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The Path of Least Resistance: Using the UN Guiding Principles on Business and Human Rights to Hold Turkey Accountable for Abuses Perpetrated by SADAT Defense Consultancy

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Introduction

When a lawyer enters the court of law, or an advocate the court of public opinion, the path of least resistance may be the quickest path to victory. But it is a path Jesus Christ, Theodore Roosevelt, Lee Ann Womack, and Winston Churchill have maligned as the way that “leads to destruction,”ⁱ “never to be envied,”ⁱⁱ something you should “never settle”ⁱⁱⁱ for, and the path on which “victory will never be found.”^{iv} The struggle to hold states accountable for human rights abuses perpetrated by private military companies (PMCs) has often slogged through the path of attribution. An easier path is available.

Mercenaries have a long and storied history in world affairs. Mercenary history stretches from the first recorded battle in history to the present day.^v Stories of mercenaries run high with themes of general disdain for the perceived degeneracy of soldiers of fortune.^{vi} From Foederati in the Roman Empire to Hessians in the American Revolution to privateers on the high seas, the monetary motivation for the fight is a fixture of warfare.^{vii} The use of the mercenary in warfare has not disappeared with the advent of the modern age—it has mutated. In modern, Western countries, the mercenary has taken a corporate form—the private military corporation (PMC).^{viii}

The use of private military companies raises open issues of accountability under international law.^{ix} International conventions and treaties cover mercenary use,^x but

PMCs fall outside of the definitional shadow cast by the formalized international law on mercenaries.^{xi} Private military companies exist in the gray—meeting portions of the definition but not others.^{xii} Some may fit, some may not.

Literature often centers on establishing formal attribution of the PMC's actions to the state when addressing how to hold states accountable for their use of PMCs that violate international law.^{xiii} This Report considers the case of Turkey and the SADAT International Defense Consultancy (SADAT) to propose that the focus on attribution is the difficult legal path. Advocates and lawyers may find greater success in taking the path of least resistance towards accountability—using the UN General Principles on Business and Human Rights (UNGP). The Report will outline the short historical overview of SADAT and Turkey. The legal troubles raised by using attribution as the legal pathway to accountability follow. Finally, how the General Principles might effectuate holding Turkey accountable for SADAT's abuses of human rights is examined.

Turkey's Use of Private Military Companies

Turkey uses SADAT International Defense Consultancy, the leading Turkish private military company, to assert its foreign policy at home and abroad.^{xiv} SADAT participated in the 2016 coup attempt in Turkey.^{xv} They are at the tip of the spear for many Turkish initiatives. They have intervened in the Syrian Civil War.^{xvi} Libya, Nagorno, Karabakh, Malaysia, and Qatar have seen purported SADAT operations.^{xvii} The Turkish government has denied any official involvement in SADAT's work across Africa, the Middle East, and Europe.^{xviii}

SADAT and Turkey have faced questions from the international community about potential human rights violations because of their operations.^{xix} These violations are potentially numerous. The UN raised concerns that SADAT has threatened the right to life, freedom from torture, the right to liberty, the security of person, and freedom from arbitrary arrest and detention—and that is in Syria alone.^{xx} The Turkish government has, at best, stood by while SADAT carries out Turkish foreign policy in a manner violating human rights, and, at worst, encourages and endorses such malignant behavior.^{xxi}

Avoidance as a Solution to the Attribution Problem

International law prohibits the use of mercenaries and international agreements govern private military companies.^{xxii} Those legal frameworks offer little promise for holding Turkey accountable for SADAT's actions. Private military companies may not be mercenaries and agreements governing PMCs are not binding law. When bringing accusations against Turkey for human rights abuses at the hands of SADAT, a significant barrier to accountability exists—attribution.

The International Law Commission's (ILC) Articles on the Responsibility of States for International Wrongful Acts (ARSIWA) governs attribution of a non-state actor's conduct to a state.^{xxiii} Using ARSIWA to attribute the actions of SADAT to Turkey is difficult. Articles 4, 5, and 8 of ARSIWA give the most hope for attribution, but they prove a delicate exercise.^{xxiv} Article 4 allows state attribution for the conduct of organs of the state.^{xxv} Article 5 allows attribution when an entity exercises governmental authority by delegation from the state but is not an organ of the state.^{xxvi} Article 8 establishes a direct control test for attribution.^{xxvii} Finding another route to accountability for Turkey allows bypassing of the entanglements of attribution.

The focus on trying to use attribution to pin SADAT's abuses on Turkey misses Turkey's potential per se violations of international law. The Universal Declaration of Human Rights carries with it the expectation that "Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights."^{xxviii} The European Convention on Human Rights declares the resolve of the European governments, "to take the first steps for the collective enforcement of certain rights stated in the Universal Declaration [of Human Rights]."^{xxix} The International Covenant on Civil and Political Rights considers "the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms."^{xxx} The International Covenant on Economic, Social and Cultural Rights,^{xxxi} among others,^{xxxii} uses the same language. These make clear the responsibility of States to respect and affirm human rights. A blueprint is lacking for how to protect those rights in the context of non-state actors.

The international legal community has grappled with issue of non-state actors and human rights violations. One facet of this grappling produced the UN Guiding Principles on Business and Human Rights. Under the Guiding Principles, every state has the responsibility to "set out clearly the expectation that all business enterprises domiciled in their territory . . . respect human rights throughout their operations."^{xxxiii} Meeting this duty requires states to enforce laws requiring businesses to respect human rights, ensure that laws enable businesses' respect for human rights, and provide effective guidance on how businesses can respect human rights.^{xxxiv}

The Guiding Principles are not codified international law. But they have received broad acceptance by the international community in the eleven years since their unanimous endorsement by the United Nations Human Rights Council.^{xxxv} The UNGP have seen increasing use in international tribunals and widespread acceptance by both states and the private sector.^{xxxvi} Turkey was a party in a case in which the European Court of Human Rights "adopt[ed] the United Nations Guiding Principles' approach to business and human rights."^{xxxvii} Formal work has been ongoing in states across the world since 2011 to implement the Guiding Principles in

to domestic law.^{xxxviii} Turkey has not taken formal implementation steps but was co-sponsor of the relevant resolution of the Human Rights Council adopting the UNGP.^{xxxix} The Guiding Principles and their widespread acceptance indicate a crystal-clear explication of the expectation that States protect human rights through regulation of businesses within state borders. These duties go hand in hand with the Universal Declaration, European Convention on Human Rights, and other treaties and conventions to which Turkey is subject.

The duty of the state is not mere restraint from or protection from abuses of human rights. It is the state's responsibility to promote those rights.^{xl} The binding and customary international law on human rights makes this clear. The responsibility to protect and promote charges the state with affirmative action protecting human rights. The Guiding Principles exemplify the affirmative action required in the context of businesses.^{xli} When a state abdicates its duties as outlined in the Guiding Principles, the state abdicates its duties to protect human rights.

Turkey has failed to take affirmative action towards protecting human rights. By using and condoning SADAT, it has done the opposite. Turkey has overlooked potential violations of human rights by SADAT both at home and abroad in the push for a neo-Ottoman expansion into the global order.^{xlii} While Turkey or Erdogan may have taken direct control of SADAT for the purposes of formal attribution, that should not be necessary to hold Turkey accountable. That Turkey has stood back and done nothing should be enough. Turkey's failure is an abdication of the duty to promote and protect human rights, as elaborated on by the Guiding Principles. Accountability should be and can be sought.

Conclusion

The mission of holding states accountable for the actions of private military companies will continue to be plagued by the issue of attribution.^{xliii} The complexities of corporate law, globalization, technology, and privatization of state functions allows states to weave a stickier web to entangle those in the pursuit of justice.^{xliv} Attribution, however, is not the only way. Holding states accountable for violations of international law when non-state actors, sheltered within the state, perpetuate human rights abuses can and should occur. Inattentive and permissive states neglect their positive obligations to protect and promote human rights.

By failing to meet its obligations in the UN Guiding Principles on Business and Human Rights, Turkey has ignored its responsibility under international law to respect and protect human rights and should be held to account. Turkey is party to most major human rights treaties^{xlv} and supports the Guiding Principles. The major treaties are binding law and have received widespread acceptance. The Guiding Principles have received similar acceptance. The Guiding Principles places clear expectations upon states. They have a duty to protect human rights in the context of

businesses. By failing to protect those rights and regulate SADAT, the Turkish government has abdicated that duty in violation of international law. Accountability does not have to be found through the arduous path of attribution – it should be found through the easiest path possible.

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- ⁱ *Matthew* 7:13 (“For the gate is wide and the way is easy that leads to destruction.”)
- ⁱⁱ Theodore Roosevelt, Speech to the Iowa State Teachers’ Association, Theodore Roosevelt Papers: Series 5: Speeches and Executive Orders, 1899-1918; Subseries 5A (“I have never in my life envied a human being who led an easy life; I have envied a great many people who led difficult lives and led them well.”).
- ⁱⁱⁱ LEE ANN WOMACK, *I Hope You Dance*, on I HOPE YOU DANCE (MCA Nashville 2000) (“Never settle for the path of least resistance.”)
- ^{iv} Steven F. Hayward, Churchill on Leadership: Executive Success in the Face of Adversity 87 (1998) (recounting a Churchill statement that “victory will never be found on the path of least resistance).
- ^v ALAN AXELROD, *MERCENARIES: A GUIDE TO PRIVATE ARMIES AND PRIVATE MILITARY COMPANIES* 3-8 (2014) (sketching a brief historical overview of the use of mercenaries from the ancient world to today).
- ^{vi} SARAH PERCY, *MERCENARIES: THE HISTORY OF A NORM IN INTERNATIONAL RELATIONS* 1 (2007) (describing the norm against mercenary use throughout time).
- ^{vii} AXELROD, *supra* note 5, at 3-8.
- ^{viii} *See* PERCY, *supra* note 6, at 13 (describing the rapid expansion of the use of private military companies beginning in the 1990s).
- ^{ix} *See* Oliver R. Jones, *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, 24 CONN. J. INT’L L. 239, 240 (2009) (describing the “vexed question of who should bear responsibility” for the actions of private military firms); *see also* Amanda Tarzwell, *In Search of Accountability: Attributing the Conduct of Private Security Contractors to the United States under the Doctrine of State Responsibility*, 11 OR. REV. INT’L L. 179, 183 (approaching the issue of accountability not from the lens of holding private military firms directly accountable but using the doctrine of state responsibility to hold states accountable).
- ^x *See e.g.*, International Convention against the Recruitment, Use, Financing and Training of Mercenaries, *concluded* Apr. 12, 1989, 2163 U.N.T.S. 37789 [hereinafter UN Mercenary Convention]; Organization of African Unity Convention for the elimination of mercenarism in Africa 1490 U.N.T.S. 25573.
- ^{xi} Amanda Foong, *The Privatization of War: From Privateers and Mercenaries to Private Military Security Companies*, 4 ASIA-PAC. Y.B. INT’L HUMANITARIAN L. 210, 217 (2008-2011) (explaining how private military companies fall outside of the definition of mercenaries).
- ^{xii} *Id.* at 219.
- ^{xiii} *See generally e.g.* Vanessa Ballesteros Moya, *The Privatization of the Use of Force Meets the Law of State Responsibility*, 30 AM. U. INT’L L. REV. 795 (2015) (approaching the issue using Article 5 of the International Law Commission’s Draft Articles on State Responsibility); Tarzwell, *supra* note 9 (focusing on state responsibility and the United States’ use of private security contractors); Michael A. Rizzotti, *Russian Mercenaries, State Responsibility, and Conflict in Syria: Examining the Wagner Group under International Law*, 37 WIS. INT’L L.J. 569 (2020) (examining Russian use of private military contractors through the lens of state responsibility).

^{xiv} Alessandro Arduino, *Turkish Private Military Companies Are Learning From Russia*, THE NATIONAL INTEREST, (Sept. 3, 2022), <https://perma.cc/5BJB-D3EG>; Jonathan Spyer, *Erdogan's Shadow Army: The Influence of "Sadat," Turkey's Private Defense Group*, THE JERUSALEM INSTITUTE FOR STRATEGY AND SECURITY (Apr. 24, 2018), <https://perma.cc/FA3P-K27J>.

^{xv} Arduino, *supra* note 14.

^{xvi} *Id.*

^{xvii} *Id.*

^{xviii} *Id.*

^{xix} Mandates of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment 1-2 AL TUR 7/2020 (June 10, 2020). [hereinafter Working Group letter]

^{xx} *Id.*

^{xxi} Arduino, *supra* note 14 (describing the Erdogan as having “a private military and paramilitary system at his disposal).

^{xxii} The Montreux Document is a joint effort of the Government of Switzerland and the International Committee of the Red Cross which recommends standards and governance for private military companies. International Committee of the Red Cross & Swiss Federal Department of Foreign Affairs, The Montreux Document 5 (Sept. 17, 2008). The UN Mercenary Convention would likely not cover a private military company such as SADAT. *See* Foong, *supra* note 11.

^{xxiii} Rep. of the Int'l L. Comm'n, Text of the draft articles on Responsibility of States for internationally wrongful acts, U.N. Doc. A/53/10 , at 2 (2001) [hereinafter Draft Articles of State Responsibility].

^{xxiv} Jones, *supra* note 9 at 261 (Addressing the difficulty that arises from the lack of binding authority of the Articles and that “[a]mbiguities and vagaries, therefore, are to be expected and can perhaps only be resolved by courts and tribunals on specific facts.”); Carsten Hoppe, *Passing the Buck: State Responsibility for Private Military Companies*, 19 *European J. Int'l L.* No. 5 989, 989-90 (discussing the difficulty of proving the responsibility of states for conduct of private military security company personnel).

^{xxv} Draft Articles of State Responsibility, *supra* note 23 at 44.

^{xxvi} *Id.*

^{xxvii} *Id.* at 45.

^{xxviii} G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

^{xxix} Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 15, Nov. 4, 1950, ETS No. 5 at 1.

^{xxx} International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 14668 [hereinafter ICCPR].

^{xxxi} International Covenant on Economic, Social and Culture Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 14531 [hereinafter ICESCR]

^{xxxii} *See e.g.*, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 24841 (“Considering the

obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms.”) [hereinafter Convention against Torture].

xxxiii Rep. of the Special Representative of the Sec’y-Gen. on the issue of human rights and transnat’l corps. and other bus. enters., John Ruggie, Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/31, Annex, at 7 (Mar. 21, 2011) [hereinafter Guiding Principles].

xxxiv *Id.* at 8.

xxxv The UN Working Group on Business and Human Rights, The UN Guiding Principles on Business and Human Rights: An Introduction 2 (last accessed Sept. 15, 2022), <https://perma.cc/KH46-5CXQ>; DAVID W. RIVKIN ET AL., DEBEVOISE & PLIMPTON, UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: THE IMPACT OF THE UNGPS ON COURTS AND JUDICIAL MECHANISMS 5-6 (2021).

xxxvi RIVKIN ET AL. *supra* note 35, at 5-6, 16 (noting the widespread corporate acceptance of the Guiding Principles and their increasing appearance in international tribunals).

xxxvii Lieselot Verdonck, It is Time for the European Court to Step into the Business and Human Rights Debate: A Comment on Özel & Others v. Turkey, Strasbourg Observers (Dec. 7, 2015), <https://perma.cc/PN8V-8CKA>.

xxxviii RIVKIN ET AL. *supra* note 35, at 20 (charting the implementation of the Guiding Principles regionally at the domestic level).

xxxix BEATA FARACIK, EUROPEAN PARLIAMENT DIRECTORATE-GEN. FOR EXTERNAL RELS, POL’Y DEP’T, IMPLEMENTATION OF THE UN GUIDING PRINCIPLES ON BUSINESS AT HUMAN RIGHTS 50 (2017).

xl *See supra* notes 28-32 and accompanying text.

xli Guiding Principles *supra* note 33 at 6 (establishing that the principles are rooted in the states’ existing human rights obligations and apply to all states and business enterprises).

xlii Arduino, *supra* note 14 (overviewing the neo-Ottoman foreign policy of the Turkish state and SADAT’s role in that foreign policy); *see also* M. HAKAN YAVUZ, NOSTALGIA FOR THE EMPIRE: THE POLITICS OF NEO-OTTOMANISM 201-02 (concluding that the Turkish state has adopted a neo-Ottoman approach to foreign policy in recent years).

xliii Hoppe, *supra* note 24, at 990 (“[T]he rules of attribution leave a regulatory gap. A state employing PMSC personnel will always face less international responsibility qua attribution than would be the case if it relied on its own armed forces, and its responsibility will be more difficult to prove.”)

xliv Jennifer Maddocks, *Outsourcing of Governmental Functions in Contemporary Conflict: Rethinking the Issue of Attribution*, 59 VA. J. INT’L L. 47, 49 (2019) (describing the increase in privatization across all sectors of government, including in the cyber domain).

xlv Turkey has signed and ratified the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* March 7, 1966, 660 U.N.T.S. 9464; ICCPR, *supra* note 30, ICESCR *supra* note 31; Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 20378; Convention against Torture, *supra* note 32; Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 27531; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 U.N.T.S. 39481; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 44910.