Government to implement the relevant provisions of your December 2016 National Action Plan on Business and Human Rights (NAP) to "enhance the visibility of workers' perspectives and of their representative organizations, and to promote the ability of workers to organize." In addition, we would appreciate an update on the progress made regarding your Government's commitment in the NAP to support access to effective remedy available to those "who feel they have been negatively impacted by U.S. business conduct abroad."
5. Please provide information whether the government has conducted, or is considering conducting, any independent assessment of the effectiveness of the measures envisaged under the NAP to promote the ability of workers to organize and to protect human rights while operating business activities overseas.
6. Please provide information regarding the measures that your Excellency's Government is taking, or considering to take, to ensure that those affected by the overseas activities of US companies have access to effective remedies, as per the UN Guiding Principles.
7. Please provide information regarding measures that your Excellency's Government has taken, in response to the recommendation provided in the Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its visit to the United States of America in 2013, in particular on US enterprises' operating overseas "needs to undertake a rigorous and comprehensive review of the current legal and policy environment for businesses, to ensure that they are capable of meeting the expectations of the Guiding Principles at home and abroad, for example in the area of labour laws and access to effective remedy"

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 Turkey 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 June 08, 1992, which guarantee the right to freedom of association.

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) 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. If the government of the United States have not ratified this instrument, it must, as a signatory since 1977, ensure that the purposes of the treaty are not jeopardized or defeated by any actions, pending a decision of ratification. The anti-union dismissal is going against the freedom of association which is recognized to everyone under article 8 of the ICESCR Covenant and therefore engage all obligations under the Convention. In addition, the Committee on the Economic, Social and Cultural Rights has indicated that "extraterritorial obligation to protect requires States Parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective." (General Recommendation 24 (2017)).

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).

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.

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.